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KASHMIR JOURNAL OF LEGAL STUDIES

Editorial

On behalf of the management and the teaching staff of the college, I have the privilege to present the first issue of "***KASHMIR JOURNAL OF LEGAL STUDIES***" to the readers. The journal has the distinction of being the first of its kind in private sector in J& K. The journal is dedicated to the promotion of legal education and research in law strengthens the *rule of law* and respect for democratic institutions.

The emergent challenges of *globalization* and *liberalization* has overshadowed positive jurisprudence and opened up research in multidisciplinary areas to produce a better and new crop of lawyers with a social vision. The *National Knowledge Commission* while recognizing legal education as an important constituent of professional education emphasized that:

> *The Vision of legal education is to provide justice-oriented education essential to the realization of the values enshrined in the Constitution of India. In keeping with this vision, the legal education must aim at preparing legal professionals who will play decisive leadership roles, not only as advocates practicing in courts but also as academics, legislators, judges, policy makers, public officials, civil society activists as well as legal counsel in the private sectors maintaining the highest standards of professional ethics and spirit of public service. Legal education should also prepare professionals equipped to meet the new challenges and dimensions of internationalization where the nature and organization of law and legal practice are undergoing a paradigm shift.*

Keeping in view the vision and the pace of progress made by science and technology the initiative to publish the journal is intended to make a comparative study of the laws of other states to strengthen our own laws, wherever necessary. How far the attempt made is successful is left to be determined by the wisdom of readers.

A number of excellent contributions received for publication which made it difficult to decide what to include and what to exclude in the present issue. The exclusion of articles and comments on account of constraints of space and cost does not constitute a reflection of their quality or relevance. The contributions in the present volume cover a wide range of law and contemporary legal issues. It is hoped that readers of the journal will offer

their valuable and critical comments which shall pave the way for improving the quality of the features issues of the journal. The editorial committee is thankful to the contributors which they find to be of great academic interest and relevance in the contemporary society.

I am thankful to the members of the *Editorial Committee* for the arduous task with which they have worked to bring out this volume. I am particularly thankful to Dr. Farooq Ahmad Mir, Associate professor in the Department of Law, University of Kashmir for his unflinching support in editing the manuscripts and ensuring that the present volume finds its own niche in the academic and judicial circles.

It may not be out of place to introduce the readers with the Shadab Educational Trust which is the moving force and spirit behind the publication of this journal. The *Kashmir law college, Nowshera Srinagar* is the creation of the *Trust* and is mainly responsible for imparting quality legal education to meet the challengers of 21st century. The college was established in the year 2005 and is one of the best leading centres of legal learning in J&K. The college during its short span of time has shown a speedy progress in terms of academic growth. The products of the college have successfully qualified national and local competitive examinations like NET, SLET, KAS, KCS etc. The Bar of the state is highly appreciative of the analytical skills and the academic merit possessed by the products of the college which is well required in the legal profession. The ideal environment for the pursuit of highest academic excellence is the lasting and only mission of the college which is being accomplished with the efforts of competent, sincere and committed teachers of the college.

I am grateful to the Kashmir Law College for printing the journal with meticulous care. I am also thankful to Mr. Jan Mohammad for Computer Layout and the design of the journal.

In the end I place on record the appreciation for all the trustees in particular Mr. Altaf Ahmad Bazaz, Patron, for showing keen interest in all academic pursuits including the publication of the journal.

A.S.Bhat

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I, Altaf Ahmad hereby declare that the particulars given above are true to the best of my knowledge and belief.

Curing Carelessness Towards Man-Made Disasters Through Legislative Action: Let There Be No More Any Uphaar Tragedy!

M. Afzal Wani*

I. Introductory

Any horrendous devastative event resulting from conditions created by human conduct—intent, negligence, error, or failure of a system as opposed to happenings in the natural process are described as man-made disasters. These may be sociological or technological in nature. The sociological disasters include crime, war, internal armed conflicts, civil disorders etc. Crime attains disastrous dimension when it grows in enormity and extent of damage, requiring special measures for its control. Arson, rioting, causing disruption in communication system are some such crimes. Use of threat for the purpose of creating fear in order to achieve a political or ideological goal is also not uncommon now. The target can be anyone, including civilians, government officials or defence personnel. War as disaster causes destruction of cultures, nations, environment and economies and inflicts great suffering on humanity. The technological disasters include industrial accidents, structural collapses, failure of fire security systems, emissions of and explosions from hazardous materials and any such other happenings. There incidence is increasing and likely to be on rise if not dealt with preventive measures.

Industrial accidents/disasters, which are now apprehended most, occur during search, excavation or purification of raw materials and during the process of manufacturing and distribution of products. These include mining disasters and environmental degradations. Bhopal gas tragedy and the Chernobyl are the examples. Structural collapses as that of buildings, bridges, dams etc. are often caused by engineering failures.

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Power outage turn disastrous when extend and disrupt personal and business activities and medical services and rescue operations. It some times leads to civil disorder also. Bush firs, forest fires, mine fires and town fires are too much damaging irrespective of the source whether start by lighting by human negligence or arson. They may some times turn into a firestorm. Lack of accessible emergency exit, poorly marked escape routes, or improperly maintained fire extinguishers or sprinkler systems may result in many more deaths and injuries than might occur with such protections.

Now nuclear emissions take place and sometimes nuclear weapons are detonated to cause disasters. Ordinarily nuclear containment systems are compromised and airborne radioactive particles scatter and irradiate large areas. These are deadly with a long-term effect on the next generation for those who are contaminated. Ionizing radiations being hazardous to living things make the whole area as unsafe for human habitation. The examples are the Hiroshima and Nagasaki, Ukraine and Belarus after a reactor at the Chernobyl nuclear power plant suffered a meltdown in 1986. The occurrence at the Three Mile Island Nuclear Power Plant in Pennsylvania in 1970, though fortunately resolved, the area retained some contamination. Military accidents involving nuclear weapons also result in radioactive contamination, for example the 1966 Palomares B-52 crash and the 1968 Thule Air Base B-52 crash. Besides, CBRN (Chemical, Biological, Radiological and Nuclear) non-conventional terror threat is now always at the door and is a matter of serious concern.

Road accidents and road based pollution, especially greenhouse effect of road transport and rapid consumption of fossil fuel are seen as disasters. More so are the aviation incidents, railroad disasters and space disasters. Space disasters, either during operations or training, have killed around many astronauts and cosmonauts, and a much larger number of ground crew and civilians.

Seen in the context of day to day activities, in the absence of due care, one can apprehend any happening like that of Uphaar Cinema in Delhi any time while being in mechanically managed homes, roads, transport, offices, markets, restaurants and places of entertainment. There is need for a strong law to safeguard victims of man-made disasters and to provide stringent punishment to the offenders because

under the prevalent law the offenders are generally booked under section 304A IPC for causing death due rash and negligent Act with no exemplary punishment. This has worsened the situation. The compensation jurisprudence evolved by courts cannot be a substitute to proper and desirable legislative action.

II. A Memoir of Prominent Man Made Disasters

To have a global perspective of the problem and underline the need for strict measures to control man made disasters a compact view of some disasters is given below:

Chemical Industry

On September 21, 1921Oppau explosion occurred in Germany when a tower silo storing 4,500tonnes of a mixture of ammonium sulphate and ammonium nitrate fertilizer exploded killing 500–600 people and injuring about 2,000 more. On April 16, 1947 Texas City Disaster took place. At 9:15 am an explosion occurred aboard a docked ship named the Grandcamp. The explosion and the subsequent fires and explosions are referred to as the worst industrial disaster in America. A minimum of 578 people lost their lives and another 3,500 were injured as the blast shattered windows from as far away as 25 mi (40 km). Large steel pieces were thrown more than a mile from the dock. The origin of the explosion was fire in the cargo on board the ship. Detonation of 3,200 tons of ammonium nitrate fertilizer aboard the Grandcamp led to further explosions and fires. The fertilizer shipment was to aid the struggling farmers of Europe recovering from World War II. Although this industrial disaster was one of the largest involving ammonium nitrate, many others have been reported including a recent one in North Korea.

A chemical tank wagon explosion in Germany in 1948, Fixborough disaster in 1947 in England, Seveso disaster in Italy in 1976 in a small chemical manufacturing plant due to the release of dioxins into the atmosphere, December 3, 1984 Bhopal gas disaster in India, November 1, 1986 Sandoz disaster in Switzerland, releasing tons of toxic agrochemicals into the Rhine, June 28, 1988 Aubum, Indiana killings due to improper mixing of chemicals, October 23, 1989Phillip Disaster, September 21, 2001the AZF fertilizer factory killings in France are still

continuously sending shock waves through every sensitive human mind and call for effective control.

Construction Industry

On January 20, 1909 in Chicago Crib Disaster during the construction of a water intake tunnel for the city of Chicago a fire broke out on a temporary water crib used to access an intermediate point along the tunnel. The fire began in the dynamite magazine and burned the wooden dormitory that housed the tunnel workers. 46 workers survived the fire by jumping into the lake and climbing onto ice floes or the spoil heap near the crib. 29 men were burned beyond recognition, and approximately 60 men died. Most of the remainder drowned or froze to death in the lake and were not recovered. On April 27, 1978 in Willow Island disaster a cooling tower for a *power plant* under construction in Willow Island, West Virginia collapsed, killing 51 construction workers. The cause was attributed to placing loads on recently poured concrete before it had cured sufficiently to withstand the loads. It is thought to be the largest construction accident in United States history.

Defense Industry

On July 17, 1944 Port Chicago Disaster took place by explosion of ammunition that killed 320 people. On August 9, 1965 a number of contract workers were killed during a fire at a Titan Missile Silo. The cause of the fire was determined to be a welding rod damaging a hydraulic hose allowing hydraulic vapours to leak and spread throughout the silo, which were then ignited by an open flame source.

Energy Industry

In May 1962 the Centralia Pennsylvania coal mine fire began, forcing the gradual evacuation of the Centralia borough. The fire continues to burn in the abandoned borough even 48 years later. In March 1967 the Torrey Canyon oil supertanker was shipwrecked off the western coast of Cornwall, England, causing an environmental disaster. This was the first major oil spill at sea. Now we frequently here of such oil spills which have caused a concern. On April 26, 1986, the Chernobyl disaster caused by one of the reactors going out of control resulted into a nuclear meltdown. Fallout could be detected as far away as Canada. The surroundings remain poisoned and mostly uninhabited.

The February 7, 2010 Connecticut power plant explosion in US, though the plant was still under construction and scheduled to start supplying energy in June 2010; the 2010 nuclear emissions in Japan of injuries was eventually established to be 27; and April 20, 2010 Deepwater Horizon oil spill in the Gulf of Mexico, considered the largest offshore spill in U.S. history have invited more serious considerations by the experts as well as the governments. The food industry, manufacturing industry and mining industry are equally demanding attention for better safety measures.[1]

This select account of the sad happenings gives a feeling that in the present technologically oriented world with mechanical operations controlling life round the clock any time any kind of unfortunate happening can take place in a factory, plant, an institution, a high-rise building etc. causing huge losses to property and life.

III. Uphaar Cinema Tragedy

An illegal DVB transformer had been installed in the ground floor of the Uphaar Cinema which caught fire on 13th June 1997and smoke spread through out the cinema complex. Due to irregular structuring and installations 59 patrons seated in the balcony died of asphyxia. The patrons were trapped inside the balcony due to improper placement of gangway and completely blocking the only exit on the right hand side of the balcony which was in contravention of rules. Even the basic fire safety norms such as Public Address system, emergency lights, foot lights and exit lights were non functional. The other exit doors, being bolted, prolonged the entrapment of the patrons who were held up inside the balcony, depriving them of timely and easy access to the egress. The suffocation caused by toxic gases, which engulfed the balcony area, killed the patrons in a state of distress.

The chronology of events that followed is as under:

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1 There are many more reportable incidents which turned into disasters but we have mentioned some such incidents to emphasise the need for appropriate action supported by law.

June 13, 1997: 59 people died of asphyxia in Uphaar cinema hall fire, which broke out during the screening of a Hindi movie over hundred persons receive injuries in the subsequent stampede.

July 22, 1997: Theatre owners were arrested in Mumbai.

July 24, 1997: Probe transferred from Delhi police to the CBI.

November 15, 1997: CBI filed charge sheet against 16 accused including theatre owners.

March 10, 1999: A sessions court initiated the trial.

February 27, 2001: Court framed charges against accused under various sections including 304 (culpable homicide), 304A (causing death by negligent act) and 337 (hurt) of the IPC.

May 23, 2001: Recording of prosecution witnesses testimony began.

April 4, 2002: High Court asks trial court to try to wrap up the case by December 15.

January 27, 2003: Owner's plea for re-possession of the theatre rejected on the ground that the place of incident was to be preserved to appreciate evidence.

April 24, 2003: The Delhi High Court awarded Rs. 18 crore compensation to be paid to the relatives of the victims.

September 4, 2004: Court started recording statements of accused.

November 5, 2005: Recording of testimonies of defence witnesses began.

August 2, 2006: Court concluded recording of testimony of defence witnesses.

August 9, 2006 : ASJ inspected the theatre.

February 14, 2007: Accused started advancing final arguments.

August 21, 2007: Association of victims of Uphaar Tragedy approached Delhi High Court seeking conclusion of trial within a fixed time frame.

August 21, 2007: Judgment reserved. Court fixed September 5 for pronouncement of verdict.

September 5, 2007: Court defers pronouncement of verdict and says it would fix the date of judgment on October 22.

October 22, 2007: Court fixed November 20 as the date of verdict.

November 20, 2007: Court convicts all 12 accused including theatre owners.

The case involved significant issues related to statutory violations, administrative lapses and payment of compensation to victims and their relatives. An analysis of the case reveals that each and every public authority had not only completely disregarded the statutory obligations for the prevention of fire hazards but in fact acted in a manner hostile to the discharge of such duties. The state of apathy is reflected by the fact that the government officials had argued that the writ petition was not the appropriate proceeding for deciding the responsibility for the incident. The violations found by the inquiry and the findings of the High Court, which had direct link with the death of 59 patrons, are as follows:

1. The decision to install a DVB Transformer was contrary to sanctioned plan and without the permission or approval of licensing authority and MCD;
2. Absence of fire safety measures from the transformer room were contrary to prescribed norms;
3. There were structural deviations in the cinema hall;
4. Use of several portions of the cinema hall was being made for commercial purposes;
5. The management of parking was negligent;
6. The right side gangway in the balcony had been shut to increase the seats, which in turn reduced the number of gangways and also crucially blocked the right exit;
7. There was failure to ensure proper supervision within the cinema at the time of the show, contrary to the mandate of DCR 1981;
8. There was failure in the functioning of fire safety equipment that would have warned the patrons to leave the cinema hall immediately upon the outbreak of fire or any emergency and also facilitated their escape through proper lighting.

The High Court, in spite of these findings reduced the sentence of the responsible persons to merely one year.

The technical authorities responsible for inspecting the premises before the grant of license had carried out the inspection very mechanically without doing any physical inspections.

IV. Emerging Concerns

The above situation raised following three questions/concerns from victims' point of view:

1. The criminal justice system works to the total dismay of the victims and their relatives that keeps them dragging in courts indefinitely with no hope of appropriate justice.
2. Under the prevalent system the offenders of man made disasters are often booked under Sec 304A IPC which ends up with conviction for causing death due to rash and negligent act. It is a mockery that someone who causes death of so many persons is charged with only rashness and negligence. Even if convicted, he need not worry as he may get relief from the appellate court, since the maximum punishment for his offence is merely an imprisonment of two years. There is no deterrence that can instill fear in the minds of possible wrongdoers.
3. Even in this era of multiplexes, under the Cinematography Act 1952, the violator of the regulations can be punished for Rs. 1000/- only and if the violation continues the offender is charged Rs. 100/- per day which is too meager and definitely will not bring in any deterrent effect.

There is a demand for stronger, single law to prevent man made disasters and safeguard victims of manmade disasters. It should make any body conscious of the consequences of his omissions and commissions. The new legislation should brings under its purview all cases related to protection of life and safety across public places and ensure that mandatory stipulations are met with by owners, occupiers and /or builders of places inhabited and /or visited by public at large. Strict adherence to public safety norms and rules/ regulations thereto, must be ensured. Punishment should be of such a nature and degree that it has the necessary preventive effect. Example of such an initiative is the development of law in Rhode Island where pursuant to the incident of the Station Night Club Fire in 2003 the Government changed the law and the governor signed into law state's most far reaching fire safety legislation. The highlights of the law (House 4550) are:

1. It mandates sprinklers in nightclubs with an occupancy of 100 persons or more within three years and creates a two-strike rule for clubs with occupancies of less than 100 that exceed capacity. If a club is cited for an occupancy violation twice in a year, automatic sprinklers must be installed within 90 days or the business will be shut down;
2. Creates criminal penalties for dangerous conditions in public assembly buildings, including blocking ingress or egress; shutting off or failing to maintain fire protection systems; storing flammables or explosives; and using fireworks or pyrotechnics without a permit and exceeding occupancy limits. The first infraction will result in a fine of not more than $5,000 and /or imprisonment of up to $2^{1/2}$ years. Repeat offenders can be fined up to $25,000 and /or imprisoned for up to five years;
3. Establishes criminal penalties for individuals who violate provisions of the state building or fire codes when a violation results in significant injury or death. Volition may result in a fine up to $25,000 and /or imprisonment of up to five years;
4. Restores the Student Awareness of Fire Education program, which helps educate children about fire safety awareness;
5. Establishes a $10 million grant program to help fire departments with equipment and staffing needs, based on population size; Also establishes fire-safety training programs for nightclub owners and managers; and Establishes a certification program for fire inspectors.

V. Law in India

The Disaster Management Act, 2005

The existing legislation relevant to the subject of present reference is the Disaster Management Act, 2005. It deals with the prevention, mitigation of sufferings and management of both natural and man made disasters. It provides for the appointment of disaster management authorities and various committees and institutions at the national, state, district and local levels charged with the responsibility of framing policies and their implementation for the purpose of effective management of disasters including, inter alia, preparedness and capacity building for dealing with disasters. The Act specifically requires for the

establishment of National Institute of Disaster Management and National Disaster Response Force. The functions the former include preparation of training modules for human resource development, production of educational materials and promotion of awareness among stakeholders; and the later is for giving specialist responses to threatening disaster situations or disasters.

The Act has a very wide application as it defines 'disaster' in very broad terms as a catastrophe, mishap, calamity, or grave occurrence in any area, arising from natural or man made causes, or by accident or negligence which results in substantial loss of life or human suffering damage to, degradation of environment, and is of such a nature or magnitude as to be beyond the coping capacity of the community of the affected area. The disaster management is defined as a continuous and integrated process of planning, organizing, coordinating and implementing measures which are necessary and expedient for –(i) prevention of danger or threat of any disaster;(ii) mitigation or reduction of risk of any disaster or its severity or consequences; (iii) capacity building;(iv) preparedness to deal with any disaster;(v) prompt response to any threatening disaster situation or disorder;(vi) assessing the severity or magnitude of effects of any disaster;(vii) evacuation, rescue and relief; and (viii) rehabilitation and reconstruction. All authorities/committees etc. constituted under the Act have been assigned roles to be played for ensuring efficient disaster management through preparation of plans and their implementation.

Chapter X of the Act deals with offences and punishments under the Act. This chapter (based on sections 51 to 60) declares that any person:

i) who obstructs any officer or employee of the central government or the State Government, or a person authorized by the National Authority or State Authority or District Authority in the discharge of his functions under this Act; or refuses to comply with any direction given by or on behalf of the Government or the State Government or the National Executive Committee or the State Executive Committee or the District Authority under this Act without reasonable cause shall be punishable with imprisonment for term which may extend to one year or with fine, or with both, and if such obstruction or refusal to comply with directions results in loss of lives or imminent danger

thereof, shall on conviction be punishable with imprisonment for a term which may extend to two years;[2]

ii) who knowingly makes a claim which he knows or has reason to believe to be false for obtaining any relief, assistance, repair, reconstruction or other benefits consequent to disaster from any officer of the Central Government, the State Government, the National Authority, the State Authority or the District Authority shall be punishable with imprisonment for a term which may extend to two years, and also with fine;[3]

iii) who, being entrusted with any money or materials, or otherwise being, in custody of, or dominion over, any money or goods, meant for providing relief in any threatening disaster situation or disaster, misappropriates or appropriates for his own use or disposes of such money or materials or any part thereof for willfully compels any other person so to do, shall be punishable with imprisonment for a term which may extend to two years, and also with fine;[4]

iv) who makes or circulates a false alarm or warning as a disaster or its severity or magnitude, leading to panic, shall on conviction, be punishable with imprisonment which may extend to one year or with fine;[5]

Section 55 of the Act provides that:

i) where an offence under this Act has been committed by any Department of the Government, leading of the Department shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly unless he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence. However, where an offence under this Act has been committed by a Department and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any officer, other than

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2 Section 51.

