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Articles

Book Review

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Message from the Patron

NALSAR as a premier Law University aims at education and training of Lawyers who are technically sound, professionally competent and socially relevant. In order to provide the high quality legal education to meet the demands of the globalized world, it is necessary to generate new ideas and knowledge. Therefore, high quality socio-legal research in premier National Law Universities is the need of the day. We at NALSAR, in addition to regular teaching of Law and Social Sciences, promote mooting, seminars, conferences, impact research and writing of research articles. NALSAR publishes four journals regularly, *viz*., NALSAR Law Review, NALSAR Student Law Review, The Indian Journal of Constitutional Law, and The Indian Journal of Intellectual Property Law. Some of these journals are published by students who prepare research projects, write research articles for National and International Conferences and publish the same in student journals. From the Academic year 2010, two more Journals, *viz*., Media Law Journal and ADR Journal shall also be published.

Another Issue of NALSAR Law Review has been brought out on the eve of 8th NALSAR Annual Convocation. Our journals enjoy a very high degree of recognition and appreciation and these journals are a valuable addition to the socio-legal research literature. Publication of these journal guarantees a much wider dissemination of Legal knowledge. The dissemination of this knowledge helps the policy makers, judges, lawyers, researchers, social scientists, social activists and other readers to grasp and understand the complexities of socio-legal issues and problems. Such legal writings impact Government policies and lead to appropriate Legislation and Legal reforms.

I hope all our readers would find the present Issue of our journal interesting, exciting and informative. We always welcome their comments on the quality of content of the Journal, its design and printing so that we effect requisite improvements in our publications.

Veer Singh
Vice-Chancellor

Editorial

The last Volume of NALSAR Law Review, emphasized on the importance of inter/multidisciplinary research work that law academics should give, as law is a product of society. All these social issues and problems of under development, mass poverty, disillusionment with the bureaucracy, disenchantment with public policy and planning, sheer failure of the government machinery in delivery of goods, lessening faith in the institutions, increasing opportunism in the media, indifference of the academics, the rampant increase in overall irresponsiveness amongst almost all the sections of society. All of these factors have largely contributed to the diminishing faith in the present legal system, therefore, the responsibility of the academia lies here only. The academic community of each and every nation should strive hard to not only to find solution to theoretical and problematic issues of the specific political community but also pave the way of systematic thinking in the direction of finding alternatives to the issues. That's how the fraternity of academicians has to conduct themselves in a positive and constructive manner. The academia only can show and lead the path of overall progress of any community.

This can be achieved by engaging in critical writing and evaluation of societal issues. NALSAR Law Review is one such step towards bringing about the required change in terms of suggestions to law reformers and legislators and adjudicators. Therefore, we once again thank all our contributor of the research papers and look forward to their continuous association with the academia.

Present Volume is a step towards achieving high degree of sensitivity and understanding to societal problems which needs to be addressed to bring about the required change in the present legal system.

Editorial Committee

CHILD LABOUR IN INDIA: THE GENESIS AND THE PROGNOSIS**

Veer Singh*

Every thing has been said already; but as no one listens, we must always begin again.

-Andre Gide

Child Labour is not a recent phenomenon and again, not confined to a particular country. According to 1996 UNICEF and ILO sources, the number of child Labourers in India may be anywhere between 14 to 100 million out of approximately a total of 246 million Child workers in the World. Today, one out of every six children in the world is involved in child Labour.

Inclusive Definition of Child Labour

Conceptually, Child Labour should have a wider construct and the artificial distinction between "Child Labour" and "child work" should be done away with.[1] Those who support the narrower definition do it in order to reduce the size of Child Labour. However, the distinction is essentially misplaced because children play a major role in the economy in a variety of ways. Traditional connotation of Child Labour is that it includes all those children who are "economically active" in the age group of 5 years to 14 years if they work regularly and receive payment for it in cash or kind.

According to U.N.O and I.L.O, child Labour is to be considered if "State parties recognize the Right of the Child to be protected against economic exploitation from performing any work that is likely to be hazardous and interferes with Child's education or to be hazardous to Child's Health or physical, mental, spiritual, moral or social development". Child work is a wider concept and includes Child Labour as well. It is inclusive of all work whether paid or unpaid, domestic or non-domestic, full-time or part-time work. ILO does not exclude work in House-holds or on family farms from Child Labour.

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** This paper was presented at the Conference on "Labour Law and Labour Markets in the New World Economy" organized by International Association of Law Schools held at Milan, Italy from May 20-22, 2010.

1 Work may be defined as participation in any economically productive activity with or without compensation and such participation could be physical and / or mental and direct or indirect including work in family enterprises or work by way of self-employment like begging, rag-picking etc.

2 *M.C. Mehta* v. *State of Tamil Nadu,* AIR 1997, SC 699.

Thus, it is any kind of work children are made to do that harms or exploits them physically, mentally, socially, or prevents their access to education. However, one must understand that all work is neither bad nor exploitative. Voluntary part-time jobs like Newspaper delivery, summer jobs to earn some pocket money or work voluntarily undertaken to earn and enhance skills do not interfere with their normal mental and physical growth and schooling.

Broader analysis of the data shows that largest numbers of children (about 70%) are working in agriculture, commercial hunting, fishing and forestry. About 8% work in whole sale and retail trade, restaurants and hotels and another 8% work in manufacturing. Majority of children work in informal and unorganized sectors and these sectors are beyond the legal prohibition, abolition and regulation both in theory and / or in practice. This leads to the worst forms of child Labour, Child abuse and exploitation. According to U.N. estimate, there could be 20 million bonded Child Labourers world-wide. About 2 million children are trafficked each year across international borders. Some one million children enter the sex trade. At any time, more than quarter million male and female children, under the age of 18 years, fight as soldiers in Government and Non-Government Armed Forces in more than 30 countries. Domestic work is the largest employment category for girls under the age of 16 years in the world. 73 million working children are less than 10 years old. Added to that, 22,000 children die every year due to work related accidents.

Child Labour in India

India has the dubious distinction of being a nation with largest number of Child workers in absolute terms. The statistics on number of Child Workers in India in different age groups has not been collected systematically and thus, no authentic figures are available. Estimates differ by wide margins from 14 million to 40 million. In India, the official statistics shows that only 11.28 million children are Child Labourers whereas out of a population of 203 million children in the age group of 5 years to 14 years, almost 100 million children are out of school system. Thus, most of them are working in and out of House holds in rural areas and they are not included in official statistics on Child Labour. They are employed in some of the most hazardous occupations like cracker-making, diamond polishing, glass and brass-ware, carpet-weaving, bangle-making, lock-making, mica-cutting, artillery shell-collection from firing ranges, smuggling of Narcotics, illicit liquor, child Sex trade, labour bondage, pesticide spraying on farms and plantations, Hotels and eateries and domestic work.

Causes of Child Labour in India

The first step in the direction of abolition and Prohibition of child Labour in India is to understand the causes of child labour in a complex socio-legal

context. Some of these causes are:

(a) Poverty is one of the Causes of Child Labour

The unrelenting poverty forces parents to pledge and sell their children into labour bondage. A study reveals that child's income accounts for 34 to 37 percent of total House-hold income. Child Labour Bondage refers to the phenomenon of children working in conditions of total serfdom so as to pay debts incurred not by them but by their parents. Poorest of the poor among lower castes and tribal are more vulnerable to labour Bondage.

In many cases, children are sexually abused by some one at home, by rich paedophiles, fake adoptive parents, brothel keepers. Child prostitution which was not very prevalent in India earlier, has now grown to dangerous magnitude. In absolute terms, India may have the largest number of Child prostitutes today and many Paedophile-rackets have been exposed in some of the sea-resorts in India. On account of poverty, some children are given in adoption that later on are abused sexually and exploited as hard manual labour. A number of child girls are trafficked into commercial prostitution. Many are married to rich old people in sham marriages and all such girl ultimately ends up in brothels or in harsh domestic employments.

(b) Inadequate Schools

Complete lack of schools and even the expenses of schooling lead to Child labour. Children who have no access to schooling are forced to do work so as to fulfill their idle time and to contribute to family income. The hierarchical feudal social order ensures the social stratification in terms of different classes, even castes and it is further strengthened by lack of education which undermines the capabilities of the poor vulnerable sections of people. Education system has been highly elitist and it limits social mobility of the lower castes and classes. In India, even primary education, despite constitutional mandate has neither been free nor compulsory. Education, by itself may not lead to occupational mobility but without education, occupational mobility in highly specialized labour market becomes extremely difficult and the uneducated and the illiterate stay and work in traditional jobs in local areas.

(c) Social attitudes

The attitude of parents also promotes Child Labour. Children are seen as economic assets and a source of income-earning for their parents as one of their pious duties. Moreover, many parents feel that children should work in order to develop skills useful in their job market. Many children are put on job as apprentices in unorganized and informal sectors like Hotels, auto-repair shops,

hair-cutting saloons, they are mostly unpaid during the period of apprenticeship and are exploited, abused in variety of ways.

Emerging International Legal Regime on Child Labour

Every year, the world community celebrates June 12 as the Anti-Child Labour day. With the establishment of I.L.O.; efforts have been made to evolve legal standards on various Labour issues including child Labour. Some of the important International Instruments include:

- Adoption of minimum Age (Industry) Convention (No. 5) 1919.
- Adoption of First Forced Labour Convention (No. 29) 1930.
- Adoption of Minimum Age Convention (No. 138) 1973.
- Adoption of U.N. Convention on Rights of the Child 1989.
- Establishment of the International Programme on Elimination of child Labour (PEC) 1992.
- Stockholm Declaration and Agenda for Action 1996.
- Adoption of Declaration on Fundamental Principles and Rights at Work 1998.
- Adoption of Worst Forms of Child Labour Convention (No. 182) 1999.
- Adoption of 12 June as World Day Against Child Labour 2002
- First Global Economic Study on the Costs and Benefits of Elimination of Child Labour.

India: The National Policy and Laws on Child Labour

Over the years, India has evolved a very comprehensive Legal framework, although largely ineffective, with the ultimate objective of total elimination of child Labour in all its forms. The objective of elimination of child labour calls for a comprehensive legal policy, statutory laws and child welfare programmes.

The Indian Constitution contains the following main policy postulates for children, their health, welfare, education and employment:

- Article 24 of the Constitution provides that no child below the age of 14 years shall be employed in any factory, mine or any hazardous employment.
- Article 39(f) enjoins on the state to ensure that the tender Age of children is not abused and that childhood and youth are protected against exploitation and against moral and material abandonment.

- Article 45 mandates the State to provide for early Childhood care and education for all Children until they complete the age of six years.
- Article 51-A(K) makes it fundamental duty of every citizen who is parent to provide opportunities for education of his Child between the age of six and fourteen years.
- Article 21-A (added by 86th Amendment 2002) provides for Right to Education: The State shall provide free and compulsory education to all children of the age of six to fourteen years in such a manner as the State may, by Law, determine.

Child Labour has emerged as an increasingly important issue in the national context, reflecting heightened sensitivity to the problem at all levels. Since child Labour is a complex socio-economic problem and it demands a holistic approach. The plethora of Laws enacted over the years have a twin focus – one, to abolish, prohibit and regulate Child Labour and second, to tackle poverty and other causes which lead to Child Labour. The second category of Laws include employment generation and income security laws as also laws which make education of Children free and compulsory under Right to Education as a fundamental right. The important statutes include:

- Children (Pledging of Labour) Act 1933.
- Bonded Labour system (Abolition) Act 1976.
- The Child Labour (Prohibition and Regulation) Act 1986.
- National Rural Employment Guarantee Act 2005.
- Right of children to free and Compulsory Education Act 2009.
- Proposed Food Security Bill 2010.

In 1979, Government of India constituted Gurupadswamy Committee to study the issue of child Labour in India. It recommended that as poverty continues, it would be difficult to eliminate Child Labour altogether, and therefore, the alternative was to prohibit Child Labour in Hazardous Occupations and to regulate conditions of work in other occupations. A multi pronged policy approach is needed. As a consequence, the Child Labour (Prohibition and Regulation) Act 1986 was enacted. The enforcement of Child Labour Legislation has faced number of hurdles, mainly because:

- Employers, Parents, Law enforcers do not perceive Child Labour as something undesirable.
- Informalization of Child Labour: Lack of statistics on Child Labour, on mobility of Child workers from informal to formal sectors' and vice-versa and lack of efficient enforcement machinery.

- Low conviction rate: Long delays in filling of cases, corruption of enforcement machinery, lack of evidence as to age of Children and other technical reasons virtually lead to a situation where conviction of offenders becomes impossible and employers of Child Labour violate the laws with impunity.

The Supreme Court in numerous cases observed that all laws on Child Labour including the constitutional mandates have been violated with impunity and state system has failed to do its duty in enforcement of these laws. One of the important Judgments[2] where the Supreme Court directed that:

(1) Offending employer must be asked to pay Rs.20,000/- as compensation to every child employed in violation of CLPR Act 1986.

(2) A Child Labour Rehabilitation-Cum-Welfare Fund was to be established in every district

(3) Employer should be asked to recruit any adult suggested by parents of children who are removed from work.

(4) Where alternate employment could not be made available, parents of the child concerned would be paid Rs.25,000/- from the corpus provided the parent sent the child to school.

Numerous Supreme Court Judgments during the period 1986-1997 generated a renewed interest in Child Labour issues in India. A number of NGOs and social action groups emerged like Child Relief and You (CRY) and others to pressurise the Government to fulfill the constitutional mandates of abolition of Child Labour and provision for compulsory and free education of children.

The National Policy on Child Labour (NPCL) 1987 suggests a gradual and sequential approach to:

- Eliminate Child Labour Bondage in all its forms
- Completely prohibit employment of children in ever expanding list of hazardous occupations.
- Implement various Poverty alleviation and employment generation programmes and schemes
- Provide for rehabilitation of Child workers
- Provide for their free and compulsory education.

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2 *M.C.Mehta* v. *State of Tamil Nadu,* AIR 1997, SC 699.

Some of the poverty alleviation Schemes launched already includes Nehru Rozgar Yogna (1989), Integrated Rural Development Programme (IRDP) (1978). In recent years, Government has played a very pro-active role towards the final goal of elimination of Child Labour in India. The National Rural Employment Guarantee Scheme (NREGA) launched in 2005 has been a rare success in some of the States. It has secured minimum of one hundred days of paid work to the rural unemployed poor. This has a considerable impact in checking migration of poor workers to other areas in search of work and livelihood. Consequently, their children have fair chance of stable and uninterrupted schooling. Their Children now are less prone to labour bondage, exploitation as Child workers on account of extreme poverty. NREGA is perhaps the first major rural development programme which seeks to deliver its benefits with in-built safe-guards against leakages through a right to information on the programme, provisions for social audit and social accountability.

Another powerful legislative response for abolition of Child Labour in India is the recent enactment of The Right of Children to Free and Compulsory Education Act 2009.

The Act makes guarantee of Fundamental Right to Education for children in the age group of six to fourteen years a reality. The main features of the Act include:

- Compulsory Education casts an obligation on the appropriate (Central and State) Governments to provide and ensure admission, attendance and completion of elementary education.
- The compulsory education shall be totally free and parents shall not be required to pay any fee, expenses or charges
- The Compulsory Free Education shall be satisfactory and of equitable quality in the formal school system with prescribed standards.
- The duties, responsibilities of the appropriate Governments, local authorities, parents, teachers and schools have been provided for in the Act.
- A system for protection of the rights of the Children and a decentralized grievance redressal system are in-built in the Act.

There is a proposal that even private schools which are not supported by Government shall have the obligation to fill twenty five percent seats from amongst Children from disadvantaged and weaker sections and expenses incurred on such children by such private school shall be reimbursed by governments. The scheme on Compulsory Free Education shall make a major impact in elimination of Child Labour.

Another major initiative in the direction of abolition of Child Labour through alleviation of extreme poverty is the proposed bill on Food Security for all families below the Poverty Line (BPL). About 38% of the population is estimated to qualify for BPL status. Every BPL family is guaranteed food grains of 25 to 30 kg per month at a highly subsidized rate of Rs.3 per kg. It is also proposed to provide them cooking oil and pulses at subsidized rates. Earlier, the scheme Antyodaya Anna Yojna (AAY) launched in 2000 aimed at food security for all and creating a hunger free India in the next five years could not achieve the desired results on account of inefficient and corrupt management of the Public Distribution System (PDS). If the food security scheme is implemented with a sustainable funding model and efficient delivery system, children of vulnerable groups like Dalits, Tribals, house-holds headed by women and old persons, shall have an opportunity to escape Child bondage, forced Child Labour and to get Compulsory Free Education at formal schools

IRRETRIEVABLE BREAKDOWN OF MARRIAGE : RIGHT OF A MARRIED COUPLE

*Vijender Kumar**

Introduction

Divorce is the 'dissolution of a valid marriage in law', in a way other than the death of one of the spouses, so that the parties are free to remarry either immediately or after a certain period of time. The Concept of divorce was introduced in India in the latter part of the 19th century among two classes of Christians. It was introduced for Hindus in 1955 in the form of the Hindu Marriage Act 1955. Before the commencement of the Hindu Marriage Act 1955, there were Acts in some of the States providing for divorce in certain circumstances, *viz.*, the Bombay Hindu Divorce Act (22 of 1947), the Madras Hindu (Bigamy, Prevention and Divorce) Act (6 of 1949), and the Saurashtra Hindu Divorce Act (30 of 1952). These Acts were repealed by Section 30 of the Hindu Marriage Act 1955. Under the Hindu Marriage Act 1955, initially, adultery, cruelty, and desertion were not made grounds of divorce but of judicial separation. These grounds were based on the fault theory of divorce. At present, 'Divorce' is governed by different Acts[1] among different communities in India.

Section 13 of the Hindu Marriage Act 1955 has undergone many changes through amendments. Section 13 (1-A) was introduced in the present Act by the Hindu Marriage (Amendment) Act (44 of 1964). The amendments of 1976 in the Hindu Marriage Act 1955 have made these three grounds as grounds of divorce as well as of judicial separation and also added Section 13-B, providing for divorce by mutual consent. The other grounds of divorce are virulent leprosy, incurable and continuous insanity, venereal diseases, conversion to another religion, renunciation of world by entering a holy order or sect and when whereabouts are unknown for a period of seven years or more. By the Marriage Laws (Amendment) Act (68 of 1976), the words "is living in adultery" stated in Section 13 (1) (i) were substituted by the words "has after solemnization of the marriage had voluntary sexual intercourse with any person other than his or her spouse".

No fault theory of Divorce

The institution of marriage being distinct as regards its socio-economic and legal footings, it will be unjust if the law ignores the importance attached to

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1 Section 13 of the Hindu Marriage Act 1955; Section 27 of the Special Marriage Act 1954; Section 32 of the Parsi Marriage and Divorce Act 1936; Section 10 of the Divorce Act 1869 and Section 2 of the Dissolution of Muslim Marriage Act 1939.

it. But at the same time it is the choice of the parties to a valid marriage to understand the importance of the institution and to preserve its sanctity. With the changing requirements, attitude and aptitude, the society has drastically changed and it is very difficult for the married couples to cope with change. While adjusting in a new atmosphere in the matrimonial home, spouses may commit, knowingly or unknowingly, with or without intention, whether economical dependent or independent, some kind of mistakes which lead to a communication gap between them and create havoc in the matrimonial home. Some times no party is willingly ready to hurt another one but circumstances beyond control create unhealthy atmosphere in the matrimonial home. It is difficult to say which party is at fault but matrimonial relationship loses its sweetness and its sanctity. At the same time it is more difficult to find out bitterness between the parties if they are well educated, working and economically independent because each individual has his own style of living.

Where both the parties of a valid marriage are at fault of any kind of matrimonial offence, it is difficult to prove which one is an aggrieved party. According to the Doctrine of Recrimination, no remedy can be granted to the party who is at fault. It is imperative in law to have one party as innocent and another at fault to provide a matrimonial relief. A person who seeks matrimonial remedy must come to the Court with clean hands. For example, if in a petition for divorce on the ground of respondent's adultery, it is found the petitioner is also guilty of adultery, then the petition will not be granted divorce even though there is no co-relationship between the two adulteries. English law abandoned this position in later law and changed the matrimonial laws as per the need and requirements of the time.

In case of no fault theory of divorce, it is not necessary to prove which party is at fault. There may be many reasons based on which sweetness of matrimonial relationship is at risk. If the parties prove with reliable evidence on record that their marriage is beyond all possible repairs then law should understand the reality of the facts and should help the parties to the marriage which has broken down irretrievably.

The Law Commission of India in its 71st Report on "the Hindu Marriage Act 1955 - Irretrievable Breakdown of Marriage as a Ground of Divorce" had suggested that the theoretical basis for introducing irretrievable breakdown as a ground of divorce is one with which, by now, lawyers and others have become familiar. Restricting the ground of divorce to a particular offence or matrimonial disability, it is urged, causes injustice in those cases where the situation is such that although none of the parties is at fault, or the fault is of such a nature that the parties to the marriage do not want to divulge it, yet there has arisen a situation in which the marriage cannot be worked. The marriage has all the

external appearances of marriage, but none of the reality. As is often put pithily, the marriage is merely a shell out of which the substance is gone. In such circumstances, it is stated, there is hardly any utility in maintaining the marriage as a façade, when the emotional and other bounds which are the essence of a marriage have disappeared.

The breakdown theory of divorce which is inherently attached with no fault theory of divorce represents the modern view of divorce. Under this theory, the law realises a situation and says to the unhappy couple: if you can satisfy the Court that your marriage has broken down, and that you desire to terminate a situation that has become intolerable, then your marriage shall be dissolved, whatever may be the cause. The marriage can be said to be broken when the objects of the marriage cannot be fulfilled. When there is not an iota of hope that parties can be reconciled, it can be considered as irretrievable breakdown of marriage.[2] Another logic why this theory holds is that after the marriage has ceased to exist in substance and in reality, there is no reason for denying divorce. Divorce should be seen as a solution and an escape route out of a difficult situation. Such divorce is unconcerned with the wrongs of the past, but is concerned with bringing the parties and the children to terms with the new situation and developments by working out the most satisfactory basis upon which they may regulate their relationship in the changed circumstances. In fact, the intention of the Parliament to introduce the concept of breakdown into the Hindu Marriage Act 1955 is evident from the statement of objects and reasons of the Amendment Bill, which reads as follows:

The rights to apply for divorce on the ground that cohabitation has not been resumed for a space of two years or more after the passing of a decree for judicial separation, or on the ground that conjugal life has not been restored after the expiry of two years or more from the date of decree for restitution of conjugal rights should be available to both the husband and the wife, as in such cases it is clear that the marriage has proved a complete failure. There is, therefore, no justification for making the right available only to the party who has obtained the decree.[3]

In *Madhukar* v. *Saral,*[4] the Bombay High Court held that the enactment of Section 13 (1-A) in 1964 is a legislative recognition of the principle that in the interest of society, if there has been a breakdown of the marriage, there is no purpose in keeping the parties tied down to each other. In *Abu Baker Haji* v. *Manu Koya,*[5] the Kerala High Court held that trivial differences get dissolved

2 Kusum, *"Irretrievable Breakdown of Marriage: A Ground for Divorce"*, 20 JILI (1978), p. 291.
3 Vide Gazette of India, Extraordinary, Part II, S. 2, p. 86.
4 AIR 1973 Bom. 55-57.
5 AIR 1971 ILR 338 (Ker.).

in course of time and may be treated as teething troubles of early matrimonial adjustment. The stream of life lived in married mutuality washes away smaller pebbles but that is not the case when the incompability of minds breaks up the flow of stream. In such circumstances the breakdown of marriage is evident so we recognize that fact and accord divorce.[6] The Delhi High Court also observed in *Ram Kali* v. *Gopal Das*[7] that it would not be a practical and realistic approach, indeed it would be unreasonable and inhuman to compel, the parties to keep up the face of marriage even though the rift between them is completed and there are no prospects of their ever living together as husband and wife.

The Law Commission of India in its 71st Report on 'Reform of the Grounds of Divorce' said that objectives of any good divorce law are two fold: "One, to buttress, rather than undermine, the stability of marriage, and two, when regrettably, a marriage has irretrievably broken down, to enable the empty shell to be destroyed with the maximum fairness, and the minimum bitterness, distress and humiliation".[8] If a marriage has broken down beyond all possibilities of repair, then it should be brought to an end, without looking into the causes of breakdown and without fixing any responsibility on either party.

In contemporary society, the breakdown of marriage theory is recognised by the laws of many countries and a trend towards this theory becomes discernable through two methods: (1) by enlarging the number of grounds based on the fault theory; and (2) by giving the widest possible interpretation to the traditional fault grounds. Cruelty has proved to be the most fertile ground.

In *Gollins* v**.** *Gollins,*[9] the husband's failure to take up a job, his inability to maintain his wife and his dependence on his wife to pay off his pressing debts was held to be a conduct amounting to cruelty. In *Williams* v. *Williams,*[10] husband's persistent accusations of adultery against the wife were considered amounting to cruelty, despite the fact that the husband was found to be insane. In *Masarati* v. *Masarati,*[11] the Court of Appeal held that "today we are perhaps faced with a new situation as regards the weight to be attached to one particular factor that is the breakdown of marriage". In the Mortimer Committee's report the breakdown of marriage is defined as: "such failure in the matrimonial relationship or such circumstances adverse to that relation that no reasonable probability remains for the spouses again living together as husband and wife.[12]

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6 *Aboobacker* v. *Mam* 1997 KLT, 66 as quoted in Paras Diwan, *Hindu Law*, 2nd ed. 2002, p. 565.
7 (1971) ILR 1 Del. 6.
8 *71st Report of the Law Commission of India*, para 15.
9 [1963] 3 All ER 966: [1964] AC 644.
10 [1963] 2 AII ER 994.
11 [1969] 1 WLR 392.
12 Paras Diwan, *Modern Hindu Law*, 17th ed. 2006, pp. 68-77.

In Hindu law, the breakdown theory has its own version. Under the Hindu Marriage Act 1955-76 divorce can be obtained by either party to a valid marriage on the following grounds:

(a) If it is shown that a decree of restitution of conjugal rights has not been complied with for a period of one year or more, or

(b) If it is shown that cohabitation has not been resumed for a period of one year or more after passing of the decree for judicial separation.[13]

These grounds of divorce are not recognised under the Special Marriage Act 1954-76.[14]

Thus, the breakdown theory was introduced into the Indian Law by allowing divorce both to the so called innocent and the guilty parties. However, the provisions of the matrimonial bars under both the Acts were overlooked.

The Law Commission of India in its 71st report has recommended that irretrievable breakdown of marriage should be a separate ground of divorce for Hindus. It suggests the period of three years' separation as a criterion of breakdown. On the basis of the report, the Marriage Laws (Amendment) Bill 1981[15] was introduced in the Parliament but was allowed to lapse on account of opposition by some women's organizations.

Irretrievable breakdown of marriage as a ground of Divorce

Irretrievable breakdown of marriage as a separate ground of divorce has not yet found a place in the marriage statutes in India, *viz.*, the Hindu Marriage Act 1955, the Special Marriage Act 1954, the Divorce Act, 1869 (2001) the Parsi Marriage and Divorce Act 1936, the Dissolution of Muslim Marriage Act 1939. The foundation of a sound marriage is tolerance, adjustment and respect for one another. Tolerance to each other's fault to a certain bearable extent has to be inherent in every marriage. Petty quibbles and trifling differences should not be exaggerated and magnified to destroy what is said to have been made in heaven. All quarrels must be weighed from that point of view in determining what constitutes irretrievable breakdown of marriage in each particular case and always keeping in view the physical and mental conditions of the parties, their character and social status. A too technical and hypersensitive approach would be counter-productive to the institution of marriage. The Courts do not have to deal with ideal husbands and ideal wives. They have to deal with a particular man and woman before them.

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13 Section 13(1-A), the Hindu Marriage Act 1955.
14 Section 27(2), the Special Marriage Act 1954.
15 Bill No. 23 of 1981.

In *Harendra Nath Burman* v. *Suparva Burman,*[16] the Court observed that the mere breakdown of marriage, however irretrievable, is not by itself and without more, any ground for dissolution of the marriage as yet under our matrimonial law. However, in *Ram Kali* v. *Gopal,*[17] the Court observed, "it would not be practical and realistic, indeed it would be unrealistic and inhuman, to compel the parties to keep up the façade of marriage even though the essence of marriage between them has completely disappeared and there are no prospects of their living together as husband and wife".

Where the parties were living separately for sixteen years without any chance of reconciliation, the Court held that marriage had broken down and dissolution of marriage was justified.[18] It may be noted that in this case the term "irretrievable breakdown" has not been used; only "broken down" has been stated. But lately even the Apex Court is using the phrase "irretrievable breakdown of marriage".[19]

In *Gajendra* v. *Madhu Mati,*[20] it was held that where parties have been living separately for seventeen years, the chance of their re-union may be ruled out and it may be reasonable to assume that the marriage has broken down irretrievably. So the marriage should be dissolved.

Arguments against introduction of Irretrievable Breakdown of Marriage

A law of divorce based mainly on fault is inadequate to deal with a broken marriage. Under the fault theory, guilt has to be proved; Courts are presented with concrete instances of human behaviour which bring the institution of marriage into disrepute.

The irretrievable breakdown of marriage is not a separate ground of divorce by itself. But while scrutinising the evidence on record to determine whether the grounds on which divorce is sought are made out, the circumstances can be taken into consideration. No divorce can be granted on the ground of irretrievable breakdown of marriage if the party seeking divorce on this ground is himself or herself at fault. The decree of divorce on the ground that the marriage has been irretrievably broken down can be granted in those cases where both the parties have leveled such allegations against each other that the marriage appears to be practically dead and the parties cannot live together. The power of the Court to grant divorce on the ground of irretrievable break down of marriage should be exercised with much care and caution in exceptional

16 AIR 1989 Cal 120.
17 AIR 1971 Del 6 (FB).
18 *Krishna Banerjee* v. *Bhanu Bikash Bandyopadhyay* AIR 2001 Cal 154 (DB).
19 *Jordan Diengdeh* v. *S.S.Chopra* AIR 1985 SC 925 and *Sneh Prabha* v. *Ravinder Kumar* 1996 (1) HLR 280 (SC).
20 II (2001) DMC 123 (MP).

circumstances only in the interest of both the parties.[21] A decree of divorce between the parties cannot be granted on ground of marriage having been irretrievably broken down, in the absence of one or more grounds as contemplated under Section 13 (1).[22]

One of the views against the introduction of Irretrievable Breakdown of marriage as a separate ground of divorce is contained in the judgment of William Scott in *Evans* v. *Evans*[23] :

> The general happiness of the married life is secured by its indissolubility….When people understand that they must live together, they learn to soften by mutual accommodation….for necessity is a powerful master in teaching the duties which it imposes.

The two grounds on which the irretrievable breakdown theory has been opposed as contained in the 71st Report of the Law Commission of India are: It will allow the spouses to terminate the marriage at will and it is against the basic principle that one shall not be allowed to take advantage of his own wrong as against Section 23 of the Act.[24] The Report responded these objections by stating that they will never succeed in their entirety and relevant safeguards will be introduced at the relevant places to counter these objections. In the words of Friedmann :

> The cost of an unhappy marriage, forcibly maintained by unavailability of legal divorce grounds, or more frequently by lack of resources to circumvent the law, may be an increase in juvenile delinquency or lesser forms of social maladjustment.[25]

Irretrievable breakdown of marriage is not contemplated to be one of the grounds for dissolution of marriage. Thus, by itself, it cannot be taken to be a ground for decree of dissolution of marriage.[26] Similarly in *Tapan Kumar Chakraborty* v. *Jyotsna Chakraborty*[27] it was held by the Calcutta High Court that the Court cannot grant any decree of divorce on the ground that the

21 *Rishikesh Sharma* v. *Saroj Sharma* I (2007) DMC 77 (SC). *Shankar Chakravarty* v. *Puspita Chakravarty* I (2006) DMC 582 (Jhar.). *Pradeep Kumar Nanda* v. *Sanghamitra Binakar* AIR 2007 Ori. 60. *Gautam Chandra Nag* v. *Jyotsna Nag* AIR 2007 NOC 674 Cal. *Sanghamitra Ghosh* v. *Kajal Kumar Ghosh* 2007 (1) HLR 464 (SC).

22 *Geeta Mullick* v. *Brojo Gopal Mullick* AIR 2003 Cal. 321. See also *Ram Babu Babeley* v. *Sandhya* 2006 (1) HLR 424 (All.). *Debjani Sinha* v. *Bikash Chandra Sinha* 2006 (2) HLR 165 (Cal.). *Jaiprakash Dattatray Patade* v. *Usha Jaiprakash Patade* 2005 (1) HLR 172 (Bom.).

23 161 E.R. 466 - 467.

24 *71st Report of the Law Commission of India*, p. 15.

25 Michael F. Farrel; *No Fault Divorce: A Time for Change*, 7 Suffolk University Law Review 86 at 107 (1972-1973).

26 *Ashok Kumar Bhatnagar* v. *Shabnam* AIR Del. 121; *Swaraj Garg* v. *K.M.Garg* AIR 1978 Del. 296; *Smita Dilip Rane* v. *Dilip Dattaram Rane* AIR 1990; *Suresh Prasad Sharma* v. *Rambai Sharma* 1 (1999) DMC 311 (MP).

27 AIR 1997 Cal. 134.

marriage is irretrievably broken down, as it has not yet been made a ground for divorce. In *Reynold Rajamoni* v. *Union of India*[28] the Supreme Court emphasized that when legislative provisions specify the grounds on which divorce may be granted, they constitute the only conditions on which the Court has jurisdiction to grant divorce. If grounds need to be added to those already specifically set forth in the legislation that is the business of the legislature and not of the Courts.

In *Vishnu Dutt Sharma* v. *Manju Sharma*[29] the Supreme Court made it clear that a decree of divorce between the parties cannot be granted merely on ground of marriage having been irretrievably broken down and Court cannot add a new ground in the existing list of grounds as available in Section 13 of the Hindu Marriage Act 1955 or any other Statute dealing with matrimonial remedies. The facts of the case in brief are as follows:

The marriage took place between the appellant and the respondent on 26.02.1993 and a female child was born on 6.12.1993. In the petition filed by the appellant, it was alleged that soon after the marriage the respondent was behaving in a cruel manner derogatory to the appellant and the family members; that the respondent avoided staying in the matrimonial home and never remained there for more than 25 days together; and that after leaving the matrimonial home on 19.5.1993 while she was pregnant with the child, the respondent never returned to live with the appellant. It was also alleged that the father of the respondent is a retired Sub-Inspector of the Delhi Police and brother is a Constable and both used to extend threats to the appellant and his family members that they would be implicated in false cases.

The trial Court after examining the evidence came to the conclusion that no case of cruelty had been made out as alleged by the appellant. The Trial Court held that considering that the respondent had been turned out of the matrimonial home and had been given beatings for which she was medically examined; it was the respondent who was treated cruelly by the appellant.

In the instant case, the respondent wife had both before the trial Court and this Court been able to demonstrate that far from treating the appellant with cruelty, she in fact suffered cruelty at the hands of the appellant. To grant divorce to the appellant despite this only on the ground of irretrievable breakdown would not, in the view of this Court, be doing justice to the respondent.

The concept of irretrievable breakdown of marriage cannot be used as a magic formula to obtain a decree for divorce where grounds for divorce are not proved. In a case where the husband utterly failed to prove his ground of cruelty

28 AIR 1982 SC 1261.
29 AIR 2009 SC 2254.

and gave up the ground of adultery, which was wholly unfounded, the Court held that the husband is not entitled to a decree of divorce.[30] Where the husband failed to prove cruelty and desertion on the part of the wife and the Court had taken considerable time in disposal of appeal it refused to become a tool in hands of the parties.[31] However whether the marriage had irretrievably broken down beyond repair is a question which has to be answered having regard to the facts of the particular case.[32]

While deciding a divorce petition filed by the husband based on irretrievable breakdown of marriage, Justice P. B. Majumdar observed that 'marriage between a man and a woman is considered to be a sacred ceremony. It is a social contract between two individuals that unites their lives legally, economically and emotionally. The husband and wife performs the marriage ceremony with a fond hope that they will stay together for the rest of their life and both of them will have love and affection amongst each other and if any children are born out of the said wedlock they will be looked after by them. With this pious objective, the marriages under the Hindu Marriage Act take place in the presence of a priest. Therefore, the said ceremony is a sacred ceremony which is not required to be treated lightly by either spouse as a child's play. It is said that marriages are made in heaven but are broken on earth. Appropriate care is required to be taken to see that such marriages are not broken lightly and that is how laws are enacted for providing dissolution of marriage as per statutory grounds available'. He further observed that 'the manner in which various divorce petitions are filed creates doubts as to (i) whether marriages which are treated as sacred ceremonies will still continue to be the same in future; (ii) whether the tradition which is prevailing since time immemorial in this country will continue for a long time; and (iii) whether the child who is born out of the said wedlock will be able to get the love and affection of parents in case the marriage is dissolved in a light fashion'.[33]

The institution of marriage occupies an important place and plays an important role in the society in general and, therefore, it would not be appropriate to apply the doctrine of irretrievable breakdown of marriage as a straitjacket formula for dissolving the marriage. This aspect has to be considered in the background of other facts and circumstances of the case. The sanctity of marriage cannot be left at the whims of one of the annoying spouses. It is only in extreme circumstances that the Court may use this ground of divorce.

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30 *Murarilal* v. *Saraswati* 2003 (2) HLR 542 (Mad.): II (2003) DMC 59 (Mad.). See also *Dilip Kumar Karmakar* v. *Biju Rani Karmakar* II (2004) DMC 522 (Cal.). *Yashwant Kumar* v. *Kunta Bai* AIR 2007 Raj. 67.

31 *Binod Kumar* v. *Madhavi Kumari* AIR 2009 (NOC) 2414 (Pat.).

32 *Ananta* v. *Ramchander* 2009 (2) HLR 259 (Cal.).

33 *Bajrang Gangadhar Revdekar* v. *Pooja Gangadhar Revdekar* AIR 2010 Bom. 8-9.

The Bombay High Court in *Bajrang Gangadhar Revdekar* v. *Pooja Gangadhar Revdekar*[34] has held that while considering the case as to whether divorce should be granted or not it is required to consider the statutory grounds provided under Section 13 of the Hindu Marriage Act. The Act is enacted keeping in view the social, economic and political changes in the country. The Act brings about a number of important changes in the field of Hindu marriage and divorce law in the country. The Act has provided decree of dissolution of marriage by way of mutual consent under Section 13-B. However, if either side is not willing to give any consent, the Court is required to see the statutory ground available as provided under Section 13 of the Act for dissolving the marriage.

Arguments for introduction of Irretrievable Breakdown of Marriage

There has been a demand from jurists, academicians and common people for the introduction of Irretrievable Breakdown of Marriage as a separate ground of divorce. Before proceeding further it will be good to define what Irretrievable Breakdown of Marriage means. The twin objects of marriage are: Maintenance of stable sexual relationship and providing care and protection to children from the marriage.[35] The marriage can be said to be broken down when the objects of the marriage cannot be fulfilled. It was recognised as early as 1972 by the Bombay High Court[36] in the following words: "the enactment of Section 13 (1-A) in 1964 is a legislative recognition of the fact that if there has been a breakdown of marriage there is no purpose in keeping the parties tied together".[37] The intention of the Parliament becomes clear when we look at the statement of objects and reasons of the amended Bill.

The Sections 13 (1-A) and 13-B of the Hindu Marriage Act 1955 are insufficient to deal with all the situations pertaining to the matrimonial remedies. Under the fault grounds though the marriage may have broken down, the parties may be compelled to live together. The fault of the accused is to be put under the pigeon holes provided under the law there are accusations and counter accusations by both the parties. There is a lot of mud-slinging by the parties**.** It also happens that the petitioner may ultimately be denied relief on the non production of evidence after a long drawn legal battle. The working of the divorce laws over a period of few decades reveals that obtaining a divorce on the basis of matrimonial grounds specified under the law is not only time consuming and nerve breaking but also involves a lot of harassment and

34 AIR 2010 Bom. 8, 15. See also *Ramen Chandra Deka* v. *Sujata Deka* 2009 (2) HLR (Gau.) 522 ; *Ananta* v. *Ramchander* 2009 (2) HLR (Cal.) 259 ; *Sunita Devi* v. *Lala* 2009 (2) HLR (HP) 527.

35 Kusum, Irretrievable Breakdown of Marriage: A ground for Divorce, 20 JILI (1978), p. 291.

36 *Madhukar* v. *Saral* AIR 1973 Bom 55.

37 *Ibid*, p. 57.

embarrassment.[38] Section 13-B also may not be used in certain conditions. It is contingent on the mutual consent of the parties to the divorce. If one of the parties is not willing to give consent the Court cannot pass a decree of divorce. Such a situation arose in the cases of *Jayshree* v. *Ramesh*[39] and *Nachhattar Singh* v. *Harcharan Kaur.*[40]

Once the marriage has broken down beyond repair, it would be unrealistic for the law not to take notice of that fact, and it would be harmful to society and injurious to the interest of the parties. Where there has been a long period of continuous separation, it may fairly be surmised that the matrimonial bond is beyond repair. The marriage becomes a fiction, though supported by a legal tie, by refusing to severe that tie. The law in such cases does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. Public interest demands not only that the married status should, as long as possible and whenever possible, be maintained, but where a marriage has been wrecked beyond the hope of salvage, public interest lies in the recognition of that fact. Since there is no acceptable way in which a spouse can be compelled to resume life with the consort, nothing is gained by trying to keep the parties tied forever to a marriage that in fact has ceased to exist. Human life has a short span and situations causing misery cannot be allowed to continue indefinitely. A halt has to be called at some stage. Law cannot turn a blind eye to such situations, nor can it decline to give adequate response to the necessities arising therefrom. The Supreme Court recommended to the Union of India to seriously consider bringing an amendment in the Hindu Marriage Act 1955 to incorporate irretrievable breakdown of marriage as a separate ground of divorce.[41]

In case of *Dastane* v. *Dastane,*[42] the parties fought for over a decade. Husband's petition for judicial separation was dismissed on technical grounds of condonation. The marriage in this case was utterly wrecked. The case makes out a point for irretrievable breakdown of marriage as a separate ground of divorce. It is also a common fact that the young children will be better off with one loving parent rather than two perpetually quarreling parents.[43] In *Sukhendu Bikash Chatterjee* v. *Anjali Chatterjee,*[44] it was held that the ground of irretrievable breakdown of marriage can be used in exceptional cases. The

38 Kusum, *Divorce by Mutual Consent*, 29 JILI (1987), pp. 110-111.
39 AIR 1984 Bom 30.
40 AIR 1986 P&H 201.
41 *Naveen Kohli* v. *Neelu Kohli* AIR 2006 SC 1675.
42 AIR 1975 SC 1534.
43 Harinder Boparai, *Reappraisal of Bars to Divorce: A comparative Study*, 26 JILI (1984).
44 (1996) 1 DMC 388.

same principle was cemented by the Supreme Court in *V. Bhagat* v. *D. Bhagat*[45] where the Court held that merely because there are allegations and counter-allegations, a decree of divorce cannot follow. Nor is mere delay in disposal of the matrimonial proceeding by itself a ground. Irretrievable breakdown of marriage is not a ground by itself but all of these facts are to be borne in mind if it becomes necessary to take an unusual judicial step or decision to clear up an insoluble mess when the Court may find it in the interest of both the parties.

In *Ashok Hurra* v. *Rupa Bipin Zaveri,*[46] the Supreme Court observed that a period of nearly thirteen years had already passed and there was no useful purpose of prolonging the agony and that the curtain should be rung at some stage. In such a state of affairs, the Supreme Court exercised its jurisdiction under Article 142[47] of the Constitution and granted a decree of divorce by mutual consent under Section 13-B of the Hindu Marriage Act 1955. But certain safeguards were also provided, such as the husband was directed to pay a lumpsum of ten lakh rupees to the wife and also another sum of fifty thousand rupees as litigation cost within a given time as condition precedent of the decree taking effect. Therefore, it may be noted that even though the High Court used the expression "irretrievable breakdown of marriage", the Supreme Court avoided it. Instead, on the peculiar facts and circumstances, the provisions of Article 142 of the Constitution were invoked as no other legal provision could apply. But it leaves such problems unsolved as only the Supreme Court can invoke the provisions under Article 142 of the Constitution. No other Court, not even the High Court, has such power. Again in *Kanchan Devi* v. *Promod Kumar Mittal*[48] the Supreme Court took recourse to Article 142 of the Constitution and dissolved the marriage on the ground that the marriage has irretrievably broken down. The Supreme Court further held that "in view of the peculiar facts and circumstances of the case and being satisfied that the marriage between the appellant and the respondent has irretrievably broken down and that there is no possibility of reconciliation, we in exercise of our powers under Article 142 of the Constitution of India hereby direct that the marriage between the appellant and the respondent shall stand dissolved by a decree of divorce. All pending cases arising out of the matrimonial proceedings and the maintenance proceedings under Section 125 of Cr. P.C. pending between the parties shall stand disposed of and consigned to the records in the respective Courts on

45 AIR 1994 SC 710.

46 AIR 1997 SC 1266. See also *Madhuri Mehta* v. *Meet Verma* (1997) 11 SCC 81.

47 Article 142 : (1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.

48 AIR 1996 SC 1515: I (1997) DHC 257 (SC).

being moved by either of the parties by providing a copy of this order, which has settled all those disputes in terms of the settlement. This appeal is disposed of in the above terms."

In *Romesh Chandre* v. *Savitri*,[49] the appellant and the respondent had been married for a period of 25 years but during this period the husband had committed adultery with other woman and had not treated his wife and son well. The differences that had cropped up could not be settled between the husband and wife even after the husband realised his mistake and apologised. Their marriage had reached a stage of no return and thus needed to be dissolved since the marriage was emotionally and physically dead; therefore, the Supreme Court on account of cruelty, both physical and mental, granted a decree of dissolution of marriage and observed that if a party still wants to continue in the wedlock despite the practical and emotional breakdown of the marriage, then it is in the best interest of both the parties and the society that the marriage be dissolved.