3 Section 52.

4 Section 53.

5 Section 54.

the head of the Department, such officer shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Any officer, on whom any duty has been imposed by or under this Act and who ceases or refuses to perform or withdraws himself from the duties of his office shall, unless he has obtained the express written permission of his official superior or has other lawful excuse for so doing, punishable with imprisonment for a term which may extend to one year or with fine.[6]

If any person contravenes any order made under section 65[which deals with power of requisition of resources, provisions, vehicles, etc. for rescue operations, etc.], he shall be punishable with imprisonment for a term which may extend to one year or with fine or with both.[7] Where an offence under the Act has been committed by a company or body corporate, every person who at the tome the offence was committed, was in charge of, and was responsible to, the company, for the conduct of the contravention and shall be liable to be proceeded against and punished accordingly. Provided that nothing in this sub-section shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he exercised due diligence to prevent the commission of such offence.[8]However, if it is proved that the offence was committed with the consent or connivance of or is attributable to any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also, be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.[9]

Sections 59 and 60 provide that prosecution for offences punishable under sections 55 and 56 can be instituted only with the previous sanction of the Central Government or the State Government, as the case may be, or of any officer authorized in his behalf, by general or special order, by such Government. Cognizance of such an offence can be taken

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6 Section 56.

7 Section 57.

8 Section 58 (1).

9 Section 58 (2).

only on a complaint made by (a) the National Authority, the State Authority, the Central Government, the State Government, the District Authority or any other authority or officer authorized in this behalf by that Authority or Government, as the case may be; or (b) any person who has given notice of not less than thirty days in the manner prescribed, of the alleged offence and his intention to make a complaint to the National Authority, the State Authority, the Central Government, the State Government, the district Authority or any other Authority or officer so authorized.

THE demand of the Association for Victims of Uphaar Tragedy (AVUT) is that an appropriate legal judicial mechanism should be put in place to protect people from "man made calamities" with deterrent effect for people whose "omissions or commissions" endanger human life. They suggest for a single legislation for safety of public places with mandatory stipulations to be followed by builders, owners and occupiers of such premises. Punishment for violation of such stipulations should be deterrent.

VI. Conclusion

Seen in this context the offences and punishments defined in chapter x of the Disaster Management Act, 2005 are not as such congruent with the demands of the AVUT. The punishments under the Act should cover: (a) non-performance of the duties by any person /department of government/body/agency etc. being responsible for preparation of the necessary guidelines to be followed in building and maintenance of places inhabited or visited by people in large numbers, (b) failure of any person /department of government/body /agency in monitoring observance of such guidelines by builders, owners and occupiers of such premises, (c) failure of any person in observance of such guidelines being a builder, owner and occupier of such premises, and (d) obstruction by any person in the working of the disaster management system by preventing discharging of functions by any responsible person or by himself refusing to comply with the directions of competent authorities under any law dealing with disaster management. The offences and penalties defined under chapter-x of the Act cover sufficiently only (d) category of offences and not the (a), (b) and (c). Therefore, provisions should be added to the Disaster Management Act, 2005 to prescribe punishment for (a), (b) and (c)

category of offences also. To meet this purpose, section 56 of the Act may be repealed and substituted by the following provision/s:

56. Any person, agency or officer, on whom any duty has been imposed by or under this Act or any other law dealing with matters related to disaster management and who omits, ceases or refuses to perform or withdraws himself from his duties without the written permission of the competent authority or any other lawful excuse for so doing, shall be punishable with imprisonment for a term which may extend to five years and with fine.

Explanation.--- For the purposes of this section 'duty' includes:

i) preparation, prescription and implementation of the guidelines and their monitoring for construction or building of public places, installation of necessary safety equipments thereat, making available minimum facilities for their safe use, and ensuring their proper maintenance; and

ii) following of prescribed guidelines for construction or building public places, installation of necessary safety equipments thereat, making available minimum facilities for their safe use and ensuring proper maintenance by builders, owners, occupiers, maintenance agencies and service providers.

OR

56. Any officer, on whom any duty has been imposed by or under this Act or any other law dealing with matters related to disaster management and who omits, ceases or refuses to perform or withdraws himself from his duties without the written permission of the competent authority or any other lawful excuse for so doing, shall be punishable with imprisonment for a term which may extend to five years and with fine.

Explanation.-- For the purposes of this section 'duty' includes preparation, prescription, implementation and monitoring of the guidelines for construction or building of public places, installation of necessary safety equipments thereat, making

available minimum facilities for their safe use, and ensuring their proper maintenance.

56. Any person or agency, on whom any duty has been imposed by or under this Act or any other law dealing with matters related to disaster management and who omits, ceases or refuses to perform or withdraws himself from his duties without the written permission of the competent authority or any other lawful excuse for so doing, shall be punishable with imprisonment for a term which may extend to five years and with fine.

Explanation.--- For the purposes of this section 'duty' includes due compliance of prescribed guidelines for construction or building of public places, installation of necessary safety equipments thereat, making available minimum facilities for their safe use and ensuring their proper maintenance by builders, owners, occupiers, maintenance agencies and service providers.

Other suggestions to be religiously followed are as follows:

1. There should be periodical review of the guidelines prescribed for prevention of disasters and preparedness for mitigating disastrous situations by the competent authorities under the Act.
2. Review of the guidelines should be, inter alia, focused on improvements in technology and up-gradation of facilities.
3. Meticulous arrangements should be made for recoding public complaints and taking appropriate action on them with issuance of compliance reports publicly.
4. All information about the prescription of guidelines, their compliance and violation should be compulsorily maintained and made publicly accessible on the Internet.
5. Names of officers responsible to discharge various obligations under the Disaster Management Act, with specific period of time, should be a part of the information perpetually made available for general public.

It may, however, be noted that a separate legislation on the basis of above suggestions can also be adopted for Uphaar like happenings and measure disasters may be left to be dealt with under the existing Disaster Management Act.

Digital Piracy under Copyright Regime: A Case for Techno-Legal Control

Fareed Ahmad Rafiqi*

1. Introduction

Intellectual property rights (IPRs) and the Web are noteworthy topics, which have aroused the interest of the entire stakeholders, directly or indirectly affected thereby, in the present-day world. This phenomenon has raised certain interesting propositions, to reckon with, in the burgeoning technological spree. For example, the advent of digital media and analog/digital conversion technologies especially those that are usable on mass-market general purpose personal computers, have vastly increased the concerns of copyright-dependent organizations, especially within the music and movie industries.[10] While analog media inevitably loses quality with each copy generation and in some cases even during normal use, digital media files may be duplicated in an unlimited number of times with no degradation in the quality of subsequent copies. Does the nature of digital technology require changes in the legal understanding as it stands now? What rights should be associated with web content? How should the rights be expressed and should the expression of the rights be used for notification, enforcement, or payment/negotiation? The answer to these questions does not lie solely in technology nor policy but the rational combination of both. In India the anti-circumvention measures to check digital piracy is sought by a proposed amendment to the copyright Act 1957, in tune with the WIPO Copyright Treaty at the international level.[11] In this paper an

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10 See Rowland & Elizabeth MacDonald, Information Technology Law, *Policing Cyberspace*, 1st Ed (1997, London) at 361.

11 In India the Copyright Office posted proposals way back in 2006 to amend the Copyright Act, 1957 at its website: http://copyright.govt.in/view%20comment.pdf/ to elicit public opinion for introducing Digital Rights Management (DRM) in tune with WIPO Treaty

attempt is made to assess the introduction of technological measures like Digital Rights Management (DRM) and Technological Protection Measures (TPM) to prevent digital piracy having assumed glaring proportions in the modern copyright era, in the context of Indian legal regime.

2. Digital Dissemination: A Bane or a Boon?

The easier and cheaper reproducibility of digital content, perfect substitutability of the digitized copies, enhanced compression and storage capacities of the content, easier extraction of digital content from storage media[12] and equally inexpensive dissemination of digitized products[13], have all made copying, authorized or unauthorized, a more frequent phenomena. The most important aspect of digital content is that *access to the content* becomes synonymous with *control of the content* which, added with the low cost of content reproduction and dissemination, causes virtual loss of ownership in terms of the content's economic value. This influences the developmental theory of copyright, because if unauthorized digital copying affects creative production, it also affects development based on the copyright industries.[14] It may be noted that in the late 20th century, publishers began producing books in new formats, and technological advances had a huge impact on the book publishing industry. Audio books offer readers the option of listening to

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but so far it has not resulted in the desirable change. However, UPA Government has introduced Copyright Amendment Bill in parliamentary. The Copyright (Amendment) Bill of 2010 has been presented in Lok Sabha as Bill No XXIV of 2010.

12 Development Of Ripping Technology: WIPO Standing Committee Report On Copyright And Related Rights, 2004,SCCR/10/2/Rev.

13 T. Bauchage, Digital Rights Management: Economic Aspects, The Basic Economic Theory Of Copying, Digital Rights Management, Technological, Economic, Legal And Political Aspects (Springer: Berlin, Heidelberg) at 239 pp. 234-249

14 See generally, Commission on Intellectual Property Rights, Integrating Intellectual Property Rights And Development Policy: Report Of The Commission On Intellectual Property Rights, London 2003.

a work that has been narrated and recorded onto a cassette or compact disc. People who are blind or have low visions value them most.[15]

With the advent of Internet, dissemination of digital material has become so rampant and fast that the conventional legal regime glued with analog pattern, find it difficult to track it down in an effective way.[16] Given its international dimension this type of digital dissemination has enormous impact to delimit copyright control in this phenomenon[17]. The present spree of e-publishing has emerged as the perfect means of publishing books, especially reference works, due to multimedia attributes of searching databases, incorporating images, sounds and videos into their products.[18] Thus, many publishers struggled with changing technical standards compounded by a widespread reluctance by users to read off a computer screen for long periods.[19] In order to checkmate digital piracy and given its global demeanor national representatives from all over the world met at WIPO Conference to update international framework for the protection of music, literary works and databases as a sequel to achieving minimum standards to control piracy[20]. It may be noted that there exists a considered opinion and apprehension by content companies that new technologies aimed at

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15 Windows XP and the latter versions of word processor include comprehensive accessibility tools especially meant for blind and visually impaired persons. Copyright (Amendment) Bill 2010 has added section 31 B to the Copyright Act in order to facilitate access of disabled persons to digital content.

16 Digital Piracy: Government Says Copyright Holders And ISPs Must Share The Cost Burden For Policing The Internet. A New Alliance for Global Change, 10 September 2010, http://www.egovmonitor.com/nod/38473.

17 Shahid Alikhan & Raghunath Mashelkar, *Intellectual Property And Competitive Strategies In The 21st Century*, 1st Ed (2006) Aditya Books Pvt.Ltd., New Delhi At 191.

18 Richard Morgan and Kit Burden, *Legal Protection Of Software: A Handbook*, 6 Encyclopedia Of Information Technology Law, 1st Indian Reprint 2007(universal law publishing, new Delhi) at 7.1.4.

19 Fishman, Stephen And Patti Gima, *The Copyright Handbook: How To Protect & Use Written Works*. 5th Ed (2000) Nolo Publishers.

20 See for details http://icweb.loc.gov/copyright/wipo.html.

circumventing access will not only result in lost revenue but also virtually cripple the net.[21]During the discourse many proposals were mooted to achieve a compromise between divergent claimants of digital dissemination of music through technology, taxation and compensation.[22]

3. Digital Rights Management And Copyright Protection

Digital rights management technologies attempt to control, use of digital media by preventing access, copying or conversion, to other formats by end-users. Although technical controls on the reproduction and use of software have been intermittently used since the 1970s, the term DRM has come to primarily mean the use of these measures to control dissemination of artistic and literary content.[23] With the help of ripping technique and use of personal computers as household appliances, consumers convert media, originally in a physical /analog form or a broadcast form, into a universal digital form. Besides, the technique of time shifting and use of file sharing tools with the active use of Internet has made unauthorized distribution of copies of copyrighted digital media much easier.[24] In effect, copyright-dependent organizations regard every consumer with an Internet connection as a potential node of a distribution network that could be used to distribute unauthorized copies of copyrighted works[25]. As a consequence, digital

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21 William Fisher, *Digital Music: Problems and Possibilities* see at: http://law.harvard.edu/ Academic_Affairs/coursepapers/tfisher/music/digitalpurposes.html.

22 id.

23 D.L. Burk, Legal and Technical Standards in Digital Rights Management Technology (April 5 2005), Minnesota Legal Studies Research Paper, Pp.5-16, Available At SSRN: Http://Ssrn.Com/Abstract=699384/ .

24 Michael J. Meurer, Price Discrimination, Personal Use and Piracy: Copyright Protection of Digital Works, Buffalo Law Review, Dec.23 1997.

25 A study conducted by the National Productivity Council sponsored by the Department of Education, Ministry of Human Resources Development, Government of India, studied the issue of piracy in India. It shows that piracy in India is worth £ 41 million consisting of 23% of total sales of

rights management is considered to provide the necessary wherewithal against such rampant misuse of digital copyright content.

The use of digital rights management is controversial. Proponents argue it is needed by copyright holders to prevent unauthorized duplication of their work, either to maintain artistic integrity[26] or to ensure continued revenue streams.[27] Some opponents, such as the Free Software Foundation, maintain that the use of the word "rights" is misleading and suggest that people instead use the term Digital Restrictions Management. Their position is essentially that copyright holders are restricting the use of material in ways that are beyond the scope of existing copyright laws, and should not be covered by future laws. [28] The Electronic Frontier Foundation also considers DRM as anti-competitive.[29] In practice all the widely used DRM systems are either defeated or circumvented.[30]

DRM technology has come to be used by entertainment industry especially in the case of films and recording business. Many online music stores, such as Apple's iTunes store and e-book publishers, have imposed DRM on their customers. Besides, a number of television producers have imposed DRM mandates on consumer electronic devices, to control access to the freely –broadcast content of their shows, in connection with the popularity of time-shifting digital video recorder

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recorded copyright products, which is about 4% of world trade, and these products include books, movies, soundtracks, computer programmes, internet, cable television and illegal copying etc. see http://www.copyright.govt.in/mainact.asp.

26 http://en.wikipeia.org/wiki/#cite_note-0

27 See Christopher Levy, *Making Money with Streaming Media*, http://www.streamingmedia.com/ retrieved on 12-12-2009.

28 Digital Restrictions Management And Treacherous Computing, http://www.fsf.or g/campgains/ drm/html/

29 Fair Play Another Use Of DRM, see http://www.eff.org/deeplinks/archives/

30 Cory Doctorow, Microsoft Research DRM Talk, http://www/craphound.com/

systems, such as TiVo[31]. Perhaps the purpose of DRM technologies was to 'keep pace with national and international developments in digital dissemination' and advance in relevant technologies, so as to protect the legitimate copyright owners especially in USA[32]

The USA passed the Digital Millennium Copyright Act 1998 to implement the Internet Protocol churned out at WIPO Conference through WIPO Copyright Treaty (WCT) and WIPO Performers and Phonogram Treaty (WPPT) but the excessive use of DRM technology against Internet Service Providers (ISPs) has made it less enthusiastic about its use.[33]

It may be noted that the rationale behind DRM technology may not be yet clear but if it intends to tackle the escalating problem of piracy, its introduction requires a better analysis and prognosis. It is an established fact that DRM technology has enabled publishers to enforce access policies that not only disallow copyright infringements, but also prevent lawful fair use of copyright works. It may even use constraints on non-copyrightable works like, public domain or open-licensed e-books or include DRM on consumer electronic devices that time-shift both copyrighted and non-copyrighted works.[34] The World Intellectual Property Organization (WIPO) negotiates treaties that help make copyright laws more consistent between Nations. The WIPO treaties

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31 Bangerman, Eric, TiVo Tightens The DRM Vise. Wikipedia encyclopedia. Retrieved on 1-1-2009.

32 Samuelson P. *The U.S. Digital Agenda At The WIPO*, Virginia Journal Of International Law, winter 1997; 37; 1.

33 Monika Ermert, Midem: Window Of Opportunity Closing For Digital Rights Management see at: http://www.ip-watch.org/weblog/index.php?P=513& res=1280& print=0 accesed on April 15 2007.

34 Mike Shea, The Digital Dark Age: Technology, Copyright, DRM, and Loss of human Knowledge from 1965 to 2005+25 September 2005; http://mikeshea.net/About_mike_shea.html.

make it possible to fight piracy worldwide, regardless of the location of the copyright holder or the infringer.[35]

In USA consumer electronic and information technology industries are now mandated to build a safety valve with inbuilt-software mechanism against anti circumvention measures. The law aims at building 'standardized copyright protection technologies into computers, software and many other digital products, to arrest digital piracy.[36] Under the Consumer Broadband and Digital Television Promotion Act 2002[37] it is provided as under:

- Makers of computers and consumer electronic devices encouraged to comply with standards and encoding rules with active role of consumer groups and copyright owners.
- The Federal Communications Commission lays down standards in case the private sector fails to agree on standards within one year.
- All digital media devices manufactured to recognize and respond to those standards.
- The rules preserve fair-use rights, including educational and research rights and legitimate consumer copying.

Makers of computers and consumer electronic devices including major software companies in USA have not taken these measures as justified. These stakeholders are not against the standards to regulate the use of digital rights management to limit or prevent unauthorized copying or to license those technologies to film industry like Hollywood, but are not in favour of government regulation and monitoring the use of

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35 U.S. laws comply with the treaties, for the most part, except for a provision in the Digital Millennium Copyright Act that makes it illegal to create or distribute software designed to defeat copy protection schemes. Once this provision is strengthened, U.S. laws will comply with the intent of these treaties.

36 See the recent Bill introduced by Senate Commerce Committee Chairman, Ernest Fritz Hollings in USA, to protect intellectual property on Net. See at: http: //Thomas.loc.gov/egi-bin/bdquery/z? D107:02048/

37 Sen. Hollings bill, The Consumer Broadband And Digital Television Promotion Act (S.2048) ,

copyrighted material that is being read, copied or transmitted in violation of the Act. They see it as a form of government licensing and worry about the costs involved in redesigning their digital products for the said purpose and more so, about the unforeseen consequences for their products including the impending impact on future innovations.[38]

4. Broadband Internet And Consumer Interest

There is a widespread agreement that the broadband Internet poses serious risks and significant opportunities for the music and movie industries and other makers of copyrighted digital content. Center for Democracy and Technology (CDT) in USA[39] agrees that copyrighted material should be protected against piracy online. Unwarranted copying by denying creators and artists' compensation for their work could adversely affect the free flow of information on the internet and end up diminishing the power of the internet that allows anyone to be a publisher. The CDT Committee observed:[40]

However, we are opposed to legislation that would mandate technical standards or require that all computer hardware and software include copy protection technology. We believe there is a better approach through market –based solutions that protect both copyright holders and consumers. In addition, before anything should happen, we believe there needs to be a fuller exploration –and education of policymakers, consumers and the affected industries-as to the technical implications and risks of the schemes being proposed. Also needed is a

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38 See Center For Democracy And Technology View: Technical Review And A Balanced Market-Based Solution Needed; http://commerce.senate.govt/hearings/hearings0202.html.

39 The Center For Democracy And Technology in USA works to protect the interest of the consumers against the backdrop of a stiff competition between giant corporate copyright holders resorting to DRM techniques to restrict access to their works and the software developers and internet intermediaries facilitating digital piracy through cracking hacking etc.

40 CDT policy post, volume 8,no 6, April 2002, a briefing on public policy issues affecting civil liberties online from the center for democracy and technology.

much broader consensus as to what consumer uses are permitted under current law and how those would be protected.

It seems that the actual inter-face between technological management of copyright content and access to such contents has not been amicably resolved so far even in USA though many efforts are on to strike a balance in the coming future. Similarly, the European Union has undertaken a big jump to regulate the inter se relationship of a copyright holder with technology support and a consumer with fair-use rights to have access on the digital content. The Digital Radio Mondiale Consortium has presented the complete global DRM standard at IBC which comprises DRM+ for broadcasting at frequencies up to 174 MHz and which obtained ETSI approval for broadcasting on frequencies up to 30MHz. The event has provided an opportunity for industry players to network to discuss the current state of the digital radio industry worldwide.[41]

5. DRM and Right to Privacy

The technological control of copyright material on the Internet raises number of issues intruding privacy. It is a reality that among the various functions of Electronic Copyright Management System (ECMS) is a requirement to track usage of material- which works are used, how often, by whom.[42] But it has a serious counter-productive impact on right to privacy, which forms the basis of wholesome individual rights. Greenleaf, an Australian legal expert has summed up the potential threat

41 Amsterdam, 8th Sep 09; DRM members exhibiting at IBC this year include Digidia, Fraunhofer IIS, Nautel, RIZ Transmitters, Thomson Broadcast & Multimedia and TRANSRADIO. Leading figures from radio markets in Europe, South Korea, Russia and China attended the conference.

42 See Blaise W. Liffick, Social Impact Characteristics Of Computer Technology, proceedings of ETHICOMP 95 Conference De Montfort University, March 28-30,1995, Leicester, UK.

to privacy by Electronic Computer Management Technology as follows:[43]

These capabilities, if realized, threaten individual privacy to an unprecedented degree. Although credit-reporting agencies and credit providers capture various facets of one's commercial life, CMS raise the possibility that someone might capture a complete picture of one's intellectual life. Reading, listening and viewing habits reveal an enormous amount about individual opinions, beliefs and tastes and may reveal an individual's association with particular causes and organizations…technologies that monitor reading, listening and viewing habits represent a giant leap-whether forward or backward the reader may decide-toward monitoring human thought.

It is possible that, in certain situations, both technological protection measures and electronic rights management systems might infringe individuals' rights to privacy by tracking consumption patterns by individuals and recording on-line behaviour. The International Working Group on Data Protection & Telecommunications has observed:

For the legitimate purpose of protecting intellectual property in cyberspace and to prevent software piracy copyright protection, technologies such as robots ("web spider") will identify protected items or digital works which send reports to central servers when used or copied asking for permission or billing. Electronic Copyright Management Systems (ECMS) are being devised and offered which could lead to ubiquitous surveillance of users by digital works. Some ECMS are monitoring every single act of reading, listening and viewing

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43 Professor Graham Greenleaf, 'IP, Phone Home' - ECMS, ©-Tech, and Protecting Privacy Against Surveillance by Digital Works", paper presented to the 21st International Conference on Privacy and Personal Data Protection in conjunction with the International Data Protection Commissioners' meeting, 13-15 September 1999, Hong Kong, published in Office of the Privacy Commissioner for Personal Data Privacy of Personal Data, Information Technology & Global Business in the Next Millennium: Conference Proceedings, Hong Kong, 1999, 285.

on the Internet by individual users thereby collecting highly sensitive information about the data subject concerned.[44]

6. Convergence and Harmonization

The directive of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, commonly known as the EU Copyright Directive (EUCD) or the Information Society Directive (Infosoc), is an European Union directive in the field of copyright law, made under the internal market provisions of the Treaty of Rome. It is intended to implement the WIPO Copyright Treaty, to which the European Union is a party.[45]

This highly controversial Directive was, at the time, the most heavily lobbied measure to pass the European Parliament. In its final form, it includes only very narrow exceptions to anti-circumvention measures and exclusive rights. As a result, it is often regarded as a victory for copyright-owning interests (publishing, film, music and major software companies) over copyright users' interests. Many important details are not specified in the Directive, and as a result, Member States have significant freedom in certain aspects of implementation. Due to escalating public awareness of the importance of copyright legislation, the process of implementation has not been entirely predictable. The European Commission has taken proceedings in the European Court of Justice against six Member States for failure to implement the Directive within the required period.[46] The situation can be summed up as under:

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44 International Working Group on Data Protection in Telecommunications, Common Position on Privacy and Copyright Management, adopted at the 27th meeting of the Working Group on 4-5 May 2000 in Rethymnon, Crete.

45 http://en.wikipedia.org/wiki/EU_Copyright_Directive#note#

46 Articles 2-4 contain a brief definition of the property rights associated with copyright and related rights. They distinguish the "reproduction right" (Art. 2) from the right of "communication to the public" or "making

- Article 5 lists the limitations, which Member States may apply to copyright and related rights. The restrictive nature of the list was one source of controversy over the directive: in principle, Member States may only apply limitations, which are on the agreed list, although other exceptions and limitations which were in place previously may remain in force.[47]
- One limitation is obligatory: transient or incidental copying as part of a network transmission or legal use. Hence, internet service providers are not liable for the data they transmit, even if it infringes copyright.
- The other limitations are optional, with Member States choosing which they apply. All limitations must be applied in accordance with the Berne three- step test; that is in certain special cases which do not conflict with a normal exploitation of the work and which don't unreasonably prejudice the legitimate interests of the right holder.[48]
- Art 6 of the Directive provides protection for 'technological measures', any technology device or component, which is designed to restrict or prevent certain acts, which are not authorized by the right holder. Member States must provide 'adequate legal protection', which may be civil, criminal or a mix of the two.
- Technological measures are only protected if they are 'effective', which means not when they actually work but when

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available to the public" (Art. 3). The latter is specifically intended to cover publication and transmission on the internet. The two names for the right device from the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (Arts.8 & 10 respectively).

47 The right of communication to the public or making available to the public is also distinguished from the "distribution right" (Art. 4) by the fact that it is not subject to the first sale doctrine. See generally WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty [Art. 5(3)(o)]

48 See [art. 5(5)] WIPO Copyright Treaty 1997.

they have been successfully implemented. A simple password is thus 'effective' irrespective of the ease with which it may be cracked.

- Right holders who use such anti-circumvention measures must allow reproduction, which is permitted under the limitation to copyright protection (Art.6 (4). Digital restrictions management information is similarly protected (Art.7).
- Unlike Section 1201 of the Digital Millennium Copyright Act, which only prohibits circumvention of access control measures, Infosoc Directive also prohibits circumvention of copy protection measures, making it potentially more restrictive.
- In both DMCA and InfoSoc Directive, production, distribution etc. of equipment used to circumvent, both access and copy protection, is prohibited. Under InfoSoc Directive, this possibility would not be available since circumvention of copy protection is illegal.[49]

Some leading content companies see digital technology, with its capability for making 100 percent accurate, high-quality copies of digital data, as a threat to their profitability, especially when digital tools are combined with the capabilities of the broadband Internet. Their fear is that, just as the music industry had to cope with widespread Internet-based swapping of music files, TV files and other multimedia content over broadband networks may face the same unauthorized trade.[50] The response of these content companies is that there needs to be a multi-industry technical standard-backed by legislation-that can prevent digital technology from being used to facilitate infringement. In the emerging scenario there has been a debate going on to usher in the era of interoperability. As a matter of fact, Europe's content sector is suffering

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49 Almost all the countries of Europe barring Spain and Czech Republic have ratified the InfoSoc Directive as a step-forward process of harmonization aimed at by this Directive.

50 Duncan Riley, *Europe Wants To Force DRM Interoperability* , retrieved on January 4, 2008.

under its regulatory fragmentation, under its lack of clear, consumer-friendly rules for accessing copyright-protected online content, and serious disagreements between stakeholders about fundamental issues such as levies and private copying." The way forward, she said, is clear. "Do we want to have a strong music, film, and games industry?[51]

7. DRM In India: Proposals And Prospects

The Indian Copyright Act 1957 was amended in 1994 and 1999 to incorporate the changes mandated under Trade Related Intellectual Property Rights (TRIPS) Agreement to, which India is a signatory. However, India is not party to the WIPO Internet Treaties and has no international obligation to ratify or adopt any of their provisions. However, there is a proposal to amend the Copyright Act so as to provide for anti-circumvention and digital rights management provisions to keep pace with WIPO Internet treaty and the matters incidental thereto[52]. The proposed section 65A envisages the provision of anti-circumvention measures enabling the copyright holders to protect their digital works through the use of technology.[53] The proposed amendment in the copyright Act while introducing anti-circumvention measures has

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51 According to arc technical DRM would also be required to remain transparent to consumers with an aim of providing interoperability. http://arctechnica.com/news.arc/post/20080103-eu-one-licence-drm-sceme-to-rule-them---all/html .

52 See for the comments on latest proposed amendments in copyright law in India at: http://www.blogger.com /www.pib.nic.in/relase/release.asp?relid=56444 the parliament is already debating the nuances of introducing Internet Treaties by Copyright (Amendment) Bill 2010 but has not ratified the WCT or WPPT agreements.

53 The proposed section 65A provides: any person who circumvents an effective technological measure applied for the purpose of protecting any of the rights conferred by this Act, with the intention of infringing such rights, shall be punishable with imprisonment, which may extend to two years and shall also be liable to fine. See supra note 2 at: http://copyright.govt.in/view%20

not dealt with the 'preparatory act' as contemplated under Internet treaties. Unlike Digital Millennium Copyright Act (USA) and European Union Copyright Directive, there is no *access provision* and technological measures are protected against circumvention only if their function is limited to the protection of copyright works.[54] This provision may not prevent competition concerning other electronic devices. Besides, the term 'intention' puts the onus on the right holder or claimant to prove the act of infringement. It may be noted that importation of infringing goods within the territory of India is prohibited under section 53 of the copyright act, but does it envisage importation of ant-circumventing goods as a preparatory measures, is not made clear in the proposed definition. It seems that a broad-based definition as provided under Digital Millennium Copyright Act and European Union Copyright Directive has not been included, with the result that a lot needs to be done to achieve compatibility with the international standards.[55]

The proposed amendment, however, provides for certain exceptions and limitations on the right holders, which shall not be treated as infringement of digital copyright by a bona fide user.[56]The

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54 The provision is very similar to Australian Copyright (Digital Agenda) Amendment Act, 2000; see WIPO-SCCR, P.85.

55 Copyright Amendment Bill, 2010. An Analysis, by Dhruv on September 4, 2010 , available at http://www.jurisonline.in/

56 Sub-section (2) of section 65A provides:
Nothing in sub-section (1) shall prevent any person from:
Doing anything referred to therein for a purpose not expressly prohibited by this Act;
Doing any thing necessary to conduct encryption research using a lawfully obtained encrypted copy; or
Conducting lawful investigation; or

a) Doing anything necessary for the purpose of testing the security of a computer system or a computer network with the authorization of its owner or operator; or
b) Doing anything necessary to circumvent technological measures intended for identification or surveillance of a user; or

other acts allowed under section 52 include fair dealing with works for the purpose of news reporting or cinema, for judicial proceedings, for legislative, educational, and instructional purposes, for non-profit & private consumption & sound recordings (but not cinematographic works) & reproduction of any work for disable person including their lawful importations.

These exceptions deal with most of the concerns that anti-circumvention provisions raised when these were adopted in the Digital Millennium Copyright Act, such as, access control measures, which do not find any mention under the proposed amendments. Similarly, anti-trafficking provisions, which were considered to be breach of free speech under the American constitution, and thereby secured under DMCA, are abysmally absent in the proposed amendments.[57]

The proposed exceptions are wide enough and amenable to liberal interpretation provided the lawmakers clarify the objective underlying these provisions of DRM and TMI in Indian milieu. It must not be an exercise to add a new provision just 'to keep pace with. The rapid advance of technology'. The provision for Rights Management Information (RMI)[58] under the proposed section 65B with a

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c) Taking measures necessary in the interest of national security.

57 The concerns raised in USA V. Elcom Ltd. et al., 203 F.Supp.2d 1111,62 USPQ 2d 1736.

ii) 58 The government issued a press release announcing that the much awaited and controversial copyright amendment bill has now cleared "cabinet", a group of senior ministers that represent the highest decision making body of the government. Unfortunately, since the winter session of Parliament is over and done with, the Bill is only likely to be introduced in the budget session of Parliament in February 2010. Through a new section in the Act, it is proposed to ensure protection to the Right holders against circumvention of effective technological measures applied for purpose of protection of his rights like breaking of passwords etc. while maintaining an appropriate balance between the interests of the right holders on

corresponding change in the definition clause section 2(ax)), is an absolute reflection of the provisions in the Internet Treaties. However, the definition clause excludes 'any device or procedure intended to identify the user', which may not go well under the Indian condition where such technology is still emerging and yet to be tested.[59]

The fair use doctrine, which was provided as a blanket provision under the DMCA and which was eventually found to be missing from the Act following interpretation of the anti- circumvention provision in *Universal City Studios Inc v. Corley,*[60] is provided under section 52 of the Indian Copyright Act. However, the scope of the provision is limited; the term ' any circumvention in section 65A read with the intention of infringing such rights may be interpreted to include almost any act barring those specified under section 52 as falling under the requirement of anti-circumvention. Unlike the EUCD the proposal doesn't define ' effective technological measures and there is no provision like Art 6(4), which would enable the government to take necessary steps if the technical measures were in violation of the fair use requirements under section 52 of the Indian Copyright Act. The proposed exceptions are wide enough for a more liberal interpretation if the lawmakers clarify the object behind the introduction of Technological Protection Measures and anti-circumvention provisions in the legislative history.[61]

After extensive trials in 2007, the Indian state broadcaster All India Radio (AIR) has decided that DRM is the best technology for converting its vast public service broadcasting network to digital. After conducting

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the one hand and of Technology innovators, Researchers and Educational Institutions on the other.

iii) The existing Performers' Rights are proposed to be further enhanced by introducing a new section to provide exclusive rights compatible with WPPT. http://www.pib.nic.in/release/release/asp?relid=56444

59 See for details http://jiplp.oxfordjournals.org/cgi/content/full/

60 273 f.3d 429 (2d cir. 2001).

61 See http: //giplp.ofordjournals.org/cgi/content/full/

trials over a one and a half year period, AIR has started regular DRM transmissions from a 250 KW SW transmitter installed near the capital city New Delhi in January this year. AIR is also in the process of converting 4 short-wave transmitters (250 kW) to DRM mode by March 2009. There are plans to introduce DRM transmissions in 42 new medium wave, 36 existing medium wave and 5 new short wave transmitters. However, the cost and availability of good receivers remains the main issue in their implementation strategy for the next five years. The BES (Broadcast Engineering Society of India) event held in New Delhi on 23rd, 24thand 25th February 2009 was a great opportunity for the Consortium to interact with AIR at a very senior level and understand the broadcaster's plans and problems.[62]

In order to formulate the proposed amendments and to carry out wide-ranging consultations with all stakeholders, the Ministry of Human Resource Development had constituted a 30-member Core Group in the year 2005 under the Chairmanship of the Education Secretary with representatives of the other Ministries/Departments concerned with the subject and other key stakeholders like copyright-industry organizations, stakeholders, subject experts and Institutions of repute in related fields. The Core Group had deliberations at length in five sessions to cover all the provisions of the existing statute and made recommendations with regard to the proposed amendments. The Core Group then created a Drafting Committee to draw up the text of the proposed amendments and to fine-tune the recommendations of the Core Group."[63]

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62 While Ruxandra Obreja, DRM Chairperson, was the keynote speaker for the event, the DRM workshop on the opening day and DRM session next day was attended by about 300-400 delegates and had excellent presentations by Lindsay Cornell and Julian Cable (BBC), Thomas Feustel (Deutsche Welle), Joseph Troxler (Thomson), T V B Subbramnyam (Analog Devices), S R Aggrawal, (AIR), Vinita Dwivedi (DRM). See http://www.drm.org/news/detail/news/india-is-going-drm/uuuploads/media/bes_IntrDRM-vineeta.pdf/

63 see for comments http://www.spicyindia.blogspot.com/2009/12/indian-copyright-amendments-procure/html

Amendment is proposed to give independent rights to authors of literary and musical works in cinematograph films, which were hitherto denied and wrongfully exploited, by the producers and music companies. An amendment is proposed to ensure that the authors retain their right to receive royalties and the benefits enjoyed through the copyright societies.

Another amendment ensures that the authors of the works, particularly songs included in the cinematograph film or sound recordings, receive royalty for the commercial exploitation of such work.

It has been proposed to introduce a system of statutory licensing to ensure that the public has access to musical works over the FM Radio and Television networks and at the same time the owners of copyright works are also not subject to any disadvantages.

Copyright is a form of intellectual property whose importance has increased enormously in the recent times due to rapid technological development in the field of printing, music, communication, entertainment and computer industries. The last amendment to the copyright act was done way back in the year 1999. Since then a lot of advancements and developments have taken place across all sectors affected by the Copyright Act. An amendment to answer certain issues like authorship of cinematographic films, exceptions to infringement, digital rights management, statutory licensing, piracy through computer networks etc has been in the pipe lines since 2006. It was on 19 April, 2010 that The Copyright (Amendment) Bill 2010 was introduced in the Rajya Sabha[64]

The existing performers' rights are proposed to be further enhanced by introducing a new section to provide exclusive rights compatible with WPPT (WIPO Performances and Phonograms Treaty) and WCT (WIPO Copyright Treaty) which have set the international standards in these

64 See the remarks of the minister of Human Resource Development Kapil Sibal.

spheres. The bill also refers to non-assignable rights such as 'moral rights' and 'the right of integrity'. The right of integrity goes towards ensuring that the reputation of an artist does not get tainted by giving him the right to prevent others from doing something to his work that can damage his reputation and name, thus preventing distortion and mutilation of work. [65] Though the Copyright Amendment Bill is yet to see the light of the day, it effectively addresses the various concerns in the existing copyright law. If passed into a law, it would go a long way to ensure that the Indian law is at par with the other international laws regarding copyrights. Certain issues like piracy of copyrighted material and selling through grey market, illegal sharing of copyright material through computer networks etc. still needs to be addressed. Prevention of undue advantage by broadcasters and prior acknowledgment of the author with proper advance royalty would ensure that the interest of the author is protected and due acknowledgment is given to his work before it is published or broadcasted.

It is proposed to amend existing provisions to provide compulsory license through Copyright Board to publish or communicate to the public such work or translation where the author is dead or unknown or cannot be traced or the owner of the copyright work in such work cannot be found.[66]

8. Conclusion and suggestions

The debate between the need for stronger IP rights, innovation and investment and the danger that DRM makes information costlier and

65 Supra note 2 Copyright Bill 2010.

66 Amendments are being made for incidental changes, which are required in the context of digital technology to cover "storing of copyrights material by electronic means'. Amendments in relation to operational facilities, such as registration of Copyright Societies by providing that only authors can register and procedure for tariff schemes of copyright societies and commercial distinction between assignment and licence; and Enforcement of rights such as border measures, disposal of infringing copies and presumption of authorship under civil remedies.

adversely affects progress is of special relevance for India, particularly as its economy becomes more knowledge-based. Digital piracy is the product of technology and can be safely controlled by technology with a pinch of values and ethics. Technological management of copyright content can protect copyright owner against violation but it may create unprecedented technological barriers for the fair use dealings and may impinge upon the right to privacy. No doubt, USA and Europe has taken steps to augment the technological control of digital content but seem to have given way to a sustainable campaign, to do away, with these barriers, evinced by the EU's Digital Libraries Initiative (2010) sets out to make all Europe's cultural resources and scientific records – books, journals, films, maps, photographs, music, etc. – accessible to all, and preserve it for future generations.[67]

Amendments are being made to bring the Act in conformity with the World Intellectual Property Organization (WIPO) Internet Treaties, namely WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) which have set the international standards in these spheres. The WCT as noted earlier, deals with the protection for the authors of literary and artistic works such as writings, computer programmes, original databases, musical works, audiovisual works, works of fine art and photographs. The WPPT protects certain "related rights" which are the rights of the performers and producers of phonograms. While India has not yet signed the above two treaties it is necessary to amend domestic legislation to extend the copyright protection in the digital environment. The need for such a provision is to curb any mal practice that right holders may try to exert in India. Provisions may also be made for pecuniary penalties against right holders who attempt to breach privacy by developing DRM technologies as in the Sony Root Kit incident.

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67 2010: Digital Libraries Initiative, Europe's Cultural And Scientific Riches At A Click Of A Mouse,

More important is an analysis of the effect of DRMs in Indian society, which requires understanding the stakeholders and their intended impact on the values present in Indian society vis-à-vis copyright jurisprudence.[68]

Keeping in view the findings of the UK Commission on Intellectual Property[69] it seems to be still premature for developing countries to be required to go beyond TRIPs standards in this area. We strongly believe that developing countries would probably be unwise to endorse the WIPO Copyright Treaty and that they should retain their freedom to legislate on how technological measures are regulated – in the interests of safeguarding access to knowledge and information, for broad socio-economic development. However, in the event that Government still decides to introduce DRM into the Act, then we strongly recommend that it introduces safeguards which will protect users from an abuse of the anti-circumvention provision; that is, safeguards that allow users to exercise all the fair dealing clauses ensured and enumerated in the current Act. This is particularly important given the manner in which DRM can affect legitimate research.[70]

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68 A commenter has aptly remarked regarding the latest proposed copyright law amendments:

Any extension to copyright term flies in the face of any economic logic and just enhances the scope for economic rent. It was wrong to extend it to 60 years in 1994 and it is wrong now, the UK and US laws need not always be the right thing.

The Director of the film should be co-author irrespective of whether the producer opts so. Even stating the conformity with WCT and WPPT is dangerous because rest assured now the 'trading partners' will be breathing heavily down our neck to 'encourage' us to join the treaties not even giving us time to test the provisions in our own setting over the next few years.