In *Chanderkala Trivedi* v. *Dr. S.P. Trivedi*,[50] the appellant-wife was against the decree of divorce on the grounds that it is not suitable for a Hindu lady to be a divorcee. However, the facts of the case present that the husband filed for divorce on account of cruelty by the wife. The wife replied to this statement by mentioning the adulterous relationship the husband has been having with another woman. The husband continued blaming the wife of associating herself unrespectably with young boys. The Supreme Court held that though it is not reasonable for a Hindu lady to be a divorcee but under the current circumstances not paying much attention to the legitimacy of the accusations but merely that their relationship had become so acrid and hostile for accusing each other of such lowly behaviour that it would be in the interest of both the parties to be separated than to live unhappily with each other in the matrimonial home. Thus, the Court in view of the complete breakdown of marriage upheld the decree of divorce by letting irretrievable breakdown of marriage by a back door entry.

In *Abha Agarwal* v. *Sunil Agarwal*, the appellant-wife was accused of cruelty by her husband. The husband first approached the Court and filed for divorce but later withdrew it on being asked to give the marriage a second try by the wife's relatives. There was no change in the behaviour of his wife even the second time, cruelty against the husband and his family continued. The wife in her statement replied to this by stating that the husband and his family used to treat her badly by continually asking for dowry. However, it was proved to be false in the Court. Thus, the Supreme Court finally held that the decree of

49 AIR 1995 SC 851: 1995 (2) SCC 7.
50 (1993) 4 SCC 232.

divorce must be given on account of cruelty, both mental and physical, and also because the marriage had completely broken in all aspects at least for one party.[51]

In *Chetan Dass* v. *Kamla Devi,* the appellant-husband wanted a divorce from his wife on the grounds of cruelty, i.e., mental cruelty. However, when probed, his allegation was found to be false. The wife came out with counter claim and alleged that her husband had an extra marital affair with a nurse from his hospital. This however, turned out to be true but even then, the wife maintained that she would not like to be divorced if the husband cut his relations with the said nurse. This was not accepted by the Court as the husband wanted to take divorce in the first place to be with the nurse and hence, this deal would not work out despite further trials. Therefore, the only proper solution out of this deadlock would be to get the two parties divorced as there is a clear case of irretrievable breakdown of marriage.[52]

In *Chiranjeevi* v. *Lavanya alias Sujatha*,[53] the husband wanted to divorce his wife on account of cruelty. But after submissions by the wife, the Court accepted the charges against the husband of leading a non-marital life and thus granted divorce to the couple on grounds that there have been a number of accusations and counter accusations. Hence, the Court could not see any way in which both of them could reconcile their differences. Therefore, though it did not fall under any of the grounds provided for divorce in Section 13 of the Hindu Marriage Act 1955, the Court felt that there was total breakdown of marriage and thus granted a decree of divorce.

In *Rishikesh Sharma* v. *Saroj Sharma*,[54] the husband filed a petition for divorce which was rejected. On moving the Supreme Court, it was observed that the wife had been living separately for several years and had also instituted baseless criminal proceedings against the husband. The wife in her written statement alleged that the appellant-husband had been living with another woman. The Supreme Court held that under the present circumstances where there is nothing in this marriage to continue and since it is dead from every angle and is impossible to revive, no purpose was being served in keeping both the parties retained in marriage. Hence, the Court ordered for the marriage to be dissolved on the basis of irretrievable breakdown of marriage.

In *Naveen Kohli* v. *Neelu Kohli,*[55] the Supreme Court has once again made a strong plea for incorporating irretrievable breakdown of the marriage

51 AIR 2000 All 377, 384.
52 AIR 2001 SC 1709.
53 AIR 1999 AP 316, 318.
54 (2006) 12 SCALE 282.
55 AIR 2006 SC 1675. See also *Durga Prasanna Tripathi* v. *Arundhati Tripathi* AIR 2005 SC 3297 : 2005 AIR SCW 4045 : (2005) 7 SCC 353.

as a separate ground of divorce under Section 13 of the Hindu Marriage Act 1955. The husband, in this case had filed a divorce petition on the ground of cruelty making several allegations, including criminal complaints against the wife. In a nutshell it was an acrimonious Court battle devoid of any sensitivity and decency. The Family Court at Kanpur granted the decree; against this the wife filed an appeal before the Division Bench of the Allahabad High Court which set aside the divorce decree; thereupon the husband filed a Special Leave Petition under Article 136 of the Constitution. The Court analysed in great detail the facts and circumstances of the case, various judgments on cruelty decided by the Courts in India and other countries, as also the law on this issue, and dissolved the marriage. The Court held that once the marriage has broken down beyond repair, it would be unrealistic for the law not to take notice of that fact, and it would be harmful to society and injurious to the interests of the parties. Where there has been a long period of continuous separation, it may fairly be surmised that the matrimonial bond is beyond repair. The marriage becomes a fiction, though supported by a legal tie. By refusing to severe that tie, the law in such cases does not serve the sanctity of marriage; on the contrary it shows scant regard for the feelings and emotions of the parties.

The Court observed from the analysis and evaluation of the entire evidence that it is clear that the respondent-wife has resolved to live in agony only to make life a miserable hell for the appellant-husband as well. This type of adamant and callous attitude…. Leaves no manner of doubt….that the respondent is bent upon treating the appellant with mental cruelty. It is abundantly clear that the marriage between the parties has broken down irretrievably and there is no chance of their coming together, or living together again…..there has been a total disappearance of emotional substratum in the marriage. The course which has been adopted by the High Court would encourage continuous bickering, perpetual bitterness and may lead to immorality.

The Court further observed that the marriage has been wrecked beyond salvage; public interest of all concerned lies in the recognition of the fact and to declare defunct *de jure* what is already defunct *defacto*. To keep the sham is obviously conducive to immorality and potentially more prejudicial to the public interest than dissolution of the marriage bond.

In another case, the parties were not living together for a considerable period and there was no evidence on record to prove that the husband was in any manner responsible for keeping wife out of matrimonial home. The feelings, emotions and affection between parties had turned into total hatred and there had been continuous separation between parties which had rendered their living together a mere fiction. In such circumstances, therefore, marriage was dissolved

by the Court.[56] In *Mamta Dubey* v. *Rajesh Dubey,*[57] the Court dissolved the marriage between the parties because the wife was not willing to withdraw criminal prosecution which was pending against the husband and his family members who were sent to jail. Due to non withdrawal of criminal prosecution the parties did not cohabit for the last 13 years and the Court found that the matrimonial bond was beyond repair, hence it granted a decree of divorce. In *Smitha* v. *Sathyajith*,[58] the Court observed that the act of contracting a second marriage by the husband clearly implies that he is not interested in continuing his marital relationship.

In *Anil Kumar Jain* v. *Maya Jain*[59] the parties had been living separately for seven years. The parties filed a joint petition for divorce by mutual consent in a trial Court in Madhya Pradesh. As the wife withdrew her consent later, the Court dismissed the petition. A single judge bench of Madhya Pradesh High Court at Jabalpur also dismissed the appeal. The Supreme Court allowed the appeal and held that it is empowered to grant divorce by mutual consent under Section 13-B of the Hindu Marriage Act 1955 even if the wife or the husband withdraws it during the proceedings in the Lower Court prior to passing of the order. Though under the existing laws, the consent given by the parties at the time of filing of the joint petition for divorce by mutual consent has to subsist till the second stage when the petition comes up for orders and a decree for divorce is finally passed. It is only the Supreme Court, in exercise of its extraordinary powers under Article 142 of the Constitution that can pass orders to do complete justice to the parties. The Supreme Court made it clear that the doctrine of irretrievable breakdown of marriage was not available to the High Courts, which do not have powers similar to those exercised by the Supreme Court under Article 142. Neither the Civil Court nor even the High Courts can therefore pass orders before the periods prescribed under the relevant provisions of the Hindu Marriage Act 1955 or on grounds not provided for in Section 13 and Section 13-B of the Act. The Court further held that no purpose would be served by prolonging the agony of the parties to a marriage which had broken down irretrievably and the curtain had to be rung down at some stage. The Court has to take a total and broad view of the ground realities while dealing with adjustment of human relationships.

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56 *Neelima Verma* v. *Manish Kumar* AIR 2009 (NOC) 2411 (HP). See also *Col. D. S. Godara* v. *Rajeshwari Singh* II (2009) DMC 479 (Uttch.), *Rajendra Krishna Agrawal* v. *Sandhya Rani* AIR 2009 (NOC) 1328 (Pat.).

57 AIR 2009 All. 141. See also *Sudhanshu Mauli Tripathi* v. *Meena Kumari*, AIR 2010 (NOC) 673 (Pat.).

58 AIR 2010 (NOC) 332 (Kar.).

59 II (2009) DMC 449 (SC).

Conclusion

Marriage is, no doubt, an individual relationship, but more than that it is a social institution having complex social dimensions. The true happiness that the institution of marriage can bestow upon a man/woman is found only in the continued pursuit of harmony by a couple. The indiscreet and unguided divorce law may destroy all that is good in marriage institution. Even if we take marriage as a mere contract, it cannot be said that it is the parties whose interest have to be considered in divorce proceedings. It is larger social interest which should be put above the individual interest of parties.

Most of the developed countries of the world have recognised irretrievable breakdown of marriage as an independent ground of divorce. The Australian Family Law Act 1975[60] has also recognised irretrievable breakdown of marriage as a sole ground for dissolution of marriage. The ground shall be held to have been established, and a decree of dissolution shall be made, if and only if the Court is satisfied that the parties separated and therefore lived separately and apart for a continuous period of not less than twelve months preceding the date of filing of the divorce petition. It is significant to note that separation can be established notwithstanding the fact that cohabitation was brought to an end by the action or conduct of one of the parties, and even though they continued to reside in the same residence, or that either party rendered some household services to the other. A decree of divorce may be refused if the Court feels that there is a reasonable likelihood of resumption of cohabitation.[61]

The New Zealand Divorce and Matrimonial Causes Amendment Act 1920 recognises that a separation period of three years or more would be a ground of divorce. The Court was given a discretion to either grant or withhold the divorce. In 1921 the Court lost this discretion even if the parties had been living apart for three years if the respondent opposed the petition and it was proved that the separation was due to the wrongful act or conduct of the petitioner. In 1967, however, the bar was removed but the period of separation was raised to seven years. An Amendment of 1968 has reduced this period to four years in case of no consent and two years in case of consent of the respondent. As Salmond in his statement said :

> The Legislature must, I think, be taken to have intended that separation for three years is to be accepted by this Court, as *prima facie* a good ground for divorce. When the matrimonial relation has for that period ceased to exist *de facto*, it should, unless there are special reasons to the

60 Section 48 (1), Australian Family Law Act 1975.
61 Section 49, the Matrimonial Causes Act 1973.

> contrary, cease to exist *de jure* also. In general, it is not in the interests of the parties or in the interest of the public that a man and woman should remain bound together as husband and wife in law when for a lengthy period they have ceased to be such in fact. In the case of such a separation the essential purposes of marriage have been frustrated, and its further continuance is in general not merely useless but also mischievous.[62]

U.S.S.R in the initial years was very liberal in granting of divorce. The divorce in U.S.S.R was called 'Post Card Divorce'. Family instability led to the tightening of the divorce conditions lately. Under Canadian Divorce Act 1967-68 irretrievable breakdown of marriage is clearly recognised as a ground of divorce, apart from the normal fault ground.[63]

The Swedish Marriage Law of 1920 provides a very good illustration of this trend. It lays down that both the spouses could present a joint petition for separation decree on the ground of 'profound and lasting disruption'. Such an application can be presented by one of the spouses to the marriage also. In case of joint application, the Court was required to pass a decree without looking into the matter. When only one spouse sought divorce, the application could be granted if the Court, after an enquiry, came to the finding of 'profound and lasting disruption' of marriage.

Hence, it is clear that law of divorce under scrutiny in all the legal systems of the world. Divorce laws has been reformed in such a way that the married couples who desired to divorce have less legal troubles and get quick legal remedy. Apart from divorce, the law is also taking care of ancillary remedies of the parties and providing proper care and protection to the children of divorced couples. However, individual freedom and independence have been regarded more than preserving social interests, security and solidarity in general.

In England and Wales Part I of the Matrimonial Causes Act 1973 incorporates the law relating to irretrievable breakdown of marriage as only ground for divorce, where the petitioner must prove the existence of one or more of the five 'facts' as mentioned in Sections 1 and 2. Sub-section (1) of Section 1 of the Matrimonial Causes Act 1973 provides five facts which are also known as grounds for divorce. Where sub-section (2) of Section 1 requires the petitioner to prove to the Court that (a) the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent; (b) the respondent has behaved in such a way that the petitioner cannot reasonably be

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62 *Lodder* v. *Lodder* (1921) New Zealand Law Report, pp. 876-877.
63 Section 4, the Canadian Divorce Act 1967.

expected to live with the respondent; (c) the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition; (d) the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to a decree being granted; or (e) the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition. Sub-section (4) of Section 1 requires that if a fact is proved, the Court must grant a decree *nisi* of evidence unless it is satisfied that the marriage has not irretrievably broken down. The Court must be satisfied that the marriage has irretrievably broken down, and that at least one of the five facts is proved. However, sometimes it is difficult to prove these facts which create confusion in divorce proceedings where the marriage has broken down irretrievably but the parties could not prove to the Court that the other party behaved unreasonably. In *Richards* v. *Richards,*[64] the petitioner satisfied the Court that her marriage had irretrievably broken down, but she failed to satisfy the Court that her mentally ill husband had behaved in such a way that she could not reasonably be expected to live with him. In *Buffery* v. *Buffery,*[65] the Court of Appeal was satisfied that the marriage had irretrievably broken down, but was not satisfied that unreasonable behaviour had been proved. A decree could not be granted because the wife had failed to establish any of the five facts. The burden of proof is solely on the petitioner to establish one of the facts and it is for the respondent in a defended suit to show, if he wishes, that the marriage has not broken down irretrievably. However, no petition may be brought during the first year of marriage, in order to discourage couples from 'giving up' their marriage too easily.[66] In *Cotterell* v. *Cotterell,*[67] the Court of Appeal held that the Court should always first consider whether the marriage has irretrievably broken down and only then go on to consider what it regarded as the subsidiary question of whether one of the 'facts' had been made out, but this decision stands on its own and is difficult to reconcile with the language of the Statute.

The Supreme Court of India has granted divorce in many cases not only on the basis of adultery, cruelty or desertion but more so because in their opinion the marriage between the two parties had completely broken down; lost faith, love, care; emotional break down; and failed to control their feelings. Though, there is no explicit provision of 'irretrievable breakdown of marriage' as an independent ground of divorce in Section 13 of the Hindu Marriage Act 1955 or Section 23 of the Special Marriage Act 1954, yet the Supreme Court used its

64 [1972] 1 WLR 1073 : [1972] 3 All ER 695.
65 [1988] 2 FLR 365 CA.
66 Section 3, the Matrimonial Causes Act 1973.
67 [1998] 3 FCR 199.

power vested in it by Article 142 of the Constitution towards administration of absolute justice for the parties in the matrimonial proceedings. The Court felt that where there are grave situations where there are not only accusations between one another, but where the mere foundation of the marriage has broken and cannot be restored at all, then the Court must pass a decree of divorce on the ground of irretrievable breakdown of marriage. Granting divorce protects the interest of the innocent party but there are cases in which both of the parties are at fault or one party is at fault and the relationship between the parties has turned absolutely acrimonious and beyond any type of repair; some cases in which the parties would not like to disclose the facts or issues of their incompatibility as they may want to keep it private. In such issues, there has to be a form or way out of the dead wedlock for these people.

It is a matter of fact that once the marriage has broken down beyond repair, it would be unrealistic for the law not to take notice of the fact, and it would be harmful to society and injurious to the interests of the parties.

Therefore, it is evident that the judiciary has taken a serious note of irretrievable breakdown of marriage as an independent ground of divorce and has been serving the needy but only in the limited number of cases as it is not possible for all litigants' spouses to afford to reach up to the Supreme Court. On the other hand the legislatures are slipping over the issue and waiting for the opportunity which is unknown to the people whom they represent. Unfortunately the trial Court, which is a competent Court of jurisdiction in matrimonial proceedings, cannot serve the people unless the Hindu Marriage Act 1955 and the Special Marriage Act 1954 is amended and 'irretrievable breakdown of marriage' as an independent ground of divorce is incorporated in the Statute book. I however, do point out that it must be implemented only when there are mechanisms in place to facilitate its proper execution so as to avoid giving undue advantage to the wrong person or giving a person a position to handle this provision recklessly.

The Law Commission in its 71st report urged for irretrievable breakdown of marriage to be made a ground of divorce and cited several reasons for the same. To illustrate this, an extract from the report is provided below:

It has been stated in support of this suggestion that the Hindu Marriage Act has been a complete failure, and that a social reform is imperative in the field. Proof of such a breakdown would be that the husband and wife have separated and have been living apart for say, a period of five or ten years and it has become impossible to resurrect the marriage or to reunite the parties. It is stated that once it is known that there are no prospects of the success of the marriage, to drag the legal tie acts as cruelty to the spouse and gives rise to crime and even abuse of religion to obtain annulment of marriage.

It is also mentioned in the report that in case the marriage has ceased to exist in substance and in reality, there is no reason for denying divorce, and then the parties can alone decide whether their mutual relationship provides the fulfillment that they seek. Divorce should be seen as a solution and an escape route out of such a situation. Such divorce is unconcerned with the wrongs of the past, but is concerned with bringing the parties and the children to terms with the new situation and developments by working out the most satisfactory basis upon which they may regulate their relationship in the changed circumstances.

The 71st Report of the Law Commission of India submitted to the Government of India on April 7, 1978 briefly dealt with the concept of irretrievable breakdown of marriage. The Report points out the fact that the fault and the guilt theories cause injustice in those cases where the situation is such that although none of the parties is at fault, or the fault is of such a nature that the parties to the marriage do not want to divulge it, yet there has arisen a situation in which the marriage cannot be worked out. The marriage has all the outward manifestations of marriage but the real substance is gone, it's just like an empty shell. The Report unequivocally asserts that in such circumstances it will be in the interest of justice to dissolve the marriage.[68] On the recommendation of the Law Commission of India, the provisions relating to irretrievable breakdown of marriage were introduced before the Lok Sabha on February 27, 1981 in the form of the Marriage Laws (Amendment) Bill 1981 but subsequently the Bill did not pass.

After having undergone a careful analysis of the provisions in law as they exist in different systems in the world, the researcher suggests the following amendments to be made in Section 13 of the Hindu Marriage Act 1955 to enable the Courts in granting decree of divorce on the ground of irretrievable breakdown of marriage and administer absolute justice towards the fulfillment of the Constitutional mandate as laid down in Article 142 :

Section 13-C: Divorce on the ground of Irretrievable Breakdown of Marriage:

(1) A petition for the dissolution of marriage by a decree of divorce may be presented to the District Court by either party to a marriage, on the ground that the marriage has broken down irretrievably.

(2) The Court hearing such a petition shall not hold the marriage to have broken down irretrievably unless it is satisfied that the parties to the marriage have lived apart for a continuous period of not less than three years immediately preceding the presentation of the petition.

68 *71st Report of the Law Commission of India*, p.12; *Naveen Kohli* v. *Neetu Kohli* AIR 2006 SC 1675.

(3) If the Court is satisfied, on the evidence, as to the fact mentioned in sub-section (2) then, unless it is satisfied on all the evidence that the marriage has not broken down irretrievably, it shall, subject to the provisions of this Act, grant a decree of divorce.

(4) In considering, for the purpose of sub-section (2), whether the period for which the parties to a marriage have lived apart has been continuous, no account shall be taken of any one period (not exceeding three months in all) during which the parties resumed living with each other, but no other period during which the parties lived with each other shall count as part of the period for which the parties to the marriage lived apart.

(5) For the purpose of sub-sections (2) and (4) a husband and wife shall be treated as living apart unless they are living with each other in the same household, and reference in this Section to the parties to a marriage living with each other shall be construed as reference to their living with each other in the same household.

Section 13-D: Wife's right to oppose the petition on the ground of hardship:

(1) Where the wife is the respondent to a petition for the dissolution of a marriage by a decree of divorce under Section 13-C, she may oppose the grant of a decree on the ground that the dissolution of the marriage will result in grave financial hardship to her and that it would in all the circumstances be wrong to dissolve the marriage.

(2) Where the grant of a decree is opposed by virtue of this Section, then-

(a) If the Court finds that the petitioner is entitled to rely on the ground set out in Section 13-C; and

(b) If apart from this Section the Court would grant a decree on the petition;

The Court shall consider all the circumstances, including the conduct of the parties to the marriage and the interests of those parties and of any children or other persons concerned, and if, the Court is of the opinion that the dissolution of the marriage shall result in grave financial hardship to the respondent and that it would in all circumstances be wrong to dissolve the marriage, it shall dismiss the petition, or in an appropriate case stay the proceedings until arrangements have been made to its satisfaction to eliminate the hardship.

Section 13-E: Restriction on decree for divorce affecting children: The Court shall not pass a decree of divorce under Section 13-C unless the Court is satisfied that adequate provision for the maintenance of children born out of the marriage has been made, consistent with the financial capacity of the parties to the marriage.

Explanation:- In this Section, the expression "children" means,-

(a) minor children;

(b) unmarried or widowed daughters who do not have the financial resources to support themselves; and

(c) children who, because of special condition of their physical or mental health, need looking after and who do not have the financial resources to support themselves.

The arguments in favour of its introduction in Indian personal laws are on a firm footing of providing the right to livelihood, where if the marriage has lost all flesh, then there is no point in staying with the skeleton and torturing oneself. Instead, the better option would be to opt out of marriage so that the rest of one's life can be spent in happiness. However, it is important in today's world to introduce breakdown of a marriage as an independent ground of divorce in totality and not as a part of it. This is because there are several other forms of divorce that have not been covered *per se* in the personal laws. Thus, not giving divorce on the grounds that the laws of the land do not provide for it does not mean that the parties of the marriage must live in continuous peril and unhappiness. The duty of the Courts and the Legislature is to make and administer law for the better functioning of the State. The personal laws that are present in the country are decades old and need a re-look. In modern age, people do consider marriage as a sacred institution but their attitudes in total are changing and the laws must get in tune with the change, otherwise there will not be peace and stability in the society.

In *Savitri Pandey* v. *Prem Chandra Pandey,*[69] the Supreme Court reiterated the need for the inclusion of irretrievable breakdown of marriage as a separate ground of divorce. The Court found favour with the contention that it is in the interest of justice that the marriage be dissolved relying on the cases of *Anita Sabharwal* v. *Anil Sabharwal,*[70] *Shashi Garg* v. *Arun Garg*[71], *Ashok Hurra* v. *Rupa Bipin Zaveri*[72] and *Madhuri Mehta* v. *Meet Verma.*[73] The Supreme Court has held that irretrievable breakdown of marriage itself is not sufficient to dissolve the marriage,[74] this ground should be used in extreme conditions[75] and where the exigency demands, the Court should end the agony

69 AIR 2002 SC 591.
70 (1997) 11 SCC 490.
71 (1997) 7 SCC 565.
72 (1997) 4 SCC 226.
73 (1997) 11 SCC 81.
74 *V. Bhagat* v. *D. Bhagat* AIR 1994 SC 710.
75 *Shyam Sunder Kohli* v. *Sushma Kohli* AIR 2004 SC 5111.

and bitterness by granting divorce.[76] Where no reconciliation[77] is possible, it was held by the Supreme Court as a case of irretrievable breakdown of marriage.

The Supreme Court in *Manjula* v. *K.R. Mahesh*[78] held, the marriage had irretrievably broken down and there would be no point in making an effort to bring about conciliation between the parties. In *Naveen Kohli* v. *Neelu Kohli,*[79] the Supreme Court has unequivocally recognised the need for the addition of irretrievable breakdown of marriage as a separate ground of divorce and has strongly recommended to the Union Government for an amendment to Section 13 of the Hindu Marriage Act 1955 and other related laws.

The legislature needs to realise that under the changed socio-economic conditions of the society, the women have come forward to accept the challenges and they have tried to become self-reliant. They no longer want to live at the mercy of their husband. All the cases involving the place of residence of the wife in conflict with that of the husband point towards the changed conditions in the society. The concept of pleasure is gaining acceptance in the society as against being living together.[80]

The Law Commission of India in its 71st Report concedes to the fact that the Government of India had considered it redundant to include irretrievable breakdown of marriage as a separate ground of divorce, when the Commission submitted its report. Though, the Commission strongly recommended the inclusion of irretrievable breakdown of marriage as a separate ground of divorce, yet no heed was paid. In *Naveen Kohli's*[81] case and a number of cases[82] the Supreme Court has strongly argued in favour of the inclusion of irretrievable breakdown of marriage as a separate ground of divorce. It is high time that the Government should recognise the need of the hour and save many couples from disgrace and humiliation by introducing irretrievable breakdown of marriage as a separate ground of divorce in Section 13 of the Hindu Marriage Act 1955 and other laws dealing with matrimonial remedies.

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76 *Durga Prasanna Tripathy* v. *Arundhati Tripathy* AIR 2005 SC 3297; *Swati Verma* v. *Rajan Verma* AIR 2004 SC 161.

77 *Chandrakala Menon* v. *Vipin Menon* JT 1993 (1) SC 229; *Kanchan Devi* v. *Promod Kumar Mittal* AIR 1996 SC 3192.

78 JT 2006 (7) SC 220.

79 *Naveen Kohli* v. *Neelu Kohli* AIR 2006 SC 1675.

80 B.D. Agarwala, *Irretrievable Breakdown of Marriage as Ground of Divorce-Need for Inclusion*, (1997) 8 SCC (Jour) 11.

81 *Naveen Kohli* v. *Neelu Kohli* AIR 2006 SC 1675.

82 *Savitri Pandey* v. *Prem Chandra Pandey* AIR 2002 SC 591 ; *Sabharwal* v. *Anil Sabharwal* (1997) 11 SCC 490 ; *Shashi Garg* v. *Arun Garg* (1997) 7 SCC 565 ; *Ashok Hurra* v. *Rupa Bipin Zaveri* (1997) 4 SCC 226; *Madhuri Mehta* v. *Meet Verma* (1997) 11 SCC 81; *V. Bhagat* v. *D. Bhagat* AIR 1994 SC 710; *Shyam Sunder Kohli* v. *Sushma Kohli* AIR 2004 SC 5111; *Durga Prasanna Tripathy* v. *Arundhati Tripathy* AIR 2005 SC 3297; *Swati Verma* v. *Rajan Verma* AIR 2004 SC 161; *Chandrakala Menon* v. *Vipin Menon* JT 1993 (1) SC 229; *Kanchan Devi* v. *Promod Kumar Mittal* AIR 1996 SC 3192; *Manjula* v. *K.R. Mahesh* JT 2006 (7) SC 220.

CLIMATE CHANGE AND GENDER RIGHTS: ANALYZING THE LINKAGE

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While the world's climate has always varied naturally, the vast majority of scientists now believe that rising concentrations of "greenhouse gases" in the earth's atmosphere, resulting from economic and demographic growth over the last two centuries since the industrial revolution, are overriding this natural variability and leading to irreversible climate change in the global climate system that supports the planet's basic life support functions.[1] Climate change is a daunting challenge due to several factors: It will have impacts on human health, terrestrial and aquatic ecological systems, and socio-economic systems. To make things worse, Climate change will affect all countries, in all parts of the globe. But its impacts will be distributed differently among regions, generations, age classes, income groups, occupations and genders.[2] The poor, the majority of whom are women living in developing countries, will be disproportionately affected. This paper focuses on the impact of climate change on women and also looks at the varied legal responses in relation to climate change and analyse how far gender concerns have been incorporated.

Climate Change and Differential impact on Women

> *Gender inequalities intersect with climate risks and vulnerabilities. Women's historic disadvantages - their limited access to resources, restricted rights, and a muted voice in shaping decisions - make them highly vulnerable to climate change. The nature of that vulnerability varies widely, cautioning against generalization. But climate change is likely to magnify existing patterns of gender disadvantage.*[3]

Women are not vulnerable because they are "naturally weaker" women and men face different vulnerabilities due to their different social roles. For example, many women live in conditions of social exclusion. This is expressed in facts as simple as differentials in the capacity to run or swim, or constraints on their mobility, and behavioural restrictions, that hinder their ability to re-locate without their husband's, father's or brother's consent Next to their physical

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1 *http://www.cdmindia.com/India%20CDM%20Potential.pdf* last visited on 05-01-2010.
2 IPCC *Third Assessment Report: Climate Change* 2001.
3 *"Fighting Climate Change: Human Solidarity in a Divided World"* UNDP Human Development Report, (2007).

location, women's assets such as resources and land, knowledge, technology, power, decision-making potential, education, health care and food have been identified as determinant factors of vulnerability and adaptive capacity. As pointed out by Moser and Satterthwaite the more assets people have, the less vulnerable they are and the greater the erosion of people's assets, the greater their insecurity.[4]

Climate change is predicted to reduce crop yields and food production in various regions, particularly the tropics. Women are the main producers of the world's staple crops, providing up to 90% of the rural poor's food intake and producing 60-80% of the food in most developing countries. Specifically they are responsible for 70-80 percent of household food production in sub-Saharan Africa, 65 percent in Asia, and 45 percent in Latin America and the Caribbean. They achieve this despite unequal access to land, information, and inputs such as improved seeds and fertilizer. Decreased Crop production could increase their difficulty in accessing resources, hence, creating an increased workload for women who has to lookout for alternatives to maintain family. This will in turn effect the gendered division of labour, and possibly have negative effects on both men's and women's incomes. Women's informal rights to resources could decrease or disappear as access to natural resources diminishes due to climate change.[5] Women's livelihoods are affected and as a result women slip deeper in poverty, leading to more inequality and marginalization

Further generally, girls and women are responsible for the collection of water and fuel wood. In the poorest areas of the world, particularly sub-Saharan Africa, women and girls can spend 3-4 hours per day on these tasks. Rural women in developing countries collect forest products and used them as fuel, food, medicines or food for their animals. The reduction or disappearance of these products will have a negative impact on the wellbeing and quality of life for them and their families. Flooding, drought and desertification can extend these burdens geographically, forcing more girls in more communities to forego education. Out of the 115 million children of the world who do not go to school, three fifths are girls, and women constitute 75% of the world's illiterate population.[6] According to UNHCR, 80% of refugees in the world are women and children. Migration of populations, given extreme changes and disasters, could interrupt and limit the opportunities for education. Men are more likely to migrate, either seasonally or for a number of years. Female-headed households left behind are often the poorest. The work loads of these women, their children and the elderly increase significantly as a result of male emigration.

4 Moser and Satterthwaite, "Towards Pro-Poor Adaptation to Climate Change in the Urban Centres of Low and Middle-Income Countries", *IIED*, London, (2008).

5 *Ibid*.

6 Oxfam International Annual Report, (2007).

A 2007 study of 141 natural disasters by the London School of Economics, the University of Essex, the Max-Planck Institute of Economics, found that when economic and social rights are fulfilled for both sexes, the same number of women and men die in disasters. On the contrary, when women do not enjoy economic and social rights equal to men, more women than men die in disasters.[7] This gender discrepancy has come to light in a range of major disasters, including Hurricane Mitch, Hurricane Katrina, and other storms in the Americas; European heat waves; and cyclones in South Asia. When swift environmental changes arise, existing inequalities are magnified and traditional gender roles are reinforced. Historic disadvantages, including restricted access to land, resources, information, and decision making, result in heavier burdens for women during and after natural disasters. The same story can be repeated in case of climate change also.[8]

Climate change effects can aggravate the risk of contracting serious illnesses. This will result in Increase in women's workload due to their role as primary careers in the family, i.e., time spent on caring for children and the sick. Climate change is expected to result in a lot of species extinction; changes in species composition, disruption of symbiotic relationships, change in tropic cascades, among others. Without secure access to and control over natural resources (land, water, livestock, trees), women are less likely to be able to cope with climate change impacts. Adaptation measures, related to anti-desertification, are often labour-intensive and women often face increasing expectations to contribute unpaid household and community labour to soil and water conservation efforts. Decrease in forest resources used by women.[9]

An increase in climate-related disease outbreaks, for example, will have very different impacts on women than on men. Each year, approximately 50 million women living in malaria-endemic countries throughout the world become pregnant, of whom over half live in tropical areas of Africa with intense transmission of *Plasmodium falciparum.* An estimated 10,000 of these women and 200,000 of their infants die as a result of malaria infection during pregnancy, and severe malarial anaemia contributes to more than half of these deaths.[10]

There is, thus, a causal interrelationship between climate change and gender:

(1) Climate change tends to exacerbate existing gender inequalities; and

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7 Eric Meumwyer, "The Gendered Nature of Natural Disasters, The Impact of Catastrophic Events on the Gender Gap in Life Expectancy", 1981-2002, Available *at SSRN: http://ssrn.com/abstract=874965 (*last visited 05-01-2010.

8 C. Bunch "'Violence against Women and Girls: The Intolerable Status Quo" in UNICEF, *The Progress* of *Nations* 23-4, (1997).

9 Wisner, B, P. Blaikie, T. Cannon, and I. Davis. *At Risk: Natural Hazards, People's Vulnerability and Disasters*, p. 24, (1994).

10 "Global Tuberculosis Control - Surveillance, Planning, Financing", *WHO Report,* (2008).

(2) Gender inequalities lead women to face larger negative impacts.

But it should be remembered that women are not just victims but active agents of change and possess unique knowledge and skills; Women can help or hinder strategies related to energy use, deforestation, population, economic growth, science and technology, and policy making, among other things.[11]

Climate Change legal frame Work and Gender Concerns

Climate change impacts affect environment, human rights, sustainable development, health and all sectors of society. Positive action, if taken in these areas, could decrease pressure from climate change. Because climate change affects women and men differently, a gender equality perspective is essential when discussing policy development, decision making, and strategies for mitigation and adaptation

Climate change emerged on the political agenda in the mid-1980s with the increasing scientific evidence of human interference in the global climate system and with growing public concern about the environment The United Nations Environment Programme (UNEP) and the World Meteorological Organizations (WMO) established the Intergovernmental Panel on Climate Change (IPCC) to provide policy makers with authoritative scientific information in 1988.[12] In its first report in 1990, IPCC concluded that the growing accumulation of human made green house gases in the atmosphere would "enhance the green-house effect, resulting in an additional warming of the Earth's surface" by the next century, unless measures were adopted to limit emissions. The UN general assembly responded to by launching negotiations.

To address climate change, the international community has embarked on the development of climate policy with an unprecedented speed. United Nations Framework Convention on Climate Change (UNFCCC) was signed at the UN Conference for Environment and Development in Rio de Janeiro 1992,[13] which identified high anthropogenic emissions as the main reason behind climate change. But it was rather a general approach and never specified emission targets or binding mechanisms and instruments of climate policy. The UNFCCC entered into force in 1994.[14] Further negotiations were crowned with success

11 Tasneem Essop, "Climate Change A Gender Issue", available on *http://www.news24.com/Content/MyNews24/YourStory/1162/bb35fc73d76c46afb64f4bf3cc6f9782/12-08-2009%2002-08/Climate_change_a_gender_issue.(*Last visited 3-12-2009)

12 The Intergovernmental Panel on Climate Change (IPCC) has been established by WMO and UNEP to assess scientific, technical and socio- economic information relevant for the understanding of climate change, its potential impacts and options for adaptation and mitigation. It is currently finalizing its Fourth Assessment Report "Climate Change 2007". http://www.ipcc.ch/ (last visited 0n 08-02-2007).

13 United Nations, United Nations Framework Convention on Climate Change (1992), <*www.unfccc.int/resource/docs/convkp/conveng.pdf*>.(last visited on 12-02-2007).

14 *Id*.

when in 1997 COP 3 in Kyoto reached on certain specific mechanisms to reduce emission of green house gases, now called the "Kyoto Protocol".[15] In consequence a carbon market is developing rapidly as a step towards reducing and stabilization of green house gases in the atmosphere to avoid dangerous global warming.

But United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol lack specific language related to gender. The only initiative which is considerate and representative of women's participation occurred in Bali. For the first time in UNFCCC history, a worldwide network of women,- women for climate justice, was established. But it is to be mentioned that there are numerous international legal instruments that mandate the incorporation of the gender perspective which also apply to the existing climate change framework. The importance of mainstreaming gender equality for the realization of human rights, sustainable development and/or poverty eradication and disaster reduction has been recognized in a series of international instruments. These include Agenda 21 It includes a complete chapter entitled "Global Action for Women towards Sustainable Development", which calls upon governments to make the necessary constitutional, legal, administrative, cultural, social and economic changes in order to eliminate all obstacles to women's full involvement in sustainable development and in public life.[16] The World Conference on Human Rights[17]; the Beijing Platform for Action[18] the 1997 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);[19] the Millennium Declaration[20] the Johannesburg Plan of implementation[21] the Convention on Biological Diversity (CBD);[22] and the

15 Kyoto Protocol to the United Nations Framework Convention on Climate Change <*http:// unfccc.int/resource/docs/convkp/kpeng.html*>.(last visited on 18-02-2007).

16 Agenda 21 is a Programme run by the United Nations (UN) related to sustainable development. It is a comprehensive blueprint of action to be taken globally, nationally and locally by organizations of the UN, governments, and major groups in every area in which humans impact on the environment.

17 Vienna Conference on Human Rights A/CONF.157/24 (Part I) On 25 June 1993, representatives of 171 States adopted by consensus the Vienna Declaration and Programme of Action of the World Conference on Human Rights.

18 *Ibid*.

19 UN GA Res 34/180, UN Doc A/34/46, 19 I.L.M. 33, (1980).

20 Resolution adopted by General Assembly, 55/2 United Nations Millennium Development Goals. Provided that to promote gender equality and the empowerment of women as effective ways to combat poverty, hunger and disease and to stimulate development that is truly sustainable.

21 Support efforts by all countries, particularly developing countries, as well as countries with economies in transition, to enhance national institutional arrangements for sustainable development, including at the local level. That could include promoting cross-sectoral approaches in the formulation of strategies and plans for sustainable development, such as, where applicable, poverty reduction strategies, aid coordination, encouraging participatory approaches and enhancing policy analysis, management capacity and implementation capacity, including mainstreaming a gender perspective in all those activities.

22 The Convention on Biological Diversity (CBD), known informally as the Biodiversity Convention, is an international legally binding treaty that was adopted in Rio de Janeiro in June 1992.

Hyogo Framework for Action 2005.[23]

Regarding India we came up with an Action Plan on Climate Change.[24] The action plan briefly recognizes the special vulnerability of women with regard to climate change. It states "The impacts of climate change could prove particularly severe for women. Though, the plan tried to analyse the impact and vulnerability of women to climate change, yet it lacks a positive strategy to counteract and make them part of responsive method.

Conclusion

We cannot consider climate change as a purely environmental issue. The reality is that it will forever change the socio-economic landscape of our world, the continent and our country if we do not act now. Those with the least options have the least ability to adapt to climate change. Gender-based roles and responsibilities often result in limited options for women because women, as primary caregivers still have a reduced ability to earn a living, have less access to land and natural resources and have less of a voice in decision making. Lack of representatives and women's participation in the decision-making spheres related to climate change at all levels (local, national and international) result in the absence of gender-responsive policies and programmes. If International Community as a whole has to think in terms of providing an overall and long lasting solution policies has to cater to gender concerns.

The values that inspired the drafters of the UDHR provide a powerful point of reference in the climate change context. That document was an international response to the human tragedy of extreme nationalism, fascism and world war. It established a set of entitlements and rights - civil, political, cultural, social and economic for 'all members of the human family' to prevent the 'disregard and contempt for human rights that have resulted in barbarous acts which have outraged the conscience of mankind'. While the drafters of the UDHR were looking back at a human tragedy that had already happened, we are now looking at a human rights tragedy *in the making*. Allowing that tragedy to evolve would represent 'a systematic violation of the human rights of the poor and of future generations'.[25]

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23 Hyogo Framework for Action, Building the Resilience of Nations and Communities to Disasters, 2005.

24 National Action Plan on Climate Change, 2008.

25 Under international human rights law, States generally only have direct human rights obligations to people within their territory or jurisdiction, rather than to the international community generally: See also Jane McAdam, 'Climate Change 'Refugees' and International Law: on or off the world map?' (Speech delivered at the Australian Human Rights Centre 21st Anniversary Symposium, University of New South Wales, May 2, 2007), pp. 6-7.

CLIMATE CHANGE LITIGATION IN INDIA: SEEKING NEW APPROACH THROUGH THE APPLICATION OF COMMON LAW PRINCIPLES[1]

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The increasing number of climate change litigation has made it one of the up-and-coming environmental issues in recent time. Climate change litigation is marred by the scientific, economic, political questions which are considered as significant impediments in devising apposite litigation strategy. The world is truly divided when it comes to the attitude of the courts in encouraging this type of cases till date. In India climate change litigation is yet to take off. This article argues that climate claims will have a strong footing in India in years to come depending upon working out an objective legal strategy based on some of the common law principles like public nuisance and negligence. Although, for critiques climate change litigation based on common law theory may still appear uncertain, the potentiality of such suits cannot be overlooked in providing a new dimension in entire climate change discussion. Overall, the article discusses about crafting a social and legal charter and strategies that may shape the future of climate change litigation in India.

Introduction

Structuring of the appropriate legal strategy to deal with climate change problem is going to be a key assignment for the legal fraternity in years to come. The role of judiciary is particularly important in interpreting the existing laws for formulating a new legal approach in the backdrop of growing impact of greenhouse gas emissions and the ever increasing economic activities affecting every facet of human productivity, daily life and ongoing global climate change negotiations.

Although, the basic mechanism of how carbon dioxide and other greenhouse gases warm the planet has been well known to us for decades,[1] climate change emerged as a firm international agenda only by the late 1980s.[2] Thereafter, it took international community more than a decade to develop a comprehensive and impressive legal framework to address the climate change issue globally.[3] India's thriving economy and steadily growing emission level has made India as one of the key players in climate change politics. Noticeably, India played a

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1 David Hunter, et al., International Environmental Law And Policy, 2nd ed. 2002, p. 590.

2 David Freestones, *The International Climate Change Legal and Institutional Framework: An Overview*, in Legal Aspects Of Carbon Trading: Kyoto, Copenhagen And Beyond (David Freestones et al. eds., 2009).

3 1992 United Nations Framework Convention on Climate Change, 1771 UNTS 107; S. Treaty Doc No. 102-38; U.N. Doc. A/AC.237/18 (Part II)/Add.1; 31 ILM 849 was adopted at the

significant role in COP 15 recently held in Copenhagen.[4] This, in fact, underplays a critical fact, i.e., India's legal system is still not wake up to the future scope of climate change litigation. The fact that climate change may citizens is aptly described in her article by Deepa Badrinarayana, an Assistant Professor of Law, Chapman University School of Law, Orange California.[5] Furthermore, Indian judiciary's inability to handle such issue is another area of concern which has to be addressed now adequately. It can be argued that the common law actions like public nuisance or negligence can be the effective means in the hands of judges to address the climate change issue in India particularly in the absence of articulated legislative provisions. A wide array of scholars, attorneys, and affected people are looking into the viability of these actions now.

This paper aims at identifying the present legal position of climate change litigation in India and mapping an overall prospective future. I have confined my study to two different legal systems in the world, United States of America and India because the first appropriately represents the affluent North and the later the poor Southern counterparts. These two prominent common law countries riding on the ethic of democracy have tremendous potentiality to shape world's legal ideas.

Part I of this article initiates the debate by pointing towards the increasing popularity of climate change litigation worldwide and its conceivable future in India. Part II further narrates the potentiality of such litigation. Part III seeks to draw a broad framework for climate change litigation by discussing some of the cases originated in United States of America. Part IV further forwards the discussion by analysing the feasibility of applying US experiences on Indian litigation scheme. Part V focuses on social and ethical aspects that influence climate change litigation and finally, Part VI concludes the paper.

United Nations Conference on Environment and Development (UNCED) that set forth a structure for the control and reduction of greenhouse gases for the first time. In 1997, 160 nations met in Kyoto to negotiate reductions in greenhouse gas emissions pursuant to the terms of the 1992 United Nations Framework Convention on Climate Change. The resulting agreement named Kyoto Protocol to the United Nations Framework Convention on Climate Change, UN Doc FCCC/CP/1997/7/Add.1, Dec. 10, 1997; 37 ILM 22 (1998) sets forth specific limits on emissions and probably most debated international environmental law document at present.

4 Politically speaking, India has won Copenhagen Accord (Copenhagen Accord, 18 December 2009, FCCC/CP/2009L.7), a reference document and a kind of political statement which does not have any binding obligation. However, the overall moral that we have learned there is nothing more than a sluggish, outmoded, probably hollow as well, promise – "We should do something to save our planet". Rich stakeholders played 'Messiah' as usual, semi-rich listened to them cautiously and bargained out their own stake and poor simply participated throughout the entire teaser. This is far from our expectation.

5 Deepa Badrinarayana, *The Emerging Constitutional Challenge of Climate Change: India in Perspective*, 19 Fordham Envtl. Law Rev. 1, (2009) (Discussing that climate change presents a serious challenge to constitutional rights of Indians; rights that can only be taken away by the State and by proper legal procedure.)

Climate Change Litigation: Potentiality and Possibility

Climate change litigation has its basis on liability claims as civil society more and more believes that human actions and the emission of certain greenhouse gases into the atmosphere can lead to grim consequences for the environment, property and human health. It creates the possibility of future litigations against the governments or corporations engaged in commercial activities. Once commenced, it raises whole new legal challenges of which both plaintiffs and the defendants must be aware.[6] Climate change litigation can be spawned from:

(a) a cause of action based on nuisance or negligence where climate change is the causal factor, which may raise liability issue;

(b) an administrative law claim against a public authority challenging any action, inaction, breach of statutory duty or constitutional law or in otherwise a failure on the part of the authority to regulate greenhouse gas emission properly;

(c) other legal causes of action arising out of growing public awareness of climate change matters which can include alleged breaches of advertising regulations and standards in the course of making claims in respect of climate change, or alleged failure by companies, their directors or officers to adequately report climate change and other environmental impacts affecting company performance which can lead to shareholders derivative actions or other regulatory actions that are consequential in nature.[7]

In India, the first two possibilities are already being explored but in entirely different environmental contexts and not as part of climate litigation. Broadly speaking, in India the citizen has a choice of the following remedies to obtain redress in case of violation of their environmental right:

(a) A common law actions against the polluter including nuisance and negligence;

(b) A writ petition to compel the authority to enforce the existing environmental laws and to recover clean up costs from the violator; or

(c) Redresses under various Environmental Statues like Environment (Protection) Act, 1986, Water (Prevention and Control of Pollution) Act of 1974, Air (Prevention and Control of Pollution) Act of 1981 etc.; or

(d) Compensation under Public Liability Insurance Act, 1991 or the National Environment Tribunal Act, 1995 in the event of damage from a hazardous industry accident.[8]

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6 Jose A Cofre, Nicholas Rock, Paul watchman, Dewey & LeBoeuf, *Climate Change Litigation*, in Climate Change: A Guide To Carbon Law And Practice, 230 (Paul Q Watchman ed. 2008).

7 Supra n. 6, p. 230.

8 Shyam Divan and Armin Rosencranz, *Environmental Law and Policy in India: Cases, Materials and Statutes*, 2nd ed. 2002, p. 87.

Nuisance and negligence actions are very common in India these days when it comes to check environmental pollution.[9] But unfortunately, none of them have been used so far to include climate litigation purely. Nuisances can be of two types, private or public. A private nuisance takes place when one uses one's property in a manner that harms the property interests of others. Theoretically, if a company uses its property in a way that harms others' property interests by contributing to global warming, it can be held liable under private nuisance. Climate change, however, is a broad problem that has less to do with defendants' use of their property and that involves much less direct "annoyance" with "neighbours." Therefore, private nuisance does not seem like a good fit for a climate change lawsuit. Public nuisance is more appropriate remedy for climate change cases.[10]

Drawing Inspiration from Affluence: Does the Model Worth for Us?

Over the last decade, the number of cases involving climate change problem has increased noticeably. Several cases have already been filed in national and international tribunals worldwide. United States has probably experienced the most surge of this kind of litigation. *Massachusetts* v. *EPA*[11] was one of such cases. U.S. Supreme Court's decision in this case has significantly altered the Government policy and re-drawn the litigation landscape. Massachusetts and several others brought claims against the U.S. Environmental Protection Agency (EPA) challenging the agency's decision not to regulate GHG emissions from motor vehicles under the Clean Air Act, 1963. Massachusetts contented that under the Clean Air Act, EPA had the responsibility to regulate any air pollutant including greenhouse gases that can "reasonably be anticipated to endanger public health or welfare."[12] The U.S. Supreme Court decided that the Clean Air Act, 1963 does give EPA the power to regulate.

This case is typically an example where the Supreme Court of U.S.A. decided an administrative law question whereby avoiding a much disputed issue of the scientific evidence for climate change.[13] Although, administrative law

9 Among all these remedies, the writ jurisdiction is more popular. The action in tort is rarely used and the statutory remedies are largely untried.

10 David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 Colum. J. Envtl. L. 1, 52 (2003).

11 549 U.S. 497 (2007).

12 Section 202 (a) of Clean Air Act, 1963 (provides that "the Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare").

13 Ryan Hackney, *Flipping Daubert: Putting Climate Change Defendants in the Hot Seat*, 40 Envtl. L. 255, 260 (2010).

cases are not subject to Daubert Standard[14] and the Federal Rules of Evidence, they do help in making up the backdrop of climate change litigation in which common law actions proceed.[15] However, establishing scientific evidence in climate change litigation is an important step in deciding the standing of the parties.

In U.S.A., for climate change cases courts are still reluctant to touch the scientific question. Dealing with nuisance is, though, not uncommon there. The first of such kind of lawsuit brought on the common law action of public nuisance was *Connecticut* v. *American Electric Power Co.*[16] In 2004, a coalition of states, private land trusts, and New York City sued a group of major electric power companies for their contributions to climate change. They alleged that these power companies are the largest emitters of greenhouse gases (GHG) in the United States, collectively emitting 650 million tons of carbon dioxide each year; that carbon dioxide is the primary GHG; and that GHGs trap atmospheric heat and cause global climate change, which is an ongoing public nuisance that must be abated under federal or state common law. Plaintiffs sought a court order requiring defendants to cap and reduce their GHG emissions.[17]

The United States District Court for the Southern District of New York dismissed this case in 2005 as a non-justiciable political question before any scientific evidence could be presented.[18] However, in September 2009, restoring the case, the Second Circuit Court of Appeals reversed the District Court's judgment. It held the political question doctrine did not bar the Court from considering the case and all plaintiffs had standing to bring "public nuisance" lawsuit against power companies for injuries caused by climate change.[19] This decision does not address the final position though, as rehearing is still pending in the Second Circuit Court where the plaintiffs have opportunity to pursue their claims further.

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14 *Id.* pp. 265-269. In *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the US Supreme Court established Daubert standard for the admissibility of scientific expert testimony. Daubert replaced the previous Frye Standard of "general acceptance in the field" with a two-prong test derived from Federal Rule of Evidence 702, which addresses "Testimony by Experts." To be admissible under Daubert, expert testimony must be both reliable and relevant. A court first must ask whether the scientific methodology underlying the testimony is reliable - is it "ground[ed] in the methods and procedures of science" and "supported by appropriate validation." while Daubert challenges have primarily worked to the benefit of defendants, there is no reason why plaintiffs cannot use them in climate change litigation where the plaintiff's position is supported by the weight of the scientific evidence.

15 *Id*. p. 261.

16 406 F. Supp. 2d 265 (S.D.N.Y. 2005).

17 *Id*.

18 *Id*. pp. 271-74.

19 *Connecticut* v. *American Electric Power Co*., 582 F.3d 309, 314-15 (2d Cir. 2009).

Another significant case on climate change based on the ground of nuisance is *Comer* v. *Murphy Oil USA*[20] where a three-member panel of the Fifth Circuit Court revived a lawsuit filed by residents along the Mississippi Gulf coast against several corporations in the energy and fossil fuels industries, alleging they were responsible for property damage caused by Hurricane Katrina. Initially in 2007, the plaintiffs sought damages under the tort theories of unjust enrichment, civil conspiracy and aiding and abetting, public and private nuisance, trespass, negligence, and fraudulent misrepresentation and concealment. At the district court level, the defendants were successful in dismissing plaintiffs' complaint. The United States District Court for the Southern District of Mississippi granted the defendants' motions and dismissed the action on the ground that the plaintiffs did not have standing to raise political question that should not be resolved by the judiciary. The Court also found that the harm was not traceable to individual defendants. On 16 October 2009, the U.S. Court of Appeals for the Fifth Circuit overturned a District Court dismissal in part, holding that the plaintiffs both have standing to raise at least three of the claims (nuisance, trespass, negligence), and that the claims are justifiable only to vacate the panel decision on March, 2010 deciding that it would itself consider the appeal from the District Court *en banc*.[21]

This recent development in *Comer* v. *Murphy Oil USA* is very important because this may set a parameter of future climate litigation for the American courts. Also it may provide answer to the question whether a corporate entity can be made liable for catalysing devastating climatic incidents along with clarifying plaintiff's legal stand to bring a suit for such activities.

It is expected that scientific challenges may continue to affect climate change lawsuits based on public nuisance and negligence actions. It is also argued that plaintiffs may be successful by applying those common law theories. If it happens as expected, the damages and costs of adaptation will be enormous and the interest in finding parties to pay those costs will likewise be enormous.[22]

Laws as it stands: An Uncultivated Quarters

Environmental jurisprudence in India is an uneasy mixture of "willingness to protect environment and lack of environmental awareness", "overabundant legislative efforts and slipshod enforcement process", "constant gross violation of basic human rights and intense protest by the victims and stake-holders". These jural opposites, connected to diametrically two differing philosophies of

20 585 F.3d 855 (5th Cir. 2009); Full text is available at http://www.ca5.uscourts.gov/opinions/pub/07/07-60756-CV0.wpd.pdf (Last visited 22.04.10).

21 *Kivalina* v. *ExxonMobil Corp*., et al., 2008 (Federal Common Law Public Nuisance 28 U.S.C. §§ 1331, 2201)

22 Supra n. 12, p. 262.

democracy and socialism, provide an obscure picture of environmental law in India. The judiciary had remained as a bystander to environmental despoliation for more than two decades since the inception of modern environmentalism on Indian soil. It had started assuming pro-active role only in 1980s. Since then development of Indian environmental jurisprudence has been heavily influenced by some of the most innovative judgments passed by the Indian courts.[23]

Standing as we know is very important for initiating legal proceeding. According to the traditional rule, only a person whose own right was in jeopardy was entitled to seek remedy.[24] Further the matter that comes before a court must be a justifiable matter. This created hardship because as per this rule, a person claiming a public right or interest had to show that he or she had suffered some special injury over and above what members of the public had in general suffered. Therefore, injuries which are diffuse in nature e.g. air pollution affecting a large community were difficult to redress.[25] This traditional *locus standi* doctrine was also detrimental for the poor community of India as it disallowed any concerned citizen to sue on behalf of the underprivileged class in the court of law. Till date, the poor and underprivileged are unwilling to assert their environmental rights because of poverty, ignorance or fear of social or economic reprisals from the dominant class of community.[26]

The liberalisation of the *locus standi* in India came with the emergence of PIL which allows any public-spirited individual or institution, acting in good faith to move to the Supreme Court and the high courts for writs under Articles 32 and 226 of the Constitution respectively for judicial redress in public interest in case of violation of fundamental rights of a poor or underprivileged class who because of poverty or disability cannot approach the court. In the last 20 years, judiciary has extended the reach of PIL to the protection of the environment. The judiciary has interpreted Article 21liberally to include an unarticulated right, i.e. the right to wholesome environment and more precisely right to enjoy pollution-

23 *M.C. Mehta* v. *Union of India*, AIR 1992 SC 382 (the Court gave direction to broadcast and telecast ecology programmes on the electronic media and include environmental study in school and college curriculum); see also *S. Jagannath* v. *Union of India*, AIR 1997 SC 811 (prohibiting non-traditional aquaculture along the coast); *T.N. Godavarman Thirumulkpad* v. *Union of India*, AIR 1997 SC 1228 (judicial supervision over the implementation of national forest laws).

24 Supra n. 8, p. 134 (Stating that there are several narrow but notable exceptions to this traditional rule. For example, any person can move a writ of *habeas corpus* for the production of a detained person and a minor may sue through his or her parent or guardian.)

25 *Id*.

26 Ramchandra Guha and Juan Martinez Alier, *Varieties Of Environmentalism: Essays North And South*, 32, 37 (1997) (stating that Lawrence Summer's 'the poor sell cheap' principle also has relevance in India. The market through so-called 'hedonic prices', i.e., the decrease in the cost of properties threatened by pollution, would point out that locations where the poor reside are more suitable for toxic waste dumping or setting up polluting industries or constructing large projects than locations where the rich live. Poor people accept cheaply, if not happily, nuisance or risks which other people would be ready to accept only if offered large amount of money.)

free water and air and more.[27] The court also has integrated right to a wholesome environment with nascent but emerging principles of international environmental law e.g. polluter pays principle,[28] the precautionary principle,[29] the principle of inter-generational equity,[30] the principle of sustainable development[31] and the notion of the state as a trustee of all natural resources.[32] Certainly, this list is not exhaustive and represents a small number of environmental cases that has reached the Indian courts. No doubt, there are few more environmental issues in India yet to be included in the domain of PIL and climate change is one of them.[33]

Commenting on public nuisance further, it is known that it arises from an unreasonable interference with the general right of the public. Remedies against a public nuisance are therefore, available to every citizen.[34] In India, public nuisance so far has covered issues ranging from sewage cleaning problem to brick grinding operations, from hazardous waste management to factory's untreated effluent discharges. But climate change is still unexplored. It has to be further understood that in liability claims proceedings based on nuisance or negligence arising out of global warming, the plaintiff always faces problem to establish his standing because it is extremely difficult to set up a causal connection between the injury suffered by the plaintiff and defendant's emission of greenhouse gases. In United States, to establish standing in Federal Court, a plaintiff must show that:-[35]

(a) a particular injury has been suffered;

(b) a causal connection exists between the injury and conduct complained of, so that the injury is fairly traceable to the challenged action of the defendant; and

(c) it must be likely, as opposed to merely speculative, that a favourable court decision will relieve the injury complained of.

27 Article 21, the Constitution of India; see also *Subash Kumar* v. *State of Bihar* (1991) 1 SCC 598; *Virender Gaur* v. *State of Haryana* (1995) 2 SCC 577.

28 *Indian Council for Enviro-legal Action* v. *Union of India* (Bichhri Case) (1996) 3 SCC 212 (describing polluter pays principle); see also *M.C. Mehta* v. *Kamal Nath*, (2000) 6 SCC 213, 220.

29 *Vellore Citizens' Welfare Forum* v. *Union of India* (1996) 5 SCC 647 (establishing precautionary principle); see also *Narmada Bachao Andolan* v. *Union of India* (2000) 10 SCC 664, 727 (shifting the burden of proof to the industry).

30 *State of Himachal Pradesh* v. *Ganesh Wood Products* (1995) 6 SCC 363 (establishing principle of inter-generational equity); see also *Indian Council for Enviro-legal Action* v. *Union of India* (CRZ Notification case), (1996) 5 SCC 281.

31 *M.C. Mehta* v. *Union of India* (Taj Trapezium Case) (1997) 2 SCC 353 (establishing principle of sustainable development); *see* also *Narmada Bachao Andolan* v. *Union of India* (2000) 10 SCC 664, 727.

32 *M.C. Mehta* v. *Kamal Nath* (1997) 1 SCC 288 (stating that state as a trustee of all natural resources).

33 Lavanya Rajamani, *Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability*, Oxford Journal of Environmental Law, Vol 19 No 3, 295 (2007).

34 *Id.* p. 112.

35 Supra n. 6.

In *Massachusetts* v. *EPA*, Massachusetts was entitled to 'special solicitude' because of State's special quasi-sovereign interest in protecting all the earth and air within its domain. Ruling in favor of Massachusetts Supreme Court of the United States held that Massachusetts, due to its "stake in protecting its quasi-sovereign interests" as a state, had standing to sue the EPA for over potential damage caused to its territory by global warming.[36] It is surprising that in *Massachusetts* the question of standing was raised by the respondents first. The respondents used scientific uncertainty regarding climate change together with the alleged overall magnitude of the crisis to dispute petitioners' claim. They contended that the impacts at state and local levels are too speculative because of the extent of both the space and time involved. Petitioners' hypotheses, each of which is the subject of an active scientific debate, are reduced to conjecture by the inherent uncertainty of global events that will unfold between now and the time of the predicted injury.[37]

The petitioners' disagreement on the issue was prominent as they aptly pointed out issues like sea level raising, depletion of the ozone layer contributing more to the global warming cause and melting of glaciers. All these are not trivial in nature and they affect us very adversely.

The Supreme Court opined that petitioners had fulfilled the standing requirements. Massachusetts was not precluded from having a standing in the case because of the global nature of climate change.[38]

The point that is noteworthy here is promoting the idea of environmental trusteeship. State is the trustee of all natural resources within its territory. In India, similar resonance is found in a case where Supreme Court declared that the State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the seashore, running waters, airs, forests and ecologically fragile areas. The State as a trustee is under a legal duty to protect the natural resources.[39] This case illustrated a situation where a resort was built by Span Motels, on the bank of the Beas River between Kullu and Manali in Himachal Pradesh. After getting the possession of the land which was in fact the part of protected forest, Span Motel carried out dredging and construction of concrete barriers on the bank of the river which in fact, changed the course of river causing ecological trouble.

36 *Massachusetts* v. *EPA*, supra n. 10, p. 17; Complete text is available at http://www.supremecourt.gov/opinions/06pdf/05-1120.pdf (Last visited 21.04.2010).

37 Hari M. Osofsky, *The Intersection of Scale, Science, and Law in Massachusetts* v. *EPA*, 9 Or. Rev. Int'l L. 233, 245-246 (2007).

38 Although the Court's holding on standing narrowly focuses on the interests of state parties, approach to them scales down the problem of climate change and its regulation; this "global" phenomenon can cause harm at a state level and choices at a federal level influence the risks faced by states. *Id*. pp. 246-247.

39 Supra n. 31.

Consequently, Span Motel was directed to pay pollution fine. Although, this judgement was on a different situation, I wonder why the same principle cannot be applied to the climate change litigation as well. Judiciary in India by and large has placed environmental right on a high pedestrial. That ecological crisis precedes everything is reflected in another groundbreaking judgement by Supreme Court where it remembering American tradition that puts government above big business, individual liberty above government and environment above all.[40]

Also, remedies available in India for public nuisance, in general, are impressive. Section 268 of Indian Penal Code, 1860 provides the definition of public nuisance. According to the Section "a person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right."[41] It again provides in the same Section that "a common nuisance is not excused on the ground that it causes some convenience or advantage." Persons who conduct 'offensive' trades and thereby pollute the air, or cause loud and continuous noises that affect the health and comfort of those dwelling in the neighbourhood are liable to prosecution for causing public nuisance.[42]

This, however, is less attractive because the penalty for is merely Rs. 200, which makes it pointless for a citizen initiate a prosecution under Section 268 of Indian Penal Code, 1860 by a complaint to a magistrate.[43]

A much better remedy is available under Section 133 of the Code of Criminal Procedure, 1973 which deals with the Conditional order from magistrate for removal of nuisance. The Section empowers a magistrate to pass a 'conditional order' for the removal of public nuisance within a fixed period of time. Magistrate may act on information received from a police report or any other source including a complaint made by a citizen.[44] This Section provides an independent, speedy and summery remedy against public nuisance.[45] In the famous judgement of *Municipal Council, Ratlam* v. *Vardhichand*,[46] The Supreme Court of India has interpreted the language as mandatory.[47] Once the magistrate has before him the evidence of public nuisance, he must order to

40 *Tarun Bharat Sangh, Alwar* v. *Union of India* (Sariska Case) writ Petition (Civil) No. 509 of 1991.
41 Section 268 of Indian Penal Code, 1860.
42 Supra n. 8, p. 112.
43 A complaint may be made under Section 190 of the Code of Criminal Procedure, 1973. *Id.*
44 Section 133 of Code of Criminal Procedure, 1973.
45 Supra n. 8, p. 112
46 AIR 1980 SC 1622.
47 *Id*.

remove such within a specified time.[48] This is done with regard to water pollution where the Court directed the municipality to take immediate action to remove the nuisance. The same principle can also be applied in case of air pollution and it is not at all uncommon for the court in India to come down heavily on industries for polluting air. For example in Taj Trapezium Case[49] the Supreme Court of India forced certain polluting industries to relocate themselves because emission from those factories was damaging Taj Mahal, the famous ancient monument. The establishment of causal connection between the emission from factories and the damage sustained by the monument was relatively easy as the Court relied on expert's report.[50]

Now, imagine a situation where a town was pristine and pollution free. The people used to enjoy good health, un-contaminated food and water and cool weather even in hot summer. After some time an industrial belt was established nearby. As the industries starts operation the atmospheric pollution is also beginning to pile up. The weather of the locality is showing signs of being altered. The people no more enjoy coolness during hot summer. The water supply, vegetation and fertility of the land are also affected. Health hazards like diseases of lungs have become common. If these facts are provided to the court what it should do? Will it decide the matter simply on the basis of economic gain that those industries are generating for the country whereby avoiding the available facts and scientific data? Or will it rely on those data which are 'reliable and relevant' and the report of some expert to establish the causal connection between the industrial activities, atmospheric pollution and the climate change? Or even if the scientific data are unavailable or incomplete can the court still decide that this is a fit case for public nuisance? I have no doubt that the same principle which is used in Ratlam Case or Taj Trapezium Case can be used here as well. Hence, the respective authority has to work diligently to remove the cause of nuisance or court may order the polluting industry to alter its process or shut down or relocate or impose pollution fine on them.

Same can be said also about action for negligence that may be brought to prevent greenhouse gas emission. In an action for negligence, the plaintiff must show that the defendant was under a duty to take reasonable care to avoid the damage complained of and the defendant has made a breach of that duty resulting in the damage to the plaintiff. Negligence theory is tied up with products liability

48 *Id*.

49 *M.C. Mehta* v. *Union of India*, (1997) 2 SCC 353.

50 The court was assisted in its efforts to improve air quality around the Taj Mahal by the reports prepared by the NEERI (National Environment Engineering Research Institute), Gas Authority of India Limited (GAIL) on the supply of fuel gas to industries in the area and the study conducted by the Vardharajan Committee, which was constituted in May 1994, by the Ministry of Environment and Forest of India.

concept as a manufacturer may be held liable in tort when it places a product on the market, knowing that it is to be used without inspection for defects, and the product proves to have a defect that causes injury to a person.[51]

By and large, this type of claim appears to be a suit for defect in design. The extent of a manufacturer's duty is defined by rational prudence and knowledge of potential risk of a product. It is the duty of the manufacturer to launch that product in the market which has the design that makes it safe to consume by the potential buyer. However, climate change plaintiffs' may stumble at a roadblock if the defendants take the strong argument of state of the art facilities available at their manufacturing site. But at the same time, it is difficult to believe that manufacturers are unaware of the global warming impact of their products. Though, they can always argue that their duties are usually restricted to those who likely would consume or use their products, when the products in question are automobiles, power, or fossil fuels, it is fair to say that virtually everyone is a foreseeable user.[52]

An act of negligence may also constitute a nuisance if it unlawfully interferes with the enjoyment of another's right in land. It may also breach of the rule of strict liability if the negligent act of defendant allows the escape of any dangerous thing which he has brought on the land. Establishing causal connection between the negligent act and the plaintiff's injury is probably the most problematic link in pollution cases[53] and in climate change matter it is even more difficult because of uncertainty of scientific data.

Further, looking into some of the environmental legislations, I venture to say that there are some provisions that can be very well used by the plaintiff in climate change litigation. For example, Environment (Protection) Act, 1986, an umbrella legislation designed to provide a framework for Central Government coordination of the activities of various central and state authorities established under previous laws, such as Water (Prevention and Control of Pollution) Act of 1974 and Air (Prevention and Control of Pollution) Act of 1981, in Section 2 (a) defines environment which "includes water, air and land, and inter-relationship which exists among and between water, air and land and human beings, other living creatures, plants, micro-organism and property."[54] Section 2 (b) of the Act, provides that "environmental pollutant means any solid, liquid or gaseous substance present in such concentration as may be, or tend to be, injurious to environment".[55] In Section 2 (c) it again provides that "environmental pollution

51 Supra n. 10, p. 47.
52 *Id*. p. 48.
53 Supra n. 8, p.100.
54 Section 2 (a) of Environment (Protection) Act, 1986.
55 *Id*.

means the presence in the environment of any environmental pollutant."[56] Air (Prevention and Control of Pollution) Act of 1981 is the principle statute that addresses air pollution problem specifically in India. The definitions of 'air pollutant' and 'air pollution' is very much similar with Environment (Protection) Act, 1986 with only addition that Air Act, 1981 does not provide specific emission norms and the same is provided under Environment (Protection) Act.

Needless to mention here that all these provisions may be used by the prospective litigants to bring actions for damage suffered on property or health by industrial activities. Moreover, establishing causal connection between damage and emission by industries will be much easier if the court looks into the existing emission norms for different localities set by the government under various environmental statues.

Social and Ethical Dimension

Climate litigation encompasses ethical, scientific, economic, social, and other complexities of the age. Lawyers bear the responsibility to make their clients aware of how climate changing may have an effect on their rights. At the same time, as citizens, we have responsibilities of our own.[57] We need to be more conscious about intergenerational equity and our present and future responsibility, social, ethical and legal that may determine the potential winners or losers in climate change litigation.[58]

My selection of United Sates and India presents an interesting and contrasting social backdrop in this regard. As an ardent supporter of democracy, the United States expects its courts to remain reliable to democratic principles. No doubt there is an uncertainty about identification of democratic principles in environmental issues, climate litigation in particular.[59] The discussion there is mainly scaled down to who should be making decisions regarding climate change. Is it the court that should determine rights and responsibilities? Or should they leave all such choices to Congress or government agencies? Or should the citizens be allowed to challenge governmental action or inaction through the courts?[60]

India, however, is still silent, as I have already suggested, on this issues. The trend in America may certainly be branded as a new variety of environmentalism addressing the more complex and contentious environmental

56 *Id*.
57 Marilyn Averill, *Climate Litigation: Ethical Implications and Societal Impacts*, 85 Denv. U. L. Rev. 899, 900 (2008).
58 *Id*.
59 *Id.* p. 908.
60 *Id*.

problems like climate change for future generation. This is understandable as the triumph of environmentalism is very much reflected in laws it has repealed or enacted or altered nowhere more effectively than in United States.[61] Political scientist Richard Inglehart has described it as post materialistic trend.[62] In India, on the other hand, reaction against environmental degradation is mainly influenced by unequal exchange, poverty and population growth.[63] Therefore, flight of social vocabulary of protest against environmental despoliation in India is delayed or has taken a course of its own. Climate change as a recent phenomenon is yet to form a part of mainstream litigations here. It is undeniable that judicial activism of India in environmental matters actually has shaped the environmental law tremendously and owes its debt in many ways to the active social movements. This may be the reason why, in spite of possibilities, the nuisance or negligence or others yet to encompass climate change in them.

Conclusion

For India the egotistical propaganda regarding the urgent need for development has remained constant since Stockholm. Indeed, no one would dare to argue that the desire was unjust at thirty or even fifteen years back. But one can easily put a self-assessing question now: Has anything changed in 37 years? In the era of free trade with expanding market, India is one of the hotspots for global economy. Consumer society in India is growing rapidly and so is the population of the country which is outweighing the economic gain. One side of the coin represents the affluence and the other is insidious misery of millions of poor people inundated by "effluents of affluence". Certainly, the meaning of development becomes paradoxical here unless backed by strong sense of self-determination. Knowing environmental right is absolutely important particularly in the milieu of rapid economic activities giving birth to new and complex ecological problems almost every day. This article is only sought to outline a broad spectrum of the future of climate change litigations in India. The strategies discussed are not exhaustive yet may be treated as a starting point of the discussion. The prosperity ahead truly depends on the growing awareness of the common people and fashioning of the foolproof risk management techniques. In the middle of the controversy over standing, both plaintiffs and defendants acknowledge the importance of scientific data in legal schemes. Indeed, keeping in mind the growing importance of science, to establish public nuisance or negligence, the parties, lawyers and judges are needed to find out the more simply structured standing doctrine.

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61 Ramchandra Guha, *Environmentalism: A Global History*, (2nd Imp. 2001) (discussed the history of environmentalism).

62 Supra n. 25, p. 34.

63 *Id*.

In this article I have only tried to delineate the scope of climate change cases based on some of the common law claims. It is also possible that there may be claims arising out of other arguments, such as strict liability. As in India common law claims is always on the strong footing a new window of opportunity may be opened up in future for the victims of climate change.

CRIMINOLOGICAL THOUGHT ON FEMALE CRIMINALITY: A STUDY OF THE FORLORN ENVIRONMENT FOR WOMEN UNDER DETENTION IN THE LONE WOMEN JAIL OF STATE OF PUNJAB

Aman A. Cheema*

My feet were still shackled together, and I couldn't get my legs apart. The doctor called for the officer ... No one else could unlock the shackles, and my baby was coming ... Finally the officer came and unlocked the shackles from my ankles. My baby was born then. 'Maria Jones describing how she gave birth while an inmate of Cook County Jail, Chicago, 1998.'

Female criminality has long been overshadowed by male criminality in terms of incidence, magnitude, seriousness, research and recognition. As a result, we know relatively little about the modern female criminal; her motivation, diversity, complexities, incarceration, and victims. However, female criminality had not gone altogether unnoticed through the years. Historically, certain crimes are generally considered female crimes like prostitution, shoplifting etc. Other crimes such as violent or white collar crime that once seemed almost off-limits to female criminal behaviour are now found among them. The reality is that female criminality like male is heterogeneous in nature. Equally, female offenders are neither easily nor singularly characterized, but in fact are varied in dimensions, age, race, ethnicity, background, and their criminal behaviour. Hence, this paper offers a multifaceted exploration of female criminals and delinquents, theories dealing with the problem, factors enhancing female criminality and delinquency in modern society, feminist perspectives of female crime and the annotations made during the pragmatic study[1] led to witness the wretched conditions faced by women and their children inmates in the lone women jail of State of Punjab, Ludhiana.

Researchers and scholars have never given female criminality the attention they gave to male criminality. There are probably two reasons for this. *Firstly,* until relatively recently, the crime index for women has been too low to make it

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1 The researchers conducted an empirical study of the sole exclusive women Jail in Punjab situated at Tajpur, Ludhiana. The questionnaires for 100 respondents were prepared but only 92 respondents responded as the rest were not willing to share their experiences. In all, three sets of questionnaires were prepared, one for Jail Staff, second for Under-trials and third for Convicted offenders. 31 Under-trial Prisoners and 61 Convicted Prisoners responded to the questionnaires. The questionnaires specified the demographic file of the respondents, their living conditions and the impact of imprisonment etc.

a significant social problem. *Secondly,* traditionally most of the researchers have been men. Though there have been some scholarly writings concerned exclusively with female criminality. However, almost without exception both the research upon which they were based and the conclusions drawn have been coloured by age old myths about the nature of women in general, that is , women are passive, more emotional than men, gentler in nature and inferior to men. These notions have been drilled into women for so many centuries. Aristotle said, 'Women maybe said to be an inferior man.' The Code of Manu stipulated, 'In childhood women must be subject to her father, in youth to her husband, when her husband is dead, to her sons. A woman must never be free of subjugation.' Lord Chesterfield, in a letter written to his son in 1748, counseled him, 'Women are to be talked to as below men, and above children.'[2] Such sentiments show clearly in the early writings on female criminality, and more subtly even in many modern writings.

Judging from the criminology texts and other works of the modern era on lawbreaking it was often seen that the world of crime has been a man's world. Although female crime has been passed over quickly in criminological texts, the subject has not been entirely overlooked. Criminological interest in women offenders can be traced back with the seminal work of Adler (1975)[3], Smart (1977)[4], Leonard (1982)[5], Morris (1987)[6], Naffine (1987)[7], and Heidensohn (1989)[8]. All these texts, while varied in content and theoretical approach, endeavoured in different ways to set the criminological record straight as far as women's relationship to criminal activity was concerned. They were concerned to challenge the conventional criminological wisdoms concerning women and crime and in so doing were concerned to render women more visible within those criminological wisdoms. Each of these texts addressed this issue in a differently focused way. They share, however, a number of common concerns. Several of these texts reflect a concern to appreciate the fact that women's relationship to the crime problem needs to be understood not only in terms of their offending behaviour, but also in relation to women's experiences as victims of crime.

2 Richard Deming, 1977, 'Women: The New Criminals', p. 46.

3 Freda Adler, associate professor of criminal justice at Rutgers University, published the results of a three year study on the changing pattern of female crime in a book titled Sisters in Crime. It was the first in-depth study of new criminality. For more information see Freda Adler, 1975, 'Sisters in Crime: The Rise of the New Female Criminal'.

4 Carol Smart has argued that women's crime should not be treated as a separate topic. Rather, it should be analyzed within the same social and historical framework utilized for lawbreaking by males. For more information see Carol Smart, 1977, 'Women, Crime, and Criminology: A Feminist Critique'.

5 Eileen B. Leonard, 1982, 'Women, Crime and Society', p.12.

6 A. Morris, 1987, 'Women, Crime and Criminal Justice.

7 N. Naffine, 1987, 'Female Crime'.

8 F. Heidensohn, 1989, 'Women in Policing in the U.S.A', The Police Foundation, London.

Attempts to explain deviant behaviour are not new. Many date back to the late 1800s and early 1900s and are rooted in age-old stereotypes, notions of female inferiority, and sexism. More modern concepts seek to associate female crime and delinquency with environmental and sociological causes. Some research focuses on why females are less apt than males to commit crimes or at least certain types of crimes. The next part of the paper will explore the more prominent theoretical propositions on female crime and criminals.

Theories of Female Criminality

> *'The problem is not the right of the society to protect itself from the disorderly and antisocial person, but the right of the antisocial person to be made orderly and socially valuable ... The problem of society is to produce the right attitudes in its members.'*
>
> ***W.I. Thomas in his book 'The Unadjusted Girl', (1907)***

Girls appear to be more varied today in their criminal and their delinquent activities than do boys. However, the rise in female delinquency and criminality is less a reflection on an increase in non-traditional female criminality than in traditional female offences such as running away, substance abuse, shoplifting and minor assaults.[9] Various criminologists who had studied female criminality from time to time had focused on this section of criminals from different angles. Their views can be broadly summed up into different theories. However, going through various texts on female criminality reveals that the views cannot be separated in watertight compartments. Hence, some of the broad demarcations of these views are discussed in different theories below.

Biological Theories

Italian psychiatrist Cesare Lombroso (1836-1909) was among the first to study scientifically female criminality.[10] He examined the skeletal remains of female offenders, particularly the brain, face, jawbones, and cranium. He hypothesized that these females were 'born criminals' and thus biologically pre-disposed to criminality. Such females were believed to be atavistic, or throwbacks to primitive genetic traits-possessing certain physical anomalies absent in normal women.[11] A prostitute was, for instance, 'likely to have a very

9 R. Barri Flowers, 1990, 'The Adolescent Criminal: An Examination of Today's Juvenile Offender', Mc Farland & Co.,. Jefferson, p.78.

10 He is referred as the founding father of the biological-positivistic school of criminology; Lombroso collaborated with his son-in-law, William Ferrero. They combined qualitative and quantitative data in an attempt to understand female criminal. Their work has long been rejected, due largely to the inadequacies of their methodology, the relatively small sample group, and the gender-based theory of atavism in relation to criminal behaviour. For more information see Cesare Lombroso and William Ferrero, 1990, 'The Female Offender', Appleton, New York.

11 R. Barri Flowers, 2008, 'Female Crime, Criminals and Cellmates', Mc Farland & Co., Jefferson, p. 65.

heavy lower jaws, large nasal spines, simple cranial sutures, deep frontal sinuses and wormian bones. A 'fallen women' usually possessed occipital irregularities, a narrow forehead, prominent cheekbones, and a 'virile' type of face.'[12] Lombroso also studied the 'occasional' female criminal, whom he believed accounted for most female offenders. According to him, 'these women generally had none or few degenerative qualities and possessed 'moral equipment' near that of normal women.'[13] The occasional female criminal committed a crime for reasons such as 'male persuasion, higher education (preventing marriage and including want), and excessive temptation (for example, shoplifting because of the overwhelming display of goods in stores)'. Such women lacked the respect for property that men had and believed clothing to be essential for attracting a man.[14]

More recent biologically based research on female crime has studied the relationship between genetics and female delinquency. T.C. Gibbens found a high rate of sex chromosomal anomalies in female delinquents.[15] J. Cowie identified genetic factors in female delinquency-relating obesity in girls to sexual promiscuity, and menstruation 'to the distress females feel in recognizing that they can never be males, thereby, making them more susceptible to delinquent conduct.'[16] Other studies have also linked menstruation and pre-menstrual syndrome (PMS) to female criminality, nothing such related symptoms as increased aggression, irritability, and tension.[17] One sociological researcher suggested that the relationship between the arrests of women for violent crimes and PMS may be one of fatigue and slower reaction time during the commission of the crime.[18]

Psychological Theories

This school of thought with respect to female criminality is believed by many to be rooted in the psychoanalytic writings of Sigmund Freud. Like Lombroso, Freud regarded females as biologically inferior to males. In 1933, he described female offenders as passive, narcissistic, and masochistic.[19] He attributed these defective qualities to a 'masculinity complex' or 'penis envy'. As a result of these conflict, making them morally inferior and less able to control their impulses, which in turn affected such areas as the female's intellectual sphere. Such females were characterized by jealousy, immorality,

12 Lee. H. Bowker, 1978, 'Women, Crime and Criminal Justice System', p. 29.
13 R. Barri Flowers, 1987, 'Women and Criminality: The Woman as Victim, Offender and Practioner', p. 92.
14 *Ibid*.
15 T.C. Gibbens, 1971, 'Female Offenders', *British Journal of Hospital Medicine*, Vol.6, pp. 279-86.
16 J. Cowie, 1968, 'Delinquency in Girls', p. 79.
17 K. Dalton, 1961, 'Menstruation and Crime', *British Medical Journal*, Vol. 2, pp. 1752-53.
18 R. Barri Flowers, 2008, 'Female Crime, Criminals and Cellmates', Mc Farland & Co., Jefferson, p. 67.
19 Sigmund Freud, 1933, 'New Introductory Lectures on Psychoanalysis', W.W. Norton, New York.

emotionalism, and bad judgment.[20]

In a study of delinquent females, Gisela Konopla identified four key psychologically and biologically based elements that are associated with female delinquency: *Firstly,* the uniquely female biological onset of puberty. *Secondly,* a complex process of identifying with their mothers; *thirdly,* changes in the cultural position of females; and *fourthly,* a faceless adult authority which results in low self-esteem and loneliness. Indeed, psychological maladjustment and dysfunction have been associated with female crime and delinquency in some studies.[21]

Sociological Theories

Sociologist William Thomas was among the first to relate female criminality to the social environment. In 1907, he criticized anthropologists for their 'assumption of the inferiority of women and their subsequent failure to distinguish between congenital and acquired characteristics.'[22] He postulated that any gender differences in intellectual functioning were not a reflection of biological differences but social influences. In his book, The Unadjusted Girl, published in 1923, Thomas 'established his eminence by fusing sociology and social psychology into the analysis of social organization and personality.' He saw the female criminal as a product of inmate instincts in conjunction with influences within the social environment. Thomas developed a dyadic goals-means conflict theory in which he proposed that every human (particularly prostitutes) had for desires: security, recognition, new experience, and response. It was the desire for new experience and response that Thomas believed most influenced female criminality.[23]

Sheldon and Eleanor Glueck's work in the field of female criminality concluded that female delinquency was the result of biological and economic factors. They found that an extremely high percentage of delinquent girls came from abnormally large families where criminal behaviour was inter-generational. Many of these girls were believed to be mentally defective and had been arrested primarily for illicit sexual behaviour.[24]

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20 R. Barri Flowers, 2008, 'Female Crime, Criminals and Cellmates', Mc Farland & Co., Jefferson, p. 67.

21 *Ibid*.

22 Coramae R. Mann, 1984, 'Female, Crime and Delinquency', p. 57. See also William I. Thomas, 1907, 'Sex and Society: Studies in the Social Psychology of Sex', Little Brown, Boston.

23 R. Barri Flowers, 2008, 'Female Crime, Criminals and Cellmates', Mc Farland & Co., Jefferson, p. 68.

24 Sheldon and Eleanor Glueck's work in the field of female criminality was based on a detailed study, published in 1934, of 500 Massachusetts delinquent girls. The Gluecks followed the girls from childhood through parole, tracing their backgrounds and social histories as well as comparing their physical and psychological traits. For more information see Sheldon Glueck, Eleanor Glueck, 1934, 'Five Hundred Delinquent Women', Alfred A. Knopf, New York.

Otto Pollak posited that female crime was primarily sexually motivated, while male crime was largely economically motivated, with the exception of crimes of passion. He further postulated that the incident of crime among women was probably equal to that of men was it not for the hidden female criminality. He contended that as a result, women's criminality was inadequately reflected in official statistics, giving such examples such as shoplifting, illegal abortions, domestic thefts, and prostitute-perpetrated thefts of customers. He argued that women were given preferential treatment at every stage of the criminal justice system, arising in part from men's 'chivalrous and paternalistic regard for women,' allowing for fewer arrests, less prosecution, shorter sentences, and a lower rate of incarceration than male offenders.[25]

Socio-Economic Theories

A number of theories tied to social and economic forces have been proposed in explaining female criminality. Role or opportunity theorists reject the masculinization of female behaviour as the cause of female crime but rather relate it to the illegitimate expression of role expectations. These theorists also posit that females are most likely to engage in criminal behaviour when legitimate avenues for reaching social goals are closed but illegitimate avenues are open. The criminality and delinquency of females is, therefore, directly related to female socialization and opportunities, and conversely, the lack of either of these elements. In a study of delinquent girls and differential opportunity, Susan Datesman found that perception of blocked opportunities was more closely related to female delinquency than the perception was to male delinquency.[26]

Many believe that female criminality is by and large a reflection of economic need or necessity rather than such factors as a sexual motivation. In a review of the literature on the etiology of female criminality, Dorie Klein found that poor and Third World women 'negate the notions of sexually motivated crime,' instead engaging 'in illegal activities as a viable economic alternative'.[27] Indeed, studies show that most female offenders tend to be economically disadvantaged, undereducated, self-supporting, and mothers, leading one researcher to comment that criminality may be a necessity for women 'to provide for themselves and their families, a factor which makes it conceivable to view

25 Otto Pollak's 1950's book, The Criminality of Women, was considered the definitive work on female crime during the postwar years. As a sociology professor, he analyzed data from a comprehensive survey of America, British, German, and French literature. For more information see Otto Pollak, 1950, 'The Criminality of Women', University of Philadelphia, Philadelphia. Laura Crites, 1976, 'The Female Offender', pp. 83-84.

26 Susan K. Datesman, 1975, 'Female Delinquency: An Application of Self and Opportunity Theories', *Journal of Research in Crime and Delinquency*, Vol.12, p.120.

27 Dorie Klein, 1973, 'The Etiology of Female Crime: A Review of the Literature', *Issues in Criminology*, Vol. 8, p. 6.

their larcenies, burglaries, and robberies in simple economic terms'.[28]

Women Liberation Movement Theories

The increase in certain female crimes in recent decades had been linked by some researchers to the 'consciousness-raising' women's movement, which they credit for the increased participation of females in the labor force, changing women's identify and self-concept, and a parallel rise in female criminality. In her detailed study on women, crime, and the contemporary women's movement, Rita Simon advanced that 'women have no greater store of morality than do men. Their propensities to commit crimes do not differ, but in the past, their opportunities have been much more limited. As women's opportunities to commit crimes increase, so will their deviant behaviour and the types of crimes they commit will more closely resemble those committed by men.'[29]

The alleged correlation between the women's liberation movement and women's criminality has been challenged by critics as naive, methodologically weak, and inaccurate. Laura Crites pointed that many female offenders are poor, single, unemployed, uneducated, and belonging to racial minority, and thus they have not taken part in the women's movement and greater social and economic opportunities. Based on the review of self-report and official data on female crime, Joseph Weis argued that a new, liberated female criminal is less an empirical reality than a social invention.[30]

Factors in Female Delinquency and Crime

> *'If you don't have a culture in which, to bring up a young human with love and discipline, he is going to become some type of human savage.'*
>
> ***Los Angeles Police Chief Edward M. Davis, (1975)***

In addition to the theories on female criminality, criminologists have studied causative elements that have been shown to correlate with the crime and delinquency of females. Significant factors that have been linked with female criminality are briefly discussed below.

The Broken Home

The term broken home is defined as a home in which one or both parents are absent due to desertion, divorce, separation, or death- thereby depriving the child or children of the benefits of a complete, stable family environment. Studies have shown that delinquent girls are more likely to come from broken homes

28 Coramae R. Mann, 1984, 'Female, Crime and Delinquency', p. 96.
29 Rita James Simon, 1975, 'The Contemporary Women and Crime', p. 48.
30 Joseph G. Weis, 1976, 'Liberation and Crime: The Invention of the New Female Criminal', Crime and Social Justice, Vol. 6, pp. 17-27.

than boys.[31] In U.S.A research on females incarcerated also indicates a high rate of inmates who grew up in broken homes.[32]

Child Abuse and Neglect

Most of women who abuse and neglect their children or parents were themselves the victims of child abuse. Research postulates that children living in violent families are emotionally and psychologically vulnerable as adults to enacting the role of either the victim or abuser which they observed during their childhoods. Vincent Fontana contented that the parents of these abusive parents were often unloving, brutal and cruel. D. Lewis found that most violent juveniles had both witnessed and been victims of severe physical violence by their parents.[33]

Child Sexual Abuse

There is a strong correlation between female sex offenders and child sexual abuse. In a study on prostitutes and sexual assault, Mimi Silbert found that nearly 66% of her samples were victims of incest and child abuse.[34] Other research has shown a relationship between incestuous women and their victims of incest and child abuse.[35]

Conjugal Abuse

Battered wives and girlfriends often become husband or lover batterers or spouse or lover killers. The majority of females who kill their spouse or boyfriend report doing so after repeated physical, sexual, and mental abuse by the male partner. Women in prison for murder are almost twice as likely to have killed a spouse, ex-spouse or other intimate person other than other family members. Indeed, a relationship between the battering of women, female child abuse, and family violence has been well established in the literature.[36]

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31 R. Barri Flowers, 1990, 'The Adolescent Criminal: An Examination of Today's Juvenile Offender', Mc Farland & Co., Jefferson, p. 138.

32 In a survey of girl and boy delinquents in long-term juvenile facilities it was revealed that less than 3 in 10 grew up with both parents present. The data on women in jail and prison have shown that more than half lived with only one or neither parent when growing up; and the vast majority of female inmates were found to be single parents. For more information see U.S. Department of Justice, 1992, Bureau of Justice Statistics Special Report, *Women in Jail, 1989*, Government Printing Office, Washington D.C., p.10; U.S. Department of Justice, 1991, Bureau of Justice Statistics Special Report, *Survey of State Prison Inmates: Women in Prison*, Government Printing Office, Washington D.C., p. 1.

33 R. Barri Flowers, 2008, 'Female Crime, Criminals and Cellmates', Mc Farland & Co., Jefferson, p. 73.

34 Mimi H. Silbert, 1982, 'Delancey Street Study: Prostitution and Sexual Assault', Delancey Street Foundation, San Francisco, p. 3.