69 http://fci.wikia.com/wiki/anti-dm-campaign/# cite_note-0/

70 See the http://www.spicyindia.blogspot.com/2009/12/indian-copyright-amendments-procure / html: wherein comments like this follow: Mr. Sibal seems to be on pay roll of IMI and seems to have gotten hefty commission for introducing such amendments. Can any ppl society display on their website that they have reimbursed any author and by how much. This

There needs to be a check on piracy especially digital piracy in India but keeping in view the seeping nature of DRM technology, it may not be an appropriate action to introduce it without safeguarding the legitimate interest of our country people. The US and European Union have adopted these measures to safeguard the interest of corporate giants but the efforts are on to compensate the end-users' legitimate grievances. We have embarked upon overhauling our copyright law to enhance compatibility with Internet Treaties, but the question is: have these treaties been successful to combat the digital piracy in essence so far?

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move by involving retro cinematograph songs will only add to kitty of IMI and its employees and it should be made public by IMI what salary and expense they are paying to its management.

Maintenance of Muslim Divorcee from Wakf Property:A Socio-Legal Study

Beauty Banday[❁]

Introduction:

Maintenance is payable to wife, children and parents under the sharia. It is an obligatory act on the part of parties to a marriage agreement which creates a familiar relationship between the spouses. The maintenance though legally permissible is often delayed or denied with the result it creates a number of problems for the aggrieved parties. In India the right to maintenance is guaranteed under the general law of criminal procedure code but due to procedural delays this provision proved to be inadequate. In 1986 the Muslim Women (protection of rights on Divorce) Act-1986 was enacted in favour of the divorcees with a view to augment their right to maintenance which included a provision for maintenance by state or wakf Boards in case the husband fails to provide the maintenance. The moot question is, have these provisions ameliorated the plight of Muslim divorcees. It is in the back drop that on divorce) Act 1986 is made in this paper together with empirical evidence to appraise the desire ability of this legislation for J&K State which is still governed by the provision of unamended criminal procedure code.

The Muslim Women (Protection of Rights on Divorce) Act -1986 (Muslim Women Act) is a declaratory law and codifies some pre-existing rules of Muslim Law.

The only special thing about the Act is that while under the general Muslim Law the same relief can be granted by a civil court, the jurisdiction under this Act rests with the criminal courts; and this indeed ensures speedy decision of cases.[71] Under the Act, a divorced woman is entitled to a reasonable and fair provision and Maintenance to be made and paid to her within the Iddat period by her former husband.[72]

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71 Hyder Khan (1992) 2 KLT 330; Anjum Hasan (1992) All 332.

72 See section 3(a) of the Act.

Where the former husband, “having sufficient means”, has failed or neglected to pay within the Iddat period to her divorced wife, a reasonable and fair provision and maintenance, the magistrate on her application can order him to pay her "such reasonable and fair provision and maintenance as he may determine fit and proper having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of her former husband.”

If a man fails to comply with the magistrates order, he may issue a warrant for levying the amount fixed by him "in the manner provided for levying fines" under Cr P C; and if it still remains unpaid in full or in part, he may sentence the man to imprisonment upto one year or until its payment if made earlier[73].

The dual expressions, "provision and maintenance", used thrice in section 3 of the Muslim Women Act, led to conflicting High Court rulings. Some High Courts have held that the two expressions meant maintenance upto Iddat period only[74]; others held that the expression "provision" is different from "maintenance" and both would be payable under the Act.[75]

The Supreme Court has now settled the issue by accepting and affirming the latter view and specifically overruled all contrary decisions of the past. It has held that the former husband has to make a reasonable and fair provision for the future of the divorced wife. Such a provision, in the opinion of the Supreme Court, “obviously includes her maintenance as well", and emphatically added that man's liability under the Act to provide maintenance to his divorced wife "is not confined to the Iddat period." That period is only the time limit for making the provision as required by the law.[76]

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73 See sections 3(2), (3) and (4) of the Act.

74 See for instance Usman Bahmani v Fathimunnisa AIR 1990 A.P. 225; Rashid v Sultana (1992) Cr L J 76; Marahim v Razia 1993 (1) DMC 60; Abdul Haq v Talat 1998 Cr L J 3433.

75 See for instance: Arab Adullah v Maimuna AIR 1988 Cr L J 141; K K Haji v Amina 1995 Cr L J 337; Jaitun v Mubarak 1999(3) Mah L J 694; Marim v Shehnaz 2000 Cr LJ 3560.

76 Danial Latifi v. Union of India (2001) 7 SCC 740.

In *Danial Latifi* v *Union of India*[77] the Constitution Bench of the Supreme Court dismissed all the petitions, most of these were filed during 1986-87, challenging the constitutional validity of the Act of 1986 and has upheld the same. The Constitution Bench more or less reviewed the ratio of Shah Bano Case-without of course either rejecting the Act of 1986 or making the CrPC law generally applicable to the Muslims. The apex court once again expressed an opinion that the 1986 Act, as interpreted by it now, "actually codifies the very rationale" of Shah Bano though ironically "it intended to reverse that decision[78]". The Bench categorically said;

> *"when a constitution Bench of this court analysed Suras 241-242 of chapter II of the Holy Quran and other relevant textual material, we do not think it is open for us to re-examine that position and delve into a research to reach another conclusion, We respectfully abide by what has been stated therein".*

Remarkably, the Bench did not even refer to the observation of the Supreme Court itself in an earlier Division Bench Judgment which interalia concluded:

> *"The Parliament enacted the Act to undo the effect of a constitution Bench decision of this Court in Mohammad Ahmed Khan v. Shah Bano Begum (AIR 1985 SC 945) because the said decision was opposed by a sizable section of the Muslim Community".79*

The Act also provides that the divorcee can also obtain maintenance from her relatives, first from her children, where the children are unable to provide maintenance to her, the liability will pass on to the parents. In case a divorced woman fails to secure maintenance from her parents because of their insufficient means or death or any other reason, the responsibility to maintain her falls on other relatives who would inherit her property. If the relatives are found unable to pay her maintenance,

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77 Ibid

78 Tahir Mahmood: The Muslim Law of India p 123 ed III.

79 Tamil Nadu Wakf Board v. Syed Fatima AIR 1996 S C 2423.

the magistrate may direct the state Wakf Board established under the Wakf Act to pay such maintenance.[80]

Maintenance From Wakf Property

Section 4 of the Muslim Women's Acts provides that the magistrate can order the State Wakf Board to pay maintenance to a divorced woman if she is unable to maintain herself and she has no relative as mentioned in sub section (1) of section 4 or such relatives or any of them have not enough means to pay the maintenance ordered by the magistrate or the other relatives have not the means to pay the shares of those relatives whose shares have been ordered by the Magistrate to be paid by such other relatives under the proviso to the said sub section.[81]

In *Tripura Board of Wakf* v. *Smti Tahera Khantoon*[82] the magistrate had come to the conclusion that the claimant was unable to maintain herself and she had a poor mother who also could not maintain her and therefore, ordered maintenance in her favour from the Wakf Board. The Magistrate had, however, not considered as to whether there were other relatives referred to in section 4(2) of the Act who had means to pay the maintenance to the respondent. On appeal, the Gauhati High Court held that there should have been a finding recorded by the magistrate about the relatives of the claimant who were bound to pay her maintenance under sub section 4 (2) of the Act. In absence of such finding, the Wakf Board would not be liable under section 4. The court further clarified that even where no such plea is taken by a Wakf Board before the magistrate, a Suo Motu finding should be recorded by the magistrate

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80 See section 4 of the Act.

81 Sub section (2) of section 4 reads: Where a divorced woman is unable to maintain herself and she has no relatives as mentioned in sub section (1) or such relatives or any of them have not enough means to pay the maintenance ordered by the Magistrate or the other relatives have not the means to pay the shares of those relatives whose shares have been ordered by the Magistrate to be paid by such other relatives under the proviso to sub section (1), the Magistrate may by order direct the State Wakf Board established under the .Wakf Act to pay the maintenance for such period as he may specify in his order.

82 AIR 2001 Gau 103.

about the relatives of the divorced woman as mentioned. Further the order passed by the magistrate must also indicate the amount of maintenance determined by him, which is to be paid by the concerned State Wakf Board.

The judgment has made every provision of the Act effective. Any contrary decision would have rendered the provision regarding maintenance from relatives under section 4(2) a dead letter. Moreover, the resources available with the state Wakf Board are not unlimited and as the language of sub section (2) of section 4 makes it clear that such limited resources available with the Wakf Boards are meant for divorced Muslim Women who are unable to maintain themselves or who have not relatives as mentioned in the said sub section having enough means to pay maintenance to them. This view is supported by the decision of the Supreme Court in *Secretary, Tamil Nadu Wakf Board* v *Syed Fatima Nachi*[83] in which the court has held that section 4 of the Muslim Women Act does not contemplate multiplicity of proceedings, first a proceeding under sub section (1), and thereafter a proceeding under sub section (2) for payment of maintenance by the Wakf Board. The proceedings i.e. before the magistrate against the relatives and the State Wakf Board may be simultaneous and in such proceedings the State Wakf Board can take such defenses as are open to them on the merit of the matter and within the framework of the legislative scheme embodied in section 4.[84]

The question regarding liability of Wakf Boards to maintain divorced Muslim Women was again considered by the Gauhati High Court in *Hasenara* v. *Fazar Ali*.[85] The court held that section 3 of the Muslim Women Act stipulates that the former husband of a divorced Muslim Woman has to "make provision" and "pay maintenance" to her within the Iddat period and after the expiry of the Iddat period the liability "to pay the maintenance" is shifted upon the relatives classified and referred to under section 4(1) and in case of non-availability of relatives as stipulated there under the responsibility is shifted further to

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83 AIR 1996 SC 2423.

84 Annual Survey of Indian Law (2001) vol 37 p-521.

85 (2001)2GIT287.

the State Wakf Board under section 4(2) of the Act. Here, the court has marked a distinction between "making provision" and "payment of maintenance", and observed that after Iddat the liability to "make provision" for divorced woman is exclusively that of the former husband and not of the relatives or the Wakf Board. The liability of the Wakf board is confined only to maintenance. Taking a literal view of the provisions of section 4, the court has observed that the Parliament deliberately omitted the use of the term 'provision' in both sub sections of section 4 which would lead any prudent man to form an opinion that so far as "making provisions" for divorcees is concerned, the liability remains with the former husband by the implicit significance of deliberate mentioning of a term in section 3 while consciously omitting it in section 4. Furthermore, the 'provision' cannot be for any limited period of time. The court thus opined that a divorced Muslim Woman obviously may require minimum residential accommodation and also proportionate fund for proper utilization of leisure and recess and also to discharge her social and religious obligation in addition to her needs for food, clothing and Medicare. As such the former husband is not absolved from his statutory liability of "making the provision" for his divorced wife for the above mentioned necessities even after Iddat period.[86]

The constitutional validity of section 4(2) was also raised by the Kerala High Court in *Syed Fazl Pookoya Thangal* v. *Union of India*.[87] In this case, Jameela claimed maintenance from the Kerala Wakf Board at the rate of Rs. 350 per month invoking section 4(2) of the Act. The Judicial Magistrate 1st class ordered the Wakf Board to pay her Rs. 2507- per month towards her maintenance. The Wakf Board challenged

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86 Annual survey of Indian Law (Vol 37) P-520.

87 AIR 993 Ker 308. The facts were as follows: One Jameela was divorced by her husband under section 3 of the Act. She was granted Rs. 15400 towards her maintenance. Towards this amount only Rs. 6000/-could be realized by attachment and sale of husband's property, and the husband was jailed for the non-payment of the balance amount. Jameela had no property or source of income to maintain herself or the child. Her near relations (and legal heirs) were her parents who were unable to maintain her because of their impecuniority,

the constitutional validity of section 4(2) of the Act on the ground that the Wakf Board is a religious body created for the purpose of performing pious activities like offering prayers to God and functions beneficial to the spiritual well being of the Muslim. Once the property is dedicated to the Wakf Board, it vests in God and no one is competent thereafter to meddle with it or divert its income to a purpose not authorized by the Wakf deed. The casting of obligation on the Wakfs to pay maintenance to divorced Muslim women and the diversion of their funds for that purpose was sacrilegious, violative of the guaranteed freedoms under Articles 25 and 26 of the Constitution.

The Kerala High Court held that to claim the rights under Art. 26, the petitioner must be a religious denomination. The Wakf Board is not a conglomeration of individuals. It is not even akin to a company where a number of individuals join together to constitute it. It is a statutory body, pure and simple. It is not a representative body of Muslim community. It has no soul and no faith, except the faith of dutifully performance of its functions and duties under the Act (i.e. the Wakf Act of 1995). It is an instrumentality of the State. The Wakf Board is a creature of the Wakf Act. It is not a denomination and hence it has no rights under Arts 25 and 26.[88]

Emerging Trend

The controversy that followed Shah Bano culminated in the enactment of the Act of 1986. The court upheld the constitutional validity of the Act claiming that its "provisions" do not offend Articles 14,15 & 21 of the Constitution of India. It was observed that a Muslim husband is bound to make reasonable and fair provision for the future of the divorced wife, which includes her maintenance, and a reasonable and fair provision extending beyond the Iddat period, to be made by the husband within the Iddat period in terms of section 3(l)(a) of the 1986 Act.[89] In *K. Kunhammed Hajj* v *K. Amina*[90] is a significant judgment which expanded the scope of a divorced Muslim woman's right to maintenance under the Act. It was held that she was entitled to a fair and

88 Syed Khalid Rashid: The Muslim law p-175-176 (Ed. III).

89 Annual Survey of Indian Law 2001 P-517.

90 1995 Cri L J 3371 (ker).

reasonable provision for the livelihood after the period of Iddat apart from maintenance during the period of Iddat.

When the relatives mentioned in section 4(1) viz. children, parents and other relatives, are unable to maintain a divorced wife, she can file a petition against the Wakf Board. However, in order to seek maintenance from the Wakf Board, under section 4(1) it is not necessary to establish that none of the relatives are in a position to maintain. This issue was raised in *Secretary Tamil Nadu Wakf Board* v. *Syed Fatima Nochi*.[91] In this case wife filed a petition for maintenance against the Wakf Board alleging that she could not get maintenance from the heirs or parents. The same was decreed against the Board which filed an appeal with the following objections;

i). an order under section 4(1) was a prerequisite for entertaining a petition under section 4(2); and

ii). the Ministry of Welfare (Wakfs Section), had written a letter to the Secretary, Tamil Nadu Wakf Board, Madras, stating that no separate fund was to be created for giving such maintenance, nor any guidelines were issued to the Wakf Board.

Dismissing the appeal, the court held that an order under section 4(1) was not a sine qua non for filing a petition under section 4(2) when there was enough circumstances to show that maintenance could not be obtained from the persons mentioned there under. As to the second objection, the court held that a letter from the ministry could not override statutory provisions. On the other hand in *Tripura Board of Wakf* v. *Smti Tahera Khantoon*[92] it was held that there should have been a finding recorded by the Magistrate about the relatives of the claimant who were bound to pay her maintenance under section 4(2) of the Act. In the absence of such a finding, the Wakf Board would not be liable under Section 4. The court further clarified that even where no such plea is taken by a Wakf Board before the Magistrate, a Suo Motu finding should be recorded by the Magistrate about the relatives of divorced women. Further, the order passed by the Magistrate must also indicate the amount of maintenance determined by him, which is to be paid by the

91 AIR 1995 Mad.88.

92 AIR 2001 Gau 103.

concerned State Wakf Board.[93] The National Commission for women (NCW) recently asked the Wakf Boards to pay more attention to women's welfare and generate funds to help women in distress. It also suggested that the monthly allowance be increased from Rs.200.00 to Rs. 1000. 00. It observed that the Wakf Boards were not strictly following the directives from the Supreme Court regarding the welfare of women especially women in distress, widows and divorces.[94]

Reading sections 3 and 4 together, it is abundantly clear that parliament wanted to protect fully the divorced woman so that she does not become a destitute or is not thrown on the streets without roof over her head and without any means for sustaining herself. It is alleged that most of the Wakf Boards are bankrupt which is not a reality. The general allegation about the mismanagement of Wakfs, however, cannot be totally denied. This responsibility placed on Wakfs, it is submitted, will act as an impetus for improving Wakf administration. Till now, Muslims themselves have been showing little interest in the development and administration of Wakfs, as they never thought that it was their legal right to avail the benefits of Wakf. Now the general public will be taking more and more interest in Wakf administration.

This Women's Protection Act is not extended to the state of J&K. Its laudable provisions, with social beneficial content, more particularly the provision for maintenance of divorcee from the wakf property, cannot be invoked to ameliorate the plight of divorcee. The maintenance for divorcee in J&K is still governed by Section 488 of the old Criminal Procedure Code which traditionally fixes liability for maintenance on a husband irrespective of his financial condition and makes the position of divorcee vulnerable were the husband is unable to pay maintenance.

In order to explore other sources of maintenance, a survey was conducted on the two hundred respondents (male & female in equal ratio) of Srinagar district who were asked the following questions.

1) Do you believe that divorcees generally face economic hardships?

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93 Annual Survey of Indian Law 2001 P-521.

94 See The Hindu, dated: 26.11.2004. The Commission felt that the wakf boards are not run efficiently and the wakf property is being either mismanaged or are not used genuine causes. It also suggested that the representation of women be increased in wakf boards so as to increase its concern towards women welfare.

Table I

Showing Response of Two Hundred Respondents

(Male and Female included)

Yes	No	Can't say	Total
122	40	38	200

The above table shows that 62% of the respondents believe that the position of the divorcees is miserable and they face economic hardships. It is only 20 % who believe opposite of it and 18% have no opinion.

2) Whether the Women Protection Act or any other Act with similar provisions be enacted in the State of J&K.?

Table II

Showing Response of Two Hundred Respondents

(Male and Female included)

Yes	No	Can't say	Total
102	60	36	200

A total of 51% respondents are in favour of passing legislation in line with the central legislation of Women's Protection Act and 19% have no opinion. 30% believe that the legislation will not help the cause of divorcee.

Table III

Showing Response of Male Respondents

Yes	No	Can't say	Total
29	51	20	100

Table IV

Showing Response of Female Respondents

Yes	No	Can't say	Total
73	11	16	100

Table V

Showing Response of Male Educated Respondents

(Matric onwards, respondents 50 in number)

Yes	No	Can't say	Total

13	27	10	50

Table VI

Showing Response of Female Educated Respondents

(Matric onwards, respondents 50 in number)

Yes	No	Can't say	Total
43	04	03	50

51% of male respondent are against the passing of legislation in J & K which will guarantee maintenance of divorcee and 20% have no opinion. 29% are in favour of providing maintenance of divorcee on the lines of Central Act. As against this, 73% of female respondents are in favour of having legislation on the lines of Women Protection Act in J & K, 11% are not in favour of extending Central legislation to J&K and 16% do not understand its implication. Male opposition can be attributed to the fact that they consider payment of maintenance beyond iddat period as envisaged under the Women protection Act, either burdensome or un-Islamic.

A comparison of the male educated with the female educated reveals that their preferences are on the same expected lines. An overwhelming majority of 86% of female are in favour and 58% of male educated are against the passing of Women's Protection Act.

3) Should maintenance of the divorcee be paid out of the wakaf property in case her husband is unable to pay?

Table VII

Showing Response of Two Hundred Respondents

(Male and Female included)

Yes	No	Can't say	Total
150	29	21	200

Table VIII

Showing Response of one hundred Male Respondents

Yes	No	Can't say	Total
76	Nill	24	100

Table IX

Showing Response of Male Educated Respondents

(Matric onwards, respondents 50 in number)

Yes	No	Can't say	Total
41	Nill	09	50

Table X

Showing Response of Female Educated Respondents

(Matric onwards, respondents 50 in number)

Yes	No	Can't say	Total
30	12	08	50

An overwhelming majority of 75% of the respondents support that divorcee should be maintained out of the wakaf property in case her husband fails to pay and only little less than 15% oppose this move. Interestingly, it is 82% of males as against 60% of females who favour payments of maintenance of divorcee out of the wakaf property. This can be attributed to the fact that males are happy if their responsibility is discharged from the wakaf property but females consider it below their dignity to get their due from the wakaf property which in their opinion is not meant for this purposes.