35 R. Barri Flowers, 2008, 'Female Crime, Criminals and Cellmates', Mc Farland & Co., Jefferson, p. 73.

36 R. Barri Flowers, 1986, 'Children and Criminality: The Child as Victim and Perpetrator', pp. 49-59.

A Family Cycle of Abuse and Violence

An inter-generational cycle of family abuse, neglect crime, and violence has long been associated with such female crimes as child abuse and neglect, sexual abuse, prostitution, delinquency, and adult criminality. In the late 1800s and early 1900s, researchers such as Richard Dugdale[37] and Henry Goddard[38] studied the long histories of deviant behaviour in certain families, including idiocy, prostitution, delinquency, fornication and feeblemindedness. More recently, Ounsted held that abusive parents are often the product of families where violence has been passed from generation to generation. Other studies have established a link between female criminality and delinquency and a cycle of crime and delinquency within the family.[39]

Substance Abuse

Females who use alcohol or drugs are more likely than nonusers to become involved in or continue abusive or criminal behaviour. Data indicate that female addicts are involved in a range of other criminal activities such as violent crime, property crime, drug trafficking, and family offences. Substance abuse is often associated with female sex crimes such as prostitution and child sexual abuse.[40]

Race and Ethnicity

Race and ethnicity does appear to be a factor in certain crimes perpetrated by females. There is an evidence to indicate that racism may play a role in differential enforcement of the law with respect to females, race, and ethnicity. Black and Hispanic women have been shown to be more likely to come into contact with various stages of the criminal justice system, that is arrest, courts etc., than white and non-Hispanic women.[41]

Mental Illness

Mental illness is generally believed to be a factor in only a small percentage of female crimes. However, studies have shown a relationship between various types of female criminality - including violent crimes, child maltreatment, and runaways- and mental disorders such as depression,

37 Richard L. Dugdale, 1877, 'The Jukes: A Study in Crime, Pauperism, and Heredity', Putnam, New York.

38 Henry H. Goddard, 1914, 'Feeblemindedness, Its Causes and Consequences', Macmillan, New York.

39 R. Barri Flowers, 2008, 'Female Crime, Criminals and Cellmates', Mc Farland & Co., Jefferson, pp. 75.

40 D. Kelly Weisberg, 1985, 'Children of the Night: A Study of Adolescent Prostitution', Lexington Books, Lexington, pp. 117-19; Mimi H. Silbert, 1980, 'Sexual Assaults of Prostitutes: Phase One', National Institute of Mental Institute, Washington D.C., p. 48.

41 R. Barri Flowers, 2008, 'Female Crime, Criminals and Cellmates', Mc Farland & Co., Jefferson, pp. 75-76.

schizophrenia, and psychosis. Researchers from New York Psychiatric Institute found that 41% of the runways studied were depressed, while 50% had attempted suicide.[42]

The Menstrual Cycle

A biological cycle explored in relation to female criminality is the menstrual cycle. A number of studies have shown that female deviant behaviour occurs most often during certain phases of menstrual cycle - the 4 premenstrual days and the first 4 days of menstruation.[43] Recent studies on the relationship between menstruation and criminality have centered on the effects of premenstrual syndrome on female deviance, particularly with respect to violent and homicidal aggression. However, currently, most experts see other factors as more significant in contributing to female crime and delinquency.

Male Coercion

Many believe that female criminality is often a reflection of male coercion or forced participation or co-participation in criminal activities. Studies have shown that violence among females is related to violence by males, domestic violence, child abuse, and male psychological abuse. Prostitutes have been found to be coerced into prostitution by pimps or other males, as well as involvement in other criminal activities such as drug abuse and dealing theft, violent crimes, and child abuse. The National Crime Victimization Survey of U.S.A. shows that in more than 14% of the multiple-offender crimes of violence, the offenders are perceived as being male and females.[44]

Recidivism

The majority of female criminals and delinquents are recidivists, or repeat offenders. More than 66% of the women imprisoned had prior criminal convictions as either adults or juvenile.[45]

Hence, these are some of the commonly quoted reasons for increase in female criminality, though the factors which results in enhancing it differ from society to society, however, some of the above discussed factors are prevalent in developed and developing societies like USA and India respectively. Moreover, the reasons of female criminality and its effects are different from men and so we require women sensitive, friendly, responsive criminal justice system which could address this issue separately.

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42 *Ibid*.

43 Daniel Glaser, 1974, 'Handbook of Criminology', Rand McNally, Chicago, p. 145.

44 R. Barri Flowers, 2008, 'Female Crime, Criminals and Cellmates', Mc Farland & Co., Jefferson, p. 77.

45 *Ibid*.

An Endeavour towards Women Friendly Criminal Justice system by Reforming Prison System in India; A Study of Lone Women Jail in State of Punjab: Some Annotations and sub-Monitions

> *'Woman-hood and childhood even in criminal wrapping and behavioral aberrations deserve to be nursed in dignity and restored to working normally using all the material, moral and spiritual resources at the society's command.'*

The Indian National Expert Committee on Women Prisoners (1987)

Crime and punishment are gendered concepts. The types of crime in which women and men are engage are dissimilar. Female offenders seem to experience each stage of the criminal justice system differently than men. Women are often handled and treated differently from men by the correctional system, and it is incorrect to assume that the experience of imprisonment is identical for both women and men. Prisons for women are unlike institutions for men, and women adapt to the prison environment differently than men. Thus, because of these reasons the researchers concentrated their study on the women prisoners. Today the position of the women prisons is no more better than what it used to be in the year 1987 when the National Expert Committee on women prisoners under the chairmanship of Justice V.K. Krishna Iyer submitted its report and recommended strongly that immediate steps need to be taken by the Union Government as well as the State Government to reform the conditions in jails.[46] The committee went on to observe that women in prison suffer from unhealthy living conditions, exploitation, unnecessary prolonged severance from their families and lack of gainful and purposeful employment. The committee had come to the conclusion that there is total neglect on the part of the concerned authorities in providing basic needs to women prisoners. There is overcrowding, malnutrition, lack of medical care, educational, vocational and legal facilities in almost all the jails. The general condition relating to food, clothing, recreation, hygiene is not at all proper and needed vast improvement. Further, very few counsellors visit jails to give much needed advice to the inmates. The committee reiterated that majority of the female population in jails consist of under trials and they languish in jails for offences for which sentences would have been far less if they had been convicted. What is more pathetic is the fact that the women inmates who obtained bail were still languishing in jails for want of surety. The committee gathered the impression while their visit to the prisons that most of the jails did not have exclusive women prisons but only separate enclosures for women. No Special Courts/Lok Adalats were being held in the

46 The Committee had visited a number of jails in the country viz. Arthur Road Jail, Mumbai; Tihar Jail, Delhi; Model Jail, Chandigarh; Central Jail, Orissa; Presidency Jail, Kolkata; Nari Bandi Niketan and District Jail, Lucknow.

jails. In some jails there was acute shortage of space and discomfort. Facilities for vocational training, elementary education, legal literacy, free legal aid etc, were lacking. Rehabilitation facilities for women after their release from jails, were almost negligible. In some jails convicts and under trials were lodged together, seriously ill patients and women with infectious diseases were not segregated. The female jails/enclosures were not managed by women personnel but were staffed by male members. Vacancies in the prison cadre especially of female staff were not filled up. At times the women prisoners were not aware of the grounds of their arrest. Mentally ill patient were languishing in jails and many had breakdown after coming to jail. They were locked up without proper care/treatment/help. There were also some cases of exploitation of young women prisoners by the jail staff for immoral purposes.(Pandya, 2008).[47]

Again in the year 2001-2002 another committee on Empowerment of Women took up the issue of 'Women in Detention' for detailed examination and report. The report stated that the conditions in an average Indian prison present a very depressing picture. Though women detenues constituted only three percent of the total prisoners in various jails in the country but their condition is pathetic in terms of the prison's environment, the treatment meted out to them in the jail and the social ostracism they suffer. Over 80 percent of the women prisoners are under trials who have been there for years together. No one knows when the trial will take place or when they will be able to come out of the prison walls the committee strongly believed that women prisoners suffer from greater disability than men. The psychological stress caused by separation from children, the unhelpful attitude of the close relations, uncertainty about the future are all factors which make their life miserable in jail. (Pandya, 2008). Later Smriti Bhonsle conducted a study[48] and elaborated upon the causes and impact of the women criminality. So as to review the impact of recommendations of above referred committees constituted by the Central Government as well as studies conducted by many scholars, the researchers have studied the women's prison at length. Some of the observations made during the visit and suggestions are summed below.

Inadequate Vocational Training

The present study covers various areas related to female criminality and delinquency and impact of prison life on females. The analysis of the data helps in hypothesizing the role of low socio-economic status to be a crucial factor within women to commit crime. Various theories and studies reveal that inferior

47 *Id*.

48 The study titled 'Undertrial Female Criminals in Mumbai City - A Sociological Study'. In this study of undertrial women prisoners, the target group was undertrial females of Arthur Road Central Prison, Mumbai.

status of women in family and society makes her stressful which is ultimately a lead towards commission of crime. There is hence, a need for psychological and sociological approach by giving opportunities to them so that they can think of rehabilitating themselves once they are out of prison. The vocational training given to them in the form of embroidery, stitching, candle making etc., are neither sufficient for their economic independence nor the inmates show much interest in these activities. The vocational training and other rehabilitation facilities should be upgraded taking in to account the interests of the inmates and purpose, which is economic independence, to be solved. There are virtually no special programs or incentives available for female inmates who are mentally challenged, handicapped, educationally disadvantaged, or simply uninterested in vocational training.

No Educational Facilities

The present study reveals that most of the inmates are illiterates. Facility of elementary education was missing in the jail. The Committee on Empowerment of Women took up the issue of women in detention and held emphasis on the need for adoption of a specialized approach for rehabilitation through education. Computer education should be given to the women prisoners as this will not only boast up their educational status but will give them various job opportunities after their prison life.

Children Ignored

It was observed that the children of inmates suffer the most by prison life. The researchers noticed that most of the children were mal-nourished; even though Punjab Jail Manual incorporates that special diet should be given to the children residing in jail. Moreover, more attention should be paid for their educational growth. Library should be developed and enriched through various newspapers, journals, books etc., for over all development of not only children but for all the other inmates as well.

Pathetic Living Conditions

General conditions relating to food, lodging, clothing, recreation etc., were far below standard and needed considerable improvement. Toilets were blocked, unhygienic and less in number as compared to the inmates, including children, using them.

Medical Neglect

Medical facility needs to be developed. It was observed during the research that no doctor was available. The lady doctor (gynecologist) recruited, visited women jail twice a week only. No psychologist is recruited even though counseling support is very essential for the inmates as it was revealed through

informal talk that most of them were psychologically sick and depressed. The jail does not have counseling cell and hence there is an urgent need for such kind of cell/centre for psychiatric counseling in prison.

Overcrowding

Overcrowding in prisons is a common phenomenon which was witnessed even in this women detention center; therefore, there is an immediate need for the making of new and modern jails with much more capacity. However, the present jails too needs to be renovated and upgraded with various facilities like a hospital, administrative block, training centre-cum-canteen, library block, central watch tower, workshops, educational facilities, firefighting system, solar water heater system, rainwater harvesting, a large green central court with every ward, video-conferencing facility, sewage treatment plant, and dual water supply system

Common Lodging

The under-trails and convicted were though lodged in different cells but the common jail campus did not result in complete segregation. Hence, the Punjab Jail Manual should be amended and it should be made mandatory for complete segregation of under-trials and convicted.

Lack of Prison Staff

The vacancies of administrative and other supportive staff were witnessed by the researchers. Most of the documentary work was done by the staff with the help of a few educated prisoners. Hence, it is suggested that the vacancies should be filled by the state government. Moreover, computers should be introduced in compilation of data and other details of prisoners as it'll not only reduce the documentary work of the official staff but will also make jail networking better.

Lack of Motivational Avenues

Custodial Staff can be an important element in prison reforms. To achieve this aim there is a need for motivation and better promotional avenues for prison staff.

Problems faced by Administrative Staff

The administrative staff should be equipped with effective powers and weapons to control the inmates in case of emergency. The researchers were informed by the jail authorities that they at times feel helpless to handle inmates in emergency situations because of lack of proper and effective power and weapons. Moreover, the authorities sounded critical about the concept of 'human rights' because many a times prisoners take undue advantage. Hence, the rights

of the prisoners and its limits need to be defined in prison laws because it should not be misused by the criminals as this result in adverse upshot of the deterrent effect of punishment.

No Legal Aid Cell

A need is also felt by the researchers to strengthen the free legal aid cell for the prisoners. The students of Law Schools can be involved to render legal assistance to the women prisoners. Moreover, all women in custody must be informed of their rights including their right to demand free legal aid.

A Need to Review Jail Manuals Regularly

The laws and manuals dealing with prison administration should be thoroughly reviewed and amended regularly taking into consideration the changing nature and dimensions of crime in society.

A Need to Rework on Concerned Legal Provisions

The Punjab State Government should soon replace the existing Prison Act, 1894. The present Act which was prepared 114 years ago during the British Raj in accordance with the conditions prevailing at that time should be replaced by new law keeping in view the present circumstances. The Punjab Prison and Correctional Service Bill, a demand which has been pending before the government since long should be speedily operationalized. The new law will not only target prison life of the inmates but will have some objectives to be fulfilled even after its completion. The provisions of the bill will have special focus on women prisoners as well.

Want for Special Government Schemes

'Empowerment is the process through which women gain insight into their situation, identify their strengths, and are supported and challenged to take positive action to gain control of their lives.' The real empowerment of women prisoners is possible if law makes it mandatory for government to take essential and compulsory steps for women prisoners after their release such as special employment schemes, financial assistance, low cost housing facilities etc. Government assistance for women after release is essential because it'll not only bring economic security but will also prevent women from social deprivation after their release.

A Need to Sensitize Criminal Justice System for Female Offenders

Firstly, there is an urgent need for simplification of bail procedures for women under-trials, especially were separation from their families and anxiety about the well being of their children are major concerns for women in detention.

Secondly, more family courts should be established for the smooth and flexible administration of justice and for speedy disposal of the cases.

Thirdly, there is also an immediate need to recruit more female judges to deal with the cases of female offenders, which might ensure better understanding of the situation which led these women to crime.

Fourthly, the whole judicial system needs to be sensitized towards women's issues. This can be achieved if all including judges, magistrates, and advocates orient themselves for a more sensitive handling of judicial and legal procedures affecting women.

Fifthly, Dr. Kiran Bedi's suggestions on prisons reforms should be considered. She advocated the role which can be played by reliable non-governmental organizations and other voluntary organizations in the rehabilitation and counseling of women inmates. Community entry would give women prisoners an environment of social acceptance and understanding.

Several feminist scholars working outside the realm of criminology and penology have suggested that the key to understanding women involves appreciating the social relationships into which they enter. Gilligan suggested, 'Women's place in man's life cycle has been that of nurturer, caretaker, and helpmate, the weaver of those networks of relationships on which she in turn relies'. She claimed that moral reasoning of women cannot and should not be compared with that of men, because women value relationships above ethical maxims and rules.[49] So the experience of prison imprisonment itself varies considerably between the sexes. Hence, the criminal justice system should encourage empowerment and consciousness-raising initiatives for formerly imprisoned women so as to enable them to overcome the social stigma that they face. These initiatives should also involve women with self-help networks. Female ex-convicts need a network of peers and mentors to assist with the restructuring of a stable life.

49 Stephen Stanko, 2004, 'Living in Prison: A History of the Correctional System with an Insider's View', p. 93.

THE CONCEPT OF SOVEREIGNTY OF STATES IN MODERN INTERNATIONAL LAW AND GLOBALIZATION*

Kailash Jeenger**

Introduction

A State is a means to rule over a sovereign territory. It comprises of an executive, a bureaucracy, courts and other institutions. The term 'state' is mainly used in international law. There are four essential attributes of statehood- (1) Population, (2) Definite territory, (3) Government and (4) sovereignty.

The fourth attribute that is sovereignty, occupies an important place in international law and international relations. Sovereignty means absolute independence of a State in the management of its internal and external affairs.[1] It refers to the illimitable powers of a State to exercise over its subjects that are population, territory, government and other institutions and to exclude other states from doing any unauthorized interference. Jean Bodin defines the term as the supreme power over its citizens and subjects, unrestricted by the laws.[2] His definition was further strengthened by Hobbes who maintained that a sovereign was not bound by any authority; not even religious. While writers like Bodin, Hobbes, Benthem and Austin maintained the theory of absolute sovereignty of a State, Pufendorf was of the view that sovereignty is the supreme power in a State but it may well be constitutionally restricted.

However in terms of international law, state sovereignty means that each State possesses the absolute power to take decisions about whatever goes on within its boundaries. The manifestations of sovereignty are as follows-

1. Each state has exclusive jurisdiction over its territory.
2. Other States have a duty not to intervene in the said jurisdiction.
3. Membership of international organizations is not obligatory.
4. Jurisdiction of international tribunals depends on the consent of States.

Types of sovereignty

Sovereignty can be classified as follows:

1. Internal sovereignty-It means supreme authority of a State over the activities taking place within its territory. It can further be classified as follows-

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1 Verghese, *International Law and Organization*, p. 173.

2 Bodin J., *De La Republique; Oppenheim*, 7th ed. Vol. 1, pp. 115-119.

i. Legal sovereignty- It is the power of a State to make laws and repeal or modify the existing laws.

ii. Political sovereignty- It signifies that the will of 'politically sovereign' in a State is ultimately obeyed by the citizens of the State. It is the political sovereignty that comes into play in international law.[3]

2. External sovereignty- It relates to the recognition on the part of all other States that each possesses this power in equal measure.

Development of the Concept

The development of a system of sovereign States culminated in Europe at the *'Peace of Westphalia'* in 1648. Therefore the concept of sovereignty finds its origin in customary international law which mainly dealt with the rules relating to diplomatic relations, treaties and war. They were, however, not followed strictly by States. States did not accept any restrictions on their sovereignty and independence. Therefore the concept of sovereignty as in the customary international law implies absolute powers of a State. It was the concept of 'absolute sovereignty'. The obligations accepted by States were less to a great extent as compared to those accepted under modern international law. Modern international law which developed after the Second World War consists of the UN Charter and international treaties and conventions. States became parties to these documents and thus they became subjects of international law. In this way the concept of absolute of customary international law diluted and transformed into supreme authority of a State. Therefore the concept of sovereignty is reviewed in the light of following-

Sovereignty and the UN

During the 20th century States moved from bilateral treaties to other form of international cooperation. States became parties to the Covenant of League of Nations and the Pact of Paris. The large scale holocaust and devastation in the Second World War resulted in the adoption of the UN Charter to establish and maintain world peace and security. The members- States agreed to fulfill the obligations assumed by them under the Charter. The provisions under the Charter which protect the sovereignty of states are as follows-

Article 2(1) "The organization is based on the sovereign equality of all its members." This principle implies that all States are equal in international law despite the inequalities regarding size, wealth, population, form of government etc. According to Vattel- "A dwarf is as much a man as a giant. A small republic is no less a sovereign State than the most powerful kingdom."

3 Dicey, *Law of Constitution*, 1939 ed. p. 40.

Article 2(4) "All members shall refrain from the threat or use of force against the territorial integrity and political independence of any State."

Article 2(7) 'Nothing contained in the Charter shall authorize the UN to intervene in the matters essentially within the domestic jurisdiction of any State or shall require the members to submit such matters for settlement under the Charter."

Article 18(1) "Each member of the General Assembly shall have one vote."

Article 27(1) "Each member of the Security council shall have one vote."

Article 51 "Nothing in the Charter shall impair the inherent right of individual or collective self defense if an armed attack occurs against a member of the UN."

Further the jurisdiction of the International Court of Justice (ICJ) is not compulsory unless States submit an international dispute for settlement. As it has been held in the '*Eastern Carelia'* case,[4] that no State can, without its consent, be compelled to submit its international dispute to any kind of pacific settlement. The judgments of the ICJ are binding on the parties to the case and in respect of that particular case only.[5]

The provisions of the charter which curtail the sovereignty of States are as follows-

Article 2(2) "All members shall fulfill in good faith the obligations assumed by them in accordance with the Charter."

Besides this a member of the UN cannot withdraw himself from the membership the UN but he can be expelled.

Veto Power

Decisions on procedural matters are taken by affirmative votes of any nine members of the Security Council and decisions on non-procedural matters, by an affirmative decision of nine members including the votes of the five Permanent Members of the Council. The dissenting vote of a Permanent Member is called 'veto' which signifies that a decision on a particular issue has blocked. The veto power is antithesis of the principle of 'sovereign equality'. Further Article 43 of the Charter provides that all members of the UN undertake to make available to the Security Council armed forces, assistance and facilities necessary for the purpose of maintenance of international peace and security.

4 (1923), PCIJ.

5 Article 59, Statute of the ICJ.

Sovereignty and International Treaties

Treaty means an international agreement concluded between States in written form and governed by international law.[6] The States which are parties to a treaty assume obligations on international level as a result of the creation of rights and duties by a treaty. For it is a fundamental principle of the law of contract, free consent is required in treaties also. States are sovereign and cannot be compelled to consent to a treaty. However when a treaty is entered into; no State can punish the other for disobedience of a provision of a treaty. In this regard the binding effect of treaty rests in the last resorts on the principle of *'pacta sunt servanda'* advanced by Anzilotti which means agreements among the States are binding and to be observed in good faith.[7] Therefore it is a general rule that a treaty neither confers rights nor imposes obligations on a State which is not a party thereto. The rule endorses inviolability of sovereignty of State. However in the following cases a treaty may create obligations upon third states also-

i. An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be a means of establishing the obligation and the third State expressly accepts the obligation in writing.[9]

ii. Multilateral treaty declaratory of customary international law is binding on third State also.

iii. Multilateral treaty creating new rules of international law are binding on all States. As held in *'Bosnia and Herzegovina* v. *Yugoslavia'*[10] the treaties which are *erga omnes* that is valid against the entire world are binding on third States too.

iv. The organization shall ensure that States which are not members of the U N act in accordance with the principles so far as the maintenance of international peace and security is concerned.[11]

As far as ratification of treaty is concerned there is no duty to ratify a treaty that is to say if a treaty has been signed by the authorized representatives of a State, it neither creates any binding obligations on the States concerned nor the Stat is bound to ratify a treaty. Besides, a State can make reservations in a treaty while signing, ratifying or accepting the same. A treaty may also be amended by a further treaty. These are considered as incidences of sovereignty and equality of States.

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6 Article 2(1)(a), the Vienna Convention on the Law of Treaties, 1969.
7 Article 26, the Vienna Convention on the Law of Treaties, 1969.
8 Article 35, the Vienna Convention on the Law of Treaties, 1969.
9 (1996) ICJ Rep.
10 Article 2(6), the UN Charter.

Sovereignty and International Criminal Law

The International Criminal Court (ICC) is the first international court to try and punish international criminals. The crimes falling within the jurisdiction of the ICC are- genocide, crimes against humanity which include extermination, enslavement, torture, sexual offences, apartheid etc., and war crimes.[11] The jurisdiction of the court extends over the parties to the Statute of ICC. A third State may also accept the jurisdiction by lodging a declaration to this effect. As far as the jurisdiction of national courts is concerned the statute makes it clear that the jurisdiction of national courts is complementary to that of the ICC. As a compromise formula a State with jurisdictional competence has the first right to commence proceedings unless that State is 'unwilling or unable genuinely' to carry out the investigation or prosecution.[12] The parties to the statute with jurisdictional competence have first right to commence proceedings against a criminal and the nationals of non-members States also fall within the jurisdiction of the ICC. The official capacity of an individual does not make him immune from the jurisdiction of the ICC.

Extraterritorial Criminal Jurisdiction of a State

State jurisdiction can also extend to foreign nationals whose acts have jeopardized its safety or public order. In *The Lotus* case[13] it was held that the territoriality of criminal law is not an absolute principle of international law and by no means coincides with territorial sovereignty. Extraterritorial jurisdiction is mainly based on two principles-

i. Protective principle- States have jurisdiction to punish acts prejudicial to their security even when they are committed by aliens abroad. Such acts include spying, plots to overthrow government, forging currency, immigration etc.

ii. Universal principle- War crimes, slavery, genocide, torture, apartheid and piracy are within the jurisdiction of universal principle. Such offenders are considered as *hostis humani generis* or enemies of all mankind. In case of universal jurisdiction the State's interest is as a member of the international community.

Thus extraterritorial jurisdiction protects the territorial integrity of a State by usurping another state's jurisdiction though in the interest of international community. However it is governed by 'effect doctrine'[14] which means a State affected by an act committed by a foreigner outside that State shall have

11 Articles 6, 7, 8, the Statute of the ICC.
12 Article 17, the Statute of the ICC.
13 *France* v. *Turkey*, 1927 PCIJ Series A, No. 10.
14 Oppenheim, *International Law*, 9th ed., Vol. 1, p. 474.

jurisdiction over that person provided the effect is 'direct and substantial' and that State exercises jurisdiction reasonably.

There are certain exceptions to the State's exclusive territorial jurisdiction. A State, in spite of being sovereign, cannot exercise jurisdiction over the following[15] -

i. Foreign States and Heads of such States.

ii. Diplomatic agents and consuls of foreign States.

iii. Foreign public ships.

iv. Foreign armed forces.

v. International institutions.

The international criminal law deals with two important issues- asylum and extradition-

Asylum

In international law it means refuge followed by active protection by a State to a criminal, national of another State who seeks refuge and protection. The right to grant asylum is an incidence of territorial supremacy. Granting asylum in one's territory is called territorial asylum which is considered as an attribute of sovereignty of State. When a State grants outside its territory that is in its embassy or warships; it is called extraterritorial asylum. In *Columbia* v. *Peru*[16] it was laid down that granting extraterritorial asylum involves derogation from the sovereignty of that State.

Extradition

A person may cross over to another State after committing a crime. The first State where he has committed crime may request the other State to deliver him back for his trial and prosecution because he cannot be arrested there on account of territorial supremacy of that State.

Sovereignty and Intervention

Every State has the right as an attribute of sovereignty to manage for itself its internal and external affairs. So intervention is an action taken by a State for interference in the affairs of another State with a view to get its desires fulfilled. As a rule, intervention is forbidden by customary international law and modern international law. Article 2(4) of the UN Charter prohibits the threat or use of force against the territorial integrity or political independence of

15 Article 31, Viena Convention on Diplomatic Relations, 1961.
16 *Asylum* case, 1950, ICJ Rep. 266.

any State. The grounds justifying intervention are as follows albeit it is a practice open to abuse-

a) Self defense

b) Humanitarian intervention

c) Balance of power

d) To protect citizens abroad

e) Collective intervention

f) Intervention in civil wars

Intervention on the ground of self-defense is an exception to the general duty of all States to respect the sovereignty of other States. Article 51 of the UN Charter provides for the right of self-defense. According to Daniel Webster[17] the essentials of the right of self-defense are instant and overwhelming necessity, no choice of means, no moment for deliberation and the act should not be unreasonable or excessive.

Intervention on humanitarian grounds is permitted if there is barbaric behavior upon human beings, the State is unable to take any action and it may affect the other States too. These two grounds of intervention are most common on international plane. But intervention, as a practice, is often misused by powerful States.

Sovereignty and Protection of Human Rights

The UN Charter contains the firm determination of its members to protect and promote human rights and fundamental freedoms for all.[18] Human rights are no longer 'internal affairs', they are not 'essentially within the domestic jurisdiction of a State' in the terms used by Article 2(7) of the UN Charter. Protection of the human rights of refugees, stateless persons or violation of human rights because of genocide, apartheid, racial discrimination cannot constitute a matter within the domestic jurisdiction of a State.

Besides the UN Charter there have been several conventions on international level for the protection and promotion of human rights. These instruments provide for an international mechanism for implementation and control which can be used either by the other States or individuals. Furthermore many of these rules protecting human rights have consolidated into customary rules of international law binding on States whether they have ratified those conventions or not. Thus the growth of human rights law limits the sovereignty of States by

17 Caroline Incident (1837).
18 Article 1(3), the UN Charter.

providing individual human rights in relation to the State. The human rights issue offers a case study of a gradual and significant reconceptualization of State sovereignty.

In the human rights issue-area the primary movers behind the international actions leading to changing understanding of sovereignty are transnational non-State actors organized in a principled issue network, including international and domestic non-governmental organizations, parts of global and regional intergovernmental organizations and private foundations.

Sovereignty and Globalization

It is certainly true that globalization and various new forces have changed the world in a very dramatic way during the last few decades. Economic globalization places significant limits on the behavior of nation-State. The growth of multinational corporations and the free flow of capital have placed constraints on state's ability to direct economic development and fashion social and economic policies. Both to facilitate and to limit the more troubling effects of these developments, super- national institutions have emerged as a significant source of authority that, at least to some degree, place limits on State sovereignty. Further in the era of technological development we cannot talk of absolute sovereignty when spy planes and satellites of the big powers openly monitor the skies of supposedly sovereign states.

Conclusion

Summing up it can be said that in spite of the limitations placed on the sovereignty of States, states are still capable of exercising their sovereign powers. States can develop the economy of the nation and frame various policies as per their needs and convenience. Besides this, the restrictions placed by the membership of international institutions and treaties are voluntary. In fact we see the illusion rather than the reality of dissolving national power and sovereignty. The modern forces of the market and the internet challenge the established forms of national authority but do not alter the political reality that each is subject to State power. Some of the restrictions are placed in the interest of the international community as a whole. Thus the concept of sovereignty of States is no longer absolute but sovereignty is still supreme.

LIMITING LIABILITIES AND EXTENDING IMMUNITIES: AN ANALYSIS OF CIVIL LIABILITY FOR NUCLEAR DAMAGE BILL 2010

*Madabhushi Sridhar**

In recent times, no draft law has generated such a commotion among various sections of people as the Civil Liability of Nuclear Damage Bill 2010 has. This article is an attempt to explain and analyze the Bill with the background of law of liability that evolved over a period of time.

Background

Because developing India needs more power to meet increasing demands and it is not self-sufficient in nuclear fuel; India is importing it. Following the successful clinching of the Indo-US Nuclear deal, on October 10, 2008, India contemplated an ambitious goal to increase 5-fold the amount of electricity produced from nuclear power plants to 20,000 MWe by 2020 to be further increased to 63,000 MWe by 2032. Then India will be producing 25 percent of its electricity from nuclear power plants by 2050. India's present production of electricity through nuclear power is 3981 MWe. Thus it offers very lucrative field for nuclear reactor manufacturing MNCs of US and other countries.

Nuclear Power or Nuclear Market?

Whether India's claim that it is a nuclear power is true or not, it is now being considered as a big nuclear market. The US was in forefront in imposing isolating sanctions over India after it declared itself as 'nuclear weapon power' with five explosion tests on May 11 and 13, 1998. Thereafter, the US changed its policy and offering unprecedented cooperation in the field of nuclear power in India, radically reversed the situation in 2005. The US lobby has even coerced international community to accept India as legitimate partner in civilian nuclear trade. The 45-member Nuclear Supplier Group (NSG) on September 6, 2008 granted a unique waiver to India also. The Indo-US nuclear deal initially appeared to be bilateral, later it gradually opened up doors to the global nuclear market. This market remained out of bounds for India since first its nuclear test conducted by India on May 18, 1974 with the plutonium obtained from the spent fuel rods of the nuclear reactor CIRUS supplied by Canada to India onto the path of developing capabilities to generate nuclear power (only) for "peaceful" purposes. But west did not believe this 'peaceful' adjective of India, which perhaps now believes. Thus the Indo-U.S. nuclear deal has cleared many international obstacles to the import of enriched uranium, nuclear fuel, and related

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technologies, and opened the door for subsequent similar deals with countries such as France and Russia. It is in the interest of global market need to deal with India which has a potential scope as purchaser of reactors, which the American and other industry is looking at.

While US desires to grab this market through its own MNCs and prevent nuclear industrial giants from other western countries from taking it over, India too was anxious to fall in line to attract the US companies involved in nuclear commerce such as General Electric and Westinghouse. But only major hindrance the global market considered is the baffling liability for nuclear accidents. As the population is dense, damage could be severe in case of nuclear tragedy their profit range would drastically fall. They are prevailing over the law makers in India to introduce this kind of law limiting their liability or providing a kind of certainty as to the quantum of possible liability. Even the insurance lobby is bringing pressure to limit its 'risk'. The main aim of this bill appears to fulfill the desire of MNCs by which they could secure insurance cover for a fixed amount in their home state. The aims and objectives of the bill are written in very attractive way saying - it is to legally and financially bind the operator and the government to provide relief to the affected population in the case of a nuclear accident. The developments in international nuclear community in recent years circling around India suggest that the US might have linked the completion of the Indo-US nuclear agreement to India's capping of nuclear liability.

In his analytical article, Mr. Sukla Sen[1] says that India is paying back for the generosity of US and explained US pressure behind the bill:

> *This Bill is generally being looked upon as a continuum of that process, allegedly, in order to ensure a "level playing field" for the American enterprises - to let them have a significant share of the cake*[2] *- the Indian nuclear market - a part payback for the American generosity bestowed upon India, for its very own reasons though. The move had, however, been first conceived by the then NDA government way back in 1999*[3]*. When the US Secretary of State, Hillary Clinton, visited India in July 2009*[4]*, there were talks of the Bill getting passed by the Indian Parliament. But nothing of that sort happened. Again in late November 2009, when Singh was to*

1 Sukla Sen's article: http://environmentpress.in/2010/04/02/the-civil-liability-for-nuclear-damage-bill-2010-some-tentative-observations/

2 http://indiacurrentaffairs.org/civil-nuclear-liability-bill-prefering-interests-of-us-companies-over-indian-people/

3 http://www.business-standard.com/india/news//govt-open-to-raising-nuclear-liability-cap//388512

4 http://www.america.gov/st/texttrans-english/2009/July/20090 7201 61943 xjsno mmis0 .2136 499.html

> *meet Obama in Washington DC*[5]*, there was talk of getting the Bill enacted. Even then, it did not happen. The Union Cabinet had dutifully approved the Bill just on the eve of the visit though. With Manmohan Singh to visit the US to attend the Nuclear Security Summit, called by President Barack Obama, slated to be held on April 12-13*[6] *the government was again trying to push it through. Never mind the considerable cooling off of Indo-US relations in the meanwhile as compared to the George Bush days*[7].

Another famous critique, Praful Bidwai[8] wrote about US interest in maximizing its business and hurry preventing the competition from other western countries:

> *The US evidently wants a share of India's nuclear power pie for American corporations and is loath to see the French and the Russians cornering the bulk of the new atomic power projects that have been made possible by the US-India nuclear deal and its endorsement by the International Atomic Energy Agency and the 45-nation Nuclear Suppliers Group - secured by Washington. But so crude is the application of the US pressure, as usual, that it is somewhat counterproductive... Besides being messy, such a compromise would still leave the bill's basic flaws unaddressed.*

The discreet demand to limit the liability itself reflects lack of concern for human lives, exposing them to nuclear accidents and also represents disinterest in shouldering responsibility for damaging consequences. If 'absolute liability' law remains in force the western MNC considers it as a big financial burden. It is evident that they do not worry about the fatal consequences of lethal nuclear accidents. Without the fear of huge damages and criminal liability how any MNC will realize responsibility to improve safety? It might be in their business interest the MNCs are pressurizing the third world to make a law for limiting their liability, with a veiled threat that otherwise none would provide fuel and technology to any Indian nuclear power plant. But why the states under rule of law with welfare objective which are expected to secure the lives of the people, offering these exemptions and immunities? Is it not inhuman that no nuclear exporting country or company is willing to undertake the responsibility of safety in operations and maintenance of the plant in a country to which it has sold nuclear fuel, generator and technology? Their liability to the human lives and environment depend upon their fault and not on their undertaking. It is

5 http://news.bbc.co.uk/2/hi/business/8374050.stm

6 http://www.deccanchronicle.com/national/pm-may-visit-us-april-n-summit-158

7 The *Abstract* at <http://acdis.illinois.edu/newsarchive/newsitem indiausrelationsfrombushtoobamanewchallenges.html

8 Don't Amend, Just Scrap the Bill, Praful Bidwai Opinion, Financial Chronicle, mydigitalfc.com, March 24, 2010.

unreasonable to desire to share only benefit and relinquish responsibility.

Emerging Liability Jurisprudence

As per the international and domestic Environmental law principles, polluter has to pay. If there is a nuclear accident caused by the MNC, it will be that polluter, which has to bear the burden. The expression payment means compensating the loss totally. There are various principles of liability that evolved over a period of time in UK, US and India.

1. **Fault based liability,** where the victim has to prove the fault of the wrong doer, while the defendant will get a chance to plead absence of negligence or fault etc.
2. **Strict liability** or no fault liability, where the wrong doer will be liable with or without proof of fault by the claimant.
3. **Absolute Liability**: stricter than the strict liability, where person engaged in hazardous and dangerous activity would be liable to pay for every loss. Principle of absolute liability is laid down by Supreme Court in *Shriram Gas Leak* case: *Where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to any one on account of an accident or in the operation of such hazardous or inherently dangerous activity resulting for example, escape of toxic gas, the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-à-vis the tortuous principle of strict liability under the rule in Rylands* v. *Fletcher.*[9]
4. **Product Liability**: Whatever may be the consequence of the use of the product, if that resulted in any loss or harm, it is the bounden duty of the producer of the product to compensate the loss. It is a kind of product related strict liability, which exempts non-interfering middle agencies such as links between maker and seller. (*Donogue* v. *Stevenson*[10]). If nuclear reactor is defective, and that caused an accident, more than an operator it is the maker or supplier to take up the responsibility of defective product i.e. the reactor and be liable.

On February 14, 1989 the Supreme Court[11], based on earlier settlement, directed the Union Carbide to pay up US $ 470 million in "full and final settlement"

(1) The Union Carbide Corporation shall pay a sum of US $ 470 million

9 Decision in *M.C. Mehta* v. *Union of India* (*Sriram gas leak* case) (1987) 1 SCC 395, AIR 1987 SC 965.

10 *Donoghue* v. *Stevenson*, 1932 AC 562. 11 *Union Carbide Corporation* v. *Union of India*, AIR 1990 SC 273.

11 *Union Carbide Corporation* v. *Union of India*, AIR 1990 SC 273.

(approximately 750 Crores) to the Union of India in full settlement of all claims, rights and liabilities related to and arising out of the Bhopal Gas disaster;

(2) All Civil proceedings arising out of the Bhopal Gas disaster shall stand concluded in terms of the settlement and all criminal proceedings related to and arising out of the disaster shall stand quashed wherever these may be pending.

In response to criticism from several quarters, and review petitions were filed by several action groups, the Supreme Court decided in 1991[12] upholding the settlement except the condition of quashing criminal charges. The Supreme Court has set aside the quashing of the Criminal proceedings being not justified and said that those proceedings would continue.[13] The UPA Government's bill with liability limitations had several clauses against these norms debated during Bhopal litigation.

Unlimited liability

Common law and law of Torts impose liability in tune with the loss as part of civil rights of the people, besides inevitable criminal liability. Over a period of time the tort law gave rise to 'strict liability' (*Rylands* v. *Fletcher*[14]) without expecting victim to prove the fault of wrong doer, and at a later stage, developed a stricter law of liability called 'absolute liability' (*Sri Ram Gas leak* case[15]) where the wrong doers will be asked to pay compensation to all those who suffered because of their dangerous activity irrespective of their diligence, absence of negligence or lack of proof of fault. The legal regime has traveled so long that to go back from these well established norms will be a retrograde step without justification.

Primarily the liability is fault based. But most of the systems under rule of law have already working with 'strict liability' or no-fault liability principle to ensure quick realization of compensation from the industries causing disasters. The Supreme Court of India in *Sriram gas leak* case and other cases has rightly come out with new principle of 'absolute liability' where defences are reduced to a bare minimum and proof of negligence is totally done away with.

Supreme Court said in *Vellore Citizens Welfare Forum* v. *Union of India*[16]..."once the activity carried on is hazardous or potentially hazardous, the

12 *Union Carbide Corporation* v. *Union of India*, AIR 1992 SC 248.
13 The Accused has been charged under Section 304A Indian Penal Code, *Keshub Mahindra* v. *State of Madhya Pradesh*, 1996 (2) Scale 522).
14 *Rylands* v. *Fletcher* [1868] (19) LT.
15 AIR 1987 SC 965.
16 1996 (5) SCC 647.

person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective ... whether he took reasonable care....” This absolute liability “extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation…”

The provisions of liability and limitation on the controversial bill 2010 are in contradiction with the precautionary principle and the polluter pays principles, which are internationally accepted norms. These norms were also upheld and made law by the Supreme Court in relation to fundamental constitutional rights. It is not proper for any body to involve in potentially harmful activities. Those who indulge in inherently dangerous activity should bear cost of all consequences of accidents, without availing any defences recognized for ‘strict liability’ in *Rylands* v. *Fletcher*[17] principle. Public Liability Insurance Act, 1991 has codified this absolute liability principle as explained by the apex court, which amounts to legislative validation.

Even in Motor Vehicle Accidents, the liability towards third party is unlimited, which means whatever is the loss caused to third party by the involvement of automobile, the owner will be liable to compensate which of course is done by insurance company through compulsory insurance. After Motor Vehicle legislation, the Public Liability Insurance Act introduced another involuntary insurance for industrial disasters. Thus the law of unlimited liability for inherently dangerous operations is already in operation wherever the Motor Vehicle laws are enforced, it was extended to industry by legislation, and it was effectively evolved and approved by the apex court in India with greater emphasis. The idea of limiting the liability is not in tune with any norms and thus not acceptable. Any industry-specific law imposing liability must provide compensation for every loss covering the maximum possible damage. No such law can limit it to an average or minimum or probable damage for the victims of an accident. An Automobile can spell disaster to the family of victim, who has every right to seek restitution of loss. Motor Vehicle Act provided for it, and also evolved insurance mechanism to realize it. The premium paid to insurance company is no way proportionate to the size of the risk it is going to cover in a year. In spite of increase in number of accidents, the insurance companies are not going bankrupt because the losses and payments are still less in number because of various factors. When it was asked to compensate a particular victim of a particular motor vehicle, insurance company cannot say no. Restitution of the parties to the position prior to accident is the aim of ‘compensation’. If this norm is fine for motor vehicle accident, why not extend it to cover victims of nuclear accident also?

17 *Rylands* v. *Fletcher* [1868] (19) LT.

Limitation on Liability is Unconstitutional

The eminent jurist, and former Attorney General, Soli Sorabjee has explained the legal position and viability of this proposed legislation[18]: Any legislation that attempts to dilute the norms of 'Polluter Pays'[19] and 'Precautionary Principle' and imposes a cap on liability is likely to be struck down as it would be in blatant defiance of the law laid down by the Supreme Court judgments. In *Indian Council of Enviro-Legal case*[20], the Court ruled that according to this principle;

> ... once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity. The rule is premised upon the very nature of the activity carried on ... It is that the enterprise (carrying on the hazardous or inherently dangerous activity) alone has the resource to discover and guard against hazards or dangers - and not the person affected and the practical difficulty (on the part of the affected person) in establishing the absence of reasonable care or that the damage to him was foreseeable by the enterprise.[21]

The apex court also ruled in the above judgment that the responsibility for repairing the damage is that of the offending industry[22] and imposed on the offending industry the obligation for carrying out necessary remedial measures to repair the environmental damage caused[23].

A three judge bench of the Supreme Court in *Vellore Citizens'*[24] case reaffirmed this point in these terms:

> "The Polluter Pays Principle as interpreted by this Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of "Sustainable Development" and as such the polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology".[25]

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18 http://beta.thehindu.com/opinion/lead/ article64688.ece?homepage=true.
19 *Indian Council of Enviro-Legal Action* v. *Union of India* 1996 (3) SCC 212, which was reaffirmed in *Vellore Citizens' Welfare Forum* v. *Union of India* 1996 (5) SCC 647.
20 1996 (3) SCC 212.
21 *Ibid*, p. 246 para 65.
22 *Ibid*, p. 248.
23 *Ibid*, p. 247 para 67.
24 1996 (5) SCC 647.
25 *Ibid*, p. 659.

Apart from these profound judicial pronouncements, the constitutionally guaranteed rights of people in general also need to be secured. It would be against the interests and the cherished fundamental right to life of the people whose protection should be the primary concern of any civilized democratic government. The Supreme Court reiterated that "the Precautionary Principle and the Polluter Pays Principle have been accepted as part of the law of the land" and referred to Articles 21, 47, 48-A and 51-A(g) of the Constitution. The Supreme Court further held that "the onus of proof" is on the actor or the developer/industrialist to show that his action is environmentally benign"[26].

With regard to measure of compensation also the Supreme Court was very specific: In Shriram gas leak case it said:

> We would also like to point out that the measure of compensation in the kind of cases referred to in the preceding paragraph must be correlated to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect. The larger and more prosperous the entire, greater must be the amount of compensation payable by it for the harm caused on account of an accident in the carrying on of the hazardous or inherently dangerous activity by the enterprise.

Problematic Provisions of Civil Liability for Nuclear Damage Bill

There are four major problems with the Bill:

1. It caps the total liability for a nuclear mishap, however serious, at as little as 300 million SDR (Special Drawing Rights) and the liability for the operators of nuclear facilities to Rs.500 crore.

2. It imposes liability only on the operator, which means statutory exemption to plant designers, manufacturers and suppliers.

3. It leaves the determination of the occurrence and gravity of a nuclear accident exclusively to the four claims commissions at four zones under Atomic Energy Regulatory Board (AERB), which means a non-judicial executive body, would determine the losses in contradiction to existing law.

4. It bars the post-mishap period for which the operator is liable to only 10 years. If compared with Bhopal tragedy, as per this Bill, the plant owners (now Dow Chemicals) will not be responsible for continuous damage being caused.

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26 *Ibid*, p. 658, para 11.

The crucial clause that limits liability is 6 (2) which says: *The liability of an operator for each nuclear incident shall be rupees five hundred crores.* The Clause 7 (1) provides: *The Central Government shall be liable for nuclear damage in respect of a nuclear incident. (a) Where liability exceeds the amount of liability of an operator specified under sub-section of section 6; (b) occurring in a nuclear installation owned by it.* Furthermore, the Clause 6 (1) provides: *The maximum amount of liability in respect of each nuclear incident shall be the rupee equivalent of three hundred million Special Drawing Rights.* It means that in case of the power plants the quantum of "liability" is "three hundred million US $ Special Drawing Rights" or equal to the "maximum" (i.e. total) "liability" of 450 million US $. The lower quantum of "rupees five hundred crores" will apply only in case of nuclear power plants operated by private companies. As of now, there is no such private plant. Because there are specific provisions referring to operator, it is inferred that there would be private operators in future. Some are apprehensive of the possibility that public sector undertakings alone would be operators and thus the bill imposes liability on operator only. In case the operators are public sector bodies alone, limiting their liability is considered as an appropriate provision.

If the operators are private parties, there are apprehensions about their safety adherence. There is higher number of safety hazards unique to nuclear industry and the nuclear power plants are suspected to be potentially catastrophic, as proved in the Chernobyl Disaster. Will it be proper to hand over such a vulnerable industry with dangerous tendencies of killing people and destroying environment, to private hands with reduced liability law?

There are immunity clauses where the operator is exempted. Clause 5 (1) says operator will not be liable for damage as a consequence of (i) a grave natural disaster of exceptional character and (ii) an act of armed conflict, civil war, hostility, civil war, insurrection or terrorism. Clause 5(ii) offers six excuses for an operator to escape liability. Clause 5(2) says the operator shall not be liable for damage caused to nuclear installation or to any property connected to installation or damage caused to the means of transport upon which nuclear material involved was carried at the time of nuclear incident. The bill also says the operator of a nuclear power plant will be liable for all accidents, including those that occur during the transport of the material. Of course, *force majeure* occurrences such as armed conflicts, natural calamities, terrorist attacks, etc., are excluded.

The maximum financial liability in case of an accident in nuclear reactors which has been set at the rupee equivalent of 300 million or Special Drawing Rights (SDRs) as per clause 6 is considered meager in comparison to the destruction caused by a nuclear accident. Especially when a similar law in US

has set the financial liability for such accident at $10.5 billion, why there should be such a low limit in India? Clause 2(p) of Bill says Special Drawing Rights are as determined by International Monitory Fund. It is very clear as to who will decide the quantum of damages to compensate the damage.

There is further sharing of liability among liable groups as defined by Clause 7, which states that the operator will have to pay Rs. 500 crore and the remaining amount will be paid by the Indian government. By this law the Central Government also undertook to bear the damage from nuclear incident caused by grave natural disaster, or terrorism, or damage caused to nuclear installation owned by it. Because these are defences which immune the operator totally. Does it mean that private operators are free to operate reactors in existing nuclear installations, and cause any damage to those government installations without any fear of liability?

The limits spelt in the Bill would mean immunity to certain sections which are otherwise liable. The Clause 17 deals with the liability in case of a nuclear accident. It allows only the operator to sue the manufacturers and suppliers, i.e., victims will not be able to sue them. Combined reading these clauses will lead to an understanding that no one will, in fact, be legally liable because the recourse taken by the operator will yield only Rs. 500 crore at maximum. If written into the contract, the operator can claim the liabilities from the manufacturer and supplier as per that contract. This is purely between the product maker and supplier and operator. But the maximum amount payable by the foreign companies, as per this bill will be limited to a meager sum of Rs. 500 crore.

In sum and substance, this bill envisages to

a) prohibit the victims to sue operator for beyond Rs. 500 crore,

b) prohibit operator from getting more than Rs 500 crore from supplier or manufacturer,

c) prohibit victims from suing suppliers or manufacturers directly,

d) prohibit the courts of law from hearing the claims, and prohibit the claims beyond ten years from date of nuclear accident.

Mr. Sukla Sen[27] analysed and compared the liability amounts with the Bhopal tragedy saying:

> In case of Bhopal Gas Disaster, the Supreme Court had approved a deal between UCC and Union of India providing compensation

27 Sukla Sen's article: http://environmentpress.in/2010/04/02/the-civil-liability-for-nuclear-damage-bill-2010-some-tentative-observations/

> to the victims amounting to US$ 470 million. That was way back in 1989, more than two decades ago. Even at that time this was considered grossly inadequate. So, while whatever cap on "liability" is unacceptable; this cap on total "liability" or the "maximum amount of liability", as the draft Bill has put it, is woefully paltry**.** More so, given the fact that a catastrophic nuclear accident may very well dwarf the Bhopal Gas Disaster in terms of devastations. In case of Chernobyl Disaster, while no precise estimate of total economic impact is available, as per one report, the total "spending [only] by [neighboring] Belarus on Chernobyl between 1991 and 2003 was more than US $ 13 billion. That's incomparably larger as compared to the "maximum liability" pegged in the Bill - 450 million US $! The second tier of compensation amounting to Rs. 2,100 crore is to be met by the government.

If we take inflation since 1984 into account, even the Bhopal settlement would be $1.5 billion today - about three times higher than the Bill's ceiling. Though the Bill allows for the raising or lowering of liability up to Rs. 100 crore, it offers no remedy. Besides, this is an arbitrary power given in the state's hands. Thus limiting the liability in terms of rupees also does not help the victims and largely benefits an MNC involved in irresponsible operation of the nuclear industry. It makes no sense to let manufacturers and suppliers of nuclear plant and equipment off the liability hook. If defective designs are the root causes of a mishap (as in Bhopal), the designer must be made liable for the consequences of that mishap. Or else, we will end up punishing a subordinate agency, like the Indian subsidiary of Union Carbide, while exonerating the culpable parent.[28]

Another point of view is that this legislation is necessary because the Indian Atomic Energy Act of 1962 has no provision for liability or compensation in the event of a nuclear accident even though India operates 18 nuclear power plants.

The Bill provides for increase and decrease also. The Central Government may, having regard to the extent of risk involved in a nuclear installation by notification, either increase or decrease the amount of liability of the operator. Assessing the loss and imposing liability is supposed to be done by an independent adjudicator like court of law or special tribunal in each individual case separately. Giving power to the Government to increase or decrease the amount liability by issuing notification, which again amounts to 'executive limitation' on overall size of the liability, which is against principles of justice and cannot work out in actually providing relief and compensation to the victims.

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28 Bhopal CJM Court punished officials of Indian company UCIL, leaving out chief of UCC, on June 7, 2010.

One interesting feature of the Bill is that it recognizes that the consequences of a nuclear accident may not be limited to national borders and provides for liability outside India's territory too. But it makes no provision for enforcing that liability. It is practically almost impossible to enforce such liability beyond territory. It appears we traveling from progressive statutory absolute liability rule to statutory corporate immunity regime.

Right of Recourse

Although the bill channels all liability for a nuclear accident to the operator of the facility, Clause 17 of the draft allows the operator a 'right of recourse' which means the right to recover any compensation it is forced to pay. The Clause 17, *inter alia*, provides as under: *The operator of a nuclear installation shall have a right of resource where - (a) such right is expressly provided for in a contract in writing; (b) the nuclear incident has resulted from the willful act or gross negligence on the part of the supplier of the material, equipment or services, or of his employee; and (c) the nuclear incident has resulted from the act of commission or omission of a person done with intent to cause nuclear damage.* The clauses (a) and (c) are mentioned in the model law developed by the Convention on Supplementary Compensation for Nuclear Damage (CSC). However the CSC does not prohibit the inclusion of additional provisions. Indeed, some countries have already included gross negligence by suppliers as grounds for invoking the right of recourse in their liability laws. Article 4 of the South Korean Act on Compensation for Nuclear Damage, for example, includes language similar to 17(b) of the Indian draft. Clause 17(b) is needed to deter suppliers from being negligent. Clause 17(a) alone is inadequate since no supplier will agree to accept liability for negligence in a contract. But, surprisingly, the Union government has agreed to delete this key provision. The Hindu newspaper reported[29] how the U.S. nuclear industry was upset with Clause 17(b) and wanted it deleted for fear it would "open the door to more lawsuits." The government has obliged the American side by getting rid of this sub-clause entirely[30]. After the uproar against the June 7 judgment of Bhopal Trial Court in a criminal proceeding leading to paltry punishment to the accused other than UCC and its Chief Anderson, the Government of India decided not to delete Clause 17 (b).

Another ridiculous 'immunity' provided by the bill to the nuclear radioactive polluters is that victims cannot question them ten years after the accident. The objections raised as regards the 10-year limit to "liability", as provided in Clause

29 The Hindu, Hyderabad, March 8 and April 1, 2010.

30 Sidhartha Varadarajan, Government dilute nuclear Bill under US pressure, The Hindu, Hyderabad, June 10, 2010.

18 (Chapter IV), are very reasonable and quite valid.[31] In case of exposure to low dose radiations, the injuries caused thereby - mostly in various forms of cancer, may take much longer time to manifest. However, it is very difficult to establish the causal link.

Exclusion of Courts jurisdiction

Clause 35 extends the legal binding that the responsible groups may have to face. The operator or the responsible persons in case of a nuclear accident will undergo the trial under Nuclear Damage Claims Commissions and no civil court is given the authority. The country will be divided into zones with each zone having a Claims Commissioner. This is in contrast to the US counterpart - the Price Anderson Act, in which lawsuits and criminal proceedings are taken up under the US courts.

Disadvantage to US companies?

One general and strong argument that is put forward by the supporters of the bill is that without this kind of law the US companies would be at a disadvantage, and that will affect our nuclear industrial progress. Their disadvantage is correct. The American vendors will be at no disadvantage as compared to their competitors as the vendors are routinely "indemnified for consequential damages". Even otherwise, the Bill does not prohibit the operator from making the equipment vendor liable on account of an accident. That is between the operator and the vendor. Liability depending upon the operation is something to do with the rights of the people at large that cannot be considered a disadvantage. No nation can allow any operator including Government operator to exempt from liability after causing a disaster through its dangerous operations.

Criminal Liability

Another basic omission in this Bill is mention of criminal liability. As we have seen from Bhopal incident leading to serious public anger at the way criminal prosecution was handled resulting in meager punishment and leaving out the real culprits, it is necessary to specify the criminal liability for causing death with negligence in such hazardous and inherently dangerous activities considering it as culpable homicide not amounting to murder.

Vicarious liability

The Bill should specify absolute liability principle and also impose vicarious liability with specific provisions on the persons including corporations who involved in selecting, designing and sending the technology or product which

31 *The bill lets nuclear equipment suppliers and designers off the hook,* from *The great nuclear folly* by Praful Bidwai at <http://www.thedailystar.net/newDesign/news-details.php?nid=130882.

might have given rise to the dangers of disasters to pay the damages and fix up criminal liability on the overall in-charge of principal MNC. The problem of escaping from liability and imposing liability only on subsidiary or operator must be thoroughly dealt with and the Bill should send across a message to the whole world that third world will not tolerate any more the accidents or disasters and excuses from liability.

India should lead the third world in agitating for vicarious liability of principal companies like UCC headquartered elsewhere over and above liability of the supplier. It should work for a convention and international agreement on vicarious liability of MNCs for the disasters of their subsidiaries in third world. There should be a time limit also within which they have to settle all claims and damage payments to the victims.

Political Opposition

As the essential aspects of the Bill became controversial the United Progressive Alliance could not table the Civil Liability for Nuclear Damage Bill, 2010, on March 15, 2010 with the strong opposition from the Left parties, sections of the Bharatiya Janata Party, other centrist parties and some of the Congress' own allies. It was referred to a Parliamentary Standing Committee, to analyze it thoroughly and critique the rationale for limiting the liability for accidents in civilian nuclear installations. Earlier, the Union Cabinet has openly ruled out the objections raised by the Finance and Environment ministries indicating that it succumbed to the pressure of the US officials.[32] After the approval a significant change is made in clause 6 (2), where the quantum of "liability of an operator for each nuclear incident" has been revised upwards from "rupees three hundred crores" to "rupees five hundred crores". A new "Chapter", 'Offences and Penalties' with 4 clauses, has been added. Besides, the Chapter IV, 'Claims and Awards', has been somewhat restructured and expanded[33]. The Bill has 7 Chapters with 49 clauses along with 'Statement of Objects and Reasons' and 'Notes on clauses'. The objective of the Bill is explained as: *To provide for civil liability for nuclear damage, appointment of claims Commissioner, establishment of Nuclear Damage Claims Commission and for matters connected therewith or incidental there of.* Para 7 of the 'Statement of Objects and Reasons' further lays down that the purpose of the Bill is: *to enact a legislation which provides for nuclear liability that might arise due to a nuclear incident and also the necessity of joining an appropriate*

32 The bill was approved by Union Cabinet on November 20, 2009. <http://www.dailyindia.com/show/364588.php> or <http://www.kseboa.org/news/us-pressure-civil-nuclear-liability-bill-likely-in-parliament-session.html.

33 Revised bill at http://www.cndpindia.org/download.php?view.36> and earlier version given in *Nuclear Liability Law in Developing Countries – Indian Case* by B. B. Singh at <http://www.cndpindia.org/e107_plugins/content/content.php?content.65.

international liability regime.

The Bill in the Clause 9 (Chapter III) provides: *The Central Government shall, by notification, appoint one or more Claims Commissioners for such area, as may be specified in that notification, for the purpose of adjudicating upon claims for compensation in respect of nuclear damage.*

The Chapter IV deals with 'Claims and Awards', which is the main part of the law. The clause 6 prescribes the limits of "liabilities", clause 7 spells out the "liability" of the Central Government and the clause 5 lists out the circumstances under which the "operator" shall not be "liable". The liability of supplier or producer is totally removed, which amounts to granting immunity to producers apparently a major departure from principle of product liability in strict terms.

Openings to Private Operators

After reading the serious apprehensions as introduction and brief outline of the killer bill let us study the impact of this defective law on this nation. Today we have a law called Environment Protection Act, 1985 which makes the polluter to pay and imposes on polluter a legal obligation to take precaution. This was strengthened by the most imaginative judicial legislation principle of Absolute Liability laid down by Supreme Court in 1986. These two legal instruments were not available to tackle the Bhopal gas leak tragedy in 1984. Now the situation is different, liabilities are fixed. The Public Liability Insurance Act, 1991 made it mandatory to the hazardous industry to insure the possible damage to people and environment. For people of India, there is no need for any law to make the hazardous nuclear industrialists liable today. But big energy corporate sector in United States of America and Union of India Government needs to limit the liability or exempt totally wherever possible.

Apparently serving the US and other western corporate interest, the Bill is an open invitation to corporate catastrophes as it envisages and permits the entry of private players as "operators" nuclear power industry. Because of unique nature of nuclear power industry and its catastrophic potentials, as chillingly illustrated by the Chernobyl Disaster on April 26, 1986, provisions of this bill are very dangerous. The fact is that profit-maximization is the very raison d'etre of a private enterprise giving rise to the consequent innate tendency to cut corners in terms of safety measures.

Enforcing liability strictly is what is needed than mere regulation, because regulatory mechanisms can at best only "regulate". Hence, the envisaged ushering in of private players as "operators" of nuclear power plants has become an open invitation to disaster. Thus validating the private participation as "operator" of nuclear power plants in India is emerging as a big legal controversy.

This draft legislation aims at defining the 'liability', arising out of any nuclear accident, of an individual "operator" independent of (and unaffiliated with) the Government of India. At present all nuclear establishments & ventures, power plants are run by the state through affiliated bodies the Uranium Corporation of India Limited (UCIL) for uranium mines and the Nuclear Power Corporation of India Limited (NPCIL) for the power plants. Without specifically laying red carpet for private 'operators', the Bill provided for 'operators' and their 'liability' and at times 'immunity' specifically. This indicates possible private operators to come up with state support.

Limiting the total "liability" of the (private) "operator" plus the "state" regardless of the scale of the disaster is the most unreasonable part of the draft law. Generally an enactment aims at imposing liability in the interest of the people who are innocent victims. Strangely this law proposes just unacceptable propositions of reducing the liability and offering immunity, besides legally burdening the state to pay for by foreign nuclear corporate caused disasters.

Defending the Bill

The provisions regarding liabilities are very crucial in this Bill of 2010. The defence of the bill rests on this aspect and on the need for nuclear power to end the scarcity of power. The scientific studies and advances in nuclear technology have significantly reduced the probability of a nuclear catastrophe and thus nuclear power is considered an environment friendly and sustainable source of energy, though environmentalists oppose to agree that it is clean or green energy. The supporters of bill say, however, it is still necessary to keep in mind the possibility of nuclear accidents and other negative aspects of the nuclear energy and measures must be taken for its peaceful use. Substantial part of the controversy is about providing sufficient financial assistance under such circumstances.

Having brought it, naturally the government has defended this civil nuclear liability legislation. Pointing to the fact that only the government or NPCIL runs nuclear power plants in India, said liability of a foreign supplier could be defined by an agreement with the operator. Fixing responsibility in terms of faulty equipment would always be time-consuming and this was why the operator had been made directly responsible for compensation. For liability beyond Rs 500 crore and up to Rs 2,300 crore, a tribunal would assess the compensation to be paid. The Government and other supporters of this Bill as it is, refer to the legislations in other countries offering even lower amounts (the Rs 205 crore prevalent in China and Rs 335 crore in Canada), and $350-600 million in some other countries. As pointed out by Praful Bidwai and many opponents argued,

the US had a pooled fund of about $11 billion under the Price-Anderson Act. The United States has displayed its concern for the safety of the US plays a safe game when it comes to its own people and tries to save coffers of its MNCs in relation to disasters in third world. What is that Indian statesman are interested in?

There are certain contentions in favour of the statutory limit on liability. Prakash Nanda[34], a journalist and editorial consultant for Indian Defense Review says comparing with Bhopal is irrelevant, he wrote:

> As regards the limit, the government has said that the amount could be raised. The point to note here is that in India all nuclear power plants are owned by the government, so there is no private motive in limiting the liability in cases of a nuclear accident, which, in any case, is a rarest of rare possibilities. Therefore, comparing the situation with the Bhopal-gas tragedy in 1985 is irrelevant since Union Carbide, owner of the Bhopal plant, was a foreign body (U.S. organization), whereas here the government of India owns the nuclear power plant. And the government can always go beyond the written liability amount by either meeting the excess from its own exchequer or from international sources such as the CSC. It does not make sense to have a high liability amount on paper, since doing so would result in high insurance coverage of the concerned power plant, which would ultimately be reflected in the rate of the nuclear energy it provided to consumers. As regards the second criticism, it is wrong to say that only the Americans are demanding a liability law of this sort. France and Russia, or for that matter any other potential supplier, also want such a law, something Energy Minister has revealed.

Comparison with Bhopal is just to explain the problem of enforcing liability in case of major disasters. A nuclear accident could be very high in its proportion compared to Bhopal tragedy. Without considering these major aspects, the state limits the liability simply to reduce the burden of insurance premium sacrificing the interests and even lives of Indians. Liability for Bhopal tragedy is not established and not imposed on Union Carbide, which supplied machinery, technology and offered training besides guiding the Union Carbide India Limited totally. Legally the UCIL is shown as separate concern in which the Union of India and Madhya Pradesh state have owned shares along with UCC. The Union of India accepted its share of liability either by offering damages beyond

34 Prakash Nanda is a journalist and editorial consultant for Indian Defense Review, Right Angle column, published on March 30, 2010.

what is given by UC or suffering the losses of the disaster. If the state becomes responsible for the disaster caused by the foreign nuclear firm, it amounts to victims paying for the victims. Whether the nuclear firm belongs to India or a foreign country, responsibility should fall on those who caused it.

Official sources say still there is no problem, as general remedies are not closed by this law. Scope for legal action against a supplier of faulty or unsafe equipment is possible as per clause 46 of the nuclear bill, which says that the Act's provisions "shall be in addition to, and not in derogation of, any other law for the time being in force." This will allow the filing of tort claims and even criminal charges in case a nuclear accident is caused by negligence on the part of the nuclear operator or its equipment suppliers. Most of the Torts claims are not pursued here in this country which presents very less possibility of enforcing general remedies. It is proved that general remedies could not be pressed in Bhopal case. The question is: If the liability is already there in general principles of tortuous liability, why this law is being made? When a special law is passed specifically for nuclear damage, how can a general law apply to nuclear accident?

Liability norms in other countries

Other countries, while implementing the broad principles laid down under international conventions, have framed their own legislative regimes for nuclear liability. They also impose financial security requirements on the operator, which vary from nation to nation.

The Situation in the US

For instance, in the US, the 1957 version of the Price-Anderson Act- the world's first comprehensive nuclear liability law - prescribed the operator's liability at $60 million and the government's share of liability at $500 million. After a series of amendments, the Act currently absolves the State from any liability below $10.761 billion in cover and places the onus entirely on the operator, without any cost to public or government and without fault needing to be proven. Over $200 million has been paid by US insurance pools in claims and costs of litigation since the Price-Anderson Act came into effect, all of it through the insurance pools. Of this amount, around $71 million was related to litigation following the 1979 accident at the Three Mile Island. According to World Nuclear Association data, in mainland Europe, individual countries have their own cap levels.

In US, in the event of an accident, the first $375 million is paid by the insurer(s) of the plant. It is mandatory to insure the plant. Beyond that, up to US$ 10 billion is paid out of a fund jointly contributed by the "operators" as mandated by the Price-Anderson Nuclear Industries Indemnity Act. Beyond

that, the Federal Government pays.[35] For US victims of nuclear accidents, they guarantee 10 billion US dollars from a fund of operators, and for the victims in India, US wants reduced, limited and truncated liability for a paltry amount. Does value of life differ from US to India?

In Germany

Germany has unlimited operator liability and requires 2.5 billion Euros security, which must be provided by the operator for each plant. This security is partly covered by insurance. France requires financial security of 91 million Euros per plant. Switzerland requires operators to get insurance cover of up to 600 million Euros. It is proposed to increase this to 1.1 billion Euros and ratify the Paris and Brussels conventions. In Finland, a 2005 Act requires operators to take at least 700 million Euros insurance cover, and operator liability is unlimited beyond the 1.5 billion Euros provided under the Brussels Convention. Sweden has ratified the Joint Protocol relating to Paris and Vienna conventions. The country's Nuclear Liability Act requires operators to be insured for at least Swedish Kroner (SEK) 3300 million (302 million Euros), beyond which the State will cover to SEK 6 billion per incident.

In Canada, the Nuclear Liability and Compensation Act is also in line with the international conventions and establishes the licensee's absolute and exclusive liability for third party damage. The limit of $75 million per power plant set in 1976 as the insurance cover required for individual licensees was increased to $650 million in the Act's 2008 revision.

In Japan, China etc.

Japan is not party to any international liability convention but its laws generally conform to them. The two laws governing them are revised about every 10 years. Russia is party to the Vienna Convention since 2005 and has a domestic nuclear insurance pool comprising 23 insurance companies covering a liability of some $350 million. It has a reinsurance arrangement with Ukraine and is setting one up with China. China is not party to any international liability convention and has only a 1986 interim domestic law on nuclear liability, which corresponds with international conventions, except that the liability limit is only about $36 million[36] .

Nuclear Accidents

It is necessary to study technicalities and the possible quantum of damage in nuclear accidents. In any nuclear industry, the maximum accident is a core meltdown: the overheating of the core of a nuclear reactor, the site of fission,

35 http://en.wikipedia.org/wiki/Price%E2%80%93Anderson_Nuclear_Industries_Indemnity_Act.
36 News Report by Anil Sasi, Businessline, April 5, 2010.

due to a Loss of Coolant Accident (LOCA) or some other malfunction. It is the meltdown that caused disaster in Chernobyl (1986) Even the Three-Mile Island (1979) tragedy was a LOCA. But that was not led to meltdown. But meltdown cannot be ruled out altogether, until 2007, it was pointed out by newspapers and journals that the global nuclear power industry recorded more than 60 serious accidents and many of them were LOCAs. A LOCA can within seconds produce an uncontrollable chain of events. The danger is especially high in certain reactor types that have a positive void coefficient of reactivity. Simply put, this describes the reactor's tendency to get progressively hotter when bubbles form in the coolant. This can have grave consequences. The natural uranium-heavy water-based CANDU design, the mainstay of India's nuclear programme, has such a positive coefficient, according to Praful Bidwai[37] .

What happens when there is a nuclear accident? Even if one of 430 operating commercial nuclear reactors can undergo a core meltdown, it would release vast amounts of radioactivity. The radioactivity, carried in dust clouds, can spread over hundreds of kilometres depending on the wind direction and speed. Such a spread of radioactivity to distant places will have a far reaching effect. It is inevitable to refer again to the worst example in Chernobyl accident, wherein leaked radioactivity made thousands of sheep in faraway Scotland and reindeer in northern Sweden, non consumable as they had fed on radioactively contaminated grass, and thus they had to be slaughtered. Explaining the disaster that can spell serious damage to India, Praful Bidwai wrote:

> A Chernobyl-like accident (1986) will wreak damage upon human and animal life, the environment and the infrastructure running into hundreds of billions to several trillions of dollars, and make huge swathes of land uninhabitable for centuries. The initial damage from the reactor-core meltdown in Chernobyl was estimated by the Ukrainian government at $250 billion. It may turn out even higher as more cases of cancer and genetic damage come to light, necessitating expensive treatment. German researchers estimate that a Chernobyl-type accident in Germany will cause damage in the range of 2 trillion to 5 trillion euros, which equals the entire annual gross domestic product of the world's third biggest economy, and until recently, its topmost exporter. ... An estimated 65,000 people perished in the Chernobyl accident. And the death toll mounts every month. This is more than three times the number killed in Bhopal. An Indian Chernobyl could conceivably kill even more given our cities' high population density. Such estimates are

37 Praful Bidwai, A Flawed Bill, Frontline, March 27, April 9, 2010, http://www.flonnet.com/stories/20100409270709500.htm.

> in line with forecasts made in the mid-1970s by United States Nuclear Regulatory Commission-sponsored studies with 3,300 early deaths plus 45,000 early radiation-related illnesses. More recent estimates are higher and run into scores of billions of dollars. It makes no ethical, technological or practical sense to subsidize nuclear power by extinguishing the liability burden or transferring it to the public[38]

It is impossible to imagine that the damage from an Indian reactor-core meltdown will be less severe. Even lesser accidents such as spills and leaks of nuclear material during transportation and handling, loss-of-coolant accidents (LOCAs), other radioactivity releases, and overexposure of the public to emissions and effluents containing dangerous material can cause grave damage. With our industrially safety norms, mostly violated and the history of industrial disasters, the nuclear radioactivity leak or meltdown would have a very serious impact on human life, animals and environment. Referring to Charles Perrow's classic *Normal Accidents;* Basic Books, 1984, Praful Bidwai explained: Nuclear technology is extremely hazardous, indeed uniquely so: it is the only mode of energy generation capable of catastrophic accidents. Nuclear reactors concentrate within a small volume large quantities of fissile material, equivalent to several hundred multiples of the critical mass needed to make a nuclear bomb – and hence a high energy density. Their core must be cooled effectively and without interruption so that it does not overheat, potentially leading to a runaway reaction. That apart, all nuclear power generation based on existing reactor designs is inherently hazardous because, as organization theory puts it, it involves large, complex systems within which various subsystems are tightly coupled, leading to a rapid transmission of a problem event to the entire system and hence to catastrophic accidents. The probability of catastrophic nuclear accidents is admittedly low. But their consequences are extremely large, indeed unacceptably so. Praful Bidwai[39] wrote further:

> According to a post-Chernobyl study by an independent expert body, Gruppe Ökologie (Germany), all existing reactor types have safety problems, many have had LOCAs, and are vulnerable to all kinds of mishaps that can produce a catastrophic accident. Very few new reactors have been built in the developed countries since Chernobyl. No nuclear reactor has been ordered in the U.S. since 1973, even before Three Mile Island (1979). This has severely limited safety innovation.

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38 *Ibid.*
39 *Ibid.*

> Two new designs - Westinghouse's AP-1000 and Areva's European (since pompously renamed Evolved) Power Reactor - have just emerged. These are claimed to be "Generation III-plus" and safer than the designs of the 1970s. But they have run into problems with regulatory authorities in the U.S., France, the United Kingdom and Finland, where the first fully market-driven nuclear project in Europe is now in progress - three-and-a-half years behind schedule and with 60 per cent over budget. Scrapping the Olkiluto project will produce a potentially fatal setback to the global nuclear industry.
>
> At any rate, the none-too-happy story of nuclear safety warrants a liability compensation regime which is strict and based on the polluter pays principle and the precautionary principle. That alone can provide the nuclear industry the incentive to redesign reactors for greater safety and operate them with abundant caution. The Bill does the opposite by lightening the nuclear industry's responsibility by Rs.1,800 crore to compensate the victims of a nuclear accident.

Another critical analyst Shobhana Saxena[40] wrote in Pak Observer: The Gulf of Mexico slick threatens the fishing industry, thousands of jobs, tourism and marine life in the coastal American states. The tragedy is that President Obama's effort to raise the liability cap to $1.5 billion failed as the Republicans in the Senate didn't allow the bill to be tabled. The Obama administration wanted to increase from $1 billion to $1.5 billion the amount that could be spent from an emergency cleanup fund paid with industry fees, and raise a $75 million liability limit BP would bear for costs not directly connected to cleaning up the spill, such as lost wages and tourism. Even as Obama licks his wounds, the real tragedy is unfolding in India where the government is again trying to push through the controversial nuclear liability bill. It's a cruel truth that when an industrial disaster happens in the US, the government of that country doesn't allow the MNC involved go scot-free. In the Gulf of Mexico accident just 11 people died, but the US government it trying to force BP to pay for everything – deaths, damages and lost wages.

Did we learn anything from Bhopal?

Though in principle, there is criminal liability for killing the people with gross negligence, it is almost impossible to procure presence of the head of MNC who caused the disaster. Best example cited could be Bhopal tragedy and failure of Indian system to bring in Warren Anderson, Chief of Union Carbide

40 Views From Abroad, http://pakobserver.net/detailnews.asp?id=32103, by Shobhan Saxena.

Corporation. The verdict of a Chief Judicial Magistrate, Bhopal on 7th June 2010, holding eight officers of UCIL guilty after 26 years of tragedy speaks volumes of the tragic consequences of tragedy. In the whole episode, it is not properly examined as to what crime the offenders would be charged with? Is it murder, culpable homicide not amounting murder or merely causing death by rash and negligent act?

The second question is about civil liability, which is equally complex and totally depends upon the international cooperation. In Bhopal the achievement in this front is neither ideal nor acceptable. But that remains a reality. It is once again manifested that our governments do not learn from experience. Bhopal should have strengthened our commitment, law and enforcement mechanism. No doubt that Bhopal experience gave us a comprehensive environmental policy, but it failed to help developing a legal regime of imposing liability on MNCs. It is beyond any sane understanding capacity that with a tragic experience of Bhopal genocide caused through pesticide factory by Union Carbide, how India is signing this suicidal pact and what for. All the law of Globalization is a major disaster as that could not secure the lives in Bhopal and could not make the Union Carbide of US liable for its wrongs. The strange technical argument that Union Carbide has nothing to do with Bhopal Disaster is still a problem India faces in its efforts to nail this MNC. It has thrown total responsibility on the Indian special purpose vehicle 'Union Carbide India Limited' in which Government of India and Government of Madhya Pradesh were also share holders. More than the profit or benefit, these two governments shared the tragic load more than any body that caused it. The Government of India with its bankrupt mindset argued before US District Court that India had not developed a mature administration of justice system and judiciary here was not mature enough to deal with such massive liability litigation. It is a shame. Marc Galanter, an author and advocate represented India and filed the affidavit signed by Government of India, claiming immaturity of system to provide answer to Bhopal claim. It is ultimately Indian system that came to rescue of Indian victims and not any other law. Now the government is destroying efficiency of legal system by bringing in such a 'legal disaster' wherein the nation surrenders its right to claim for future disasters by multinational companies to give them 'free hand' to establish nuclear power houses and sell that power to a big market called 'India".

Disaster and Compensation

An estimated 8,000 people died immediately and another 12000 thereafter, when Union Carbide's pesticide plant in Bhopal spewed deadly cyanide gas on the night of Dec. 24, 1984. Tens of thousands of others who were maimed were largely left to fend for themselves or paid inadequate compensation. Around

5 lakh affected and remain victims for ever, two generations scarred, and the air, soil and water of the city poisoned forever. How much they got in compensation: $470 million, a ridiculous amount. In 1999, Bhopal survivors filed a class action suit in U.S. courts against Union Carbide, asking that the company be held responsible for violations of international human rights aw and for the cleanup of environmental contamination in Bhopal. Nothing tangible could happen in US and the litigation came back to India and it was ultimately a settlement but not adjudication. The counsel of Union of India and Union Carbide heeded the advise of the Supreme Court to end the possibly a prolonged legal war, which might not help a suffering victim.

After purchasing Bhopal industry the Dow Chemicals has refused to accept responsibility for the tragedy or pay proper financial compensation. Strangely, Dow spent $10 million on an advertising campaign to fix their image but offered less than a million to help the people of Bhopal. On the 20th anniversary of the disaster, Bichlbaum went on British TV to claim that Dow Chemicals was belatedly accepting all the blame for the incident and would reimburse the people of Bhopal by selling off shares of the company and donating $12 million to the people affected.

Although the stunt was quickly revealed as a hoax, the result was that Dow Chemicals lost 3 billion dollars in less than a half hour during a frantic stock sell-off that followed the faux announcement.

The Union Carbide could get away lightly after causing the world's worst industrial tragedy at Bhopal. The government is aware of all that difficult and protracted process to get 470 million dollars as compensation from Union Carbide, which is one-fifth of the amount required to look after the health of those affected by the Bhopal gas leak and take care of the environmental damage it left behind. Compare this with fraudulent nuclear liability Bill the government is trying to impose on this country. The Bill, in its present form, seeks to limit all liability arising out of a nuclear accident to about $450 million and the liability of the operator only to Rs 300 crore. The difference between $450 million and Rs 300 crore (about $67 million) is the government's liability.

Considering India's population density (even stampedes at temples leave hundreds dead every year) and poor industrial safety record (radioactive material can be found in scrap markets), a nuclear accident can cause immense damage both in terms of loss of human life as well as environmental destruction.

The Bhopal case is regarded as a proof of international corporate 'immunity', instead of liability, where corporations use the laws of one nation to evade responsibility in another. With all this experience, the leaders of this country proposed under this nuclear liability bill to immune a nuclear equipment supplier

from any victim-initiated civil suit or criminal proceedings in an Indian court or in the home country.

When the civil liability is truncated by Government itself, it is almost impossible to visualize making guilty criminal liable and sent to jail. The successive governments have not shown any desire to get Warren Anderson, the criminal-in-chief of Bhopal tragedy, extradited from New Jersey, where he has been living in a mansion. When he visited Bhopal after the tragedy he was given a red carpet welcome and farewell too at airport after getting a few papers signed, might be warrant of arrest and release on bail. The criminal case first conceded to be withdrawn as a term of settlement, but after admonition from Supreme Court the trial went on till recently and judgment was reserved by the trial court in Bhopal without personally hearing Warren Anderson. There is no surprise if the trial ends in finding local managers guilty of the ghastly crime with one or two comments on the masters of disaster.

International Law of Nuclear Liability

Liability for Nuclear disasters is explained in four conventions. They are: 1. The International Atomic Energy Agency's (IAEA) Vienna Convention of 1963 (since 1977); 2. The Organization for Economic Co-operation and Development's (OECD) Paris Convention on third party liability in the field of nuclear energy of 1960 (since 1968); 3. Brussel's Supplementary Convention of 1963; 4. Convention on Supplementary Convention (CSC) 1997. The very low liability levels which were started with the Paris Convention of SDR 5 million, or 6 million Euros, to SDR 175 million (about 210 million Euros) were adopted by the Brussels Convention. However, by the 1982 Protocol, those levels were raised to SDR 300 million. In 1997, the Vienna Protocol and the Convention on Supplementary Convention (CSC) marked increased limits and set up a somewhat extensive, but still limited, definition of nuclear damage altered to include preventive steps and environmental reinstatement, and changes such as allowing compensation to residents of non-Contracting Parties and making 300 million DRs (about 360 million Euros) the minimum amount that State Parties must make available under national laws, and the CSC would provide for a supplementary fund. On the basis of installed nuclear capacity, the CSC provides for additional funds to be made available through contributions by State Parties collectively and a UN rate of assessment. Although the CSC is not functional yet and is not going to come into force anywhere in the near future, whether or not a State is party to any existing nuclear liability convention or has nuclear installations on its' territory, it may adopt to the CSC.[41]

41 Report on Civil Liability for Nuclear Damage Bill by Ajay Goyal, Anand Misra, Bikas Mohanty, Shaunak Kashyap, for Greenpeace, 2010, p. 37.

The expression "appropriate international liability regime" in objective statement of the Bill clearly refers to 'Convention on Supplementary Compensation for Nuclear Damage' (CSC) 1997, which is based on the earlier Paris and Vienna Conventions. India is not a signatory to these Conventions, and the CSC has not come into force. Before India is considered for membership of this convention, it has to bring a national law in compliance with it. While the CSC provided for absolute liability of the operator, that is the operator would be held liable irrespective of its fault, the Bill provided for contrary to it. The concerned Clause lists out the circumstances under which the "operator" will not be "liable" in case of an accident. This is also in contradiction to the accepted norms of jurisprudence in democratic countries. International Environmental law also did not provide any such exemption to operators whose industry caused a disaster. It is highly unjustifiable to include such a clause in clear departure from CSC and other basic law. Even if India becomes a signatory of CSC it would not harm the interests of the people as that provided for absolute liability. The Bill has stipulated immunity to industries in certain cases, besides limiting their liability. The range of implications of joining this Convention, the main purpose of which appears to make Supplementary Compensation available jointly by the member countries in case of a (catastrophic) accident over and above the "liability" limit of the "operator" and the concerned state also need be thoroughly examined.

Sukla Sen[42] pointed out that *the mainstream, and also radical, critics*, known to be otherwise knowledgeable, *have rather pitiably missed the central point that the essential thrust of the Bill is to enact a law defining "civil liability" in case of "nuclear damage", in compliance of the CSC, and usher in private players as "operators" and peg their "liability" at ridiculously low levels, going much beyond the framework of the CSC*. The CSC does not obligate a member state to open up its womb to private players nor does it compel the "liability" to be pegged at a level below SDR 300 million.

Of the 30 countries that operate 436 nuclear power plants, 28 countries, with 416 such plants, have some sort of nuclear liability act in force in their territories. Only India, which operates 18 nuclear power plants, and Pakistan, which has two, are neither members of any international convention nor have any national legislation. But then, India, unlike Pakistan, has a big plan for augmenting nuclear energy.

There must be a national law or bilateral arrangement or international liability regime such as the Vienna-based Convention on Supplementary

42 Sukla Sen's article: http://environmentpress.in/2010/04/02/the-civil-liability-for-nuclear-damage-bill-2010-some-tentative-observations/.

Compensation for Nuclear Damage[43] or the Paris Convention on Third Party Nuclear Liability in the Field of Nuclear Energy - for the exporter and importer to manage the liability in case any nuclear accident takes place. India is not a signatory to the Convention on Supplementary Compensation (CSC) for Nuclear Damage, which was adopted in 1997, seeks to provide complete protection for nuclear equipment suppliers. But the CSC has so far been ratified by just four countries - the United States, Argentina, Morocco and Romania. Devised by the Vienna-based International Atomic Energy Agency, the CSC comes into force after at least five countries with a minimum installed nuclear capacity of 400,000 megawatts ratify it.

This Bill is claimed to have been made as per on two nuclear liability conventions of the early 1960s, the "Convention on Third Party Liability in the Field of Nuclear Energy", or the Paris Convention of the Organization for Economic Cooperation and Development (OECD), and the Vienna Convention on Civil Liability for Nuclear Damage of 1963 under International Atomic Energy Agency (IAEA) auspices.

These conventions limited nuclear liability because nuclear power was believed to have unlimited potential for public welfare. Sixty years on, nuclear power has comprehensively belied its early promise. It is far more expensive (about twice as costly as) than electricity from fossil fuels or even renewables like wind. It is inappropriate for developing-country grids that have large peaking-power requirements. And it bristles with safety problems - from radiation exposure of occupational workers, routine radioactivity releases, LOCAs, and problems posed by high-level wastes, which remain hazardous for thousands of years. Besides, many renewable energy sources have since evolved impressively, demolishing the no-alternative-to-nuclear-power claim. The global nuclear industry, working through the IAEA, recently sponsored the Convention on Supplementary Compensation (CSC) for Nuclear Damage which works within the Paris-Vienna framework but doubles the maximum compensation, to $986 million. The global nuclear industry, working through the IAEA, recently sponsored the Convention on Supplementary Compensation (CSC) for Nuclear Damage which works within the Paris-Vienna framework but doubles the maximum compensation, to $986 million.[44]

Science and Technology Minister of Government of India claimed that the CSC was tried and tested, widely respected international treaty "the international regime for compensation payment in case of nuclear accidents". But the reality is otherwise. Since it was opened for signature in 1977, the CSC

43 http://www.iaea.org/Publications/Documents/Conventions/supcomp.htmll.

44 Praful Bidwai, A Flawed Bill, Frontline, March 27, April 9, 2010, http://www.flonnet.com/stories/20100409270709500.htm.

has only been signed by 13 states and ratified by only four countries (Argentina, Morocco, Romania and the U.S.) - in place of the minimum of five countries needed for its entry-into-force. Most of the developed countries have passed their own domestic laws on nuclear liability. Their compensation levels are not as sordid as the CSC's. States like Germany, Austria and Sweden laws did not place any cap on liability. Even the U.S. has a corpus fund of $10.7 billion for compensation. This CSC exists only on paper.

In his analysis Sukla Sen further pointed out the difference between the CSC and our Bill, saying: However, once India joins the CSC, and it comes into force, the cap on total "liability" would undergo significant change as additional compensation over and above 300 million SDR would become available. In fact the CSC also permits the concerned states to provide for further compensation, without any "cap". There must not be any overall "cap" on the quantum of compensation to potential victims. That is too unjust and inhumane. The CSC, as explained above, does not impose any such obligation to limit or cap the liability. It also does not obligate entry of private "operators". Natural justice demands that it has to relate to the actual damages caused. The overall "cap" of 300 million SDR, which works out to about US$ 460 million, is even lower than the compensation amount of US$ 470 million ratified by the Indian Supreme Court to the victims of Bhopal Gas Disaster way back in 1989.[45]

Conclusion: Draft Law on Breach of Law

The Sovereign Republic of India in its 60th year of Constitutional Rule of Law is reinventing the liability jurisprudence to detriment of people and for the benefit of MNCs. It can also be condemned because it promotes all terms of MNCs at the cost of people and future generation. The bill is virtually the Corporate Immunity for National Damage Bill 2010. It appears that Indian political rulers are apprehending post-nuclear-accident-trauma of foreign corporate bodies and scripting a legal remedy as a sequel to nuclear disaster if happens at all. 'King can do no wrong' was an old British maxim about sovereign immunity in tort (civil wrongs) law. But for modern India, the new maxim is 'MNC can do no wrong'. The jurists and activists are questioning why the state should take responsibility for the damage which might be caused in nuclear accidents resulting from nuclear reactors by enacting self-imposing liability legislation? Whether India is trying to curry favour of US companies by this law, just to secure foreign direct investment or foreign technology and the nuclear reactors to India to increase the generation of nuclear power in future?

In 1999, soon after the second Pokhran tests, the Vajpayee government initiated the process of India joining the CSC for Nuclear Damage, which is the

45 Sukla Sen's article: http://environmentpress.in/2010/04/02/the-civil-liability-for-nuclear-damage-bill-2010-some-tentative-observations/.

international regime for compensation payment in case of nuclear accidents. Simultaneously, the Vajpayee government set up a committee to study the nuclear liability regime. This committee produced a report in November 2001, which said that the Atomic Energy Act was silent about liability and compensation in case of nuclear accidents and that it was time to have a legal mechanism to clarify liability in case of nuclear accidents and join the international treaty regime for nuclear liability.

It is claimed that the IAEA is an impartial body as regards nuclear safety or regulation, its very charter commits it to promote nuclear power on the presumption that it is safe and economical. This agency has refused to involve another United Nations agency, in particular the World Health Organisation with its strong health mandate, in assessing the damage from Chernobyl. For years, it blatantly claimed that less than 30 people died in the accident - primarily firemen.[46]

Here it is pertinent to keep in mind that the CSC does not establish either a floor or a ceiling on the liability of the operator or require the concerned state to limit the liability of the "operator". It in no way makes it incumbent upon any member country to either bring in private "operator" or limit/cap its "liability" at a level lower than the "total liability" (of minimum 300 million SDR).[47]

Sidhartha Varadarajan, wrote in The Hindu[48] quoting the responses of American nuclear industry representatives. Speaking on background because of the sensitivities involved, an American nuclear industry source told The Hindu, "CSC Annex Article 3.3 says, 'The liability of the operator for nuclear damage shall be absolute' ... [But] the draft India bill has no provision making the operator absolutely liable, as required by the CSC." This objection assumes significance in the light of claims made by senior Indian officials in briefings to the media and political parties that the Rs. 500 crore cap applies only to "no-fault liability." Nuclear operators and their suppliers would continue to be exposed to claims of tortious liability - liability for damages caused through some fault of theirs - by Indian victims in the event of an accident. Indian officials cited Article 46 of the bill - which says the liability law will not take away from the provisions of the existing laws allowing action in the event of a nuclear accident - and reiterated the government's willingness to make the bill's provisions more explicit. They said the Article 35 exclusion of civil courts jurisdiction applied only to claims arising out of a 'no-fault liability'. Civil courts would remain fully empowered to

46 Praful Bidwai, A Flawed Bill, Frontline, March 27, and April 9, 2010.

47 The Convention on Supplementary Compensation for Nuclear Damage: Catalyst for a Global Nuclear Liability Regime *by Ben McRae at <http://www.nea.fr/law/nlb/nlb-79/017-035%20-%20Article%20Ben%20McRae.pdf>*

48 Sidhartha Varadarajan, The Hindu, Hyderabad, April 1, 2010.

hear tort claims. On his part, the American nuclear industry source also identified the 'right of recourse' granted to nuclear operators by the Indian bill against suppliers as a major problem area. Article 17(b) of the bill - first highlighted in The Hindu - allows the operator to sue his supplier for recovery of any damages he is forced to pay if a nuclear accident results from "the willful act or gross negligence on the part of the supplier of the material, equipment or services, or of his employee."

"Like the lack of absolute or strict liability, 17(b) is inconsistent with the CSC, as well as the Paris and Vienna Conventions and the nuclear liability laws of every other country with a nuclear power programme," the U.S. nuclear industry source said.

The American source also found fault with Article 46. "If this article means the operator would not be exempt from any other proceedings [other than criminal liability], that too would be inconsistent with the CSC requirement for exclusive operator liability. CSC Annex Article 3.9 provides, "The right to compensation for nuclear damage may be exercised only against the operator liable ... The draft bill has no such provision channelling liability exclusively to the operator."

While the Obama administration has not said anything to India about these "problem" clauses, Indian officials say they are aware that the nuclear industry association in the U.S. is beginning its lobbying drive. "They have held a meeting and it is only a matter of time before Washington raises this with us," an official said. "But they are also in a bind. After all, the Indian law is consistent with the CSC. But that doesn't mean we have to give up our rights under tort law and common law."