Legal Education in the Changing Era of Globalization

Rafia Hassan Khaki[*]

I) Introduction

The vision of legal education is to provide justice- oriented education essential to the realization of the values enshrined in the Constitution of India. In keeping with this vision, the legal education must aim at preparing legal professionals who will play decisive leadership roles, not only as advocates practicing in courts but also as academics, legislators, judges, policy makers, public officials, civil society activists as well as legal counsel in the private sectors maintaining the highest standards of professional ethics and spirit of public service. Legal education should also prepare professionals equipped to meet the new challenges and dimensions of internationalization where the nature and organization of law and legal practice are undergoing a paradigm shift.[95]

As the world gets more and more globalised, the gradual internationalization of legal services becomes inevitable. India also being in the process of globalizing its economy needs to liberalize its legal service sector. However, before opening up its legal market to foreign lawyers and law firms, India needs to bring about massive reforms within the system to create a level playing field for Indian counterparts to survive the foreign competition. Competition with foreign firms calls for extreme preparation.[96] The first and the basic step

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95 National Knowledge Commission, 'Report of the Working Group on Legal Education', 2008, at pp. 4-5, available at. http://www.knowlegecommission.gov.in/downloads/documents/wg-legal.pdf.

96 Ms. Jumoke Akinjide, 'Globalisation of Legal Services - Fears of African Countries', available at

in this direction would be the upliftment of the standard of legal education within the country.

This paper gives the historical background of legal education in India and makes a critical evaluation of the prevailing conditions of legal education in India. At the end, the paper attempts to devise certain reforms in the system of legal education in India to make Indian lawyers capable of meeting the challenges of globalization.

II) Legal Education in India: A Historical Retrospect

The legal education in India was transplanted by the English during their rule in India. In 1852, the legal education was started in India when the first Professorship of Jurisprudence was established at the Elphinston College, Bombay. The college was converted into a government law college in 1856. Thereafter, legal education was introduced as a subject for teaching in three Universities in the presidency towns of Calcutta, Madras and Bombay. Thus, a beginning of the formal legal education was made in India. For almost a century, a stereo-typed system of teaching compulsory subjects under a straight lecture method and the two year course continued.[97] The colleges imparting legal education were mostly part-time institutions conducting classes in the mornings or evenings. With the result, the standard of legal education was not good. The need was therefore felt for upgrading the standard of legal education. Accordingly numerous committees were set up periodically to consider and propose reforms in legal education.

The University Education Commission (Radhakrishnan Commission) was set up in 1948-49. The Commission observed in its report, "We have no internationally known expounders of jurisprudence and legal studies. Our colleges of law do not hold a place of high esteem either at home or abroad nor has law become an area of profound

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http://meetings.abanet.org/webupload/commupload/ic805000/sitesofinterest-files/Liberalisation-of-legal.services.doc.

97 Neha Nanchahal, 'Legal Education in India', available at http://www.123oye.com/job=articles /cyber/legal-education.htm

scholarship and enlightened research." [98] This is due to our defective system of legal education. The Radhkrishnan Commission further observed that the changes that have occurred and are occurring in the political, economic and social life of the nation since the emergence of India as a sovereign democratic State make complete re-orientation of the outlook of legal education imperative.[99]

In the year 1949, the Bombay Legal Education Committee was set up to promote legal education. The Committee recommended a three year scheme of legal studies comprising of the study of law for two years at the University for a law degree followed by a third year spent in the study of vocational subjects ending with a professional examination conducted either by the Bar Council or Council of Legal Education, the establishment of which was proposed by it.[100]

The All-India Bar Committee of 1951 made the recommendation that the uniform minimum qualification for admission to the roll of advocates should be a law degree obtained after at least a two years study of law in the University after having first graduated in arts, science or commerce and a further apprentice course of study for one year in practical subjects…after attending a certain percentage of lectures arranged for imparting instruction during this apprentice course.[101]

In 1954, the 14th Report of the Law Commission (Setalvad Commission) of India discussed the status of legal education and recognized the need for reforms in the system of legal education. It depicted a very dismal picture of legal education. The Commission made a number of significant recommendations in its report for the improvement of standard of legal education. The report, after discussing in detail the question of duration of the course of legal studies, observed, "… what we envisage is a system of legal education in which instruction for a law degree will be imparted only in properly equipped and full time

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98 Report of the University Education Commission (1948-49), Vol. I, at p. 257.

99 Id. at p. 258.

100 Bombay Legal Education Committee Report (1949).

101 All-India Bar Committee Report (1951), at p.33, para.60.

law colleges. Further what we contemplate is that teaching at Universities should not include procedural, taxation and local laws and other cognate subjects which may, with advantage be left to be taught later to those who intend to take a professional career…a two year course at University would be adequate to give the students a sufficient and sound knowledge of the theory and principles of law, the more practical aspects being left to be dealt with later in the instruction to be imparted by the professional bodies."[102]

The period of two years was considered to be not sufficient for covering the large number of subjects to be taught for equipping the students either for later higher academic studies and research or for a professional career. **Sir Tej Bahadur Sapru** has rightly commented, "It is impossible to traverse even a respectable area of law within two years. If the universities want to raise their standard of legal education, if the universities want their graduates in law should have a more extensive, if not more intensive, knowledge of law, then the least they can do is that they must provide three years course."[103]

In 1961, the Parliament enacted the Advocates Act, 1961. In pursuance of this Act, all Universities imparting legal education in the country switched over in 1962 to the three year law course from the then prevailing two-year programme. This was considered to be one of the major steps for the improvement of standard of legal education in India. However, with the passage of time, the three year course was also felt to be unsatisfactory. It was thought that the 5 year law degree after 10+2 schooling will be the best substitute, for improvement of standard of legal education. Accordingly in 1982-83, the Bar Council of India introduced a five-year integrated course in law after 10+2 schooling and proposed to discontinue the old three year course. There was a lot of hue and cry from certain quarters against the discontinuance of the three year law course. Ultimately, the BCI had to succumb to the pressure and allow the universities to continue the three year course simultaneously.

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102 Law Commission of India, 14th Report, Vol. I (1958), at p. 531.

103 As cited in 14th Report of Law Commission of India, Vol. I, (1958), at p.530.

The three year course was however restructured into a semester system and several papers came to be included and excluded as per the BCI guidelines.

Thus, at present in India there are two types of law courses, the three year course after graduation and the five year course after 10+2. The 3 year course continues to be the dominant law course especially in northern India.

III) Regulating Agencies of Legal Education in India

In India, the legal education is regulated by the Bar Council of India (BCI) constituted under the Advocates Act, 1961, the University Grants Commission (UGC) constituted under the University Grants Commission Act, 1956 and the concerned University authorities.

The Advocates Act, 1961 has been passed by the Parliament by virtue of its powers under the Entries 77 and 78 of List I of Schedule VII of the Constitution of India. The legislative subject here is 'practice in the Supreme Court or High Court.'[104] In *Bar Council of Uttar Pradesh v/s Uttar Pradesh*"[105], the Supreme Court specifically held that in pith and substance, the Advocates Act, 1961 deals only with the following subject matter referred to in Entries 77 and 78 of List I:

"**Entry 77**. - Constitution, organization, jurisdiction and power of the Supreme Court (including contempt of such court) and the fees taken therein; persons entitled to practice before the Supreme Court.

Entry 78. – Constitution, organization (including vacations) of the High Courts except provisions as to officers and servants of High Courts; persons entitled to practice before the High Courts."

The Advocates Act, 1961 thus deals with the conditions which a person has to satisfy before he can be permitted to practice in the Supreme Court or the High Courts, but the Statement of Objects and Reasons or the Preamble of the Advocates Act, 1961 does not expressly refer to 'standards of legal education'. It is only section 7(1)(h),(i) and section 49(d) which refer to this aspect.

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104 See O. N. Mohindroo *v.* Bar Council, AIR 1968 SC 888.

105 AIR 1973 SC 231.

Under the Advocates Act, 1961, the Bar Council of India, constituted under section 4 of the Act, has the following two important functions with respect to legal education:

1) To promote legal education and to lay down standards of such education in consultation with the Universities in India imparting such education and State Bar Councils.[106]
2) To recognize Universities whose degrees in law shall be a qualification for enrolment as an advocate and for that purpose to visit and inspect Universities in accordance with such directions as it may give in this behalf. [107]

Section 49 (af) and (d) give the BCI power to make rules, *inter alia*, (a) to prescribe the minimum qualification required for admission to a course of degree of law in any recognized University; and (b) to prescribe the standards of legal education to be observed by such Universities in India for that purpose. Pursuant to this power, the BCI has made rules in Part IV of its 1965 Rules dealing with the standard of legal education and recognition of degrees in law for admission as advocate.

Apart from the consultation process with the Universities and the State Bar Councils, the B.C.I, in the matters of legal education is obliged to give due regard to the advice of an expert committee, the Legal Education Committee,[108] constituted under section 10 (2)(b) of the Advocates Act, 1961.

The University Grants Commission Act, 1956 has been enacted by the Parliament in exercise of its legislative power under Entry 66 [109] of List I of the Constitution of India. The Preamble to the UGC Act, 1956

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106 Section 7(1) (h) of the Advocates Act, 1961.

107 Section 7 (1) (i) (a) of the Advocates Act, 1961

108 As per Section 10(2) (b), the Legal Education Committee shall consist of ten members of whom five shall be persons elected by the Council (BCI) from amongst its members and five shall be persons co-opted by the Council; who are not members thereof.

109 "Entry 66 of List I-Coordination and determination of standards in institutions for higher education or research and scientific and technical institutions."

states that the Act is intended 'to make provision for the co-ordination and determination of standards in Universities.' In view of section 2(f) of the UGC Act, the UGC has control over the Universities as well as affiliated colleges. The UGC has the general duty to take, in consultation with the Universities or other bodies concerned, all such steps as it may think fit for the promotion or co-ordination of University education and for the determination and maintenance of standards of teaching, examination and research in University. The UGC may recommend to any University the measures necessary for the improvement of University education and advice the University upon the action to be taken for the purpose of implementing such recommendations.[110] The UGC may, after consultation with the University, cause an inspection to be made in such a manner as may be prescribed and by such persons, as it may direct.[111] The UGC could withhold grants to the Universities if its directives are not implemented.[112] Thus UGC has very wide ranging powers with respect to maintenance of standards of education in Universities and affiliated colleges. The honorable Supreme Court has observed, "The University Grants Commission has greater role to play in shaping the academic life of the country. It shall not falter or fail in its duty to maintain a high standard in the Universities."[113]

Thus, it is evident that both BCI and UGC have wide powers to regulate and promote the standards of legal education by virtue of the Advocates Act, and the UGC Act. The provisions of these Acts with respect to legal education have to be given harmonious construction. Section 7(1) (h) of the Advocates Act cannot be treated to be in conflict with the UGC Act, 1956. The reason is that under section 7(I) (h) the BCI has to consult the Universities and the Universities are answerable to the UGC in the matter of standards of legal education. In other words, the subject of legal education comes within the purview of two entities,

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110 Section 12(d) of the University Grants Commission Act, 1956.

111 Section 13 of the University Grants Commission Act, 1956.

112 Section 14 of the University Grants Commission Act, 1956.

113 Osmania University Teacher's Association *v.* State of Andhra Pradesh, AIR 1987 SC 2034.

the UGC and the BCI. The UGC can lay down the standards of education and BCI can lay down the conditions for eligibility of a law graduate to enter the legal profession. Precisely to ensure harmony, the Advocates Act in section 7(I) (h) has required consultation by BCI with the Universities. The two are partners with a common goal.[114]

The Curriculum Development Committee (CDC) Report, 2001 of UGC, admits of considerable harmony in the process of consultation between the BCI and the Universities. After referring to section 7(I) (h) of the Advocates Act, 1961 and section 12 of the UGC Act, 1956, the said report of 2001 states:

"In the field of legal education, there was, thus, dilemma of dual responsibility of the BCI and UGC. The CDC in the eighties were aware of this difficulty and suggested certain ways and means to solve the problems arising from the dual responsibility and called for more interaction, in the from of information sharing and consultation between UGC and BCI. It is significant that BCI had an open mind when they set out in 1995 for a reform. They consulted the Universities and the UGC law panel while formulating the reforms for LL.B. courses… Although this cannot be described as closer interaction, the gap in common endeavors between BCI and UGC for reforms in legal education were being filled."[115]

The CDC Report of 2001 of UGC thus accepts that there has been some consultation but it says that 'closer interaction' is necessary between the UGC and BCI.

In the light of above, the Law Commission of India observed in its 184th report that one cannot ignore practical difficulties in the present form of section 7(I) (h) which requires the Bar Council of India to consult all the Universities. The Universities in which law is taught either directly or through affiliated colleges are large in number and make it practically impossible for the BCI to consult every University whenever it has to take important decisions relating to legal education. If

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114 Law Commission of India, 184th Report, Vol. 15 (2002), at p. 184.14.

115 CDC Report, 2001 of UGC as cited in 14th Report of Law Commission of India (2002), at p. 184.15.

it has to consult each University, it will be a time consuming process. The BCI appears to have genuinely felt that requirement of section 7(I) (h) is satisfied if some of the professors working in the Universities are invited to speak at some seminars dealing with reforms of legal education. The Commission is of the view that such a procedure has to be modified in as much as the professor or two invited to a conference, may not be representatives of the views of all the Universities.[116]

In order to solve the practical problem and make consultation easy and meaningful the Law Commission made the recommendation that in as much as the Bar Council of India cannot be required to consult all Universities, as stated in section 7(I) (h), the provisions of section7 (I) (h) have to be amended by prescribing that the Bar Council of India must consult a body which effectively represents all universities and that such a body shall be constituted by the University Grants Commission. This requires amendments to the Advocates Act, 1961 and the University Grants Commission Act, 1956. [117]

With respect to Legal Education Committee Bar Council of India, the Law Commission of India made the recommendation that Clause (b) of subsection (2) of section 10 has to be amended to provide for membership of Legal Education Committee of the Bar Council of India representing different classes of persons. The Committee shall comprise of 5 members from the Bar Council of India, one retired judge of Supreme Court of India, one retired Chief Justice/Judge of High Court both to be nominated by Chief Justice of India and three academics in law to be nominated by the University Grants Commission and these three should be members of the proposed UGC Committee on Legal Education and all three of them must be in office and one of them be Director/Vice-Chancellor of a statutory Law University. The Chairman of the Committee, namely, the retired Judge of the Supreme Court, shall have a casting vote. The Attorney-General of India can, at his option, participate in the meetings of Legal Education Committee of the Bar Council of India and the Chairman of that Committee shall be entitled to

116 See Supra note 20, at p. 184. 15-16

117 Ibid.

request the Attorney General to participate in the proceedings of the Committee and when he so participates, he may, if necessary, vote on any resolution. The Commission further recommended that the Bar Council Legal Education Committee should meet at least once in every three months.[118]

All these recommendations as proposed by the Law Commission of India in its 184th Report (2002) either with respect to consultation between UGC and BCI or the Legal Education Committee of BCI and UGC need to be implemented, as soon as possible, so that the consultations for the improvement of the standards of legal education can be made in an objective and effective manner.

IV) Prevailing Conditions of Legal Education in India

With the enactment of the Advocates Act, 1961 there was mushroom growth of law colleges in India.[119] Most of these law colleges were ill-equipped and maintained very poor standards. They had no full-time teachers or any worth while library. Most of these law schools used to enroll hundreds of students in a class without having any facilities. Students would not attend classes regularly, many of whom used to know the name of subject only on the day of examination, and the degree became almost a saleable item.[120] Colleges were started at the behest of politicians, judges and lawyers and legal education was treated as a money making avenue.[121] All these factors resulted in the deterioration of the standards of legal education in the country. The situation became so bad that an urgent need of reforming the system of legal education was felt and many efforts were made from time to time to improve the standard s of legal education.

In 1993-94, the Committee headed by the Honb'le Mr. Justice A.M. Ahmadi was constituted to make some suggestions regarding admission to law colleges, syllabus, training, etc. The Committee

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118 Id. at p. 184.20

119 At present, there are more than 700 law colleges in India.

120 N.L. Mitra, 'Legal Education In India', available at www.aals.org/2000 international/english /india.htm.

121 Ibid.

observed in its Report (1994) that the syllabus of the law colleges was very unsatisfactory, the teaching standards were equally bad and that there was lack of discipline in the law colleges. The Committee suggested that there should be an entrance examination for admission to law colleges. So far as the syllabus is concerned more emphasis should be given to practical training. Procedural and practical subjects must be made compulsory and experienced advocates must be employed to teach those subjects.[122] The Committee recommended that the "case method" introduced by Prof. Langdell of Harvard and the "problem method" pioneered by Prof. Carl Llewellyn and Judge Jerome Frank should be adopted as a method of teaching in law colleges.

The Law Ministers' Working Group on Legal Education at Bhubaneshwar in 1995 considered reforms in the legal education and entry into legal profession in detail. The Law Ministers expressed their concern at the deteriorating standards of legal education. They were of the view that a successful strategy for improving the legal education ought to take into account the following important elements, among others:[123]

1. The BCI should play a more effective role in discharging its functions under the provisions of the Advocates Act;
2. It should be ensured that only such law colleges are brought into existence whose infrastructure facilities are in conformity with minimum standards laid down by BCI;
3. Legal Education Committee of BCI should consist of, among others, representatives of the judiciary, Union Ministry of Law, Justice and Company Affairs, UGC, established law colleges/faculties and institutions specializing in legal research. The recommendation of such a body should, as a general rule, be accepted by the BCI;

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122 'Report on Reforms in Legal Education and Entry into Legal Profession By Ahmadi Committee', Indian Bar Review, Vol. XXII (4)1995, at p.13.

123 'Bhubaneshwar Statement of Law Ministers' Working Group on Legal Education', Indian Bar Review, Vol. XXII (4) 1995, at p.36.

4. Admission into law colleges should be through a common entrance test, held either at the national or at the state level;
5. Practical training should be given its due place in professional legal education;
6. Professional legal education should be a five year law course after 10+2 level; and
7. Law examinations should increasingly be problem based to enable students to develop skill of analysis of facts and reasoning essential for profession.

These recommendations were by and large approved by the Bar Council of India with some minor changes.[124]

The 184th Report of Law Commission of India, presented on December 20, 2002 focused on legal education and professional training. The Law Commission took up the subject of 'Legal Education', *suo motto*, as it was found to be fundamental to the very foundation of judicial system. In its Report, the Commission gave a number of valuable recommendations for the upliftment of standards of legal education in India. Some of the important recommendations as given in the 184th Report of Law Commission of India are as under:

1. For an effective consultation between the UGC and BCI for the promotion of standards of legal education, the Law Commission proposed amendments to the UGC Act and the Advocates Act. The UGC Act, 1956 may be amended to provide a separate provision for constituting the Legal Education Committee of the UGC. The UGC shall nominate three members out of its Legal Education Committee for the Legal Education Committee of the BCI, so that they can coordinate the decisions taken by the UGC Committee on Legal Education with those taken by the Legal Education Committee of the BCI. The Legal Education Committee of BCI should consult the Legal Education Committee of UGC. The Commission proposed that the Legal Education Committee of BCI should also have one retired judge

124 'Bar Council Approves Bhubaneshwar Statement with Minor Changes', India Bar Review, Vol. XXII (4) 1995, at p. 40.

of the Supreme Court and one retired Chief Justice or retired judge of a High Court to be nominated by the Chief Justice of India. Accordingly it has recommended the amendment of Section 10 (2) of the Advocates Act, 1961.[125]

2. The accreditation and quality assessment of law schools in the country must be introduced by the BCI and UGC, so that healthy competition environment may be generated.[126]
3. The "problem method" may be introduced in the examination system to an extent of about 75% in each paper apart from 25% for theory.[127]
4. The Central Government should start at least four colleges in the country for providing professional training to law teachers in consultation with the BCI and the UGC, apart from the existing refresher course conducted by the UGC.[128]
5. A separate provision be incorporated in the Advocates Act, 1961 for providing that in case of any conflict in the inspection reports of the BCI and UGC/Universities, a Task Force should make inspection on the same lines as in the regulations of the AICTE in which a judicial officer would be a member.[129]

The National Knowledge Commission (NKC), established by the Prime Minister of India in 2005, constituted a Working Group on Legal Education to suggest innovative means of raising standards and promoting excellence in legal education. The Working Group observed in its Report that the task of improving the quality of legal education in a vast majority of law schools in the country entails a wide range of measures including reforms in the existing regulatory structure, significant focus on curriculum development keeping in mind contemporary demands for legal services, recruitment of competent and committed faculty, establishing research training centres, necessary

125 See Supra note 8, at p. 184.4.
126 Id. at p. 184.5.
127 Id. at p. 184.70.
128 See Supra note 32,
129 Id. at p. 184.69.

financial support from the government, and creating necessary infrastructure especially a well endowed library.[130]

Thus attempts for raising the standards of legal education have been made from time to time by appointment of various committees, commissions, working groups, etc., for making recommendations for the improvement of standards of legal education. Numerous valuable recommendations as mentioned above were given by these committees, commission, etc. However, no substantial results were achieved in terms of quality, professionalism and competitiveness of legal education as most of these recommendations have not been implemented and remain only the paper tigers. As a result there has been no improvement in the standard of legal education in India. In fact the standard of legal education is deteriorating day by day because of uncontrolled expansion of law colleges in the country, poor quality teaching, poor organization and management, lack of organized continuing legal education, etc.[131]

For the upliftment of the existing standards of legal education in India, no more commissions and committees need to be established. What is required is to examine the recommendations of the previous committees and commissions thoroughly and implement the important ones in a stepwise manner without making any further delay. Chief Justice **A.M. Ahmadi** has rightly pointed out, "*We have waited long enough to repair the cracks in the legal education system of the country and it is high time that we rise from our armchairs and start the repair work in the right earnest."*[132]

V) Three Year Course Versus Five Year Course: The Debate

As a major step towards improvement of the legal education, the Bar Council of India after matured deliberations and consultations

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130 See Supra note 1, at p. 5.