When basic principles such as liability to the extent of damage caused which is conveniently transferred to insurer under a risk management mechanism, polluter shall pay and no harm rule reflected in International Environmental Law, how can some conventions force the states to agree to cap the liabilities which stand to no reason or logic?. While the philosophy of sustainable development is universally agreed, how can any convention or law give primacy to development to the global environment and lives of people?

If the above referred conventions contradict other conventions of environment and sustainable development, the law proposed by India is further dilution of both international and municipal law of liability. The Bill virtually says 'you do what ever you want and just do not pay more than 500 crores of rupees'. We are making a solemn promise that we do not make any body other than local company liable for any disaster caused by any reactor sold by any country. In one word the civil nuclear liability bill is a suicide pact with a promise

of no liability. It is against all basic norms of international or national liability for wrongs perpetrated against human beings and humanity at large. Why should people of India guarantee benefit, profit and cover all the losses in favour of wrong doing nuclear power MNCs?

Is it a draft law aiming at limiting liability only to the operator and awarding immunity to producer or any other player? How far it is proper to offer legal immunity or reduce the liability to those who install nuclear reactors which can cause nuclear dangers in its general operations? It is pathetic that we offer in golden plate the lives and golden environment of this great country to international corporate thugs in the name of 'energy development'. This bill is in the form of a pledge that we do not make any claim against suppliers and producers of defective nuclear reactors, and not claim beyond Rs. 500 crore from operators even if thousands of us are killed and valuable environs are destroyed. The liability jurisprudence evolved from fault-based liability to no-fault liability emerging into absolute liability. This bill proposes retrograde law limiting liability in general and granting absolute immunity to some, imposing liability on the state itself in brazen violation of international liability norms, Constitutional principles, profound judicial pronouncements and environmental enactments.

What cannot be included in agreement, in the interest of people and the environment, is being made into a law. A government elected for five years, is attempting to inflict a permanent damage on coming generations depriving their right to remedy and to full compensation to the damage suffered.

For these reasons, this Civil Nuclear Liability Bill should not become law in present form. Better we do not have any law in its place because this bill is a manifestation of unreasonable bias towards the global nuclear industry and commerce with scant regard for human life in India. The purpose of making law is to provide for enforceable remedies but not to deny the remedies which were developed over a period of time. This Bill is denial by 'law' of decent compensation to the suffering public. Even if there is strong law, there is no possibility of enforcement bending Indian big industry to abide by it. But our existing law is not that strong and leaves so many problems and thus it does not work against a strong MNC which is beyond the jurisdiction of India. Instead of making a strong law making the makers, suppliers and operators liable jointly and severally for the cumulative loss of life, property and environment, by defining vicarious liability of principal companies for the damages caused by their subsidiaries and imposing criminal liability with specific legislative frame, state chose to deny what is already available to people under un-codified principles of liability developed by Supreme Court of India. When the law itself allows openly an unreasonable limit on 'operator' and absolute immunity on 'supplier' or 'Parent Corporation headquartered elsewhere, what kind of justice it can

render to the future victims of possible nuclear accidents? If tested on what our Constitution and judiciary laid down over a period of time, the Act of this nature cannot stand scrutiny of the constitutional court.

Finally, this bill is totally unwarranted and good if withdrawn. If the Government has a strong will to provide perfect systems of liability and remedies, there should be a comprehensive law to impose civil liability on principal companies, manufacturers along with operators. Absolute liability norms which are scattered in judgments and various laws or rules should be codified into law. Following is the table of demerits of the Bill and suggestions to remove the damage going to be caused by the Bill.

The Damage Bill 2010	***To remove the Damage by Bill***
Section 1(3) Bill extends to Territorial Waters, Continental shelf, Maritime Zones, on board Ships and Aircrafts and artificial islands.	*With various limitations on liability provided in other sections, this extension becomes meaningless.*
Section 2(f) *defines nuclear damage in extensive terms. Covers human, property, economic, environmental losses and costs of preventive measures too.* 2 (*f*) "nuclear damage" means- (*i*) loss of life or personal injury to a person; or (*ii*) loss of, or damage to, property, caused by or arising out of a nuclear incident, and includes each of the following to the extent notified by the Central Government; (*iii*) any economic loss, arising from the loss or damage referred to in clauses (*i*) or (*ii*) and not included in the claims made under those clauses, if incurred by a person entitled to claim such loss or damage; (*iv*) costs of measures of reinstatement of impaired environment caused by a nuclear incident, unless such impairment is insignificant, if such measures are actually taken or to be taken and not included in the claims made under clause (*ii*); (*v*) loss of income deriving from an economic interest in any use or enjoyment of the environment, incurred as a result of a significant impairment of that environment	*Because this definition covers almost all imaginable losses, it leaves no scope for any body to claim a relief or compensation. Good definition, but because of limitations and exemptions provided in other sections does not serve purpose.* ***Limitations should be removed and every element of nuclear damage has to be compensated.*** *Definition of "nuclear damage" covers "impaired environment".* *There is no provision as to who can lodge claims for "costs of measures of reinstatement" as mentioned therein.* *Any public spirited group or citizen, apart from public bodies like Gram Sabha, panchayat, municipality etc. and affected persons, must be entitled to raise such claims.*

caused by a nuclear incident, and not included in the claims under clause (*ii*); (*vi*) the costs of preventive measures, and further loss or damage caused by such measures; (*vii*) any other economic loss, other than the one caused by impairment of the environment referred to in clauses (*iv*) and (*v*) in so far as it is permitted by the general law on civil liability in force in India and not claimed under any such law, in the case of sub-clauses (*i*) to (*v*) and (*vii*) above, to the extent the loss or damage arises out of, or results from, ionizing radiation emitted by any source of radiation inside a nuclear installation, or emitted from nuclear fuel or radioactive products or waste in, or of, nuclear material coming from, originating in, or sent to, a nuclear installation, whether so arising from the radioactive properties of such matter, or from a combination of radioactive properties with toxic, explosive or other hazardous properties of such matter;	
Section 3. ***Atomic Energy Regulatory Board shall notify nuclear incident.*** **3.** (*1*) The Atomic Energy Regulatory Board constituted under the Atomic Energy Act, 1962 shall, within a period of fifteen days from the date of occurrence of a nuclear incident, notify such nuclear incident: Provided that where the Atomic Energy Regulatory Board is satisfied that the gravity of threat and risk involved in a nuclear incident is insignificant, it shall not be required to notify such nuclear incident.	*It shall notify every incident causing damage and accident causing serious damage. Whether damage is substantial or not, there is a duty to compensate every loss. Word 'Accident' be added and Proviso be removed. Non-notification shall be considered as dereliction of duty and penal consequence should be prescribed* ***Any private citizen, or group, should have the right to draw the attention of the AERB to an alleged "incident' in case it is not notified by the AERB suo moto. The AERB shall duly examine and respond to such request.***

Section 4. ***Liability of operator.***	*This section explains various kinds of situations wherein liability arises but proviso states that liability is limited as prescribed by section 6.*
4. (*1*) The operator of the nuclear installation shall be liable for nuclear damage caused by a nuclear incident-	
(*a*) in that nuclear installation; or	
(*b*) involving nuclear material coming from, or originating in, that nuclear installation and occurring before-	
(*i*) the liability for nuclear incident involving such nuclear material has been assumed, pursuant to a written agreement, by another operator; or	
(*ii*) another operator has taken charge of such nuclear material; or	***Liability of operator should be joint and several along with makers and suppliers including principal companies.***
(*iii*) the person duly authorized to operate a nuclear reactor has taken charge of the nuclear material intended to be used in that reactor with which means of transport is equipped for use as a source of power, whether for propulsion thereof or for any other purpose; or	
(*iv*) such nuclear material has been unloaded from the means of transport by which it was sent to a person within the territory of a foreign State; or	
(*c*) involving nuclear material sent to that nuclear installation and occurring after-	
(*i*) the liability for nuclear incident involving such nuclear material has been transferred to that operator, pursuant to a written agreement, by the operator of another nuclear installation; or	*To be further added:* ***The operator shall deposit a sum of 300 million SDR in an escrow account for each nuclear reactor to be operated before start of operation.***
(*ii*) that operator has taken charge of such nuclear material; or	
(*iii*) that operator has taken charge of such nuclear material from a person operating a nuclear reactor with which a means of transport is equipped for use as a source of power, whether for propulsion thereof or for any other purpose; or	
(*iv*) such nuclear material has been loaded, with the written consent of that operator, on the means of transport by which it is to be carried from the territory of a foreign State.	

Section 4(2). ***Joint liability of all operators.***	*It explains in detail the liability of the operator and discusses in minute aspects the liability of separate operators, and says where separation is not possible the liability is joint and several. Again it is limited by a cap in section 6.*
Section **4** (*2*) Where more than one operator is liable for nuclear damage, the liability of the operators so involved shall, in so far as the damage attributable to each operator is not separable, be joint and several: Provided that the total liability of such operators shall not exceed the extent of liability specified under sub-section (*2*) of section 6.	***Makers and suppliers should be added for imposing liability.***
(*3*) Where several nuclear installations of one and the same operator are involved in a nuclear incident, such operator shall, in respect of each such nuclear installation, be liable to the extent of liability specified under sub-section (*2*) of section 6.	
Explanation - For the purposes of this section -	
(*a*) where nuclear damage is caused by a nuclear incident occurring in a nuclear installation on account of temporary storage of material-in-transit in such installation, the person responsible for transit of such material shall be deemed to be the operator;	
(*b*) where a nuclear damage is caused as a result of nuclear incident during the transportation of nuclear material, the consignor shall be deemed to be the operator;	
(*c*) where any written agreement has been entered into between the consignor and the consignee or, as the case may be, the consignor and the carrier of nuclear material, the person liable for any nuclear damage under such agreement shall be deemed to be the operator;	
(*d*) where both nuclear damage and damage other than nuclear damage have been caused by a nuclear incident or, jointly by a nuclear incident and one or more other occurrences, such other damage shall, to the extent it is not separable from the nuclear damage, be deemed to be a nuclear damage caused by such nuclear incident.	
Section 5. ***Liability and immunity of operators.***	**Section 5 (1)(ii)** ***should be removed****. This should be absolute liability. Only possible exception is grave natural disaster.*
5. (*1*) An operator shall not be liable for any nuclear damage where such damage is caused by a nuclear incident directly due to-	*Immunity under 5(2) is meaningless, why should installation suffer*
(*i*) a grave natural disaster of an exceptional character; or	

(*ii*) an act of armed conflict, hostility, civil war, insurrection or terrorism. (2) An operator shall not be liable for any nuclear damage caused to- (*i*) the nuclear installation itself and any other nuclear installation including a nuclear installation under construction, on the site where such installation is located; and (*ii*) to any property on the same site which is used or to be used in connection with any such installation; or (*iii*) to the means of transport upon which the nuclear material involved was carried at the time of nuclear incident:	*from the acts of operator, without any remedy of compensation?* ***This immunity should be removed. The corresponding CSC clause - Annex, Articles 3, 5. b. - provides that national law may have provision to drop such circumstances from the list of exceptions. Clause 591)(ii) does not figure in the corresponding CSC Clause: Annex, Articles 3, 5. a.*** *The concept of "strict liability" being the foundational concept, such exceptions, and consequent transfer of liability for damage under such circumstances to the "Central Government" and thereby to the Indian taxpayers, in case of a private operator, is wholly undesirable and unjustified.*
Proviso to Section 5 Liability Provided that any compensation liable to be paid by an operator for a nuclear damage shall not have the effect of reducing the amount of his liability in respect of any other claim for damage under any other law for the time being in force.	*Securing liability under other law is good. But how many proceedings that law will allow for claiming damages. Because of rule that one cause of action arises out of one wrong,, this provision may not help the victims. This law prohibited other actions for claiming damages other than under this law.*
Section 5 (*3*) Where any nuclear damage is suffered by a person on account of his own negligence or from his own acts of commission or omission, the operator shall not be liable to such person.	*This is against the norms and principles of compensation as prescribed under Workmen'' Compensation Act, 1923.* ***This has to be removed.***
Section 6. ***Capping liability*** 6. (*1*) The maximum amount of liability in respect of each nuclear incident shall be the rupee equivalent of three hundred million Special Drawing Rights.	***Most unlawful and unreasonable provision of this Bill, and should be deleted outright.*** *Liability should commensurate the damage and*

(2) The liability of an operator for each nuclear incident shall be rupees five hundred crores: Provided that the Central Government may, having regard to the extent of risk involved in a nuclear installation, by notification, either increase or decrease the amount of liability of the operator: Provided further that where the amount of liability is decreased, it shall not be less than rupees one hundred crore: Provided also that the amount of liability shall not include any interest or cost of proceedings.	*compensate every loss. Penalty in proportion to guilt and compensation to wipe out the loss are basic and universal norms. A government elected for five years has no authority to sacrifice this right of future generations for benefit of a business company. Remove all limits on liability. Do not deny the rights of people by passing a new law. It is unconstitutional, against the norms of Environmental law, International Law, etc.* *How can the Government deny the interest and cost of proceedings if the victim is otherwise entitled to?* ***The Convention for Supplementary Compensation (CSC) does not obligate the GoI to go in for such differentiated liabilities, one for private operator and another for the state affiliated operator.*** ***This provision has to go.*** *In case of Bhopal gas disaster, the compensation amount settled (to be paid by the UCC) back in 1989 was 470 million US $. That was pretty much inadequate.* *In case, of oil spill in the Gulf of Mexico, the BP has committed an initial amount of US $ 20 billion. And there will be no cap. In the US, in case of a nuclear accident, the first 300 million US $ to come from the respective insurance cover, then up to US $ 10 billion from a common pool of funds maintained by the nuclear industry. Beyond that, the Federal Government, without any cap. (Ref.: P. 2/4 of 'The Price-Anderson Act: Background Information: November 2005' at <http://www.ans. org/pi/ps/ docs/ps54- bi.pdf>.)*
Section 7. ***Liability of Central Government*** 7. The Central Government shall be liable for nuclear damage in respect of a nuclear	*If a government, who is not supplier, operator, or investor can be made liable for the damage caused by accident, it can be*

incident, - (*a*) where the liability exceeds the amount of liability of an operator specified under sub-section (*2*) of section 6, to the extent such liability exceeds such liability of the operator; (*b*) occurring in a nuclear installation owned by it; and (*c*) occurring on account of causes specified in clauses (*i*) and (*ii*) of subsection (*1*) of section 5.	*called absolute liability which stricter than absolute liability recognized, where even Act of God or Civil war is no defence. Then why not this liability be extended to maker/supplier and operator? Why should Government spend people's money to pay people's loss caused by MNC?*
Section 8. ***Insurance cover to limited liability*** **8.** (*1*) The operator shall, before he begins operation of his nuclear installation, take out insurance policy or such other financial security, covering his liability under sub-section (*2*) of section 6, in such manner as may be prescribed. (*2*) The operator shall from time to time renew the insurance policy or other financial security referred to in sub-section (*1*), before the expiry of the period of validity thereof. (*3*) The provisions of sub-sections (*1*) and (*2*) shall not apply to a nuclear installation owned by the Central Government.	*When even Motor Vehicle Act imposes a statutory obligation on owners of vehicles to insure their 'unlimited' liability towards third parties, how can insurance of nuclear operator be limited?* ***"Under Sub-section (2) of Section 6" should be removed.***
Section 9. ***Claim Commissioners*** **9.**(*1*) Whoever suffers nuclear damage shall be entitled to claim compensation in accordance with the provisions of this Act. (*2*) **For the purposes of adjudicating upon claims for compensation in respect of nuclear damage, the Central Government shall, by notification, appoint one or more Claims Commissioners for such area, as may be specified in that notification.**	*It should be called special nuclear claims courts and be made independent in function so that they decide liability and do justice. But the hands of these commissioners are tightened with limitations.* ***Remove these limitations.*** *The Claims Commission must include member(s) of the medical profession with an established track record of engaging with people's health issues to ensure the proper assessment of the health impact of an "incident".*

Section 15. Procedure for claims **15.** (*1*) Every application for compensation before the Claims Commissioner for nuclear damage shall be made in such form, containing such particulars and accompanied by such documents, as may be prescribed. (*2*) Subject to the provisions of section 18, every application under sub-section (*1*) shall be made within a period of three years from the date of knowledge of nuclear damage by the person suffering such damage.	*Prescribing such forms as mandatory will limit the rights of the victims.* ***These forms should not be made compulsory though advised to be used.***
Section 16(3). Order to restrain the operator who is likely to remove the property. (*3*) Where an operator is likely to remove or dispose of his property with the object of evading payment by him of the amount of the award, the Claims Commissioner may, in accordance with the provisions of rules 1 to 4 of Order XXXIX of the First Schedule to the Code of Civil Procedure, 1908, grant a temporary injunction to restrain such act.	***It is good but not enough; it should be empowered to attach the property also.***
Section 17. ***Right to recourse when contract is there.*** **17.** The operator of a nuclear installation shall have a right of recourse where - (*a*) such right is expressly provided for in a contract in writing; (*b*) the nuclear incident has resulted from the willful act or gross negligence on the part of the supplier of the material, equipment or services, or of his employee; (*c*) the nuclear incident has resulted from the act of commission or omission of a person done with the intent to cause nuclear damage.	***Right to recourse is available whether there is contract or not. This provision limits the right unreasonably.*** ***The right under (b) should extend against manufacturer also.*** ***The contract between any and every operator and its supplier(s) (of equipment, material or services, as the case may be) must include in writing a provision to the effect that the operator shall have the right of recourse in case of an "incident" without any exception, including as regards the damage to the equipment/plant/ site.***

Section 18. ***Right to claim extinguishes in 10 years.*** **18.** The right to claim compensation for any nuclear damage caused by a nuclear incident shall extinguish if such claim is not made within a period of ten years from the date of incident notified under sub-section (*1*) of section 3: Provided that where a nuclear damage is caused by a nuclear incident involving nuclear material which, prior to such nuclear incident, had been stolen, lost, jettisoned or abandoned, the said period of ten years shall be computed from the date of such nuclear incident, but, in no case, it shall exceed a period of twenty years from the date of such theft, loss, jettison or abandonment.	***There should not be such limit at all.***
Section 20. ***Nuclear Damage Claims Commission*** 19. Where the Central Government, having regard to the injury or damage caused by a nuclear incident, is of the opinion that- (*a*) the amount of compensation may exceed the limit specified under sub-section (*2*) of section 6; or (*b*) it is expedient and necessary that claims for such damage be adjudicated by the Commission instead of Claims Commissioner; or (*c*) it is necessary in the public interest to provide special measures for speedy adjudication of claims for compensation, the Central Government may, by notification, establish a Nuclear Damage Claims Commission, for the purposes of this Act.	***It totally depends on Govt. opinion. If Govt. thinks compensation is sufficient there will be no commission.*** ***Only bureaucrats cannot decide independently. It should consist of independent members from judiciary and people's agencies without bureaucrats because they are not trained to assess the claims.***
Section 35. No injunction can be given by Courts. 35. No civil court shall have jurisdiction to entertain any suit or proceedings in respect of any matter which the Claims Commissioner or the Commission, as the case may be, is empowered to adjudicate under this Act and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.	***Section 5 Proviso says the choice of claiming damages under other laws is available. That is denied here in Section 35.***
Section 39. Offences and Penalties, 5 years imprisonment **39.** (*1*) Whoever- (*a*) contravenes any rule made or any direction issued under this Act; or	*These offences are breach of order by Commission, not taking insurance cover for limited liability and not depositing amount in advance.*

(*b*) fails to comply with the provisions of Section 8; or (*c*) fails to deposit the amount under Section 36, shall be punishable with imprisonment for a term which may extend to five years or with fine or with both.	***Here criminal liability provision should be made: If the act leads to death of human being, operator shall be prosecuted for murder.***
Section 40. ***Offences by Companies***	***Principal company should be made liable jointly along with subsidiary company.*** *It is against the principle of command responsibility and thereby would ensure that minions are punished in case of violations and senior officers go scot free.* *This has to be amended as:* ***Provided that nothing contained in this sub-section shall render any such person liable to any punishment under this Act, if he proves he exercised all due diligence to prevent the commission of such offence. "that offence was committed without his knowledge or": to be deleted.***
Section 47. ***Protection for action taken in good faith***	*No such immunity in operating a nuclear plant/installation is called for. Such immunity will only engender criminal negligence and worse.* *Instead of this or along with this there should be a provision to impose liability for action taken not in good faith, or done without due care or caution, or negligently done.*

LEGAL PROBLEMS RELATING TO PARENTAGE

Subhash Chandra Singh*

Introduction

The emergence of new reproductive techniques has offered new opportunities for many infertile couples to become parents. But at the same time it created a new problem in the areas of parentage and legitimacy of children. According to legislation in most countries, only children born to legally married couples are considered legitimate, while children born out of wedlock are regarded as illegitimate. In these later instance, the mother alone acts as parent for all purposes. Apart from this, the status of children resulting from assisted reproductive techniques has been under discussion for some years. The categories of technologies used for assisting reproduction which range from simple or low techniques such as artificial insemination of the women by the sperm of the donors (AID) to high tech options such as *in vitro* fertilisation (IVF).[1]

The use of AID or IVF with donated gametes gives rise to links of affiliation which include a third person and may disrupt personal relationships from the legal standpoint. Despite the novelty of these medical techniques, the element constituted by the third person in filial relationships is not entirely unknown in family law. It was necessary to make allowance for it even in relation to the first presumption of paternity. It was also known that, in relation to illegitimate affiliation, the man recognising paternity was often aware that he was not the parent. It often happened that the person who had been declared the father by a judicial decision was not the biological father. It was only in respect of maternity that it was possible to use the Roman maxim *mater semper certa* with certainty.[2]

In addition to the problems mentioned above there is the question of the relationship between male or female donors and the child. This is the situation where the legislature (or the court) encounters new situations associated with the problem of affiliation. Advances in science and medicine have, today, even put in doubt the Roman maxim that *mater semper certa est*, and issues raised

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1 Rainer Frank, *The Establishment and the Consequences of Maternal and Paternal Affiliation*, paper presented at the XXVII Colloquy on European Law, organised in Valletta, from 15-17 September, 1997, by the Council of Europe and the Foundation of International Studies at the University of Malta.

2 Supra n. 1.

by surrogate mothers and donated gametes or embryos are attracting widespread interest and concern. One of the fundamental issues today is as to by whom and under what circumstances can legitimacy be attacked. The principle *pater est quem nuptiae demonstrant* is widely accepted as a general rule, but there is increasing evidence of its weakening. The husband is given an obvious right to contest filiations (in certain circumstances and within a stipulated time limit). I feel that the discussion on the more traditional areas of parentage should prove fruitful and innovative. Thus, the purpose of our study is to review the traditional principles of parentage in the context of children born as a result of AID or IVF techniques.

Under the current legal system as in practice in different countries there are three possible ways of getting affiliation of children. Firstly, there is the affiliation of children conceived by natural procreation - which is the case of the vast majority of cases. Children conceived using an assisted method of procreation achieved using the parental couple's gametes may be equated therewith. Secondly, there is the situation of adopted children; and lastly the situation of children conceived by medically assisted procreation achieved by way of donated gametes or embryos, or that of children born to surrogate mother, the later case being the most complex.[3]

Basic Principles of Affiliation

The international efforts to establish a common basis in order to approximate and harmonise the domestic laws of different countries on affiliation has been completely ignored by the Convention on the Rights of the Child (CRC). As regards illegitimate affiliation it is possible to use different rules as prevalent in different countries. These rules are based on presumptions. The oldest one is the *pater est* rule. The discussions on the traditional principles of maternal and paternal affiliation should prove fruitful.

The *pater est* Rule of Affiliation

Originally, the *pater est* rule was for the most part an irrefutable rule of affiliation. The husband of the child's mother was considered the father of the child even whether it was obvious that he could not possibly have procreated the child. For example, Article 316 of the original version of the Napoleonic Code provided the husband (and only the husband) with the right to contest affiliation. However, the time limit for the exercise of this right was one month after the birth of the child (in special circumstances it was two months).

Even though there is general international adherence to the *pater est* rule in principle, there is increasing evidence of its weakening. A study of the legal development of a number of countries has shown that the *pater est* rule is

3 Supra n. 1.

gradually turning into a mere legal presumption which is becoming less and less significant in light of modern medical technology (blood test and DNA tests).[4] To a certain extent, the importance of the "blood" (and hence biological) link as the basis of legal affiliation has declined owing to the preference given to adopting affiliation and the inclination to maintain what is known as "social" paternity or maternity. Regulations of various countries based on Roman law give preference to certainty in that they prohibit the questioning of the legitimacy of a child, when such legitimacy results from an official document and is supported by legitimate material status.[5]

The rigours of *pater est* rule is that the natural father is either denied the right of parentage especially if the husband is willing to raise the adulterous child as his own, or is made subject to various restrictions which in law or in reality, make success extremely difficult. In some countries, for example, a search for natural filiations would require the consent of the mother or of the child if he/she is of age; if consent is refused the father would need to seek court authority.

Possession *d'etat* Rule

While it is true that most countries have adopted the *pater est* rule whereby a child born in wedlock is legally affiliated to the mother's husband even in cases where the spouses have been separated for years. In contrast to this, French law rigidly focuses on the existence of the marriage by means of a factual criterion, the so-called possession *d'etat* of the child or the de facto "possession of status".[6]

To be able to speak of affiliation under the *possession d'etat* rule the persons concerned must generally have had a genuine relationship, which may be evidenced by factual circumstances, such as their cohabitation, the personal contacts which they maintain with each other, the material aid which they obtain from each other, etc. The mere fact of a biological link is not sufficient to support the conclusion that family life exists; this is, in fact, a vital point in the field of law of descent.

The concept of possession of status is peculiar to French law and the so-called Roman law systems that follow French law. It is foreign to the other legal systems, which generally reject it on account of its uncertainty. Even in

4 *Ibid.*

5 According to the law of most countries today, every child who is born in wedlock is considered to be legally affiliated to the mother's husband, provided that the husband himself or other persons with standing have failed to contest affiliation successfully within the prescribed period.

6 In many countries the possession of status is a way of providing affiliation, by expressing ties of affection. It corresponds to a sociological reality to which the law attributes consequences with regard to the establishment of affiliation. Australia, Germany, Greece, Switzerland and Turkey in Europe do not recognise this concept.

France, there is controversy over the circumstances under which the possession of status should be considered appropriate for a child.

The Common European Heritage

The relations between reality as it exists in every society and the legal order in force are always very complicated. Each influences the other. It is well known that the law, by its very nature, tends to be conservative. At common law, a child conceived following the use of donated gametes would be considered illegitimate. It is likely that the donor would be legally considered the father or mother of the child, and have all the rights and obligations attendant upon such a status. The common law rules governing legitimacy of children have been modified in most European countries by legislation and international human rights norms.

Up to now there has been no interference with legitimate affiliation, while in the case of illegitimate affiliation, it is possible to make use of the European Convention on the Status of Children Born out of Wedlock of 1975, but nothing therein expressly addresses the problems of medically assisted procreation. The common principles which have been developed by common consensus and human rights standards, by Europeans, are relevant to worth citing here, which are not limited to just Europe, but can be adopted by all. The principles require that we:[7]

- preserve the exclusivity of maternal and paternal affiliation as well as those transparency and stability and ensure that it is not legally possible to extend them;
- preserve the primacy of maternity from which paternity can only be inferred;
- preserve the validity of maternity being inferred from the fact of giving birth;
- preserve at least in civil law, the system of the three presumptions of paternity (and in common law the rule *pater est* with freedom to establish illegitimate paternity);
- preserve the rational combination of the predominant element of biological truth with the additional element of what the real life situation actually is;
- observe the principle of non-interference with the private lives of families without their consent;
- implement as far as possible, the principle of non-discrimination between father and mother and between legitimate and illegitimate children as

7 The Third European Conference on Family Law - Proceedings, Cardiz, Spain, April 20-22, 1995, especially the Report by M.T. Meulders-Klein and the Conclusions of the Conference.

regards affiliation;

- remember that the link of affiliation can only be formed in law between physical persons who have come into existence, but that survives after death;
- remember that in the matter of affiliation there should be no "leapfrogging" across the generations, especially in the direct line; and
- remember that incest is still abhorrent to European ethical and legal thinking and that it must not be brought about artificially.

Presumption of Maternity and Paternity

Presumption of maternity and paternity and the stability of the child's status must generally prevail over other interest. That is the reason why legal presumption is always in favouring of legitimacy. It is worth citing the Report of CAHBI in this regard:[8]

1. The woman who gave birth to the child is considered in law as the mother.[9]
2. In case of utilisation of sperm of a donor :
   a) the mother's husband is considered as the legitimate father and, if he has consented to the artificial procreation, he may not contest the legitimacy of the child on the grounds of artificial procreation;[10]
   b) if the couple is not married, the mother's companion who gave his consent cannot oppose the establishment of parental responsibilities in relation to the child, unless he proves that the child was not born as a result of artificial procreation.[11]
3. When the gametes donation is made through the intermediacy of an authorised establishment, no filial relationship may be established between the donor of the gametes and the child conceived as a result of artificial procreation. No proceedings for maintenance may be brought against a donor or by a donor against a child.[12]

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8 CAHBI Report, Principle 14.

9 Point one of Principle 14 emphasises, *inter alia* that the surrogate mother must be regarded as any other mother and that while the gestation principle is decisive, the genetic principle is not—where another woman's ovum is used.

10 As regards legitimate paternity (point 2a), it will be noted that the above-mentioned principle is supported by the first presumption of paternity and that the stability of the child's status must generally prevail over other interests.

11 Point 2b is based on the observation that the opportunities for mother's companion to be relieved of his obligations towards the child are limited.

12 The explanation of point 3 makes clear that it was not the intention to relieve the donor of any duties which he might have, except in the case of medical intervention carried out in accordance with the law.

The problems for affiliation arising from progress in modern medicine are only a part of the factors which make their demands on the legal regulation of relationships. The main question here is of the relationship between male or female donors and the child. Perhaps it is more prudent to speak of "birth" rather than of "giving birth", which conjures up the image of spontaneity, because the child may also be delivered by Caesarean section or by other medical intervention even after the mother's death. As regards the illegitimate children, it is possible to use of the European Convention on the Status of Children Born out of Wedlock of 1975, in particular Articles 2, 3 and 4, but nothing therein expressly addresses the problem of medically assisted procreation.

Links of Affiliation in Case of Medically Assisted Procreation

The advances in reproductive biology that have made it possible to produce human pre-embryos *in vitro* have been among the most significant scientific achievements of the past 35 year. For many couples who were previously considered sterile, the emergence of these new techniques to alleviate infertility has offered new opportunities to conceive. Suffice it to say that in connection with affiliation, two essential medical techniques are of interest to use in the present context: artificial insemination of the woman by the sperm of the donor (AID) and *in vitro* fertilisation (IVF) with the subsequent transfer of the embryo into the uterus if the gametes coming at least in part from the donor are used (sperm of the donor and/or ovum of the donor). AID is used extensively throughout the world, and today thousands of infertile couples have children who were conceived through an AID programme.

The use of AID or IVF with donated genetic materials may sometimes pose a serious problem to links of affiliation. The legal system is not completely free to determine the way in which to solve the problem associated with reproductive technologies. The legislation and regulations of AID practice in most European countries require the consent of the donor, the recipient and the recipient's husband. Some of the techniques used are described below.

Sperm Donation

Artificial insemination with donor semen is indicated in cases of male infertility or when the husband is a carrier of serious inherited diseases or abnormality.[13] The sperm used could be that of her husband or partner- referred to as artificial insemination by husband's sperm (AIH); or that of a donor, referred to as artificial insemination by donor sperm (AID). The latter is resorted to when the husband/partner is infertile, has a low sperm count (azoospermia), or a genetic disorder which the parents do not want to pass on to the offspring. In

13 J.G. Schenker, Assisted Reproduction Practice in Europe: Legal and Ethical Aspects, *Human Reproduction Update,* Vol.3 No.2 173-184 (1997).

cases of sperm donation, the need for female consent by the husband is more important. The consenting husband is listed on the birth certificate as the father and has the rights and duties for rearing the child, so that the offspring becomes his legitimate child. The donor has no rights, obligations or interest with regard to the child born as a result of AID, and the child has no rights of legation or interest toward the donor in any current system.

The Roman Catholic Church is opposed to artificial insemination altogether, viewing it as sinful, since it involves masturbation and because it breaks what it considers the 'inseparable connection between the two meanings of the conjugal act: the unitive meaning and the procreative meaning', precisely the same grounds on which the Vatican bans contraception.[14] It views artificial insemination by donor as adulterous and a violation of the sanctity of marriage. Islam also considers AID adulterous. Some others too believe that it is no different from adultery - 'technological adultery'[15] - medical technology having only given it a label of 'decency' and taken away the 'immorality' associated with it. It also rules out jealousy on the part of the husband or legal partner, as the woman is not actually sleeping with another man, in this case the sperm donor.

Oocyte Donation

Oocyte donation falls into two categories (i) women with ovarian failure, and (ii) women with loss of gonadal function.[16] It seems that where AID is already accepted, oocyte donation should not constitute any ethical problem, since with the later method there are fewer controversial issues than with AID. Oocyte donation has an advantage over AID in that both the infertile woman and the husband contribute to the birth of the child. Furthermore, from the point of parentage law, the child born is considered the child of the mother who gave birth. In all countries where AID is permitted, the oocyte donor has no rights or obligations with respect to the child.

Egg Donation

While earlier it was only donor semen that was used, now donor eggs are often used in infertility treatment.[17] The latter is a much more complicated process than AID. From the point of law, eggs donation can be dealt with in the

14 C. Krauthammer, Artificial Babies, Artificial Families, Artificial Sex: The Ethics of Human Manufacture, *The New Republic*, 17-21, May 4, 1987.

15 V. Stolcke, New Reproductive Technologies: The Old Quest for Fatherhood, *Issues in Reproductive and Genetic Engineering*, Vol. I, No. 1, 5-19 (1988).

16 J.G. Schenker, The Therapeutic Approach to Infertility in Cases of Ovarian Failure, *Ann. N. Y. Acad. Sci.,* 626, 414-430 (1991).

17 Jyotsna Agnihotri Gupta, *New Reproductive Technologies, Women's Health and Autonomy : Freedom or Dependency,* 352 (2000).

same manner as AID. The child born is considered the child of the mother who gave birth. In all the countries in Europe the egg donor has no rights or obligations with respect to the child. At present, eggs donation is practiced in more than 10 countries in Europe, and is forbidden by legislation in Austria, Germany, Norway, Sweden and Switzerland.

Embryo Donation

The issue of embryo donation creates more complexity in the area a parentage, since there is no direct link between the embryo and the further rearing of parents, even though there will be a gestational link.[18] In embryo donation the relationship is analogous to that of adoption, and the only difference is the time at which adoption occurs. The arguments in favour of the practice are that it is preferable to adoption, since the rearing mother contributes the uterus and the rearing father commits himself to the child even before implantation. Principle 12 of the CAHBI Report specifically bans the transfer of embryos. Embryo donation is practiced in about 8 countries in Europe. In countries where embryo donation is practiced, informed consent is needed both from the gamete donors and the recipient parents. Neither the donors are informed about the outcomes of their donation, nor will they have any control over the child who is their genetic offspring.

Surrogate Pregnancy

A child born of a mother known as a "surrogate mother"[19] should normally enjoy the same personal status as any other child, without discriminatory rules. Acceptance of the practice of surrogate mothers varies throughout the world, and the frequency with which it occurs differs substantially. The practice seems to be more readily accepted in the United States than in any other countries. The legislation relating to these practices is a separate problem. Currently, the legal practice of surrogacy in Europe and Asia is limited. It is practiced according to legislation only in two countries in Europe, i.e. the U.K. and Israel. In Israel, the legislation gives the rights to surrogate mother to appeal to the District Court during the first 7 days after delivery to be allowed to break the contract and keep the child. When the surrogate does not object to handling over the child, the responsibility for the child born is that of the commissioning couple.[20]

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18 J.G. Schenker, Transplantation of Foetal Tissue, Gametes and Organs, in C. Sureau (ed.) *Ethical Aspects of Human Reproduction,* 149-163 (1995).

19 A surrogate mother is defined as a woman who carries a foetus and bears a child on behalf of another person or persons, having agreed to surrender the child to this or those persons at birth or shortly thereafter. Principle 1 of CAHBI defines surrogate mother as a woman who carries a child for another person and has agreed before pregnancy that the child should be handed over after birth to that person.

20 Israel Surrogacy Law 1995.

It is worth citing the report of CAHBI in respect of surrogate motherhood. Principle 15 states:

1. No physician or establishment may use the techniques of artificial procreation for the conception of a child carried by a surrogate mother.
2. Any contract or agreement between surrogate mother and the person or couple for whom she carried the child shall be unenforceable.
3. Any action by an intermediary for the benefit of persons concerned with surrogate motherhood as well as any advertising relating thereto shall be prohibited.
4. However, states may, in exceptional cases fixed by their national law, provide, while duly respecting paragraph 2 of this principle, that a physician or an establishment may proceed to the fertilisation of a surrogate mother by artificial procreation techniques, provided that:
   (a) the surrogate mother obtains no maternal benefit from the operation;
   (b) the surrogate mother has the choice at birth of keeping the child.

There are variations within surrogacy. There is 'genetic' surrogacy and 'gestational' (full) surrogacy. In the first case, the woman is inseminated with the sperm of the commissioning father, while in the latter she receives an embryo from somewhere else.[21] In genetic surrogacy the egg cells are her own and she provides her uterus.[22] It is hard to compare a donation of sperm with gestation, whether the ovum comes from the "carrier" mother or from the woman of the couple who obtain her services. The fact that the "carrier" mother is precluded from the decision as to the continuation of her legal link with her child does not appear very problematic, at least from the standpoint of the protection of human rights.

The Rights of Biological Father/Mother to Contest Affiliation

There are only few countries in the world that recognise the biological criterion of affiliation. In Europe, France is the only country that affords the biological father the right to contest paternity. This right, however, is subject to the requirement that the child does not enjoy the possession of status of a child born in wedlock with regard to the mother's husband. The *pater est* rule that is in practice in most countries does not essentially serve to establish affiliation but only serves an evidentiary function. Only the man who procreated the child is the father of that child. The presumption is that the mother's husband is the father. However, this presumption can be rebutted at any time. English law does not provide for any time limitation for contesting paternity.[23] The same

21 Supra n. 17, p. 354.
22 *Ibid.*
23 Supra n. 1.

rule applies in India too. Whenever a dispute over child support, inheritance, and custody or visitation rights involves clarification of a father-child relationship, the court can order blood or DNA tests in order to determine the biological father. In contrast to France, English and Indian courts can order submission to blood and DNA tests even where the mother, her husband and child live in same household; whereas the child, in French legal nomenclature enjoys the possession of status of a child born in wedlock. When deciding the issue even the Indian and English courts are bound to decide the issue of paternity only by the best interest of the child.[24]

In *Re H*,[25] the English Court of Appeal has considered the claim of the biological father in the context of child's best interest. The case involves the following facts: A married couple has two children. Both the husband and wife were involved in extramarital relationships. The woman became pregnant from a man with whom she had planned a common future. The mother had told her 13 year old son that her boyfriend was the father of the child she was expecting. Before the child was born, however, the wife was separated from her boyfriend, reconciled with her husband and decided to raise the child with her husband even though her husband could not be the father of the child under the circumstances. Having being denied the opportunity of recognising paternity, the ex-boyfriend filed for a contact order after the birth of the child and sought a court order for a DNA test in order to establish paternity. The Court granted the motion of the mother's ex-boyfriend reasoning that under the given circumstances a clarification of the child's paternal affiliation would be in his best interest and not harm his family life. This shows that rejecting the *pater est* rule in favour of the biological father should not only be an option where there is no longer a marital union between the mother and husband but also where the union exists but as an exception the interests of the child would be better served by a determination of paternity.[26]

Compulsory Physical Tests for Establishing Affiliation

Blood or DNA tests are said to provide evidence for doing better justice in disputed questions of paternity. They are, however, negative in character and can show either that a man cannot be the father of a given child or that he may be; never that he is. So for as the blood test is concerned, the test is, however, not as useful as it appears at first sight. The child may be illegitimate even if its blood group is compatible with the husband's and wife's groups. Further, blood sample may be taken only with a person's consent. As such, since tests cannot provide legitimacy, but only illegitimacy, these are against the child's interest

24 *Ibid*.
25 (1996) 2 Family Law Reports 65.
26 Supra n. 1.

and will generally be refused by those having custody of the child. In several cases, the courts have shown reluctance to accept scientific criteria of proof. In *Nishit Kumar Biswas* v. *Anjali Biswas*,[27] the Calcutta High Court has rightly observed that if these tests were allowed "there would be nothing to prevent such cases becoming the battle-group of experts with bloody hands".

As to affiliation, one fundamental issue is whether the putative father can be compelled to submit himself to medical tests to establish or negate affiliation. Up until now, there has been very little discussion of whether blood or DNA tests for establishing affiliation can be compelled, i.e. against the will of the putative father.[28] With reference to this issue, some countries opt for not compelling the putative father to submit to tests, but allow the courts to make any inference they deem necessary out of refusal. In *Gautum Kundu* v. *State of West Bengal*,[29] the prayer of a presumed father for blood test to rebut the presumption of legitimacy was rejected by the Court as no one can be compelled to give blood sample for analysis.

The issue whether blood or DNA tests for establishing paternity can be compelled, i.e. against a party's will, is not fully clear. The laws of various countries on this issue vary differently. Neither direct compulsion nor indirect compulsion by means of imprisonment or monetary fines may be ordered in Great Britain or in the Roman law countries. Conversely, the courts in Germany and the Nordic countries may order blood and DNA tests to be performed and, if necessary, compelled with the assistance of the police. In Austria and Switzerland, direct compulsion is prohibited but ultimately the result is no different than that obtained in Germany and the Nordic countries because the courts can impose high monetary fines or order imprisonment in order to compel the putative father to undergo testing. The question whether physical tests may be compelled in order to establish affiliation is becoming increasingly significant because the right of a child to know his origins is being discussed in greater depth in nearly all Western countries. However this right is undermined where the putative father, child and mother can successfully circumvent physical testing. A decision handed down by the English Court of Appeal[30] clarifies the point:

Three men were considered equally likely to be the father of the child. The mother claimed maintenance for the child against one of the men, a prosperous businessman who refused to undergo the blood test which had been directed by the court. The Court of Appeal decided against the businessman:

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27 AIR 1968 Cal 105.

28 See Frank, Compulsory Physical Examinations for Establishing Parentage, *International Journal of Law, policy and the Family,* 10 (1996), p. 205.

29 AIR 1993 SC 2295.

30 *Re A* (a minor) (1994) 2 FLR 463.

"G was given the opportunity to have the child's paternity established by his submission to a blood test. He rejected the opportunity. The fact that there were others to whom the same opportunity might have been afforded was irrelevant to the inference that would not be drawn from G's refusal."

The Nordic countries (Denmark, Sweden and Norway) espouse the view that the father of a child should generally be the man who procreated the child. The determination of paternity is not the private matter of the father, mother or child. It is rather the responsibility of government institutions such as the Social Welfare Board in Sweden or County Governor in Norway. They are responsible for determining the true father of a child, even against the will of the mother. In uncertain cases, they also have the power to order blood or DNA tests prior to a voluntary recognition in order to prevent a man who is not the true father of a child from falsely recognising the child as his own.

The question still remains whether a child's right to know his/her origins supersedes the right to bodily integrity of the person who is to undergo testing. To what extent has the child the right to know who his/her real biological father is? Is truth to prevail even if it disrupts family peace and long standing relationships? The search for one's origins, it was argued, should only be allowed for medical reasons. The position of the donor is more complex. Only a few countries legally exclude any possible relationship between the donor and the child. The issue involves also the interests of the child, which are often brought into the picture.

Legitimacy and Section 112 of the Indian Evidence Act

The Indian law presumes strongly in favour of legitimacy of offspring, as it is birth that determines the status of a person. Section 112 of the Indian Evidence Act, 1872 embodies the rule of law that a child born during the continuance of valid marriage or during two hundred and eighty days (i.e. within the period of gestation) after its dissolution shall be conclusive proof that it is legitimate, unless it is proved by clear and strong evidence that the husband and wife did not or could not (e.g. by reason of absence, want of opportunity, illness or impotency, etc.) have any access at any time when the child could have been begotten. Section 112 refers to point of time of birth as the deciding factor and not to the time of conception; the latter point of time has to be considered only to see whether the husband had not access to the mother. When sexual intercourse between husband and wife is proved, there is presumption of legitimacy, even though the wife might have been living in adultery with another. Under such circumstances, evidence of her sexual intercourse with other cannot be given. The principle underlying the rule appears to be that on ground of public policy. It is undesirable to enquire into the paternity of a child whose

parents "have access" to each other. In *Kamti Devi* v. *Poshi Ram*,[31] the Supreme Court refused to over through the conclusive presumption under Section 112 of the Indian Evidence Act by DNA test; non-access should have been proved, as the Court observed.

The section follows the English law in adopting date of birth and not date of conception as the test of legitimacy. The section assumes the existence of a legal marriage and says that birth during continuance of a valid marriage is conclusive proof of legitimacy. The presumption of legitimacy is a rebuttable presumption of law, and the only way of displacing it, is to show, as pointed in the latter part of the section, that the parties to the marriage had no access to each other at the time when the child was begotten and no other exception is allowed. Thus, where the husband and wife have cohabited together, and no impotency is proved, the issue is conclusively presumed to be legitimate, though the wife is shown to have been guilty of infidelity; and even where the parents are living separate, a strong presumption of legitimacy still arises, which can only be rebutted, either by proving a divorce or a judicial separation, or by cogent and almost irresistible proof of non-access in a sexual sense.

The 'access' and 'non-access' means presence or absence of opportunity for sexual intercourse.[32] Existence of opportunity for sexual intercourse does not mean merely physical presence at the necessary time, e.g. residence at the house or place. Access or non-access must be taken in the sexual sense. There must also be capability of enforcing marriage relation. Access therefore may be impossible not only when the husband is away during the period when the child could have been begotten, but also on account of impotency, incompetency (e.g. under the age of puberty, natural infirmity, malformation, illness, etc.). So, a husband may be present and yet there may be non-access.

The presumption of legitimacy equally applies where the child is born within the possible period of gestation after the marriage has been terminated by the husband's death or by a final decree of divorce or nullity. The question as to what is the precise period of gestation still remains debatable. It is said that the average period of gestation is 280 days.

Areas of Concern

Family law is principally concerned with the regulation and recognition of certain relationships. The most recent focus has been placed on the relationship between children and parents and for this reason parentage and its interplay with issues of bioethics, human rights and civil status. The main area of concern is the perpetuation of the offensive term "illegitimate" in the legal system in referring to a child born to parents not married to each other. An innocent child

31 AIR 2001 SC 2226.

32 *Venkateshwarlu* v. *Venkatanarayana*, AIR 1954 SC 176.

is still stigmatised by this reference, which is offensive in present-day society.[33] The modern law has tried to improve the position of illegitimate children by raising their status to legitimate children in certain matters. But the vast majority of children still remain unaffected. To be designated as an illegitimate child in preadolescence is an emotional trauma of lasting consequences.[34]

In India, legitimisation by subsequent marriage of parents is not recognised. All personal laws make a distinction between legitimate and illegitimate children. The Hindu Marriage Act, 1955 (as amended by the Marriage Laws (Amendment) Act, 1976),[35] and the Special Marriage Act, 1954[36] confer a status of legitimacy on the child of only annulled, void and voidable marriages. But such children are not entitled to an equal treatment at par with legitimate children; they are given an inferior status as such children can inherit the property of the parents alone, and of none else. Therefore, a child of Hindu bigamous marriage can inherit the property of his/her parents alone. Such a child cannot get any right to inherit the property of other parental relatives or be a member of Hindu coparcenaries. The odd situation is of those children who are born to a mother with whom the putative father has not gone through a form of marriage ceremony.

The Special Marriage Act, 1954 also recognises the rights of children born of void or voidable marriages to inherit from both the parents. Muslim, Christian and Parsi children, if illegitimate, cannot inherit from their father, according to their personal laws. Under the Muslim law, there is no mode or method recognised to legitimise an illegitimate child, for the western doctrine of legitimation is not recognised at all.

There are only two methods through which parentage is established in Muslim law (a) by birth during a regular (also irregular but not void) marriage, or (b) by acknowledgment. The doctrine of acknowledgement of paternity is quite different from doctrine of legitimation. Whereas legitimation proceeds upon the principle of legitimating children whose illegitimacy is proved and admitted, the rule of acknowledgement proceeds upon the assumption that the acknowledged child is not only the offspring of the acknowledger by blood, but also the issue of a lawful union between the acknowledger and the mother of the child. The Indian Divorce Act 1869 applicable to Christians, however, provides inheritance rights to illegitimate child in the parents' property only under certain specified circumstances.[37]

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33 *Guard* v. *Beeston*, (1997) 642, 668.

34 *BEB* v. *BEB,* (1999) 514, 517.

35 Section 16 as amended by the Marriage Laws (Amendment) Act 1976. Before the amendment, the status of legitimacy could be conferred only on the children of those void marriages which were declared null and void.

36 Section 26 of the Special Marriage Act 1954. The language of this section and Section 16 of the Hindu Marriage Act is identical.

37 Section 21 of the Divorce Act 1869.

Conclusion

Although there is general international adherence to the *pater est rule* in principle, it is gradually loosing ground. Legal systems are affording an increasing number of interested persons to contest affiliation and the *pater est* rule has been rejected in a number of cases on the motion of the biological father. The group of interested parties with the right to contest affiliation has also been expanded. In most European countries other persons besides the husband have the right to contest affiliation. They include the mother and the child, in particular but may also include the husband's parents and heirs. Consequently, the *pater est* rule only partly fulfills its original purpose of permanently affiliating a child with the legally married couple. The other objective of the *pater est* rule, which is to prevent third parties from interfering in the marital affairs of others, is no longer met in many legal system.

The current marriage legislation no longer provides for a period during which a woman may remarry, the absence of such a provision sometimes gives rise to paternity disputes. Except for the differences on the ground of presumed legitimacy, the law does not make any distinction between children born in wedlock, children born out of wedlock, children born of adulterous relationships, adopted children, etc. A thorny problem sometimes arises within the context of adoption. The unwed mother whose child is listed as the offspring of an "unknown father" may freely give the child in adoption without recourse to the biological father. Where the mother is married but her husband, legally listed as the father, is not the true biological father his consent must be obtained. On occasion this may be impossible and the court may deem it in the child's best interest as well as in "the interests of all persons concerned" to dispense with such consent.

In the context of many European countries which have done away with illegitimacy, India remains conservative in its bid to uphold the unity and stability of the family. There is no process of legitimation under the personal laws of different communities. Section 112 of the Indian Evidence Act speaks only about presumptive legitimacy in wedlock and no more. More importantly, surrogate motherhood throws up a minefield of dilemmas in legal and ethical areas. In the context of growing use of medical techniques by infertile couples and single persons, we are required to reexamine and redefine our legitimacy law by going beyond the Indian Evidence Act 1872 that limits legitimacy of a child born within 280 days after the dissolution of marriage either by death or divorce. To date there is no law by which a single person can get the status of a legal parent with the use of modern reproductive technologies. A law that takes into consideration the very complex nature of this field is essential to protect the interests of donors, recipients and the child.

PARENTAL KIDNAPPING: A CHILD ABUSE

*Aruna B Venkat**

Kidnapping

The consequences of parental kidnapping which is also known as child stealing are profound. The parent who loses the child has to deal with a precipitous loss beyond the feelings related to the marital breakup or divorce. The child who is kidnapped must cope with the shock of the kidnapping, the sudden loss of a parent and social circle, and an abrupt adaptation to a new environment. The child also often has to deal with lies that the snatching parent tells about the other parent, for example, "mommy doesn't love you anymore", or, "your father is dead". It is now generally agreed that the frequency of parental child stealing is increasing.[1]

We have for a long time believed that if a parent does something to a child then that is all right. The concept of child as chattel is still with us. Gradually, over the years we separated child abuse and neglect out from permissible parental actions. The debate over the issue of whether it is possible to charge a parent with a crime against a child has led us to understand that parents can be, should be, and must be charged with child abuse when they have committed crimes against a child. This whole area of children's rights has been assessed within the context of maltreatment, serious neglect, physical and sexual abuse of children. We now must reconceptualize parental stealing/ abduction/ kidnapping as child abuse of the most flagrant sort.[2]

A parent may abduct in cases when a marriage sours, partners frequently experience tremendous anger, desire for revenge and thoughts of violence. They need to go through the grieving process, and cope with their depressions. Children are frequently used to ward off the parents' depression, and parenting becomes inadequate to the needs of the child. There are significant changes in parent-child relationships after separation, and for many parents the narcissistic injury involved in the loss is so great, they lose their capacity for concern for the child.

The parent may need a child in a way they have never needed them before: unconsciously, for sexual gratification; as the repository for all their anger; and as a comfort to the parent; that is, the child must parent the parent.

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1 Agopian, M. W. *Parental Child Stealing*. Lexington, Mass.: Lexington Books, D. C. Heath, 1981.

2 Huntington, Dorothy, *Parental Kidnapping: A New Form of Child Abuse*, 1982. Dr. Huntington is Director of Research and Evaluation, Center for the Family in Transition, Corte Madera, California, and is Project Director of the Child Stealing Project. This work is supported by the James Irvine Foundation and the Morris Stulsaft Foundation.

Parents use the child in parental conflicts. Some parents and children may have difficulty in separating psychologically and have confused ego boundaries. Perpetrators may have an inability to endure the chronic separation from the child and need to have the children with them for ego support. They cannot face the feelings of isolation and loss that come with divorce, and take the children for comfort.[3]

Child abduction is an International Phenomenon

Child abduction is an International Phenomenon and is not confined to countries from the west, east, north or south, but wherever there are marital disputes.[4] Statistics have shown that there has been a global increase in the number of homes that break every year. It is here, that the child abduction finds its roots.[5] Child abduction has become an International Phenomenon ever since the International Borders have shrunk. Since, the time we have adopted the notion of 'Global Citizen', inter-marriages between communities, religions, cultures etc have increased which in turn has increases the number of divorces and separation as well. The children happen to be the worst effected. As both the Parents lay claim on the child and fight for custody and access rights, that is, when the problems arise. No doubt, it is said child kidnapping is rooted in marital disputes. Child abduction/ kidnapping by parents can happen both at national and international levels. At national level, the problems of locating the child may not be many as compared to the international level. International Parental Abduction has turned into a pandemic in today's world.

Child stealing or kidnapping of the child by a parent is a form of child abuse. It is a moral, ethical and a social wrong. But, some view it as a criminal offence. When a parent kidnaps a child, the child is used as both an object and a weapon in the struggle between the parents which leads to the brutalization of the children psychologically, specifically destroying their sense of trust in the world around them.[6] Some experts have coined terms like 'parental Alienation' to describe the potential negative impact on child victims. Children are the resultant casualties. Parental Child Stealing has been on the increase since the mid-1970's. This has emerged particularly as a post-divorce phenomenon. The term 'parental kidnapping', "encompasses the taking, retention, or concealment of a child by a parent, other family members, or their agent, in derogation of the custody rights, including visitation rights, of another parent or family member".[7]

The abductor parent may move from one state to another, beginning a new round of investigation into the abuse with each move, impeding intervention

3 *Ibid*.

4 Teressa Ooi, *Kidnapped Children: Parents' Pain never dies*, Straits Times (Singapore), November 24, 1994, p. 9.

5 AR Lakshmanan, *International Child Abduction – Parental Removal*, (2008) 48 IJIL, p. 427.

6 Supra n. 3, p. 7.

7 Hoff,,P.M. Interstate and International Child Custody Disputes: A Collection of Materials. Washington, D.C.: Child Custody Project. American Bar Association, 1997.

by child protective services.[8] Or, the abductor may flee to another country, completely shutting down any hopes of involvement by child protective services in the country of origin. The most pervasive scenario is that the abducting parent goes into hiding, or moves beyond the jurisdiction of governing law. Huntington and others believe that inherent in the act of kidnapping and concealment are negative consequences for the child victims. The main concern here is that the parent flees and is not reachable and locatable by the law agencies, nor by child protection agencies. The abductor parent is hiding, so no one knows what is happening to the child.

The abducted child is without the safeguards normally provided by child law. This leaves the child completely vulnerable to the dictates of the abductor parent, who, may not have the child's best interests in mind, or may be functioning with severe impediments.[9]

Psychological Impact on Child

According to Rand, an abducting parent views the child's needs as secondary to the parental agenda which is to provoke, agitate, control, attack or psychologically torture the other parent. "It should come as no surprise, then, that post-divorce parental abduction is considered a serious form of child abuse".[10]

It is generally accepted that children are emotionally impacted by divorce. Children of troubled abductor parents bear an even greater burden. "The needs of the troubled parent override the developmental needs of the child, with the result that the child becomes psychologically depleted and their own emotional and social progress is crippled".[11] Since, the problem of parental child abduction is known to occur in divided parents rather than in united and intact families, the inordinate emotional burdens compound abduction trauma. Generally, the abductor does not even speak of the abandoned parent and waits patiently for time to erase probing questions, like "When can we see mom (dad) again?". "These children become hostages ... it remains beyond their comprehension that a parent who really cares and loves them cannot discover their whereabouts".[12]

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8 Jones M, Lund M, Sullivan M: Dealing with parental alienation in high conflict custody cases, presentation at conference of the Association of Family and Conciliation Courts, San Antonio, TX, 1996.

9 Johnston, J.R., Girdner, L., and Sagatun-Edwards, I. (1999). Developing Profiles of Risk for Parental Abduction of Children from a Comparison of Families Victimized by Abduction with Litigating Custody, Behavioral Science and Law, 17: 305-322.

10 Rand DC: *The spectrum of the parental alienation syndrome*. American Journal of Forensic Psychology, 15-3, 1997

11 *Ibid*.

12 Clawar SS, Rivlin BV: *Children held hostage: Dealing with programmed and brainwashed children*. ABA Section of Family Law, p. 115.

Parental child abduction as Criminal Offense

Parental child abduction occurs when the parents separate or begin divorce proceedings. A parent may remove or retain the child from the other seeking to gain an advantage in expected or pending child-custody proceedings or because that parent fears losing the child in those expected or pending child-custody proceedings; a parent may refuse to return a child at the end of an access visit or may flee with the child to prevent an access visit or fear of domestic violence and abuse. Parental child abductions may be within the same city, within the state region or within the same country, or may be international. Depending on the laws of the state and country in which the parental abduction occurs, this may or may not constitute a criminal offense. For example, removal of a child from the UK for a period of 28 days or more without the permission of the other parent (or person with parental responsibility), is a criminal offense. In many States of the United States, if there is no formal custody order, and the parents are not living together, the removal of a child by one parent is not an offense. In Australia the absconding parent, usually the mother, is awarded with the Family Court's presumption of residency status quo after keeping the child for a minimum of three weeks. [13]

Motivations underlying the Abduction

A key question that we must ask is the motivations underlying the abduction of the child by a parent. Why do family members take children? Is it for love? The answer suggested by Hilgeman,[14] is usually not, where the typical motivation for family abduction is power, control and revenge. These characteristics are also prevalent in domestic violence cases. In fact, family abduction is really a form of family violence. Some abductors may believe they are rescuing the child, but rarely do they resort to legal approaches for resolution. Some abductors are so narcissistic that they do not have the ability to view their children as separate entities from themselves. These abductors believe since they hate the other parent, that the child should as well. Sometimes abductors feel disenfranchised and have a culturally different perspective regarding child rearing and parenting. They may miss and want to return to their country of origin with the child.[15]

The abduction of a child is a crime whether the abductor is a stranger or the child's parent, and Canadian laws clearly emphasize this. Internationally, steps have been taken for the co-operation of countries to return children to

13 http://www.en.wikipedia.org/.

14 Hilgeman, G.K., *Impact of family child abduction,* Retrieved February 29, 2008, from the Vanished Children's Alliance Web site: http://www.vca.org/.

15 http://www.childfind.ca/; http://www.rcmp-grc.gc.ca/omc-ned/index-accueil-eng.htm, http://www.missingkids.com

their home countries because the harmful psychological and social effects on children and the parent victim are understood and addressed. Essentially, missing children, whether they are abducted by their parents or not, is a serious crime not only to the child and parents, but a general terrifying assault on any community. Through co-operation of law enforcement agencies, the media, international community and the general public, we can only hope for the swift and safe return of our children, but even then, the experience and effects do not end there.[16]

When does Parental Abduction Occur?

International Parental Abduction occurs when a parent leaves a country with a child or children in violation of custody decree or visitation order. Another related situation is retention where a parent takes children legally to his/her home country for such reason as holiday but then fails to return in violation of Court order.[17]

While, the number of cases of international parental abduction is small in comparison to domestic cases, it is often the most difficult to solve due to involvement of international jurisdiction. In many countries, parental abduction is not legally a crime but civil tort dispute. Moreover, unless there is a treaty agreement, family court is not obliged to return children to honour ruling by foreign family court. Lastly, 2/3 of the case of international parental abduction involve mothers who are the primarily care giver and in most cases domestic violence and abuse is alleged, which is difficult to assess. Lastly, even if there is a treaty agreement to return the child, the court is reluctant to return the child if this result in permanent separation of child from primary caregiver. This happen when the abducting foreign mother will face criminal prosecution and deportation if returning countries are criminalising this type of abduction. Another problem with the Hague Treaty is that frequently the national body which signed the treaty has no means or motivation to force the local judge to honor the goal of the treaty, ensuring children have optimal contact with both parents.[18]

The Hague Convention on the Civil Aspects of International Child Abduction is an international treaty and legal mechanism to recover children abducted to another country by one parent or family member. The Hague does not provide relief in many cases. A private industry emerged to address this gap[19], which shall be discussed later in the article.

16 http://www.mcsc.ca.
17 Supra n. 13.
18 *Ibid*.
19 *Ibid*.

The Hague Convention on the Civil Aspects of International Child Abduction

The Hague Convention on the Civil Aspects of International Child Abduction came into force on the 1st of December, 1983, after an increasing number of violations of trans-border custody orders. The main objectives of this convention aim to deter child abductions, to promote co-operation among countries and their respective authorities and to ensure and prompt return of abducted children to their home countries.

To promote co-operation, the Convention provides for the creating of Central Authorities responsible for applying the Convention in each country where it is in force. In Canada, there is one Central Authority at the federal level (the Department of Justice) and a Central Authority in each province and territory. Because child custody falls within provincial jurisdiction in Canada, those Central Authorities are responsible for administering and enforcing the Convention. The Department of Justice, as the Central Authority at the federal level, assists the provinces, territories and other member countries at their request, and provides information to the public.

In a case of trans-border abduction, the parent files an application with a Central Authority. That authority must take all the appropriate measures to protect the interests of the custodial parent, discover the whereabouts of the child, prevent harm to the child and secure the child's return. If necessary, the authority will also initiate legal or administrative proceedings to obtain the child's return.

Lack of a single unified international instrument compelled parents in early parts of the twentieth century to fight hostile legal battles in different nations. The initial attempt to codify law on abduction of children at the international level was made as early as the 1970s.[20] Finally in 1980, the attempts were fructified in the form of the Hague Convention on International Child Abduction (the **"**Child Abduction Convention"), by way of a unanimous vote passed by over twenty three states who had participated in the fourteenth session of Hague's Private International law conference.[21] Recently in 1996,

20 "In 1976, multiple countries' leaders agreed a solution was necessary to address concerns regardingabducted children and their delayed return." Donyale N. Leslie, *"A Difficult Situation made Harder: A Parent's Choice behveen Civil Remedies and Criminal Charges in International Child Abduction"',* 36 Ga. J.Int'l & Comp. L. 381 at 385; *See generally* Paul R. Beaumont & Peter E. Mceleavy, The Hague Convention on International Child Abduction (1999), and International Child Abductions: A Guide to Applying the Hague Convention with Forms (Gloria DeHart ed.) (2nd ed. 1993).

21 The conference participants at the Hague's Fourteenth Session on Private International Law included Australia, Austria, Belgium, Canada, Czechoslovakia, Denmark, Egypt, Finland, France, Greece, Ireland, Israel, Italy, Japan, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States, Venezuela, and Yugoslavia.

at the eighteenth conference Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (the "Protection Convention") was also formulated. The Protection Convention is broader in scope and is not merely confined to abduction of children.

At the regional level, European nations came together to give effect to the Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on the Restoration of Custody of Children, 1980 (the "European Convention") which deals with similar issues.

These Conventions provide the building blocks for the states to domestically protect rights of children and parents. The Child Abduction Convention is heralded for having brought a simplistic procedure to solve and deter the problem of international child abductions. The application of the Child Abduction Convention is currently restricted to eighty one states that are signatory to it. International abduction of children up to the age of 16 is covered under the Convention. The Child Abduction Convention expressly intends "a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."[22]

The purpose behind creation of the Child Abduction Convention was to allow for the prompt return of children to the states from which they were wrongfully removed or retained with the belief that the speedy return of the child will help avoid the adverse consequences that flow from the abduction. Furthermore, the Child Abduction Convention aims to work as a preventive measure against *'forum-shopping'* in custody disputes by requiring that the rights of custody are respected across international lines by contracting States.[23]

Concept of Habitual Residence

The Child Abduction Convention arms the left-behind parents to seek the immediate return of their abducted children to their country *of habitual residence.* A parent can secure the return of a child if the child is a 'habitual resident' of one contracting state and has been 'wrongfully removed' to another contracting state. Under the terms of the Convention, a child is wrongfully removed when taken in violation of the custody rights of another person. Under Article 3, removal or retention of a child is considered unlawful if it breaches the rights of custody that lie with a person or an institution where the child was

22 Article 1, Convention on the Civil Aspects of International Child Abduction, opened for signature Oct. 25, 1980, 1343 U.N.T.S. 98, (the "Abduction Convention").

23 Smita Aiyar, *"International Child Abductions involving Non-Hague Convention States: The Need for A Uniform Approach", 21* Emory Int'l L. Rev. 277, 283 (2007)

habitually resident immediately before the occurrence of the abduction.[24] The requirement that a child be habitually resident of a contracting state to the Child Abduction Convention is laid down in Article 4.[25]

Crucial Elements

Following facts must be present in a case for which complaint is made under the Child Abduction Convention by the complainant-

(1) As mentioned earlier, the abducted child is below the age of 16;

(2) the child was removed from his/her state of *'habitual residence'* in breach of a *'right of custody"* attributable to the left-behind parent (it should be noted that mere violation of right to access is not covered), which that parent had been exercising at the time of the wrongful removal; and

(3) The state of habitual residence and the state of refuge following the child's wrongful removal or retention should be contracting parties to the Child Abduction Convention.[26]

On the establishment of all these factors by the petitioning parent Article 12 mandates that the child should be returned.

Institution of the case and power of the Central Authority

The procedure under Article 8 of the Child Abduction Convention requires that the custodial parent whose child has been abducted to another Convention country to applies to the Central Authority within their country of residence for the return of their child.[27] Therefore, civil proceedings are instituted by the left-behind parent, either in the country where the child was abducted and taken to, or by filing with a Central Authority of the Child Abduction Convention.[28] If the claim is in accordance with the standards set forth in the Child Abduction

24 Article 3, the Abduction Convention, 1343 U.N.T.S. 98, "The removal or the retention of a child is to be considered wrongful where -
   a) it is in breach of rights of custody attributed to a person, an institution or any other body, eitherjointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
   b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention..."

25 The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

26 Article 4 and Article 9, the Abduction Convention, 1343 U.N.T.S. 98

27 Article 8, the Abduction Convention, 1343 U.N.T.S. 98, "Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child..."

28 Anastacia M. Greene, *"Seen and Not Heard?: Children's Objections Under the Hague Convention on International Child Abduction",* 13 U. Miami Int'l & Comp. L. Rev. 105, 111(2005)

Convention, the claim is subsequently forwarded to the Central Authority of the country where the child has been taken.[29] It should be noted that this court ordered return is not a decision based on the merits of any parental custody dispute or a determination of the best interests of the child.[30] Article 16 specifically precludes consideration of custody issues until a return decision is made.[31] Instead, the actual child custody proceedings begin once the child is returned to his or her country of *habitual residence.* Thus, the Convention counters the incentive that parents may have to remove the child to another country with a favourable legal system in order to obtain custody.[32] Once an international court that is a party to the Convention determines that a child has been wrongfully removed, the Convention provides that the child is to be summarily returned to his or her home country, where the merits of the case will be heard.[33]

Prima Facie case for Return

In order to receive a return order, the petitioning parent must first meet the elements of a prima facie case of wrongful removal. To establish a prima facie case, the party must show the existence of the following:

i. 'Habitual residence' - The child must be a habitual resident of the country from which abduction was carried out;

ii. 'Custody rights' - The parent filing the complaint should have custody rights over the child; and

ii. 'Wrongful removal' - The third and the most important element to be established is that the child was removed from his 'habitual residence' in breach of the complainant's (parent's) custody rights, which that parent was exercising at the time of the removal.[34]

Once the petitioning parent has satisfied the abovementioned criteria, the prima facie case can be said to be established and it allows for return of the child. As stated earlier, once the parent makes out a prima facie case, the

29 Smita Aiyar, *"International Child Abductions involving Non-Hague Convention States: The Need for A Uniform Approach",* 21 Emory Int'l L. Rev. 283 (2007).

30 Article 19, the Abduction Convention, 1343 U.N.T.S. 98,
"A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue,"

31 Article 16, the Abduction Convention, 1343 U.N.T.S. 98 "After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice."

32 Supra n. 28, p. 112.

33 Dana Beth Finkey, *"The Hague Convention on the Civil Aspects of International Childhood Abduction: Where Are We, and [There Do We Go From Here?",* 30 Hastings Int'l & Comp. L. Rev. 505(2007).

34 Refer Articles 3 and 4, the Abduction Convention, 19 I.L.M. 1501 (1980); See also supra n. 3.

child's return is mandatory under the terms of Article 12, unless the wrongful abductor can prove certain narrow defences or exceptions, that are discussed below.[35] Thus, the initial burden of proof ought to be discharged by the petitioning parent, once the parent succeeds in establishing the above elements the burden of proof shifts to the responding party to prove an affirmative defence or exception preventing return.

Rights of Custody

The Child Abduction Convention only protects rights of custody and the provisions are not breached on denial of rights of access (visitation rights). With 'right of custody' the parent gets the right to determine the child's residence. However, the problem surfaces when a non-custodial parent has both a right of access and a *ne exeat* clause. A *ne exeat* clause is a court order stating that the custodial parent cannot leave a geographic area; it basically forbids a person from leaving the country. Such non-custodial parents argue that the *ne exeat* clause gives them the right to determine the child's residence, therefore qualifying them for the Convention's remedy of return. They argue that the custodial parent's departure from the jurisdiction undermines the court's *ne exeat* order and frustrates the non-custodial parent's rights of access.[36]

Defences and Exceptions to Return of the Child

Only in limited cases the return of the child back to the country of his/her habitual residence can be turned down. These exceptions must be constructed strictly, in keeping with the Convention's main goals of prompt return and judicial compliance with the treaty's terms.

The Convention lists six defences that prevent a child from being returned, two of them specifically look at the best interest of the child and the remaining four exceptions deal with general conditions that may stop the court from returning a child.

The two defences under the Child Abduction Convention that cater specifically to the child's best interests are provided in Article 13. Article 13(b)[37]

35 Article 12, the Abduction Convention, 19 I.L.M. 1501 (1980): "Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment..."

36 Supra n. 33, p. 510.

37 Article 13 (b), the Abduction Convention, 1343 U.N.T.S, p. 101, "... there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."

defence is also known as the 'grave risk of harm[5] defence and the Article 13(2)[38] is referred to as the 'child's objection' to return.[39] Article 13(b) is the most commonly invoked defence. Under Article 13(b), the court may refuse to return the child if the respondent succeeds in establishing that returning the child would place him or her in 'grave risk of psychological or physical harm' or an 'intolerable situation.' However, the judge always retains a degree of discretion, and may order the child's return even on establishment of Article 13(b) defence.

However, Article 13(b) defence has received heavy criticism from various corners. Many have criticised the courts' strict interpretation of the defence, while others have argued that even stricter restrictions are needed to prevent the defence from overwhelming the principal objectives of the Convention. As the main goal of this clause and the Children's Objection Clause, is advancement of the child's individual interests by preventing removal., the two clauses are often raised conjunctively. Therefore, much of the interpretation and analysis given to the grave risk defence is also relevant when considering Child's objections.[40]

The Courts may decline to return a child if the objection comes from a sufficiently mature child, and that the child be of satisfactory age and maturity to have that objection considered by the courts. This allows the child to decide for himself, if he is capacitated to do so. This provision empowers the court to consider an abducted child's views before returning that child to his or her country of habitual residence. This exception only requires proof by a preponderance of the evidence and does not require proof beyond reasonable doubt. It is left for the courts to determine whether a particular child is sufficiently mature or not to make an objection.[41] However, the Child Abduction Convention does not prescribe a threshold age which is considered appropriate for a child's views to be taken on board.

As mentioned above, there are four general exceptions provided under the Child Abduction Convention. Under Article 12 the court may refuse return if more than a year has passed and the child is already 'well-settled' in his new environment. The court may also refuse return in terms of Article 20[42] if the

38 Article 13(2), the Abduction Convention, 1343 U.N.T.S, p. 101
"The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views."

39 Supra n. 28, p. 116.

40 Supra n. 28, p. 117.

41 *Ibid*, p. 111.

42 Article 20, the Abduction Convention: "The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."

returning of the child would violate *'fundamental principles of human rights and fundamental freedoms'* of the requested country. Finally, if the petitioning parent had actually consented to or acquiesced to the child's removal, the court may determine that the removal was not actually 'wrongful' and therefore would not amount to violation of the treaty.[43]

Shortcomings of the Child Abduction Convention

Before analysing the Child Abduction Convention critically it must be stated that the Convention has gone a long way in establishing a clearer regime for return of a child to his or her country of habitual residence. Each year more number of countries ratify the Convention, augmenting the effectiveness of the Convention. Having stated that it should be noted that the implementation of the Child Abduction Convention has not eased the burden in many cases, as both states involved must be signatories to the Convention for it to apply.[44]

The distinctiveness of the Child Abduction Convention lies in not insistence of an existing enforceable custody order to obligate a court to return the child to the country of habitual residence. Moreover, the absence of a formal custody order does not provide a reason to decline return. This distinguishes the Convention from other instruments such as the European Convention which aims to address the problem of child abduction.[45]

One of the criticisms levelled against the Child Abduction Convention has been that instead of construing Article 13 (b) (refusal to return in case of grave risk or harm) defence narrowly, on occasions the courts have interpreted the defence too liberally. In effect the principle instead of being employed by the court in return proceedings is being utilised by the court with jurisdiction over the custody issue.

Moreover, the fact the interpretation and implementation of the Child Abduction Convention is left in the hands of national judges also gives rise to some apprehension. 'Custody rights' are very significant to the operation of the

43 The Lowe study of Hague cases found that courts have never decided to refuse return based on an Article 20 defence. Supra n. 28, p. 115, See Merle H. Weiner, "*Navigating the Road Behveen Uniformity and Progress: The Need for Purposeful Analysis of the Hague Convention on the Civil Aspects of International Child Abduction"*, 33 Colum. Hum. Rts. L. Rev. 275 at 302.

44 Supra n. 23, p. 290.

45 Lynda R. Herring, *"Taking Away the Pcnvns: International Parental Abduction & the Hague Convention",* 20 N.C. J. Int'l L. & Com. Reg. 137, 146 (1994). European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children, May 20, 1980, Europ. T.S. 105; Inter-American Convention on the International Return on Children, July 15, 1989, O.A.S. T.S. 70; Unif. Child Custody Jurisdiction & Enforcement Act (1997) 9(1A) U.L.A. 657 (1999) (a uniform act adopted in some form by all 50 states), available at http:// www.law.upenn.edu/bll/ulc/uccjea/finall997act.pdf, last accessed March 20, 2009. The Hague Convention does not seek to address the issue of international parental abduction through jurisdictional rules and the recognition of judgments unlike these other instruments.

Convention. However, whether there has been a breach of 'rights of custody' depends upon what rights the parties have according to the 'law of State in which the child was habitually resident immediately before the removal or retention.'[46] Thus, the interrelationship of the 'autonomous' rights of custody under the Convention and the directive to look at the 'law of the habitual residence' can create some confusion.[47]

Finally, although Article 21 of the Child Abduction Convention requires the Central Authorities established by the Convention to organise and protect access rights, there is no procedure set up to do so. This in effect renders the right remedy less. This indicates that only rights of custody are protected under the Convention. Another aspect where the Convention is lacking is that there is no consensus relating to the extent of the duty to recognise already ordered rights, or to organise, establish, or protect such access rights.[48]

Protection Convention 1996: Comparative Analysis

Article 50 of the Protection Convention lays down that this Convention does not affect the applicability of the Child Abduction Convention and that nothing precludes the parties from invoking either of the Conventions to seek redressal in cases of inter country child abduction. As stated in the beginning, the purview of the Protection Convention 1996 is much wider; it covers issues like property of child, placement of a child in foster family, guardianship etc., in addition to the areas dealt with under the Child Abduction Convention.[49] Articles 5 through 9 of the Protection Convention place primary jurisdiction on these issues based on the habitual residence of the child. The residence of the child ordinarily shifts with change in location. These standards are independent of those of the Child Abduction Convention and apply whether or not the abducted child is returned. If both the State of habitual residence and the State to which the child has been taken are Parties to both the Conventions, either or both Conventions may be invoked. The choice is entirely of the petitioning parent in such circumstances. If the Child Abduction Convention is not invoked, or if the child is not immediately returned under the provisions of the Child Abduction Convention, the authority hearing the case must apply the mandatory rules of jurisdiction and recognition of the Protection Convention, The court or other authority may not simply assume that once return is denied jurisdiction to

46 Article 3(a), Abduction Convention, 1343 U.N.T.S, pp. 98-99.

47 Linda Silberman, "Interpreting the Hague Abduction Convention: In Search of A GlobalJurispitidence", 38 U.C. Davis L. Rev. 1049, 1068 (2005).

48 Gloria Folger DeHart, "The Relationship Between the 1980 Child Abduction Convention and the 1996 Protection Convention", 33 N.Y.U. J. Int'l L. & Pol. 83 (2000).

49 Article 3, Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental responsibility and measures for the protection of children ("protection convention") 35 I.L.M. 1391(1996)

determine custody vests.[50]

The Protection Convention takes a cue from several earlier Hague conventions for the protection of minors,[51] addresses jurisdiction, recognition and enforcement of judgments, and choice of law questions. In general, the applicable law is the local law of the forum.[52] The Protection Convention seeks to ensure that the measures taken consistently with the jurisdictional standards are recognised and enforced by other Contracting States, by providing for a system for such cooperation between states.[53]

While it cannot be denied that the Protection Convention does not solve all issues dealing with securing and enforcing access rights, it takes a step further and resolves other issues which the framers of the Child Abduction Convention had failed to cover within the Convention. Judicial decisions establishing access rights and the conditions pertaining to them are measures under the Protection Convention hence, they are required to be recognised and enforced when issued under the jurisdictional standards of the Convention. Therefore, the non-custodial parent who has an order should be able to enforce the exercise of these rights; unlike the Child Abduction Convention which only offers rights to the custodial parents.

Where no order exists, the Protection Convention resolves the issue of which state has jurisdiction to consider measures regarding access, resulting in an order entitled to recognition and enforcement and less likelihood of conflicting orders.[54] If the child's habitual residence changes, however, the new state acquires jurisdiction to alter custody and access rights. The non-custodial parent may be faced with the difficulties of litigating and of presenting evidence by long distance if the continued validity of access rights is at issue before an authority in the new state.

Discussion on the European Convention

This Convention governs the recognition and enforcement of foreign decisions relating to custody, whether made by administrative or judicial

50 Article 3, Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children ("Protection Convention") 90 I.L.M. 1391(1996).

51 This is the 1961 Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants, opened for signature Oct. 5, 1961, 658 U.N.T.S. 143, available at http:// www.hcch.net/e/conventions/menulOe.html, which is in effect in fourteen jurisdictions. The 1961 convention "used nationality as its principal jurisdictional base, and was subject to severe problems of concurrent jurisdiction."

52 Protection Convention, Articles 15-22.

53 Supra n. 23, pp. 277-284.

54 Article 3, Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children ("Protection Convention") 92 I.L.M. 1391(1996).

authority. Like the Hague Convention 1980, the European Convention is also concerned only with custody issues of children till the age of 16. The procedure followed in these two Conventions is similar; it requires that an application accompanied by relevant documents be made to the Central Authority in any of the Contracting States. A decision relating to custody as per the Convention is one which "relates to the care of the person of the child, including the right to decide on the place of his residence or to the right to access to him."[55]

Article 9(3)[56] requires that all custody decisions given in one Contracting State should be recognised and enforced in all others without any review of the substantive custody issue. There are some broad grounds listed in Articles 9 and 10 of the European Convention based on which recognition and enforcement of the award can be refused. Under Article 9 the application has to be made to a central authority within a period of six months, whereas Article 10 comes into picture for circumstances not covered under Article 9. Following are some reasons on which enforcement or recognition of an award can be denied:-

i) Where the decision is given in the absence of the defendant or his legal representative, and the defendant is not duly served with necessary documents in sufficient time, unless he himself had concealed his whereabouts.

ii) In the above cases the competence of the authority giving the decision was not founded on the habitual residence of the defendant or of the child, or the last common habitual residence of the child's parents, at least one parent being still habitually resident there.

iii) The decision is incompatible with a decision relating to custody which became enforceable in the State addressed before the removal of the child, unless the child has had his habitual residence in the territory of the requesting State for one year before his removal.

iv) Where no application has been made to a central authority, the provisions of paragraph 1 of this Article shall apply equally, if recognition and enforcement are requested within six months from the date of the improper removal.

v) Article 10, states that if it is found that the effects of the decision are manifestly incompatible with the fundamental principles of the law relating to the family and children in the State addressed a decision may be left aside.

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55 Article 11, European Convention, *ETS 105- Decisions concerning Custody of Children, 20. V. 1980.*

56 In no circumstances may the foreign decision be reviewed as to its substance.

vi) Further if there is conflict with the interests of the child due to change in circumstances including due to passage of time and that the effects of the original decision are manifestly in conflict with the welfare of the child such decision need not be enforced.

vii) A procedural ground for rejection would be when at the time when the proceedings were instituted in the State of origin:

a) the child was a national of the State addressed or was habitually residentthere and no such connection existed with the State of origin; or

b) the child was a national both of the State of origin and of the Stateaddressed and was habitually resident in the State addressed.

viii) Finally if the decision is incompatible with a decision given in the State addressed or enforceable in that State after being given in a third State, pursuant to proceedings begun before the submission of the request for recognition or enforcement, and if the refusal is in accordance with the welfare of the child.[57]

European Convention and Abduction Convention: Compare and Contrast

It may appear that most of the procedures prescribed in the Conventions are identical. In addition, both the Conventions are applicable only to children till the age of 16. If a person's complaint can be covered under both the Conventions, there is no bar on choosing either of the Conventions and following the procedure laid down therein. However, there are certain distinctions between the Conventions that ought to be kept in mind. For instance, a complaint made under the Hague Convention prevents registration of a foreign custody decision under the European Convention. Furthermore, the Hague Convention protects rights of custody in cases of wrongful removal or retention of children, irrespective of whether there has been an actual custody order or not. The purview of the European Convention on the other hand is limited to registration and enforcement of foreign custody decisions in all cases, and not just that of wrongful removal or retention. Moreover, the European Convention can also be utilised for issues related to right of access which is not the case in the Hague Convention. Finally, it can be stated that the reasons for refusal of return of a child are narrower than those provided under the European Convention for refusing the enforcement of a foreign decision.[58]

57 European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and onRestoration of Custody of Children Luxemburg, 20.V.1980.

58 Cheshire and North 's *Private International Law*, PM North and JJ Fawcett (ed.), 15th ed. 1999, p. 880.

Brussels II Regulation

European Union has taken a further step in the direction of protecting children's rights, in the form of Council Regulation 2201/2003. Abduction Convention continues to be applicable with certain changes as formulated under the Brussels II Regulation as per Article 60(e) of the Regulation. Akin to the provisions of the Abduction Convention, the Regulation also provides that where a child was habitually resident in a Member State immediately before a wrongful removal or retention,[59] the courts of that Member State will continue to have jurisdiction over the child until the child has acquired residence in another Member State.[60] The acquisition of a new habitual residence is qualified along the lines of the Abduction Convention as being only when all the interested parties with rights of custody have acquiesced in the removal, or the child has resided in the new State for one year in the knowledge of all parties with the rights of custody.[61] However, this is subject to further rider that during that time no request for return has been lodged, or has to be withdrawn, or closed pursuant to Article 11(7)[62], or where a judgment of the Member State of origin does not return of the child.[63]

One aspect in which the Regulation goes a step further than the Regulation is that the court cannot refuse to return a child unless the applicant has been given an opportunity to be heard,[64] nor on the basis of earlier discussed Article 13(b) of the Abduction Convention if it is established that adequate arrangements have been made to secure the protection of the child after return.[65] This provision therefore, further restricts the use of Article 13(b) defence. This also further implies that even the court of refuge may be of the opinion that the child is in grave risk of danger if returned, the discretion not to return is removed if it can be established in the court that there are adequate protective measures available in the other Member State.[66] Finally, even though a court of refuge has issued a non-return order after having used the discretion permitted when

59 Defined at Article 2(11) of the Brussels Regulation.
60 Article 10, the Brussels Regulation.
61 Article 10(a), (b), the Brussels Regulation.
62 "Unless the courts in the Member State where the child was habitually resident immediately before the wrongful removal or retention have already been seized by one of the parties, the court or central authority that receives the information mentioned in paragraph 6 must notify it to the parties and invite them to make submissions to the court, in accordance with national law, within three months of the date of notification so that the court can examine the question of custody of the child Without prejudice to the rules on jurisdiction contained in this Regulation, the court shall close the case if no submissions have been received by the court within the time limit."
63 Article 10(b)(i), (ii), (iii), (iv), the Brussels Regulation.
64 Article 11(5), the Brussels Regulation.
65 Article 11(4), the Brussels Regulation.
66 David McClean and Kisch Beevers (ed.), *Morris' Conflict of Laws*, 6th ed. 2005, p. 304.

one of the strict grounds of refusal to return has been made out, a court which has jurisdiction under the Regulation may make a return order which is enforceable via the fast track system contained in Article 42 of the Regulation, without the need for a declaration of enforceability and without any possibility of opposing its recognition.[67]

International Child Abduction under the Convention on the rights of the Child

The United Nations' Convention on the Rights of the Child (CRC) was adopted on November 20, 1989. Though, the Hague Convention and the CRC are similar in their focus on the vulnerabilities of children, however, the latter is a human rights treaty conferring a wide variety of rights on the children. As has been observed by one author, *"the CRC is special because for the first time in international law, children's rights are set out in a treaty which will be binding for those States that ratify it*".[68]

Article 1 of the CRC defines a child as a, *"human being below the age of eighteen years, unless under the law applicable to the child, majority is attained earlier*. "The CRC sets forth specific, enumerated rights for children, who in turn *"are supposed to be active in exercising them in accordance with their growth and evolving capacities."*[69] In particular, the CRC mandates the protection of children in especially difficult situations, such as when a child is separated from his or her parents and in incidents of child abduction.[70] The underlying assumption of the CRC is that a child's best interests must be examined in all actions concerning her/him, having regard to the child's family ties, continuity in its upbringing; and ethnic, religious, cultural and linguistic background.

In light of the various limitations of the Hague Convention, it might be useful to explore the applicability of the CRC in cases of international child abduction. Article 9 of the CRC addresses the issue of children being forcibly separated from their parents.[71] Specifically, paragraph 3 of Article 9 provides that the child must be granted the opportunity to *"maintain personal relations and direct contact with both parents on a regular basis."*

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67 *Ibid,* p. 305.

68 Cara L.Finan, *Convention on the Rights of the Child: A Potentially Effective Remedy in cases of international child abduction*, 34 Santa Clara L. Rev. 1007(1993-1994).

69 Convention on the Rights of the Child, Articles 9-11.

70 *Ibid*.

71 Convention on the Rights of the Child, Article 9, paragraph *I-'State Parties shall ensure that a child shall not be separated from his or her parents against their -will, except -when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child."*

In furtherance of the mandate of Article *9,* Article 10 of the CRC provides that *"applications by a child and his or her parents to enter or leave a State party for the purposes of family reunification, shall be dealt with by State Parties in a positive, humane and expeditious manner. "* Further, State Parties are required to respect the right of the child and her/his parents to leave any country, including their own, and to enter their own country.[72]

Article 11 of the CRC deals with the illicit transfer and non-return of children abroad and requires that State Parties take measures to combat this phenomenon. It provides that *"to this end, State Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements."* Though it Article 11 might be useful in case of international child abduction, however, Article 35 is more relevant in this regard. Article 35 specifically provides that State Parties should take *"all appropriate national, bilateral and multi-lateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form."* It is evident that Article 35 can be used a route to ensure greater acceptance of the Hague Convention, as it requires nations to accede to treaties dealing with child abduction.

The emphasis of the CRC is on promoting the best interests of the child in every situation that could potentially affect him or her.[73] This may be used as a pretext for allowing the forum Court to examine the merits of the underlying custody dispute. However, as stated by various commentators, the object of the Hague Convention is to promote the best interests of the child by ensuring her/ his speedy return to the country of his habitual residence.

It has been argued that the Hague Convention primarily addresses matters of jurisdiction and does little or nothing to promote the rights of the child.[74] Moreover, the Hague Convention is very state centric as it allows the judicial system of each participating country to exercise great discretion while interpreting the language of the Convention.[75]

Perhaps one of the greatest advantages in utilizing the CRC in cases of international abduction of children is that it has been ratified by 194 countries[76] . Included among the parties are most countries of the Middle East, Asia and

72 Convention on the Rights of the Child, Article 10, paragraph 2. Further, this right has been made subject only to "such restrictions as are prescribed by law and -which are necessary to protect the national security, public order, public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention."

73 Convention on the Rights of the Child, Article 3.

74 June Starr, *The Global Battlefield: Culture and International Child Custody Disputes at Century's End*, 15 Ariz. J. Int'l & Comp L. 791 (1998).

75 Courtney E. Hoben, *The Hague Convention on International Parental Kidnapping: Closing The Article 13(b) Loophole*, 5 J. Int'l Legal Stud. 271 (1999).

76 http://www.unicef.ora/crc/ last visited on March 16, 2010..

other Third World Countries.

Another advantage of the Child Rights Convention is that it shifts the dispute from the courtroom of a particular country to a permanent international forum presided over by a panel of human rights experts.[77] This may enable parents to overcome the problem of national bias which they frequently experience. The panel consists of individuals who are selected with consideration being given to equitable geographical distribution, as well as principal legal systems.[78]

However, the CRC does not provide for consideration of individual petitions.[79] As Cohen states, *"it is a shortcoming of the Convention's implementation mechanism ... [that it provides no] method for reviewing the individual complains of children -who rights have been violated."*[80]

The Hague Convention and the CRC

The Permanent Bureau of the Hague Conference on Private International Law examined the relationship between the CRC and the Hague Convention in relation to a case that arose in Germany in 1995.[81] In that case, an appeal from an order of return came before the German Constitutional Court based on an argument that such a return pursuant to the Hague Convention would violate certain provisions of the German Constitution. In response to this appeal, the Permanent Bureau of the Hague submitted a memorandum detailing its responses to the argument, wherein the Permanent Bureau has examined the relationship between the Hague Convention and the CRC.

It was argued that the Hague Convention is a means of ensuring the mandate of Article 10, paragraph 2 of the CRC.[82] By setting forth the process by which the return of an abducted child to the child's country of habitual residence can be implemented, the Hague Convention supports the stated objective in Article 10 of the CRC in that such a return would re-establish the contacts and relations between parent and child that were severed by the abduction.

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77 Convention on the Rights of the Child, Article 43.

78 *Ibid*.

79 *Id*, Articles 44-45.

80 Cara L. Fijian, Convention on the rights of the chuld: A potentially effective remedy m cases of international child abduction, 34 Santa Clara L. Rev. 1007 (1993-1994).