131 N.R. Madhava Menon, 'Few Thoughts on Reforming Legal Education", India Bar Review, Vol. XXII (4) 1995, at pp. 67-72.

132 'Law Schools and Legal Education in India', available at works.bepress.com/cgi/viewcontent. cgi?article=1001and context=dutimoy-mukherjee.

introduced in 1982 a five year integrated course in law after 10+2 schooling. The Committee on Subordinate Legislation of the 10th Lok Sabha, the Committee of Judges on Legal Education appointed by the Chief Justice of India in 1993, the All India Law Ministers' Conference in 1994 etc. have unanimously recommended the adoption of the five-year B.A.LL.B. programme as the course for professional legal education. The course was expected to adequately equip the students to join the legal profession. Initially the idea was to discontinue the three-year course gradually and encourage and promote the five-year professional integrated course for the purpose of enrolment as advocate. However, owing to the resistance from certain quarters against the discontinuance of the three-year course, the Bar Council of India was forced to give up the idea and allow the Universities to continue simultaneously the three-year course also. Thus, at present, there are two types of law courses in India, the three-year course after graduation in any stream and the five-year integrated course after 10+2 schooling.

There is an on-going debate as to whether the three-year course or the five-year course is better for meeting the growing demands of the legal profession. The majority seems to be influenced by the efficacy of the five-year law course because of the following advantages: (1) students caught at a younger age have higher commitment; (2) with more professional regimentation through skill based education, better technical competence can be infused at a younger age; and (3) higher motivational levels can be achieved by imparting direction at a younger age.[133] On the other hand the three year law course has the advantage of: (1) multidisciplinary intake; (2) higher level of discretionary judgment especially in choosing the right career; and (3) wider level of application of law in various fields.[134]

A professional education course has two kinds of inputs *viz*. (1) a knowledge input; and (2) a skill and special ability input. There is an attempt to functionalize the component of knowledge in problem solutions. Like medicine or engineering or technology, law is a

133 See Supra note 26.

134 Ibid.

professional education. Like these branches of knowledge and application, legal education which is capable of being professionalized has also to have knowledge and skill of application. As such like other courses, one may think that a five year law course almost on the pattern of education in medicine or technology would be ideal.[135]

However, the problem in the legal profession is that legal knowledge and application is based on many other types of knowledge like knowledge in science, technology, trade and commerce, engineering and others. Can a five year law course produce a lawyer like Dr. Barry Scheck, the DNA expert, or a patent attorney like Trevor Black or an environmental lawyer like Mark Gallanter? What made them great lawyers is their basic grounding in science, technology and medicine etc. and then their interest and ability to turn into legal profession.[136]

Legal education including its professional character must be distinguished with medical or technical education. In legal education a multi-base level education input is beneficial because law has its role in every branch of knowledge. For example; a corporate lawyer is required to have a fair understanding of the accounting and disclosure system; a criminal lawyer is to have a command over the forensic science; an intellectual property attorney has to have a good command over the physical and biological sciences. Often a lawyer does good job if he has good knowledge in mathematics, statistics, psychology, philosophy, logic, anthropology, literature etc.[137] In this background, it can be said that legal education has to take off from various disciplines at the base level, and super specialization calls for strong base level education in science, technology, medicine, literature, economics, accounts and other branches of knowledge.[138]

Moreover, in the present day world of science and technology, the offence world would also use the ever-developing techniques in the

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135 N. L. Mitra, 'A Few Questions in the Beginning', Indian Bar Review, Vol. XXII (4) 1995, at p.75.

136 Id. at p. 77.

137 Ibid.

138 Id, at p.78.

sophisticated manner. As such the modern world requires more and more super specialization in the legal profession. The question then is, can it come out of the presently designed standardized five year law course after higher secondary base-level inputs? Definitely the answer is in negative. It is for this reason that most common law countries still follow a pattern of three years legal education after the first degree, or graduation in any discipline, such as social science, management, finances, medicine, engineering, physical science, biological sciences, etc. This makes it clear that the three year law course after graduation in any stream need not to be discontinued in India. However, keeping in view the numerous advantages of five year law course, it too can't be done away with. Both the three year course and the five-year course are to be retained though reforms are required to raise the standard of both the courses. Unfortunately, almost all the Indian law schools, whether having three year or five year law course, suffer from acute academic anemia. Qualified full time teachers are not available, libraries are virtually non-existent, and there is staggering enrolment, absentee students, mass copying at examination, absence of adequate physical and financial resources - all these pile up as problems of legal institutions. In such a situation, whether the duration of the course is for five years or three years does not make any difference. So, the debate is not a 'five years course versus a three years course'. The debate is deeper and is concerned with the very purpose of legal education, its need for specialization and the contemporary needs of the society.[139]

A successful experience was made by the Bar Council of India and the Government of Karnataka by establishing the model law school namely the National Law School of India University (NLSIU) in Bangalore in 1986. It started enrolling around a hundred students from all over India after an entrance examination, and offered only the five-year course. It had many more facilities than other law colleges - a campus given by the State Government, a good full-time staff, modern methods of teaching and most important of all - huge funds from BCI

139 Id, at p. 79.

and the Government.[140] The National Law School was successful in attracting the serious and committed students to study law.[141] With the result, the NLSIU produced competent lawyers. The outstanding success of the National Law School invited the attention of policy planners,[142] the organized bar and the Committee of Judges on Legal Education appointed by the Chief Justice of India (1993) and resulted in setting up of law universities on the Bangalore model like NALSAR at Hyderabad (1996), NUJS at Kolkata (1999) and NLU at Jodhpur (2000), HNLU at Raipur (2003), GNLU at Gandhinagar (2004).[143]

Today we have about eleven NLSU's where students are selected in an all India competition. These colleges have been producing our best legal talent comparable to the most renowned colleges in US and UK. However, this alone is not sufficient.[144] The Law Commission has indeed observed in its 184th Report (2002) as follows:

> *We cannot however, rest content with a few star colleges. We must be concerned with all the rest of the hundreds of law colleges located in cities and district headquarters all over the country… A few bright star law colleges with limited number of student intake in an all India selection is not the end and may not result in an over all change in the level of legal education.*[145]

Therefore, there is need to bring about a revolutionary change in the standards and curriculum of Indian law colleges, whether imparting

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140 Dhairyasheel Patil, 'Legal Education-The Journey so Far', Indian Bar Review, Vol. XXII (4) 1995, at p.45.

141 C. Raj Kumar, 'Improving Legal Education in India', The Hindu, dated June 27, 2007.

142 Committee on Subordinate Legislation of the Tenth Parliament recommended a Bangalore type model law school in every State, which has been endorsed by the All India Law Minister's Conference at Bhubaneshwar in 1992.

143 See Supra note 38.

144 See Supra note 1, at pp.16-17.

145 See Supra note 20, at pp. 184,54-55.

three year or five year course, so as to bring them, step by step, to the level required in the present age.[146]

VI) Globalization and Legal Education

Some four or five decades ago, the concept was that the legal education is meant to produce graduates who would mostly come to the bar, while a few may go into law teaching. The Advocates Act, 1961 was enacted to achieve the said object, namely, to prescribe minimum standards for entry into professional practice in the courts. However, during the last few decades and more particularly after liberalization in the year 1991 the entire concept of legal education has changed. Today, legal education has to meet not only the requirements of the bar and the new needs of trade, commerce and industry but also the requirements of globalization.[147]

In the changing era of globalization, the liberalization of legal services has become inevitable. The liberalization of legal services and the probable entry of foreign lawyers into India throw up new challenges. We have to compete with the knowledge and skills of the foreign lawyers to survive the foreign competition and to benefit from the liberalization process. Globalization of legal profession is likely to introduce a sea-change in the entire fabric of law teaching and legal profession in India.

The conventional role of a lawyer was to step in after the event to resolve disputes and dispense justice to the aggrieved party. In the changed scenario, the additional roles envisaged are that of policy planner, business advisor, negotiator among interest groups, expert in articulation and communication of ideas, mediator, lobbyist, law reformer, etc. These roles demand specialized knowledge and skills not ordinarily available in the existing system of legal education.[148] The expansion in business across the world has generated a need for lawyers who are global in their approach. Legal education has to play a big role

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146 See Supra note 1, at p. 17.

147 See Supra note 1, at p. 13.

148 N.R. Madhav Menon, 'Halting Progress of Legal Education', The Hindu, dated October 23, 2001.

in creating such lawyers. There is an urgent need for truly global legal education.[149] The profession of law, today to a greater extent, requires lawyers to represent clients not only within but also outside national frontiers. Thus new subjects with international dimensions and comparative law studies have to be included within the legal curriculum.

The lawyer of tomorrow must be comfortable to interact with other professions on an equal footing and be able to consume scientific and technical knowledge. The law curriculum for the future must provide integrated knowledge of a whole range of physical and natural science subjects on which legal policies are now being formulated. These areas include bio-diversity, bio-technology, information technology, environmental sciences, air and space technologies, ocean and marine sciences, forensic sciences, public health, petroleum and mineral related subjects, etc. Lawyers will be naturally called upon to specialize in assorted branches of legal practice as it is impossible to be a practitioner on all emerging areas of legal practice.[150]

The most challenging task is to strike a proper balance to ensure that students are taught a fair mix of courses that give them knowledge and training in Indian law, but at the same time prepare them for facing the challenges of globalization, whereby domestic legal mechanisms interact with both international and foreign legal systems.[151] The Working Group of National Knowledge Commission is also of the same opinion that the aim of legal education should be to create lawyers who are comfortable and skilled in dealing with the differing legal systems and cultures that make up our global community while remaining strong in one's own national legal system.[152]

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149 'Call to Make Indian Legal Education Global', available at http://www.timesof india.indiatimes. com/Education/Call-to-make-indian-Legal-Education.Global/articleshow/3540121.cms

150 See Supra note 54.

151 C. Raj Kumar, 'Globalization and Legal Education', The Hindu, dated August 6, 2007.

152 See Supra note 1, at p.5.

According to **C. Raj Kumar**,[153] in the era of globalization, we need to pay attention to four important factors to improve the standards of legal education. These include global curriculum, global faculty, global degrees and global interactions. The existing curriculum of legal education in India is to be revamped to meet the challenges of globalization. Impetus is to be given to the study of international law and comparative law studies. There is a need for having a global focus on hiring of good faculty for law schools. Of course, success of law schools will depend on the schools' ability to provide the right kind of intellectual environment and financial and other incentives for Indian or foreign scholars to teach and pursue research in India and to contribute to its growth story.

Indian law schools need to consider innovation when it comes to the degree programmes offered by them. It will be useful to look at the experience of the United States and other countries in examining whether Indian law schools should consider offering the Juris Doctor (JD) programme. Increasingly, many parts of the common law world are beginning to offer JD programme; law schools in Australia, Canada and Hong Kong are in the forefront. Obviously, there is an emerging trend in favor of JD programmes.[154]

Moreover the law schools of the future ought to provide academic space for engaging in teaching and cutting edge research on issues of global significance. The institutions ought to constantly reinvent themselves for facing the challenges of globalization through exchange and collaboration programmes. This will have different implications for faculty, students, and for the development of teaching and research programmes.[155]

To face the globalization challenges, the law schools and Universities should built a system of legal education that encourages clinical legal education so that the students get real life dealing in courts

153 See Supra note 57.

154 Ibid.

155 Ibid.

and with clients. The law schools and Universities should promote acquaintance with new technological means by putting course materials on the web, by conducting on-line tests to grade students, etc. Teachers and students should be oriented to look at the web as an information provider. Command over spoken and written language, effective oral skills, diction and extensive reading are pre-requisites of being a good lawyer. Knowledge of a foreign language is important to be a lawyer in the global economy. Law students should be provided the opportunity to learn a foreign language of their choice.[156]

In order to select the right and committed candidates to study law, the admission to law colleges and Universities should be strictly based on a Law Aptitude Test (LAT) on the lines of the common entrance test for admission to professional courses. In 2008, the Common Law Admission Test (CLAT) was introduced to select candidates on an all-India based competition. This was a good move to bring uniformity in standards of the process of intake of students in law colleges. Plans are being made to introduce changes to the CLAT to select students who have skills to become international lawyers. These plans were introduced at seminars organized in Hyderabad and Delhi recently by US-based Institute of International Education (IIE), an international exchange organization.[157]

The Bar Council of India, the State Bar Councils, the State Governments, the University Grants Commission and the Universities have a great role to play for improving the standard of legal education in the country. They should work in a comprehensive manner without any conflict to find out the ways and means to meet the new challenges of globalization and provide better tools of research and methodology of learning for the generations to come.[158]

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156 See Supra note 3.

157 See Supra note 55.

158 'Curriculum of Legal Education to Meet Challenges of Globalization', available at http://www. legalserviceindia.com/article/1321-LegalEducation-To-Meet-Challenges-of-Globalization.html

VII) Conclusion and Suggestions

Globalization of legal services has thrown up new challenges which demand a sea-change in the entire fabric of law teaching. We have to compete with the knowledge and skill of foreign lawyers and law firms to survive the foreign competition. Otherwise we won't be able to derive the benefits of liberalization of legal service sector and will be forced out of the business. Thus, the improvement of the standard of legal education is the need of the hour, to meet the ever-growing demands of globalization. Following suggestions are proposed with respect to improvement in the standard of legal education in India:

- It is recommended that the law curriculum should be revised to meet the challenges of globalization by including the subjects of global importance like International Trade Law, Intellectual Property Rights, International Economic Law, etc. within the curriculum of both 3-year and five-year legal educational systems. Comparative law studies should also be given a due place in the law curriculum.
- The Indian law schools and universities should encourage the clinical legal education to inculcate the innumerable lawyering skills like counseling skill, documentation skill, negotiation skill, procedural skill, analytical skill, research skill etc. in the law students in a practical manner. In the National Law School, there are compulsory courses conducted on trial advocacy, appellate advocacy, conciliation, mediation and arbitration and special practical training in various branches through placement programmes. Similar practical courses should be started in the rest of law college and universities of India.
- The law schools need to improve their libraries. The internet facilities should be made available in the law libraries whereby the foreign journals and periodicals must be especially made available to the students to make them aware of the latest developments taking placing the world over.

- English, being the global language should be included within the syllabus of both the 5-year and the 3-year law course (with more emphasis upon spoken English) so that the law students could develop excellent communication skills.
- The Indian government should encourage the collaboration and student exchange programmes with the foreign Universities to prepare the students for global practice.
- The BCI and the UGC, the bodies regulating the legal education in India should join hands to devise new ways and means for the improvement of the standards of legal education in India. As such the recommendation given by the Law Commission of India in its 184th Report requiring amendment of section 7 (1) (h) of the Advocates Act, 1961 should be implemented.
- The admission to law colleges throughout the country should be strictly through a Common Law Aptitude Test (CLAT) based on the lines of Common Entrance Test (CET) for admission to other professional courses. It will help in the selection of right and committed candidates to law courses.
- The recommendation of the Law Commission of India as given in its 184th Report requiring the Central Government to start at least four colleges in the country for providing professional training to law teachers in consultation with the Bar Council of India and the University Grants Commission should be implemented to improve the quality and standard of law faculty.
- Furthermore, the recommendations given by the various committees, commission, working groups, conferences etc. need to be reviewed thoroughly and then the important ones should be implemented in a stepwise manner.
- Apart from the aforesaid suggestions, it is also proposed that the Government must appoint a committee consisting of members from the BCI, UGC, Universities, State Bar Councils, Law-firms etc. to conduct a study on liberalization of legal services in India

and changes required in the system of legal education to meet the challenges of globalization.

Events are moving fast and reforms in legal education cannot wait any longer to meet the challenges of globalization. Any overnight solution in this regard is not possible, but at the same time, any further delay would be suicidal in the days ahead. So, the above mentioned changes are to be brought about, slowly and steadily in the current system of legal education to meet the ever-growing demands of globalization. It has been rightly said that, "*Legal education is an investment which if wisely made will produce most beneficial results for the nation and accelerate the pace of development".*[159]

159 G. S. Pathak, quoted by Dyutimoy Mukherjee, 'Law Schools and Legal Education in India', available at works.bepress.com/egi/viewcontent.cgi?article=100/and content=dutimoy-mukhrjee.

Housing Services and Consumer Protection: Judicial Response

Mushtaq Ahmad[*]

Abstract

The entire purpose of widening the definition of 'service' by the Consumer Protection (Amendment) Act,1993 was to include in it not only day-to-day buying of goods by a common man but even such activities which were otherwise not commercial but professional or service oriented in nature. Therefore, the plea of the Government Housing Boards, Corporations, Societies or Development Authorities that, being statutory authorities, their activities were outside the purview of the Consumer Protection .Act has always been rejected by the consumer fora and courts. A legislation which is enacted to protect public interest from undesirable activities cannot be construed in such a manner as to frustrate its object. The apex court finally settled the issue and held that—the test therefore, was not a person against home complaint has been made was a statutory body but whether the nature of duty and function performed by it was service or even facility. The legislative intention was thus clear to protect a helpless consumer against services even rendered by statutory bodies. In this article an attempt has been made to discuss the role of Consumer Fora and the Supreme Court in deliberating upon the conflicting issues related to housing service, arbitrary price rise by builders, delay in allotment of flats or plots, harassment and mental agony to consumers and other complicated questions involving deficiency in service.

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Introduction

The last, but not the least, important measure of legislative reform has been the enactment of the Consumer Protection Act of 1986(hereinafter to be referred as C.P.Act) .According to the *Statement of the Objects and Reasons* of C.P.Act, the Act seeks ,*inter alia* ,to promote some basic rights of consumers ,such as, the right to safety ,right to be informed of quality ,potency and purity of products, right to access to variety of goods and services at competitive prices, right to redressal of grievances and right to consumer education. The legislation though important, was only the first step in safeguarding the interests of community at large. In today's times, services hired or availed of by the consumers have assumed important place for all the people in the world and India is not an exception. A modern society lives and thrives upon 'services' of numerous kinds which have become indispensable for comfortable and orderly existence of human beings. The concept of service has received prominence in recent years in India as a result of industrialization and rapid urbanization. Consumers depend on services of various kinds e.g. housing construction, financing, courier, education, boarding and lodging etc., which are provided by business undertakings in both the public and private sectors. However, these services may suffer from deficiencies of several kinds. Sometimes the quality of service is so poor that it causes major mishaps, especially in the case of defective constructions. A number of such defective constructions collapse almost every year resulting in death and various types of injuries to people. Only a few bold consumers take the provider of such defective services to task by filing complaints[160].

Today consumer is in need of adequate protection against defective services provided by: undertakings run under the auspices of a department of the State, corporation owned and controlled by the

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1 Saraf ,D. N. 1995. *Law* of *Consumer Protection in India*, Tripathi Publishers(2nd ed.), pp.141-156.

State or private builders or contractors[2]. In this article an attempt has been made to discuss the role of Consumer Fora and the Supreme Court in deliberating upon the conflicting issues related to the use of sub-standard materials, delay in handing over possession, escalation of construction costs and interest rate, delay in allotment of flats or plots, extorting money on various pretexts, harassment and mental agony to consumers and other complicated questions involving deficiency in service. The role of the consumer protection law in reshaping the housing sector and applicability of C.P.Act to public undertakings would also be considered.

Housing Service

The C.P. Act has introduced the notion of 'deficiency of service[3] and made it an actionable wrong. The term 'service' under section 2(1)(O) of the C.P. Act not only covers public sector services but also services rendered by the 'private sector'. Moreover, the C.P. Act is not only applicable to the categories of services enumerated in the definition but it extends to those services which can fairly and reasonably be read as implied in the definition[4]. The Supreme Court of India in *Lucknow Development Authority* v. *M. K. Gupta* observed:

> *"The test, therefore, is not a person against whom complaint is made is a statutory body but whether the nature of the duty and function performed by it is service or even facility."* [5]

The definition of the term 'service' had already been kept very wide and now with the inclusion of the terms 'housing construction' by the C.P. (Amendment) Act, 1993, it has been further widened. The entire purpose of widening the definition is to include in it not only day to day buying and selling activity undertaken by a common man but even to such activities which are otherwise non-commercial in

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2 Upadhaya , M. L.1991. *Consumer Protection Laws: A Strategy for implementation,* , P.25.