81 Germany Constitutional Court decision in case concerning the hague convention on the civil aspects of international child abduction, including memorandum prepared by the permanent bureau of the hague conference on private international law for submission to the Constitutional Court, 35 ILM 529 (1996).

82 Convention on the Rights of the Child, Article 10, Para 2- "A child whose parents reside in different States shall have the right Jo maintain on a regular basis, save in exceptional circumstances, personal relations and direct contacts v/ith both parents."

Secondly, Article 8 of the CRC states that State Parties will *"respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference:"* In this respect, the Permanent Bureau argued that the abduction of the child by one parent deprives the child of his or her relations with the left-behind parent and that parent's culture, thereby depriving the child of part of his or her identity in violation of Article 8 of the CRC. Further, paragraph 2 of Article 8 provides that if such a deprivation has occurred, State Parties will *"provide appropriate assistance and protection, with a view to speedily [re-establish the child's]173 identity. "*It was contended that the *"the Hague Convention works to strengthen and protect the identity or personality of the child against wrongful infringement."*[83]

In responding to the argument that the Hague Convention is inconsistent with Article 3 of the CRC, the Permanent Bureau relied on the Australian case of *Murray* v. *Murray* (AC 20847) , wherein it was stated that,

"The Hague Convention is predicated upon the paramountcy [sic] of the rights of the child. It proceeds on the basis that those rights are best protected by having issues as to custody and access determined by the Courts in the country of the child's habitual residence.. . The fact that issues relating to the welfare of the child are not relevant to a Hague Convention application is because such an application is concerned with where and in what court issues in relation to the welfare of the child are to be determined."

India is not a signatory to the Hague Convention. Principles relating to custody of children are laid down in the Hindu Marriage Act, 1955[84] ; the Hindu Minority and Guardianship Act, 1956[85] and the Guardian and Wards Act, 1890.

An examination of case law related to the subject reveals that in so far as domestic custody disputes are concerned, the Courts have tended to base their enquiry on the basis of the "best interests of the child." The Supreme Court in *Sumedha Nagpal* v. *State of Delhi*[86] has observed that, '*No decision by any Court can restore the broken home or give a child the care and protection of both dutiful parents...But a decision there must be, and it cannot be one repugnant to the normal concepts of family and marriage."*

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83 Supra n. 81.

84 Section 26 of the Hindu Marriage Act provides that a Court can pass orders and make such provisions in the decree in and proceedings under the Act with respect to the custody, maintenance and education of minor children upon an application for that purpose as expeditiously as possible.

85 Under the Hindu Minority and Guardianship Act, the custody of a child is given to any person, be it the child's natural parents or guardian with the prime importance given to the welfare of the child: *Gila Hariharan* v. *Reserve Bank of India,* (1999) 2 SCC 228.

86 JT 2000 (7) SC 450.

In *Rajesh K. Gupta* v. *Ram Goal Agarwala*[87], the Supreme Court observed that in such habeas corpus petitions, the principle consideration for the court is to ascertain whether the custody of the child can be said to be lawful or illegal and whether the welfare of the child requires that the present custody should be changed and the child should be left in the care and custody of someone.

The legal position in relation to international removal of children by parents, however, remains ambiguous, and the judicial stance in this regard has been vacillating. Though there have been very few cases involving international child abduction, however, an examination of the said cases reveals that the Court s have, in rare instances upheld the principles enshrined in the Hague Convention.

The earliest case that came up for consideration was *Elizabeth Dinshaw* v. *Arvand M. Dinshaw*[88] wherein the Supreme Court emphasized that in matters of custody of minor children, the sole and predominant criterion is what would best serve the interest and welfare of the minor. It was observed that courts in all countries are bound to ensure that a parent does not gain advantage by any wrongdoings like removing children from one country to another. The Court further observed that, *"it is the duty of all Courts in all countries to do all they can to ensure that the wrongdoer does not gain an advantage by his wrongdoing. The Courts in all countries ought to be careful not to do anything to encourage the tendency of sudden and unauthorised removal of children from one country to another. This substitution of self-help for due process of law in this field can only harm the interests of the wards generally, and a judge should pay due regard to the orders of the proper foreign Court unless he is satisfied beyond reasonable doubt that to do so -would inflict serious harm on the child."*

The principle laid down in the *Dinshaw* case was later upheld in *Smt. Surinder Kaur Sandhu* v. *Harbax Singh Sandhu.*[89] In the given case, orders had been passed by the Court in England regarding custody of the minor child. The parents were Indian citizens, but after marriage had settled in England. The child was a British citizen by birth. The father brought the child to India and the mother obtained an order from the English court directing the father to deliver the custody of the child to the mother and on that basis a writ petition was filed in the High Court in India for production and custody of the child. It was held that English courts have the most intimate contact with the issue and jurisdiction and the custody should be given to the mother instead of father.

87 (2005) 5 SCC 359.
88 AIR 1987 SC 3.
89 (1984) 3 SCC 698.

In *Kuldeep Sidhu* v. *Chanan Singh,*[90] the children and parents were Canadian citizens and an order was passed by the Supreme Court of Ontario (Canada) granting interim custody to the mother. The unauthorized removal of the children from Canada to India by the father was held to be improper and the order of the Canadian Court was directed to be honoured.

However, the principles evolved in previously mentioned cases were not followed in *Dhanwanti Joshi* v. *Madhav Unde,*[91] and the Supreme Court held that an order of a foreign Court granting custody is not bindbg as the child was well-settled in the custody of the abducting parent, hi the facts of that case, the effect of international norms regarding applicability of judgments of US courts on Indian courts was considered and it was found that the same was subject to paramount consideration of welfare of child. The Hague Convention on the Civil Aspects of International Child Abduction was examined to which India was not a signatory. It was observed that the court to which the child was removed could conduct summary enquiry and the court would return the child to the country from which the child had been removed unless such return could be shown to be harmful to the child. The overriding concern, however, remains the child's welfare. If the courts are moved promptly, then those aspects can be considered by the court from whose jurisdiction the child had been removed.

The ratio in *Dhanwanti Joshi's* case was followed in *Sarita Sharma* v. *Sushil Sharma.*[92] In the said matter, the mother had removed the children from USA despite orders of the court of that country. It was observed that a female child should ordinarily be allowed to remain with the mother so that she can be properly looked after and in the given facts of that case proper care was being given to the children in India and thus in spite of the order passed by the Court in USA, it was held that it would not be proper to hand over the custody of the children to the respondent and permit him to take the children to USA. Suppression of material facts from the court would make the order of a foreign court not binding on the Indian Court.

Similarly, in *Paul Mohinder Gahun* v. *State of NCT of Delhi,*[93] it was observed that in view of what has been stated in *Sarita Sharma's*[94] case, it was evident that Courts in this country cannot be guided entirely by the fact that one of the parents had violated an order passed by a competent court abroad. It was stated that Courts have consistently held in favour of determining the issue regarding custody of the minor child, and in such cases question of conflict of laws and jurisdictions and orders passed by foreign courts granting

90 AIR 1989 P&H 103.
91 1998)1 SCC 112.
92 (2000) 3 SCC 14.
93 113 (2004) DLT 823 (DB).
94 (2000) 3 SCC 14.

custody to one or other parent thus take a backseat. It was observed that a girl child of tender age is bound to shape better in the care of the mother.

However, in *Aviral Mittal* v. *State,*[95] the Delhi High Court observed that while it is true that the interest of the child is paramount, however, it must be examined as to which of the parents is in a better position to look after the child. It was held that, *"in matters relating to matrimony and custody, the law of that place must govern the parties which has the closest connection with the well-being of the spouses and the welfare of the offspring of the marriage."* The High Court directed the child to be returned to the custody of the custodian parent, and observed that the jurisdiction of a competent Court cannot be ousted by mere abstinence from its proceedings. The decision in this case falls in line with ratio laid down in *Dinshaw's* case.

In *Mandy Jane Collins* v. *James Michael Collins,*[96] the Bombay High Court declined the return of a child to Ireland in exercise of its writ jurisdiction and held that the question of custody requires analysis of disputed question of facts.

The Supreme Court has affirmed its ratio in *Sarita Sharma's* case in *Bhavesh Jayanti Lakhani* v. *State of Maharashtra.*[97] In the instant case, reliance on a custody order of a Family Court in America was considered unwarranted, and the Supreme Court upheld the High Court order staying the operation of the order passed by the Indian Family Court on the basis of the American custody order. Moreover, the Supreme Court held mat before a foreign custody order can be enforced in India, it must satisfy the rigors of Sections 13 and 44A of the Code of Civil Procedure, 1908. Interestingly, the Supreme Court held that matters of parental child abduction are, *"essentially ...in the nature of a Matrimonial dispute, a private dispute and no criminal extraditable offence can be made out of the same, in the absence of a specific request for extradition."*

From the above discussion, it can be discerned that Indian Courts, while deciding cases relating to international child abduction, have relied on varying standards and principles. If some matters have been decided on the basis of the centrality of the welfare of the child, others have been decided on the basis of principles of jurisdiction and "comity of nations."[98] The reason for this ambiguity stems from the absence of any law in this regard.

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95 163 (2009) DLT 627.

96 (2006) 2 HLR 446.

97 (2009) 9 SCC 551.

98 Law Commission of India, "Need to Accede to The Hague Convention on the Civil aspects of International Child Abduction", (1980), p. 20.

The Law Commission of India has, in its 208th Report, made a strong case for accession to the Hague Convention. It has been argued that accession to the Convention will not only ensure legal certainty in international abduction cases, but it will also *"bring in the prospect of achieving the return to India of children who have their homes in India"*.[99] Moreover, foreign judges deciding custody matters may feel more comfortable allowing children to travel to India as without the guarantee afforded by the Hague Convention to the effect that the child will be swiftly returned to the country of origin, the foreign judge may be reluctant to give permission for the child to travel to India.

There has been a rash of cases concerning parents who remove a child from the United States to India without the consent of the other parent and then refuse to return the child to this country. Parents often have a grave misunderstanding of the serious nature of such parental child abduction. Many believe that simply because India is not yet a party to the Hague Convention on the Civil Aspects of International Child Abduction (the "Hague Convention") the legal system can neither prevent nor cure a parent's unauthorized removal of a child from the United States to India. Such views are totally mistaken.[100]

U.S. federal law makes kidnapping a crime even when it is committed by one of the child's parents. The International Parental Kidnapping Crime Act (IPKCA), 18 U.S.C. 1204, makes it a federal felony to remove a child under the age of 16 from the United States, or to retain a child outside the United States with the intent to obstruct the lawful exercise of parental rights. In addition, every state recognizes that the abduction of a child by his or her parent is a serious crime, subject to penalties in excess of one year in prison.

The International Parental Kidnapping Law has been used against Indian parents on many occasions. For example, Dr. Fazal Raheman, who was convicted of the crime in the following circumstances: He had married his wife in India and moved with her to Massachusetts. They had two children. After a few years he apparently became concerned that his wife was becoming too "independent" and he "made threats" against her. He then took the children without her consent to his former home in Nagpur, India and refused to return them.

His wife obtained an emergency custody order from a Court in Massachusetts while the husband obtained a custody order in his favor from the Nagpur Family Court. The mother traveled to India to try to find her children and bring them home but her husband filed criminal charges against her in India and she fled to the United States without her children.

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99 *Ibid*.

100 Jeremy D. Morley, News India-Times, March 28, 2008.

Dr. Raheman was then charged with the crime of international parental kidnapping. He was also charged with wire tapping since he had illegally tapped his wife's telephone and videotaped her. He was captured during a return trip to the United States and after trial he was convicted of both charges and was sentenced to three years' imprisonment, followed by three years of supervised release. He was ultimately released from prison on condition that he effect the return of his two children - then 12 and 8 years of age - to their mother in the United States.

However, Dr. Raheman then proceeded to provide false information to the Nagpur Family Court, which was found to have inhibited the likelihood that the children would be returned to the United States. As a result he was sentenced to a further year and a day in prison. The Nagpur court transferred custody of the children to Raheman's elderly mother in Nagpur and the mother had no contact with them except for sporadic visits. Imposing the second sentence, Judge Patti B. Saris harshly criticized Raheman for stealing the children from their home in the U.S., and noted that Raheman had betrayed the trust of the country which had given him great benefits while he lived here.

Dr. Raheman appealed but a federal appellate Court held that the International Parental Kidnapping Act was applicable to a father who took his children from the United States to India even though the pre-decree abduction was not illegal under state law.[101]

The enactment of the Hague Convention has been both a positive and effective first step in curbing the growing problem of international parental kidnapping. Unfortunately, this international agreement is a limited remedy that leaves some parents without legal relief. The problem of international parental child abduction will continue to persist until all countries have signed the Hague Convention or a similar agreement which requires returning abducted children to country of their habitual residence.

Instead of focusing solely on curing the symptoms of child abductions by implementing measures that facilitate the return of the child or the proper custody determination of children, pursuing various preventive measures could help deter the abductions in the first place. There are actions that both parents and countries can take to reduce the risk of international child abduction, such as increased border awareness, the use of computers as referencing tools for customs agents, and national registry for such cases.

In order to better protect and promote the rights of children, the Hague Convention's state-centered approach should be tempered by adopting some of the principles which the Convention on the Rights of the Child created through

101 *United States* v. *Fazal-Ur-Raheman-Fazal*, 355 F.3d 40 (1st Cir. 2004).

the use of a transnational approach. International child abductions must be prevented, discouraged, and remedied. If the Hague Convention adopts these transnational and global principles from the Convention on the Rights of the Child, it will more effectively remedy international child abductions and serve as a human rights document. This would then enable the Hague Convention to reach its greatest potential both as a means of discouraging and remedying international child abductions and as a human rights document.

The Hague Convention of 1980 was definitely a step in the right direction as it made an attempt to identify the elements for the applicability of the Convention and provided objective standards for determining whether the child is to be returned or not. However, the Convention has only been ratified in 45 countries and there exist a lot of countries that function as safe haven where abducted children can be taken without any fear of legal backlash.

Provisions of the Convention need strengthening

The following suggestions would go a long way in achieving that end and also, move towards unification of PIL rules:

1) One solution is for the global community to entice more countries to become parties to the Hague Convention, thus increasing its efficacy.
2) Preventive methods are necessary to curtail the proliferation of abductions to nations which are not parties to the Hague Convention.
3) Instead of focusing solely on curing the symptoms of child abductions by implementing measures that facilitate the return of the child or the proper custody determination of children, pursuing various preventive measures could help deter the abductions in the first place.
4) Training customs officers to recognize high risk situations can allow a potential abductor to be turned away or apprehended at the border. Canada, for example, has trained their 3600 customs inspectors on how to recognize a parental kidnapping situation.
5) If countries such as the Islamic countries of the Middle East are apprehensive about the procedures under the Hague Convention, then countries like United States, U.K. or India still can negotiate bilateral treaties with those countries individually to assist in the return of abducted children.
6) The principles of Comity of nations and Welfare of the child should always be kept in mind while giving ascendancy to the former.

Mediation and Parental Abduction

The Hague does not provide relief in many cases. Therefore, by 2007, both the United States, European authorities, and NGO's had begun serious

interest in the use of mediation as a means by which some international child abduction cases may be resolved. The primary focus was on Hague Cases. Development of mediation in Hague cases, suitable for such an approach, had been tested and reported by REUNITE,[102] a London Based NGO which provides support in international child abduction cases, as successful. Their reported success lead to the first international training for cross-border mediation in 2008, sponsored by the National Center for Missing and Exploited Children.[103] Held at the University of Miami School of Law, Lawyers, Judges, and certified mediators interested in international child abduction cases, attended.

Interest in developing an international professional standard for mediators handling international child abduction cases continues to grow. Current US law as well as State policy and standards governing the training and certification of mediators reflect the same standards and training as the UE. Public data bases hosted by State Governments in the USA list certified mediators. As well, those NGO's involved in the mediation projects have lists of those that have completed the Cross-Border training.

The role of the Mediator

As the world and its people have become more closely knitted together, cross-border relationships have intensified in both number and nature. However, with this surge has come the corresponding percentage of breakdowns in these relationships. This rise cross border, interfamilial disputes, and resulting increase in the number of child abductions, pose unusual demands on the typical method of dispute resolution within the judicial system.[104]

Mediation is a voluntary method of settling disputes. A neutral third party, a mediator who does not exercise decision-making authority, assists the parties in negotiating a mutually beneficial settlement. It has been called "no-fault conflict resolution" because the goal is to reach a solution fairly and quickly, instead of deciding who is right, or who is wrong, in a costly court battle. Cross-border mediation is the specialized form of mediation that targets the intricacies of custody and visitation concerns of the global family.[105]

The main responsibility of the Mediator for International Parental Child Abduction is to assist the parents in finding the best solution for the well-being of their child. Therefore it must be stressed that the Mediator's fundamental duty is to ensure that the best interests of an abducted child are served. In order to save children and parents, as well as other closely involved parties such as grandparents, the emotional strain and disruption arising from legal proceedings,

102 http://www.reunite.org.
103 http://www.missingkids.com.
104 http://www.accord-mediation.com/.
105 http://www.accord-mediation.com.

the Mediator provides information and advises on the alternative way to settle the dispute, namely, mediation.[106]

An effectively executed program for mediation and alternative dispute resolution (ADR) services and training would alleviate much of this burden on the judicial system, supplying a network of qualified professionals with specialized skills in cross-border, culture, customs and faith issues, and the tools to bring these individuals to mutually beneficial agreements. The breakdown of the family can have detrimental effects, particularly on the children involved. Mediation and ADR bring a creative and flexible approach to conflict resolution. The emphasis is placed on individuals to resolve their dispute, which enables the parties to better tailor the solutions to match their needs and to suit their schedule. The processes strive to increase communication between parties, thereby encouraging future relations and circumnavigating the stresses, time and turmoil of litigation and the courts. With the cross-border nature of these relationships comes a need for specialized knowledge, training and sensitivity in the appropriate measures and options available to these families. The complexity of these cases often increases the time to process an application and any subsequent appeals, and the difficulties in correctly applying the Convention's legal requirements and enforcing decisions. Article 7 (c) of the Hague Convention obligates the Central Authority of signatory countries "to secure the voluntary return of the child or to bring about an amicable resolution of the issues" either directly or via an intermediary. The Convention gives a guideline of six weeks for return of a child, as the damage to both child and parent, and their relationship is extensive if this is prolonged. The current state of the judicial system is ill-equipped to cope with the complexity and time criticalness of these disputes.[107]

An agreement reached by the parties during a mediation procedure can avoid unnecessary relocation of the child, allow the parents actively and purposefully to address all issues affecting the family and is speedier and less costly than court proceedings. Once understood, accepted and signed by the parties, the agreement can be brought before the courts, which can formalise its terms in a court order that will be recognised and enforceable in other countries.[108]

Conclusion

"*As adults, many victims of bitter custody battles who had been permanently removed from a target parent, whisked away to a new town and given a new identity, still long to be reunited with the lost parent. The loss cannot be undone.* Childhood cannot be recaptured. Gone forever is that

106 http:// www.europarl.eu/.
107 http://www.accord-mediation.com/.
108 *Id*.

sense of history, intimacy, lost input of values and morals, self-awareness through knowing one's beginnings, love, contact with extended family, and much more. Virtually no child possesses the ability to protect him- or herself against such an undignified and total loss".[109]

Suggestion

Child abduction is child abuse, but the abusers are the parents themselves. They are traumatized, they need help and care, and not punishment. It is a wrong but to call it a crime, in my opinion, is not the solution at all. Parents need counseling and help to overcome and solve the problems that are breaking a home. Let us look at the possibilities of a reunion of the parents. This is the only solution to the problem called Parental Kidnapping, as it arises out of marital discord.

109 Clawar SS, Rivlin BV, *Children held hostage: Dealing with programmed and brainwashed children,* ABA Section of Family Law, p. 105.

GLOBALIZATION OF LEGAL SERVICES UNDER WTO AND GATS: OPPORTUNITIES AND CHALLANGES FOR LEGAL PROFESSIONALS

V. Balakista Reddy*

Prologue

> *"Law is not a trade, not briefs, not merchandise, and so the heaven of commercial competition should not vulgarize the legal profession."*
>
> *- Justice V. R. Krishna Iyer*

Although the traditional mindset about legal profession still predominates in many countries, yet International Trade in Services currently amounts to well over two trillion US dollars, a sixth of total world trade. The service industries also account for a significant portion of the growth of the domestic economy and of job creation. In the past decades international trade in legal services has grown as a result of the internationalization of the economy. Increasingly, lawyers are faced with transactions involving multiple jurisdictions and are required to provide services and advice in more than one jurisdiction. The demand for lawyers to be involved in foreign jurisdictions often comes from their corporate clients who are involved in business activities across borders and prefer to rely on services of professionals who are already familiar with the firm's business and can guarantee high quality services. Some countries also favour international trade in legal services, as the establishment of foreign lawyers is seen as a catalyst for foreign investment, contributing to the security and predictability of the local business environment.[1]

The main obstacle to internationalize the trade in legal services is represented by the predominantly national character of the law and by the national character of legal education.[2] The national and local character of the legal profession is a reflection of the national character of the law and of the territorial jurisdiction of the Courts. Initially, the principle role of the lawyer was originally that of an advocate, and the legal profession was organized around the Court s with each bar associated to a specific local Court. Lawyers were required to maintain physical establishment in the territory of the local Court in

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1 "Legal Services", Background Note by the Secretariat, Council for Trade in Services, World Trade Organization, 6 July 1998; See also "Trade in Services: Opportunities and Constraints", Report on Trade in Legal Services, Project Study Sponsored by Ministry of Commerce, Government of India, available at http://www.tradelawonline.com/search/articles/?7c629564-b8d2-4756-9558-eb0ab0e66d8f

2 *Id.*

order to be accessible to other members of the bar and to the Court itself. The paradigm local Court / local bar / local lawyer changed with the expansion of trade and with the emergence of new fields of the law such as business and trade law for which representation before local Courts are relatively less important. Most of the times, these subjects require legal counseling in matters involving transactions, relationships and disputes not necessarily entailing Court proceedings.[3]

India is a signatory to the WTO and member country to the GATS and could be said to have an obligation to liberalize its services including legal services, and thus open them up to foreign competition. This is currently seen as the key to the future for foreign lawyers to be granted rights of practice as India will be required to honor this commitment.

Keeping all these contemporary developments in view, this paper has dealt with the issues surrounding India's commitment to the WTO/GATS Agreement, particularly its implications on the image of legal services and profession. The researcher seeks to examine the opportunities and challenges for lawyers in this scenario and also deal with the contribution made by various GATT rounds of negotiation before the Uruguay Round, Negotiations in the Uruguay Round and the establishment of the WTO and various Annexes to the WTO. The researcher also zeros in on the General Agreement on Trade in Services (GATS), and its impact on various service sectors including the legal services.

GATS: Past, Present and Future

Certain aspects of globalization which have had an impact on legal profession deserve attention. In this age of globalization and interdependence, principles of international law affect all states alike, small and large, rich and poor, weak and powerful.[4] Many of the structural changes that have taken place in the world economy since the early 1980s resulted in the liberalization of capital markets. Manufacturing was also no longer a domestic process. This led to the loss of control on local markets, goods, and finances by the National governments.

As a matter of fact, globalization has both positive and negative aspects. On the positive side, it has led to greater international economic, cultural, and political cooperation. On the other hand, it has had profound implications for states including the undermining of the autonomy and policy-making capability

3 *Id.*

4 Guido Bertucci and Adriana Alberti, "Globalization and the Role of the State: Challenges and Perspectives", available at http://unpan1.un.org/intradoc/groups/public/documents/un/unpan006225.pdf

of states.[5] Many governments see their role as not to regulate markets but to facilitate their expansion. Globalization and regional interactions are wiping out national borders and weakening national policies.[6]

In this regard, we must understand developments during the Uruguay Round which heralded the establishment of WTO. Moreover, the service sector contributed to more than 40-60% but it was mainly out of the GATT system. As a consequence, investments required guarantees, the IPRs required better guarantees and the proper dispute settlement mechanism was also to be in place. As GATT could not address all the above-mentioned areas, the Uruguay round of negotiations attracted a lot of importance.[7]

A. The Aims and Accomplishments of the Uruguay Round

The goals of the Uruguay Round were to- (1) further liberalization of trade by reducing tariffs and other barriers to trade; (2) properly reflect the modern developments in the world trade by including in the GATT negotiations for the first time TRIMS, GATS, and IPRs; (3) bring an end to exemptions of the GATT rules such as those granted to the agriculture, clothing and textiles sectors and resubmit them to GATT; and (4) improve and strengthen the GATT dispute settlement procedure for effective implementation of international trade regulations.[8]

B. Uruguay Round-Tribulations and Forecasts

Though no other international treaty has been as little understood, yet it has raised much concern and hostility in India. Wide ranging apprehensions have been expressed in many developing countries including India. These include concerns relating to sovereignty, agriculture and drug prices. Main contentious issues were and have been those related to agricultural subsidies, public distribution system, patenting of seeds and life forms, and textiles and clothing. The Uruguay Round established the WTO and annexed a wide range of multilateral trade agreements to the WTO, which will have impact on all aspects of the international trading system.[9]

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5 International Monetary Fund (2000) Globalization: threat or opportunity, *International Monetary Fund*, corrected January 2002, available at http://www.imf.org/external/np/exr/ib/2000/041200.htm#II.

6 See generally, Montek Singh Ahluwalia, "India's Experience with Globalisation", Australian Economic Review, Vol. 39, pp. 1-13, March 2006; Chandrasekaran Balakrishnan, "Impact of Globalisation on Developing Countries and India", available at http://economics.about.com/od/globalizationtrade/l/aaglobalization.htm.

7 M.K. Smith, and M. Doyle, (2002), 'Globalization' the *Encyclopedia of Informal Education*, available at www.infed.org/biblio/globalization.htm.

8 "Understanding the Uruguay Round", World Trade Organization, available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm.

9 Pierre Sauvé, OECD Trade Directorate, Completing the GATS Framework: Addressing Uruguay Round Leftovers, available at http://www.cid.harvard.edu/cidtrade/Papers/Sauve/sauvegats.pdf.

C. Uruguay Round Parleys and Legal Services

Legal services were included in the GATS negotiations at the insistence of the United States. Given the substantial differences among national regulatory systems, U.S. negotiators initially envisioned a special annex on legal services, similar to the Annex on Financial Services, to specifically address the regulatory barriers facing lawyers. Under the terms of the GATS, obligations of such an annex would be binding on all GATS members and would have required all GATS members to allow foreign lawyers some minimum level of access to their legal markets.[10]

D. The Anatomy of GATS

The GATS, which was also negotiated during the Uruguay Round, sets out a comprehensive framework of rules governing trade in services. It sets out a set of basic rules, a clear set of obligations for each member country and a dispute-settlement mechanism to ensure that the rules are enforced. The GATS applies to all service sectors and all forms of trade in services, though with adjustments and exceptions tailored to the type of service. The types of services covered include telecommunications, insurance and financial services, research and development services, computer and information services and professional services. Professional services include legal services, as well as accounting services, engineering services, architectural services, among others.

We identify the following as the two key components of GATS:

(a) Most Favoured Nation Obligation

The unconditional Most Favoured Nation (MFN) obligation is a core general obligation of the GATS. It essentially requires that each service supplier from a Member country must receive from other Members treatment no less favorable than is accorded to other foreign service suppliers.

(b) Specific Commitments

In addition to creating general obligations, the GATS also provides a legal basis for negotiating the multilateral elimination of barriers to trade in services. The GATS negotiations are designed to improve market access[11] and to reduce discrimination against service suppliers based on nationality.[12]

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10 Alan Oxley, The Achievements of the GATT Uruguay Round, available at http://epress.anu.edu.au/agenda/001/01/1-1-A-5.pdf..

11 Market Access is a negotiated right and obligation under the GATS. A Member is obliged to provide market access to services suppliers from other Members only in those sectors which the Member has included in its schedule.

12 National Treatment is a second negotiated right and obligation under the GATS. If a Member includes a service sector in its schedule of National Treatment obligations, that Member must

The GATS and the Legal Services: New Vista of Trade

The GATS applies to legal services and therefore, once a country signs it; its regulation of legal services is automatically subject to certain provisions of GATS. For example, all GATS signatories are subject to a transparency requirement, which specifies that all relevant measures be published or otherwise publicly available.[13]

In addition to these general requirements, most countries have included legal services on their Schedule of Specific Commitments; which means that legal services are subject to many additional provisions of GATS. For example, if a country lists legal services on its Schedule, then its regulation of legal services not only must be transparent, but must also be administered in a reasonable, objective and impartial manner.[14]

The globalization of legal services is a serious issue, which needs an attention of the all stakeholders. At present, the legal services industry is experiencing a fundamental transformation as a result of the expansion of trade and development of new fields of law, which include corporate restructuring, privatization of government departments, cross-border mergers and acquisitions, issues dealing with intellectual property rights and competition law have generated increasing demand for more sophisticated legal services. This has led to the emergence of a new type of lawyers mainly involved in advisory services-as opposed to the traditional local Court advocate-expected to provide advice to clients in respect of transactions and investments covering countries around the world.

The regulation of lawyers has historically been a domestic policy issue. In order to uphold the integrity of their laws and the judicial systems, countries have enacted elaborate regulatory schemes to control those who provide legal services and how they are provided. During the last two decades, globalization of the legal services industry has increased the general awareness of the effects of national regulations, particularly as they affect foreign lawyers. The globalization of markets and the internationalization of trade in services have increased scope for lawyers, while reducing traditional protective barriers. Consequently, globalization of legal services has and will continue to lead, increasingly, to issues of regulation.

"accord to services and services suppliers of any other Member ... treatment no less favourable than that it accords to its own like services and services suppliers." This obligation essentially prohibits discrimination against foreign providers of services.

13 "Trade in Legal Services", A Consultation Paper on Legal Services under GATS, available at http://commerce.nic.in/trade/consultation-paper-legal-services-GATS.pdf.

14 "Guide to reading the GATS schedules of specific commitments and the list of article II (MFN) exemptions", available at http://www.wto.org/english/tratop_e/serv_e/guide1_e.htm.

The Outsourcing Industry: A Curtain Raiser

The story goes that, International trade in services has recorded a rapid growth in the recent past. The services sector accounts for an increasing share of the investment flows in the world. While in the early 1970s, services constituted only a quarter of the global Foreign Direct Investment flows, in the recent past this share has gone up to two third of the total FDI. Technological developments, demographics, the growing internationalization of production processes, and economic liberalization are among the key driving forces behind the increasing globalization of services. The sea-change in India's approach towards trade and investment liberalization in services may be attributed partly to the growing importance of the services sector in India's economy and its trade and investment flows in the recent years. India's services sector recorded an average annual growth rate of 9 per cent in the 1990s; while India's GDP grew at an average annual rate of 7.5 per cent during the same period. The average growth rate of services attained a still higher mark during the last five years, i.e., 8.6 per cent. According to the *RBI Annual Report*, in 2005-06, the services sector has recorded a growth rate of 10.3 per cent, contributing almost three-fourths of the overall real GDP growth of India.

Due to a large knowledge pool and a significant cost arbitrage, few countries like India, Philippines and China are front runners in providing outsourced services. After achieving great success in Business Process Outsourcing, India is now looking for a big leap in Legal Process Outsourcing (LPO). India automatically becomes a natural choice if we analyze the comparative costs of various aspects of LPO for different countries. The comparative advantages of having a huge labour pool and English speaking professionals are aiding this growth.

The Notion of Legal Process Outsourcing: An Emerging Phenomenon

Legal outsourcing refers to the practice of a law firm obtaining legal support from an outside law firm or legal support services company. When the outsourced entity is based in another country the practice is sometimes called off shoring.

Legal Process Outsourcing has gained tremendous ground in the past few years in the United States. Legal outsourcing companies, primarily from India, have had success by providing services such as document review, legal research and writing, drafting of pleadings and briefs and providing patent services. Although the off shoring of IT services, software code and call centres and other low-end business processes to lower-wage countries has now been underway for the last 15 years, the off shoring of legal services is still in its nascent stage.

The services that will be offshore within the broad area of legal and paralegal services include, (1) Electronic Document Management Services, (2) Research Services (3) Due diligence Services (4) Contract Drafting and Proof Reading of Contracts (5) Document Discovery in Litigation (6) Intellectual Property Services.

With respect to the off shoring of legal services, the following models seem to be emerging:

1. Captive Centres formed by US Law Firms and their Subsidiaries

Currently, Indian legal system does not allow 'foreign' (i.e., non-Indian) law-firms to practise in India. Hence, some law firms in the US and India are setting up subsidiaries, so that they do not practise law in India, but provide legal and paralegal services only for export purposes.[15]

2. Joint Ventures by US-based Firms

Rather than opening their own captive centres, several US-based firms have joint ventures with firms in India. A good example is *Cantor-Colbourn Esq.,* who has joined hands with *Lall and Sethi*, however, since statistically most joint ventures fail especially in India – one needs to be cautious while treading this path.[16]

3. Third Party Vendors Providing Services to Law-Firms and In-house Corporate Attorneys

Evalueserve is a prime example of a third-party provider and currently has over 100 professionals providing legal support services. Evalueserve hires Indian engineers and lawyers and trains them to become proficient in US law and various USPTO, PCT and WIPO rules and regulations.[17]

Brickbat and Bouquets of LPO

In fact, the reduced labour costs, and therefore, the increased profit margins for the end-clients, are the most compelling reasons for these clients to offshore legal services to low-wage countries such as India. Besides the reduced labour costs, there are some other important reasons why many organizations-large, medium and small-offshore some of the work.

First, due to the substantially lower labour costs in India, Indian legal professionals can take substantially more time in doing a unit of work, thereby, making the additional end deliverable more robust and complete. Since this

15 Alok Aggarwal, Best Practices in Offshoring of Intellectual Property Services, available at http://articles.practice.findlaw.com/2007/Jun/25/274.html.

16 *Id*.

17 *Id*.

deliverable is then reviewed by a US attorney, such a deliverable is likely to have a better quality than a similar one produced in the US because of the extra attention it has received. Secondly, off shoring also enables organizations to take advantages of multiple shifts and time zone advantages, which is especially important for contracts, legal research, electronic document management, document discovery, and in situations with strict deadlines. Thirdly, since the work done by Indian legal professionals is the same as that provided by a US associate with 2-3 years experience, US lawyers can move up the value-chain and provide a broader array of services to their clients. For example, if Indian lawyers complete most of the drafting, the US lawyers can provide more litigation services and spend more 'face time' with their clients.

However, there also exist some major challenges to LPOs. First, the legal services industry has long had an aversion to risk. This is particularly true within the corporate legal area, where stakes are very high. Here the general counsel and other in-house lawyers are more comfortable outsourcing work to known US based law-firms. Secondly, since the cost of client acquisition in the legal services industry is rather large, many law-firms and solo practitioners try to maximize the number of billing hours from each client. However, when they have to outsource or offshore some of the work, they need to reveal this to the client. Thirdly, sending work offshore also raises the risk of losing confidentiality; although more and more research and development work is being done offshore, sending confidential material offshore still creates apprehensions in the minds of US lawyers. Fourthly, conflict of interest issues are very important for law-firms, solo practitioners and in-house attorneys. And, most legal services providers in the US are bound by ethics and guidelines that incorporate such issues.

GATS and the Indian Legal Profession: On the Upgrade

Considering India's obligations following GATS, it is felt that the must be considered while restructuring a proper regulatory regime. First, there is a distinction between those foreign lawyers who want to practice in Indian Court s and those who want to work primarily as Foreign Legal Consultants. Second, most foreign firms are interested in non-litigation legal consulting business. Third, any regulatory regime must be decided after consulting the Bar as well as the various Bar Associations, Bar Councils, Law Officers and leading law firms. It is important that the regulatory regime addresses issues pertaining to reciprocity rights of the Indian lawyer in the foreign country's jurisdiction, discipline, control and maintenance of ethical standards as prevailing in India and undertakings that the FLCs will not practice Indian law or employ.

The law governing and regulating the legal profession in India is the Advocates Act, 1961. Section 29 of the Act states that: "Advocates to be the only recognised class of persons entitled to practise law - Subject to the provisions

of this Act and any rules made there under, there shall, as from the appointed day, be only one class of persons entitled to practise the profession of law, namely, advocates." "Advocate" is defined in Section 2 (1) (a) of the Act as "an advocate entered in any roll under the provisions of this Act". The general view had always been that the practise of law referred to under the Act meant the practice of law in Courts, i.e., litigation and it was in respect of that aspect of the practice of law that the Act afforded Indian advocates a monopoly in India. The perceived wisdom was that the Act was enacted only to consolidate the classes of legal practitioners who would be entitled as a matter of right to an audience before a Court, to regulate such practice by establishing an All India Bar and State Bar Councils with whom such persons were required to be registered etc.

It was not intended to cover other forms of legal activity such as consultancy, advice, drafting of documents, negotiating etc. - work of a kind undertaken by only a handful of lawyers at the time and mainly in Mumbai, the overwhelming majority of Indian lawyers then as indeed still only concerning themselves with litigation.

This view was challenged in 1995 when the Lawyers' Collective, a Mumbai based forum of lawyers, commenced proceedings in the Mumbai High Court against a number of Indian institutions including the Reserve Bank of India ("RBI"), the Government of India, the Bar Council of India and a number of other Bar Councils and the only three foreign firms holding licences for liaison offices from the RBI - the US firms of White & Case, Chadbourne & Parke Associates and the English solicitors, Ashurst Morris Crisp. The litigation in essence challenged the right of non-India and lawyers to do any legal work in India including in relation to UK and US law.

Development of legal profession in India has been restricted in India on account of the number of impediments in the current regulatory system which hinders Indian law firms from competing effectively against foreign firms. First, there are a number of restrictions, which severely limit the scope of growth in the legal profession, In India there is an absolute bar on advocates advertising and soliciting for any purpose,[18] and indicating any area of specialization.[19] Restrictions on advertising by lawyers in India have resulted in a situation where consumers cannot make an informed choice from the competitive market since the information relating to service is not available to them. Moreover restriction on professional firms on the informing potential users on range of their services and potential causes further injury to the competition. Secondly, the Bar Council

18 Rule 36, Bar Council of India Rules, 1975.
19 *Id*.

of India Rules, 1975 in Chapter III, Rule II[20], prohibits advocates from entering into partnership or any other arrangement for sharing remuneration with any person or legal practitioner who is not an advocate. Lawyers cannot enter in cooperation with non-lawyers. Prima facie there seems to be no pro competitive justification for such a regulation. Such a measure as hampered the delivery of services to the consumer and anticompetitive.[21] This absolute bar has been lifted to some extent with the institute of Chartered Accountants permitting tie-ups between lawyers and Chartered Accountants.

Thirdly, the regulatory and legal system in India has the effect of limiting the size of legal establishment. Section 11 of the Companies Act, 1956 stipulates that a partnership or any form of association with more than 20 members if not registered as a company shall be an unlawful assembly.[22] Fourthly, in India only natural persons can practice law, as is evidenced by combined reading of Sections 24[23], 29[24] and 33[25] of Advocates Act and artificial body cannot act as a lawyer. The justification for such restriction is on public policy grounds and in particular to ensure professional responsibilities and liabilities. Thus a legal service provider cannot be incorporated as a company and still continue in practice the profession of Law in India, as per the provisions of Advocates Act, 1961. Fifthly, the requirement that Advocates enter into partnerships only with other Advocates has the effect of prohibiting partnerships with foreign firms.[26] The effect of this provision is that partnerships cannot be entered into between Indian Lawyers and those of other countries. These restrictions on incorporation and size of partnerships , prohibition on entering into partnerships with foreign Law firms and lawyers, has limited the size and growth of the profession as well as professionals and prevents them from being globally competitive. Sixthly, the lack of restrictions on partnerships across the world has given rise to firms with a number of partners. Big law firms having wide controlling, regulating and functioning power nationally and internationally. In sharp contrast Indian firms are small and incapable of associating with legal experts from other countries . This way Indian law firms are at disadvantage to law firms of U.S. and E.U.[27]

20 An Advocate shall not enter into a partnership or any other arrangement for sharing remuneration with any person or legal practitioner who is not an Advocate.

21 Section 19 (a) and 19 (c) of the C.A, 2002.

22 Section 19 (e) and Section 19 (f) of the C.A, 2002,

23 Section 24 prescribes the qualifications to become an advocate.

24 Subject to the provisions of this Act and any rules made there under, there shall, as from the appointed day, be only one class of persons entitled to practise the profession of law, namely, advocates.

25 Except as otherwise provided in this Act or in any other law for the time being in force, no person shall, on or after the appointed day, be entitled to practise in any court or before any authority or person unless he is enrolled as an advocate under this Act.

26 Chapter III, Rule I, Bar Council of India Rules, 1975.

27 Legal Services, Background Note by the Secretariat, S/C/W/43, 6th July 1998, WTO Council for Trade in Services, p.8.

Having functioned in such a limiting framework for the past forty-four years, the Indian legal profession is today ill-equipped to compete on par with international lawyers, who have grown their practices in liberalized regimes and have vast resources at their disposal. It is further to be noted that there are only a few firms in India having the expertise to handle commercial work for multinationals.

Why India's Response should be affirmative?

There are several good and valid reasons, for the Indian government and indeed, the Indian lawyers' community to favourably consider the entry of foreign law firms in India. As India opens up its economy and enters the global trade and commerce mainstream, any form of prohibition on the use of legal and/or financial advisers will be adversely viewed by overseas investors. Lawyers are perceived as an integral part of the investment process and foreign companies want their preferred lawyers with them as much as their own bankers. Foreign lawyers will bring modern know-how and practises which would be of great benefit to Indian law firms. Indian law firms are, relative to their Western counterparts, are less organised less well structured. They tend to be dynastic in their management practices rather than performance oriented. This will change for the better, including improvement of career prospects for Indian lawyers in India and abroad, greater confidence among Indian law firms to pitch for business in foreign markets, etc. Indian business itself stands to benefit greatly from the adoption of quality contractual documentation, which will come in with foreign law firms. Already, significant changes in contractual documentation have occurred despite minimal contacts and these have begun to be apparent in the nature of commercial deals. The process will get accelerated greatly, when foreign law firms start practising in India.

The Law Commission, headed by Justice Jeevan Reddy, published a "Working Paper on the Review of the Advocates Act, 1961" in 1999.[28] Section 4 is entitled "Entry of Foreign Legal Consultants and Liberalisation of Legal Practice." The Paper has suggested that Section 29 of the Act be amended to include all services such as advising, research, documentation etc. besides representation in Court s, tribunals and other statutory bodies. It has further stated that the Act should be amended to recognize qualifications in law obtained outside India for the purpose of admission of a foreign legal consultant as advocate.

It added that the Council should immediately proceed to frame rules necessary to standardize conditions for entry of foreign legal consultants and building up a fair and transparent regulatory system, as required under GATS.

28 http://pib.nic.in/archieve/lreleng/lyr2000/rjan2000/r05012000.html, visited on 02-09-07.

Additionally, the Council should choose a model of liberalization that suits the country as well as a regulatory regime to be adopted to regulate the entry and function of the foreign lawyers.

The Working Paper suggested that India could adopt both "full" and "limited" Licensing approaches as recommended by the International Bar Association for the regulatory system. Under full licensing, foreign lawyers are integrated as full members of local profession with no restriction on the scope of practice, provided they fulfil certain basic conditions.

In contrast, under limited licensing approach, the scope of practice is limited to advice on home country law, excluding all Court work, host country law and law of any other jurisdiction where the foreign lawyer is not qualified and licensed. The debate is going on in the subject. There is still fairly strong opposition from the Indian legal profession to the idea of permitting the entry of foreign lawyers to practice in India, though many lawyers in India are showing a willingness to come to terms with foreign law firms provided the ground rules are properly framed. It can be expected therefore that the Indian legal profession will not wish to surrender its monopoly lightly.

Conclusion

Suffice it to say, any attempt to liberalize trade in legal services must strike a balance between the concerns of national regulators regarding the practice of foreign attorneys and the benefits of increased international competition in the global legal market. Some of the restrictions imposed on foreign lawyers by national regulators are objectively justifiable and facilitate the effective and reliable provision of legal services in the domestic market. Such restrictions should not be sacrificed in an attempt to increase international competition. However, many of the restrictions on foreign lawyers are unreasonably discriminatory and should be eliminated.

Since India is also a signatory to the General Agreement on Trade in Services (GATS), it will have to enter into negotiations regarding opening up of service sectors to the Foreign Service suppliers. This involves the opening up of legal services to foreign lawyers and FLCs and foreign law firms. However it is hoped that before entering into any commitment that may affect the interests of legal profession in the country, the Government will have to consult the legal profession.

BOOK REVIEW

LAW OF ARBITRATION & CONCILIATION**

K.V.S. Sarma*

Recent years have heralded a period of unprecedented change in India's dispute resolution mechanism. Following the reforms in the dispute resolution mechanism arbitration became more popular method in settling the civil disputes as an alternative to the normal judicial method. It gives me immense pleasure in reviewing 9th edition of Dr. Avtar Singh's book on *"Law of Arbitration & Conciliation"* which was published by Eastern Book Company, Lucknow. This popular and well established text book covers the subject comprehensively but concisely.

The new Act confers complete power on the Arbitral Tribunal for full and final disposal of the matter presented before it by the parties to the dispute. The author has divided the book into five parts. Part I deals with Arbitration, while Part II deals with 'Enforcement of certain foreign awards', Part III deals with 'Conciliation', Part IV deals with 'Supplemental Provisions' and finally Part V deals with 'Alternative Dispute Redressal'. In addition to the time honoured precedents, frequent reference is made to contemporary cases and topical issues to engage students' interest. The law under the Act has expanded, and the treatise has grown to match this expansion. It is a well organised and well researched which includes references to the leading Indian cases.

The style of the subject is exceptionally accessible to the students who are new to the subject. The book is self explanatory and adopts the "Teach yourself style". The relevant background for each legal provision has been given.

It is an excellent textbook which covers very eloquently all aspects on "Law of Arbitration" in a very systematic and logical manner. This book will be of an immense help not only to students, researchers and teachers of this discipline but also to executives, managers and bureaucrats as well for their proper understanding and functioning of day to day work. I hope this book will mark the end of all sorts of haziness, confusions and doubts in the field

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