3 Section 2(1)(g) of the C.P. Act, 1986.

4 For instance Education Services, Courier Services etc.

5 AIR 1994 SC 787 (792-793).

nature and yet they partake a character in which some benefit is conferred on the consumer.

One of the important objectives, though nowhere near realization, of the State is to provide accommodation to the people. To realize this goal, the State Governments have set up Housing Boards. But unfortunately, the performance of these Boards has been highly unsatisfactory, both in terms of quality and turnover. The construction of houses constructed by these boards is sub-standard; there is arbitrary increase of price and inordinate delay in allotment of flats or plots or handing over possession even after allotment. In some cases, where the harassed consumers approach the Consumer Redressal Agencies for redressal, the Boards pleaded that, being statutory authorities, their activities were outside the purview of the C.P. Act. This plea had been rejected. The National Commission held in *UP. Avas Evam Vikas Parishad* v. *Garima Shukla and Ors*[6]., that the Board is clearly engaged in rendering 'service' for consideration to the public and the beneficiaries of this service are clearly 'consumers' falling within the definition in section 2(1)(d)(ii) of the C.P. Act.

This ruling of National Commission has been followed in almost all the orders passed by the National Commission[7] and the State Commissions [8] even before the amendment of section 2(1)(O). However, the Supreme Court in *Lucknow Development Authority* v. *M. K. Gupta*[9]*held that*:

> *"a person who applies for allotment of a building site or for a flat, constructed by the development authority or enters into an agreement with a builder or a contractor is a potential user and nature of transaction is covered in the*

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6 (1991)I CPJ I (NC). See also *U.P. Avas Evam Vikas Parishad* v. *C.P.Sharma,* (1991)1 CPJ 7 (N.C).

7 *Anjaly Gupta* v. *K. M. Enterprises;* (1993) I CPR 66 (NC). See also *Teckchand Jain* v. *Rajkumar* R.P. No. 95, Order dated :13.3.93.

8 *Sukamar Mehta* v. *H.U.D.A,* (1992) I CPJ 825 (Guj.) See also *Dr. S. K. Ahlluwallia* v. *Chief Engineer H.P. Housing Board* (1991) I CPJ 481 (HP).

9 AIR *1994* SC 787.

expression 'service of any description' under section 2(1)(0) of the C.P. Act. A government or Semi-Government body or local authority is as much amenable to the C.P. Act, as any other private body rendering similar services". [10]

Further the argument that the applicability of the C.P. Act having been confined to movable goods only, a complaint filed for any defect in relation to immovable property such as a house or building or allotment of site could not be entertained by the Commission was rejected by the Supreme Court[11] in the following words:

"when possession of property is not delivered within the stipulated period, the delay so caused is denial of service. Such claims or disputes are not in respect of immovable property as argued but deficiency in rendering of service of particular standard, quality orgrade. If a builder of a house uses sub-standard material in construction of a building or makes false or misleading representation about the condition of the house, then it is denial of the facility or benefit of which a consumer is entitled to claim value under the C. P. Act".[12]

Another striking feature of this judgment was to make responsible personally the officers involved in harassment of consumer. The apex court made it clear that although the compensation will be paid to the consumer by the institution, the institution will in return collect that amount from the erring officer. The court further held that harassment of a common man by public authorities is socially abhorring and legally impermissible. Crime and corruption thrive and prosper in the society due to lack of public

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10 *Id.,at 793.*

11 *Id,, at 794.*

12 The opinion of the Supreme Court was followed by the Delhi High Court in *Jaina properties (P) Ltd.* v. *Union of India; (1994)* 2 CTJ 399 (Del. HC.) *(CP).* See also *Usha Agarwal* v. *U. P. Vikas Parishad ;* (1994) I CPJ 31 where the National Commission held that the words *'housing construction'* in section 2(1)(0) will take in *'commercial complexes"* also.

resistance. Nothing is more damaging than the feeling of helplessness. He who is responsible for it must suffer it. It may result in improving the work culture and help in changing the outlook[13].

Since the housing services are provided not only by statutory development boards but also by private builders or contractors, the Forum or the Commission is thus entitled to award not only the value of services but also compensation to the consumer concerned for injustices suffered by him. This approach was adopted by the National Commission in *Shashi Constructions* v. *Dr. Nirmala Mokadam*[14], where a builder's agreement to provide a flat to the owner of the land which he did not fulfill was enforced by the National Commission by providing compensation to the complainant according to the estimated value. The Commission held repeatedly that allotting plots for housing construction which were either in litigation or in respect of which the development authority had no right to make allotment amounts to grave deficiency in service.[15]

Some unfair transactions on the part of builders have received close scrutiny by Consumer Fora. In a case brought before the Delhi State Commission, where a flat had been allotted to the complainant for *Rs.216,000/-* on hire purchase terms, when he asked for possession, it was found to have been allotted to some other person. The Delhi Development Authority allotted another plot to him at the

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13 Supra note 9 at PP. 796-798.

14 (1996) II CPJ 3 (NC). See also *Rarnesh Chandra Ramniklal Shah* v. *Lata Constructions;* (1996) I CPJ 81(NC), where a flat was deliberately provided to another person even after taking its full value in advance from the complainant. The builder offered him to pay Rs.9.5 lakhs, the National Commission added to it 18% interest from the date of refusal till payment and Rs.1 Lakh as compensation for disappointment.

15 *B. N. Venkatesh Marthy v Bangalore Development Authority,* 1992(2) CPR. 523 (NC). It ordered refund of the deposit of Rs.84,900 together with 18% interest. A sum of *Rs.39,000/-* was awarded as the expenditure unnecessarily incurred on aborted construction; sum of Rs.8000/- and Rs.10,000/- as architect's and Lawyer's fees; a sum of Rs.10,000/- as compensation for harassment and a sum of Rs.10,000/- as the costs.

enhanced rate of Rs.3,30,000/- The State Commission held that the complainant was entitled to have second flat at the same price as already paid by him and the Development Authority was further directed to pay interest.[16] The same line of action was followed by the State Commissions of *Rajasthan*[17], *Tamil Nadu*[18] *and Andhra Pradesh*[19]. However, where the delay is due to circumstances beyond the control of the party, compensation has not been awarded. Recently the Supreme Court in *Gaziabad Development Authority* v. *Sanchar Vihar Ltd*[20] did not allow compensation or interest where delay in handing over possession of the plots to the allottees was caused due to interim orders of the court obtained by the landowners.

The Calcutta High Court in *W.B.E.I Development Corpn* v. *State Commission*[21]held that the allotment of developed site under any particular scheme prepared for a particular purpose would definitely fall within the CP Act. In the present case the Government of West Bengal transferred vast tract of land to lessee, the W.B.E.I Development Corporation(a Government undertaking) for setting up and developing an industrial complex for electronic industries with power to subdivide the land to others for the same purpose in conformity with master plan to be submitted by the lessee .The lessee was also required to arrange sewage treatment and disposal, internal roads, power supply and water supply at their own cost, etc., as stipulated in the agreement of lease between the Government of West Bengal and Electronic Industry Development Corporation (WBEIDC). Pursuant to that purpose, and in accordance with scheme undertaken for the purpose the land was developed and divided into plots and the plots were allotted to deserving and competent parties

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16 *Joginder Singh* v. *DDA*, 1994 (2) CPR 629 (Del)

17 1994 (3) CPR 5 (Raj.).

18 *Vimal Flat Owners Association* v. *Vimal Constructions (P) Ltd* 1994 (3) CPR 534 (TN).

19 *Galaxy Apartment Owners Asociation* v. *Dr. NRK Raju*, 1994 (3) CPR 25 (AP.).

20. (1996)3 SCC I.

21. AIR 2000 Cal.80

for setting up of electronic industries on concerned plots within the framework of the contemplated scheme. The question before the court was, whether it was mere transfer of land to anyone or transfer of plots under a well thought out scheme to develop electronic industries through competent persons or agencies , and service under the provisions of the C.P.Act?.The court held that it was not just transferring of a plot of land by its owner to any transferee who wants to take the land for any purpose of his own choice. It was rather an arrangement under a well thought out scheme to develop electronic industries through competent persons or agencies with an assurance of infrastructure, like the facilities of electricity, drainage etc. Qualitatively, it was something different from a mere transfer. Therefore, in view of the scope of the Consumer Protection Act and the definition of relevant terms contained therein, the responsibility undertaken by the WBEIDC to make allotment of plots to the deserving candidates for setting up and development of electronic industries falls within the ambit of 'service' as defined in the C.P. Act and therefore, the matter will come within the scope of that Act.

In *Haryana Urban Development Authority* v. *Raj Dulhar*[161] a petition was filed by HUDA for quashing the order of allotment of a residential plot to respondent No. 1. The Court held that the question, whether a person who makes an application for allotment of plot in a scheme notified by HUDA can be treated as consumer, and the functions discharged by it can be regarded as service within the ambit of the CP Act, has been conclusively answered affirmatively by the apex Court. However, the Court laid down that the mere submission of application by the petitioners does not create a right in their favour to be allotted plots of land. The advertisement issued by the authority can at the best be termed as an invitation to the prospective buyers to apply for consideration for allotment of land. The very fact that the advertisement didn't contain any restriction on the number of applications, which could be made by the Co-operative Group Housing Societies, is a clear proof of the intention of the authority

161 AIR 1998 P& H 283

that the prospective applicants will be considered by it for the purpose of allotment of land earmarked for group housing purpose. Such advertisement cannot be construed as a promise held by the authority to allot land to the applicants and once the Government has, in exercise of policy decided to allot land at the revised rates under the new scheme, the inchoate right of consideration which came to vest in the petitioners on the basis of the application submitted by them, stood extinguished. The petitioners cannot enforce their so-called expectations nor can they seek mandamus against the authority on the basis of the doctrine of promissory estoppels [16223] .It was further held that the record of the case shows that HUDA authorities had intimated the complainant as early as in the year 1986 that she can withdraw money deposited by her. Thus, there was no basis for recording the finding that the authorities of HUDA harassed the complainant or that they withheld the earnest money deposited by her with an ulterior motive.

Therefore, it is submitted that an ordinary citizen or common man is hardly equipped to match the might of the State. Any defect in constructions activity would amount to denial of comfort and service to consumer. If the service is defective or it is not what was represented then it would be unfair trade practice.

Complicated Issues

The C.P. (Amendment) Act, 1993 has made a provision for representative suits or class action suits, which could be instituted where there are "numerous" consumers having the same questions of law and fact. However, some important issues relating to housing service were not disposed of by the National Commission on the ground that the issues raised were complicated and should be decided in a Civil Court and not by this commission. In *Trimurti Nagar* v.

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162 This opinion was expressed by the Punjab and the Harayana High Court in the Express Co-operative Group Housing Society v. State of Haryana, C.W P.No. 8905 of 1997 and was adopted in the present case.(Supra).

Chief Officer, Nagpur Housing and Area Development Board[24]*',* the petitioners comprising of 569 tenement holders raised several grievances such as re categorisation of flats; questionable enhancement of prices; loss of plinth area and use of substandard material used for construction. The Commission came to the conclusion that the issues raised in the present case were complicated questions of law and fact which required elaborate oral and documentary evidence. The Consumer Court thought the case fit to be tried by a Civil Court for adjudication. It is unfortunate that such a view has been taken by the National Commission in a matter which apparently seems to seal the fate of class actions. By their nature, such representative suits would be complicated. It seems that the Commission has not taken into account the Amendment Act of 1993 which provides for class actions. Consequently, what has been given by legislature as a facility to the consumer has been taken away by the National Commission by its interpretation in this case?

The State Commissions, on the other hand, have entertained complaints filed by several consumers in a representative capacity. The Tamil Nadu State Commission[25] has provided relief to the owners association for the failure of the builder to construct a compound wall as provided in the agreement and not attending to plastering work, colour, wash and painting of windows, grills and doors. The Commission concluded that there was bad workmanship, as such the builder was directed to provide the above facilities or to pay compensation to the affected owners. Similarly the *Maharashtra State Commission*[26] provided relief to several consumers against the same builder as if it were a class action. The Commission held that since the complaint raised the common questions of facts and law, there was no illegality in joining the four complainants as parties. The

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24. 1994 (1) CPR 797 (NC).
25. Vimal Flat Owner Welfare Association v. Vimal Constructions (P) Ltd. 1994(3) CPR 532 (TN). See also Galaxy Apartment Owner Association v. Dr N R K Raju, 1994(3) CPR 25(A.P).
26. *1994* (3) CPR 70.

builder was held liable to refund the amount with interest and awarded *Rs.50,000/-* to each complainant as compensation for failure to construct the flats in due time.

It is submitted that by their nature, such representative suits would be complicated but the same need not be referred to civil courts for adjudication. The Amendment Act of 1993 clearly provides for representative suits or class actions to be instituted before Consumer Redressal Agencies to provide the facility of speedy and inexpensive justice to the aggrieved consumers..

Deficiency in Service

The question that arose for consideration before the Consumer Fora was whether a direction can be issued under the C.P. Act for removal of latent defects which could not have been known at the time of taking possession of the house or land. In such cases, the defence taken by the Boards or private builders was that at the time of taking possession, these defects were not brought to the notice or the allottee had signed a declaration at the time of taking over possession. These defences were negatived by the National Commission and the State Commissions and issued directions for rectification of defects by virtue of clause (e) of section 14(1) of the C.P. Act.

The National Commission[27] inquired how latent defects in construction would be visible at the time of taking possession. It was only when the rains started, water dripped and cracks developed in the house that these defects became patent. The Commission held that these were latent defects which could not have been known at the time of taking possession and the complainant was entitled to all the expenditure that he had incurred to remove defects. The Commission also relied on the judgment of the Supreme Court[28] and directed that persons responsible should be required to pay compensation. Likewise, the *Andhra Pradesh State Commission* [29] directed the

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27. *Dilbagh Rai* v. *Housing Board Haryana:* 1993(3) CPR 31 (NC).
2 8. Lucknow Development Authority v. M. K. Gupta, AIR 1994 SC 787.
29. *Galaxy Apartment Owners Association* v. *Dr N. R. K. Raju,* 1994 (3) CPR 25 (A.P).

builder to provide separate septic tank and some other facilities within two weeks. The State Commission held that the builder had failed to provide minimum essential facilities.

In a landmark decision, the National Commission [30]. held that since the amendment of 1993 and the addition of clause (e) to section 14(1), a direction can be issued under the C.P. Act that the deficiency in service be rectified, it pulled up the State Commission for having held the view that the Forum had no jurisdiction to direct the board to remove the defects. The fact that the house allottee had signed a declaration at the time of taking over possession that 'the house was complete in all respects' was held not to constitute any estoppel against the recipient. By this ruling the consumers of housing service are likely to be greatly benefited.

Escalation of Construction Costs and Delay

Those rendering house building services have been allowed to increase charges equal to the amount of cost escalations provided there has been no inordinate delay on their own part in which case escalation during the period of delay may not be allowed. However, one of the frequent complaints of the consumers has been that the builders(including Housing Boards) continue to charge installments when there was inordinate delay in completing the construction and handing over possession after the construction was completed. Because of the escalation clause in the agreement, they have to pay higher amount on account of galloping increase in the cost of construction. This was held to be a deficiency in service by the State Commission of Himachal Pradesh in *Dr. S. K. Ahluwallia* v. *Chief Engineer H.P. Housing* Board[31]. This order was also upheld by the National Commission. Following this decision similar views were

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30. *Pushpa Pathania* v. *Rajasthan Housing Board,* (1995) I CPJ 150 (NC). See also *Vikas Pradhikaran* v Devindra *Kumar,* (1996)1 CPT 269 (NC), where the authority was directed to provide an alternative plot and the scheduled payment.

expressed by the. *State Commissions* of *Karnataka*[3,2] U.P.[33] , *Orissa* [3 4] and *Maharashtra* [35]

The questions regarding competence of the Boards to revise the cost of the flats and fixation of price were raised before the National Commission *in Gujarat Housing Board* v. *Datania Amritlal Fulchand* [36] . It was held by the National Commission that there is no statutory obligation upon the Housing Board to sell the flat at the tentative price mentioned in the brochure. The price of the land, building materials, labour charges and cost of transportation, quality and availability of land, supervision and management charges are all variable factors that enter into price fixation.

The Commission observed:

> *"The question of pricing cannot be gone into by the Consumer forums since the price of flat is* not *fixed by any law and that even if some extra charges have been collected by way of price that will not constitute a ground that there is a deficiency in service on the part of the opposite party".*

The same principle was again reiterated in *Gurinder Bedi* v. *D.D.A.*[37]and followed in *D.D.A.* v. *A.N.Saigal*[38]. But regarding escalation clause, the National Commission in *Gurinder Bedi's* case held:

> *"Escalation of price does not fall within the definition of deficiency of service. Escalation clauses are valid. The demand of a reasonably moderate escalation is not a*

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31. (1991) I CPJ 481 (H. P.).
32. *U. K. Ashoka Ran* v. *Cyma Constructions,* 1993 (2) CPR 487 (Kar.).
3 3. *Chandra Sahai* v. *UP Avas Evam. Parishad,* 1993 (2) CPR 461 (U P)
34. *Orissa Housing Board* v. *Biswa Nath Misra,* 1994 (1) CPR 78 (Ori.).
35. *KR. Mahawalla* v. *Army Welfare Housing* Orgn., (1995) III CPJ 184.
36. 1993 (3) CPR 650 (NC). See also *D.D.A* v. *Kaminichopra,* (1996)1 CPJ 285 (NC).

37. (1993) III CPJ 404 (NC).
38. (1996)1 CPJ 34 (NC).

deficiency in service; it would be so if it is in the nature of an unscrupulous exploitation of the consumer."

In another case, the National Commission[39] held that when there is no delay, marginal escalation is justified. The same approach was adopted by the State Commission of Maharashtra in *K.P. Mahawallia v Army Welfare Housing Organisation* [40].

It has been repeatedly held by the National Commission that pricing of services is one of the factors over which Consumer Forums cannot play much role. There cannot be any interference in matters of pricing [41] . The Commission also cited judgment of the Supreme Court in *Premji Bhai Parmer* v. *D.D.A* , wherein it was held by the apex court:

"The experts alone can work out the mechanics of price determination. The Court can certainly not be expected to decide without the assistance of experts". [42]

The controversy seems to have been finally set at rest by the Supreme Court in *Delhi Development Authority* v. *Pushpendra Kumar* [43] ,when it held:

"Since the right to flat arises only on the communication of the letter of allotment, the price or rates prevailing on the date of such communication is applicable, unless otherwise provided in the scheme. In case the respondent is not willing to take or accept the allotment at such rate, it is always open to him to decline the allotment."

It is submitted that inordinate delay, arbitrary and exorbitant increases in costs are all consumer wrongs forming the subject-matter

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39. *DRS - 87 Applicants Association* v. *City Industrial Development Corporation of Maharashtra,* (1995)1 CPJ, 164 (NC).
40. (1995)3 CPJ 184 (Mah.)
41. *Gujarat Housing Board* v. *Datania A. Lal Fulchand* 1993(3) CPR 650 NC. See also *Commissioner Assam* State *Housing Board* v. *M. K. Adhikari,* (1996) II CPJ 47 (NC).

42. AIR 1980 SC 738
43. AIR 1995 SC 1(3).

of the dispute under the C.P. Act and, therefore, jurisdiction of Consumer Forums on these matters cannot be denied. When possession of property is not delivered within the stipulated period, the delay so caused is denial of service. Such claims or disputes are not in respect of immovable property as argued but deficiency in rendering of service of particular standard, quality or grade. If a builder of a house uses sub-standard material in construction of a building or makes false or misleading representation about the condition or possession of the house, then it is denial of the facility or benefit of which a consumer is entitled to claim value under the C. P. Act.

Conclusion

Since early sixties there have been new developments in overcoming shortage of housing in major towns and cities. As one of the objectives of the state has been to provide accommodation to the people and for this purpose State Housing Development Authorities and Housing Boards were established. With the passage of time some private builders have also came into existence. They acquire land, develop it and primarily engage themselves in the business of building apartments, houses or markets. Use of media is made on an extensive scale to attract customers in this real estate business. In many cases the consumers are made to part with money as advance on the basis of promises, many of which are never kept. The complaints before Consumer Fora comprise many malpractices viz ; use of sub-standard material, delay in handing over possession, escalation of construction costs and interest, change in the specifications, deficiency in service and extorting money on various pretexts ,which have become sources of loss, harassment and mental agony to consumers. The Development Authorities or private builders or contractors not only mint money from the helpless consumers but also cause harassment to them. An ordinary citizen or common man is hardly equipped to match the might of the State. Any defect in constructions activity would amount to denial of comfort and service to consumer. If the service was defective or it was not what has been represented then it would be unfair trade practice. A person who applies for allotment of a building site or for a flat constructed by a development authority or enters into an agreement with a builder or a contractor is a potential user and nature of transaction is covered in the expression ‘service’ as

defined under section 2(1)(o) of the C.P.Act. When private undertakings are taken over by the Government or corporations are created to discharge what was otherwise State's function, one of the inherent objectives of such social welfare measures has been to provide better, efficient and cheap services to the people. Therefore, a Government or semi-government body or local authority was as much amenable to the C.P.Act as any private body rendering similar service. It was indeed unfortunate that since enforcement of the C.P.Act there has been a demand and even political pressure iwas built to exclude one or other class from the operation of the Act. Truly speaking, it would be a service to the society if such bodies instead of claiming exclusion subject themselves to the C.P.Act and let their acts and omissions be scrutinized, as public accountability is necessary for healthy growth of the society.

Freedom of Press and Contempt of Court as Reasonable Restriction

Dr. Vijay Saigal[*]

The right to freedom of speech and expression as envisaged in Article 19(1) (a) of Constitution of India provides that right to hold and express opinions and ideas subject however to reasonable restriction imposed under clause (2) of the Article. This freedom of speech and expression recognizes the inalienable right of the Indian people to speak, express and propogate their ideas freely. The Supreme Court has also safeguarded and protected this freedom from time to time and in the process has described it as paramount[163], sacrosanct,[164] rights reserved by the people[165], inalienable and inviolable[166] and transcendental.[167]

Freedom of speech and expression includes freedom of press and circulation, even though the same is not mentioned specifically, in Article 19(1) (a). This fact have long settled in judgments i.e. *Romesh Thappar v. State of Madras*[168], *Brij Bhushan v. State of Delhi*[169], *Sakal Papers(p) Ltd. v. Union of India*[170], *Bennett Coleman Ltd. v. Union of India*[171].

Similarly, reasonable restrictions can also be imposed on it. One of the grounds of imposing reasonable restrictions on the freedom of speech and expression is Contempt of Court. Naturally therefore, such freedom of speech and expression which includes freedom of press as well cannot be permitted as constituting Contempt of Courts.

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163 A.K. Gopalan v. State of Madras, AIR 1950 SC 27.

164 State of Madras v. Champakam Dorairajam, AIR 1951 SC 226.

165 Pandit M.S.M Sharma v. S.K. Sinha, AIR 1959 SC 395.

166 Ujjam Bai v. State of Uttar Pradesh, AIR 1962 SC 1621.

167 Golak Nath v. State of Punjab, AIR 1967 SC 1643.

168 AIR 1950 SC 124.

169 AIR 1950 SC 129.

170 AIR 1962 SC 305.

171 AIR 1973 SC 106.

Consequently, the question as to how long freedom of press can go before it transgresses its limits and becomes a Contempt of Court assumes importance.

The Apex Court in *Re: Harijai Singh*[172] emphasized the value of freedom of press vis-à-vis the law of Contempt of Courts in the following words:

> "*The freedom of press has always been regarded as an essential pre-requisite of a democratic form of government. It has been regarded as a necessity for the mental health and the well being of the society. It is also considered necessary for the full development of the personality of the individual. It is said that without the freedom of press truth cannot be attained…The freedom of press is regarded as the mother of all other liberties in a democratic society*[173]*."*

The Court further observed that:

> "*In a democratic set up, there has to be an active and intelligent participation of the people in all spheres and affairs of their community as well as the state. It is their right to be kept informed about current political, social, economic and cultural life as well as the burning topics and important issues of the day in order to enable them to consider and form broad opinion about the same and the way in which they are being managed, tackled and administered by the government and its functionaries. To achieve this objective, the people need a clear and truthful account of events, so that they form their own opinion and offer their own comments and view points on such matters and issues and select their further course of action. The primary function therefore, of the press is to provide comprehensive and objective information of all aspects of the country's political, social, economic and cultural life. It has an educative and mobilizing role to play. It*

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172 AIR 1997 SC 73.

173 Id., at 77.

plays an important role in moulding public opinion and can be instrument of social change."[174]

The Supreme Court cited Mahatma Gandhi, who, in his autobiography mentioned three objective roles of the newspaper[175]

(i) To understand the proper feelings of the people and give expression to it;

(ii) To arouse among the people certain desirable sentiments; and

(iii) To fearlessly express popular defects.

The inevitable conclusion drawn by the Apex Court is: "It, therefore, turns out that the press should have the right to present anything which it thinks fit for publication."[176]

Laying a note of caution, the Supreme Court opined:

*"(T)his freedom of Press is not absolute, unlimited and unfettered at all times and in all circumstances as giving an unrestricted freedom of the speech and expression would amount to an uncontrolled license. If it were wholly free even from reasonable restraints it would lead to disorder and anarchy. The freedom is not to be misunderstood as to be a press free to disregard its duty to be responsible. In fact, the element of responsibility must be present in the conscience of the journalists. In an organized society, the rights of the press have to be recognized with its duties and responsibilities towards the society. Public order, decency, morality and such other things must be safeguarded. The protective cover of Press freedom must not be thrown open for wrong doings. If a newspaper publishes what is improper, mischievously false or illegal and abuses its liberty it must be punished by Court of la*w."[177]

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174 Id., at 78.

175 Ibid.

176 Ibid.

177 Ibid.

In *Dr. D.C Sexena v. Hon'ble the Chief Justice of India*[178], the Supreme Court held that if maintenance of democracy is the foundation for free speech, society equally is entitled to regulate freedom of speech or expression by democratic action[179]. Interests of the people involved in the acts of expression should be looked at not from the perspective of the speaker but also the place at which he speaks, the scenario, the audience, the reaction of the publication, the purpose of the citizen exercises his freedom of speech and expression. Nobody has a right to denigrate others right to person or reputation[180].

The Court further held that bonafide criticism of any system or institution including the Judiciary cannot be objected to as healthy and constructive criticism are tools to augment forensic tools for improving its function. Constructive, public criticism even if it slightly oversteps its limits thus has fruitful play in preserving democratic health of public institutions.

In *Re: Arundhati Roy*[181], the Supreme Court held that

> "*Fair criticism of the conduct of a judge, the institution of the Judiciary and its functioning may not amount to Contempt if it is made in good faith and in public interest. To ascertain the good faith and the public interest, the Court have to see all the surrounding circumstances including the person responsible for comments, his knowledge in the field regarding which the comments are made and the intended purpose sought to be achieved. All citizens cannot be permitted to comment upon the conduct of the Courts in the name of fair criticism which, if not checked, would destroy the institution itself. Litigant losing in the Court would be the first to impute motives to the judges and the institutions in the name of fair criticism which cannot*

178 AIR 1996 SC2481.

179 Id., at 2492.

180 Id., at 2493.

181 AIR 2002 SC 1375.

be allowed for preserving the public faith in an important pillar of democratic set up i.e. Judiciary"[182]

Recently, in *Haridas Das v. Usha Rani Banik*[183], the Supreme Court has laid stress upon upholding the faith of the people on the institution of Judiciary. The Court observed that by attacking the reputation of judges, the ultimate victim is the institution[184]. Striking a note of caution, the Court observed that the day the consumers of justice lose faith in the institution that would be the darkest day for mankind.[185]

The Court emphasized that:

"*The right to criticize an opinion of a Court, to take issue with it upon its conclusions as to a legal proposition, or question its conception of the facts, so long as such criticisms are made in good faith and are in a ordinary decent and respectful language and are not designed to willfully or maliciously misrepresent the position of the Court, or tend to bring it into disrespect, or lessen the respect due to the authority to which a Court is entitled, cannot be questioned. The right of free speech is one of the greatest guarantee to liberty in a free country like ours, even though that right is frequently and in many instances outrageously abused. If any considerable portion of a community is led to believe that either because of gross ignorance of the law or because of a wrong reason, it cannot rely upon the Courts to administer justice that portion of the community upon some occasion, is very likely to come to the conclusion that it is better not to take chances on the Courts failing to do their duty.*"[186]

182 Id., at 1394

183 AIR 2007 SC 2688.

184 Id., at 2694.

185 Ibid.

186 Id., at 2692-93.

In *R.K. Anand v. Registrar, Delhi High Court*[187], the Supreme Court dealt with the nature and extent of right of media to deal with a pending trial. In the present case, sting programme telecast made serious allegations against two lawyers wherein prosecution witness was shown meeting Special Public Prosecutor and Senior Defence Counsel negotiating for said witnesses' sell-out in favour of the defence for a high price.

Rejecting the contention that the TV channel (NDTV) should have carried out the stings only after obtaining the permission of the trial Court or the Chief Justice of the Delhi High Court and should have submitted the sting materials to the Court before its telecast, the Court held that such a course would tantamount to pre-censorship of reporting of Court proceedings and this would be plainly an infraction of the media's right of freedom of speech and expression guaranteed under Article 19(1) of the Constitution.[188]

However, the Court continued that media is not at liberty to publish any kind of report concerning a sub-judice matter or to do a sting on some matter concerning a pending trial in any manner they please. The legal parameter within which a report or comment on a sub-judice matter can be made is well defined and any action in breach of the legal bounds would invite consequences.[189]

The Court further observed that compared to normal reporting, a sting operation is an incalculably more risky and dangerous thing to do. A sting is based on deception and therefore, it would attract the legal restrictions with far greater stringency and any infraction would invite more severe punishment.[190]

Accordingly, the Court held that the sting programme telecast by NDTV in no way interfered with or obstructed the due course of any judicial proceedings, rather it was intended to prevent the attempt to

187 (2009) 8 SCC 106.

188 Id., at 197.

189 Ibid.

190 Id., at 198.

interfere with or obstruct the due course of law in the BMW trial.[191] The Court also held that the sting programme telecast by NDTV served an important public cause to protect and salvage the purity of the course of justice.[192]

The Court stressed that the TV channel should have made a fuller disclosure before the High Court of all the facts within its knowledge and hoped that the observations will help NDTV and other TV channels in their future operations and programmes.[193] The Court observed:

> *"[L]ike almost every other sphere of human activity in the country the electronic news media has a very broad spectrum ranging from very good to unspeakably bad. The better news channels in the country (NDTV being one of them) are second to none in the world in matters of coverage of news, impartiality and objectivity in reporting, reach to the audience and capacity to influence public opinion and are actually better than many foreign TV channels. But that is not to say that they are totally free from biases and prejudices or they do not commit mistakes or gaffes or they sometimes do not tend to trivialise highly serious issues or that there is nothing wanting in their social content and orientation or that they maintain the same standards in all their programmes. In the quest of excellence they have still a long way to go."*[194]

In last, the Court observed that private TV channel being a business venture, there is inherent dilemma to reconcile business interest with that of professional standards and held that any attempt to control and regulate the media from outside is likely to cause harm than good. The *norms to regulate the media and to raise its professional standards must come from inside*.[195]

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191 Id., at 200.

192 Id., at 204.

193 Ibid.

194 Id., at 204-5.

195 Id., at 205.

The natural conclusion which can be drawn from the above discussion is that the press in India does not enjoy a special privilege. It enjoys the same amount of freedom of speech and expression as is available under the Constitution to others. The freedom is not absolute but is subject to reasonable restrictions. Special role of the press in a democracy has been recognized but that makes it all the more responsible towards the public. The moral obligation of the press towards the people to bring out matters of public concern has been hailed but it has also been pointed out that *while publishing some matter in relation to administration of justice, it has a responsibility to be more careful and must show self restraint*. When the matter published has a tendency to interfere with due course of justice or when it disparages the dignity of Courts or castigates motives to judges while administering justice, it has to be visited with a Contempt action.

Medical Negligence and Consumer Protection Act 1986: A Perspective

*** Dr. Satinder Kumar**

No doubt medical profession is a nobel calling, but at present it has lost its sanctity on account of factors like professionalism and easy flow of money. A medical practitioner when consulted by a patient owes him duty in deciding whether to undertake the case or what treatment to give. Accordingly breach of any of these duties supports an action for negligence against the medical practitioners.[196]

Interestingly before discussing whether the services rendered by the medical practitioners falls with in the ambit of consumer protection act or not, it is worthwhile to understand the exact meaning of the word 'medical negligence'. A medical practitioner cannot be held guilty of negligence merely because he made an error of judgement, engaged in the practice of scientific medicine in any of its branches including surgery, obstetrics, but not in the fields like veterinary medicine, or surgery under Ayurvedic, Unani, Homoeopathic or Biochemic system of medicine.[197] However, the liability of the doctor depends on the nature of the error. In this context, the judgement of the House of Lords concerning the nature of the error pronounced in the case of *white house v. Jordan*[198], is remarkable to note wherein the Hon'ble court observed as follows :

"The true position is that an erring medical practitioner may or may not be negligence, but it depends upon the nature of the error, made by him. If it is one that would not have been made by a reasonable competent professional man possessing the standard and skill. Therefore, if acts ordinarily, then shall be liable for negligence. On the

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196 Grant v. Australian Kmitting Mills Ltd. (1936) AC 85, 103 per Lord Wright.

197 Sec. 2(d); The Indian Medical Council Act, 1956.

198 1981(1) All E.R., 267.

other hand, if it is merely an error, on the part of such a person then he will be exempted from the imposition of the liability of negligence."

This statement was followed by the Supreme Court of India in the case of *Spring Meadows Hospital v. Harjot Ahluwalia*.[199] Actually various meanings has been ascribed to the term negligence by various eminent jurists. But the most accepted meaning is mentioned as under :

"Negligence is the breach of a duty in omitting to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do, but negligence as a mode of actionable' consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by virtue of which the plantiff has suffered injury to his person or property[200]".

Intriguingly the term negligence is used for the purpose of fastening the defendant with the liability under civil and criminal law. Therefore, what may be negligence in civil law may not necessarily be negligence in criminal law. Hence, generally speaking it is the amount of damages incurred which is determinative of the extent of liability in tort. However, in criminal law it is not the amount of damages, but the amount and degree of negligence that is determinative of liability and in order to fasten liability, the degree of negligence has to be higher than that of negligence in civil law i.e. gross or of a very high degree.[201]

In the context of law concerning 'negligence', professionals like lawyers, doctors, architects and others are included in the category of persons professing special skill. As such any task which is required to be performed with a special skill would generally be admitted or undertaken to be performed only by the person who possesses the requisite skill for performing that task[202], the degree of skills required by

199 AIR 1998 SC, 1801.

200 Justice G.P. Singh, 24th Ed., 2002,, pp. 441-442.

201 Jacob Mathew v. State of Punjab (2005) 6 SCC 1, p. 16.

202 Id. at 18.

a medical practitioner was stated by *Halsbury's Law of England* in the following words:

"The medical practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care i.e. neither the very highest nor a very low degree of care and competence, judged in the light of the particular circumstances of each case, is what the law requires, and a person is not liable for negligence because someone else of greater skill and knowledge would have prescribed different treatment or operated in a different way, nor is he guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in the particular art, even adverse opinion also existed among medical men".

Basically deviation from normal practice is not necessarily an evidence of negligence. Therefore, in order to establish liability it must be shown (i) that there was a usual and normal practice (ii) that the defendant did not adopt it (iii) that the course in fact adopted was one which no professional man having ordinary skill would have taken had he been acting with ordinary care[203]. These three tests were also considered as determinative of negligence in professional practice[204].

Surprisingly coming to the relation that exist between medical negligence and consumer protection act, there was a great deal of controversy whether the services rendered by the medical practitioners falls within the ambit of the consumer protection act and whether the patient who avails such services can be called a consumer as per the meaning ascribed to the word 'consumer' in the act. So far as the word 'service' used under the act[205], is concerned, it has been defined to mean 'service of any description' which is made available to potential users i.e. liberally makes it clear that it takes into account any service including the services rendered by doctors and other professionals, but

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203 Herein after to referred as, the Hal'sbury Laws of England, Vol. 30, 4th ed., para 35.

204 Charles Worth and Percy on Negligence (2001), 10th ed., para 1.23.

205 The Consumer Protection Act, 1986.

not the kinds of service mentioned under section[206], of the consumer protection act 1986.

In this endeavour the judiciary in various cases has held that there is an 'implied undertaking' by the member of medical profession that he would use a fair, reasonable and competent degree of skill. There may be one or more proper standards and if he confirms one of these standard, then he will not be held negligent.

The Hon'ble Supreme Court of India, in *Dr. Lakshman Balkrishna Joshi v. Dr. Trimbak Bapu Godbole*[207] opined that a doctor when consulted by a patient owes him certain duties i.e. a duty of care in deciding whether to undertake the case or in deciding what treatment to give or duty concerning the administration of treatment, can not be held liable for every thing that goes wrong. Accordingly, a breach of any of these duties gives a cause of action against the medical practitioner both under civil as well as criminal law.

Furthermore, the Andhra Pradesh State Commission in *Ghulam Abdul Hassan v. Katta Pulbiah Choudar*[208], while considering whether the services rendered by a doctor for consideration to a potential user could come within the purview of the word 'service' used under the act[209], out rightly pinpointed that "if a doctor makes available his services to potential users for a consideration, there is no reason why such services shall be excluded from the definition of the word 'service' under the consumer protection act, 1986.

Yet in another case *Vasantha P. Nair v. M/S Cosmopolitan Hospital (P) Ltd.*[210], the Kerala State Commission observed that a patient is 'consumer' and the medical assistance provided was 'service'. In consequence thereof, in the event of any deficiency in the performance

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206 Sec. 2(1)(0), the Consumer Protection Act, 1986.

207 AIR 1969, SC, 1570.

208 1981(1), CPR 499 (AP).

209 Supra note 10, p. 4.

210 1991(1), CPJ 444 (Kerala). In this case the state commission in a significant observation opined that where a patient is admitted in a hospital and is put in charge of a doctor, what actually takes place, is the hiring of the services of the doctor by the patient".

of medical services, the consumer redressal agencies can have the jurisdiction to set aside the same.

However, the Tamil Nadu State Commission in the case of *Mappooyan v. P.Elango*[211], also held the same view and held that the relationship between a medical professional and a patient was not a 'contract of personal service' but a 'contract of professional service' falling within the periphery of the act[212].

Furthermore, this decision was favoured by the National Commission in the case of *cosmopolitan Hospital v. Vasantha P. Nair*[213], with the observation that the service of a medical practitioner was not a personal service so as to constitute as an exemption to the definition of the word 'service' under the consumer protection act[214]. But in *Consumer Unity Trust Society v. State of Rajasthan*[215], The National Commission observed that the persons who avails the facility of medical treatment in government run hospitals does not fall, within the definition of the word 'consumer' and the said facility offered in government hospitals cannot be considered as 'service' rendered for consideration for the patients in the hospitals.

However, the decision was not accepted by the consumer activists and was taken in the way that it was not in consonance with the spirit of the consumer protection act, even some eminent persons[216] went on to observe that the said decision sounded the death knell of the emerging consumer jurisprudence in the country while mentioning some important points in this regard.

Thereafter, a committee was constituted by the Ministry of Civil Supplies and Public distribution to suggest suitable amendment to the Act[217] and suggested:

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211 1991(II) CPR 460 (TN).

212 *Op.cit.*

213 1992(1) CPJ 302 (NC).

214 Herein after to referred as the Consumer Protection Act, 1986.

215 1991 CPR 64; Appeal No. 2/89 dated 15.12.1989 (NC).

216 As quoted by Mushtaq Ahmed on consideration; whether a pre-requisite in medical service: KULR (2000), p. 172.

217 Op. cit.

"That services like health services in hospitals run by government and local bodies and services provided on mandatory basis by local bodies, housing schemes needs to be brought within the framework of the act, as they affect the lives of the citizens".

However, the decision of the national commission in *CUTS* case[218], was followed by several state commissions and it was made amply clear that consideration must be direct and services rendered free of charge do not fall within the ambit of the consumer protection act, 1986.

Further, it was cemented by the observation of the Hon'ble Madras High Court in the case of *Dr. C. Subramanian v. Kumarswamy*[219], wherein it was observed that the services rendered by a medical practitioner or a hospital by way of diagnosis and treatment both medicinal and surgical would not fall within the ambit of the definition of the word 'service' mentioned under section 2(1) (0) of the Act and the patient or his representatives having interest will not cover under the definition of 'consumer'[220].

Hence this decision succeeded in creating an atmosphere of uncertainty with the result the consumer movement in the country suffered a set back and certain doubts were also raised with regard to the effectiveness of the Act in order to control the litigations concerning medical negligence.

In this direction, the year 1995 proved a landmark year in the history of consumer movement in the country, as the apex court in a historic judgement cleared all the ambiguities in the case of *Indian Medical Association v. V.P. Santha*[221], and overruled the judgement of the Madras High Court[222] and uphold the view given by National Commission in cosmopolitan hospital case[223], in the instant case, wherein the Supreme Court of India defined the parameters of rights and

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218 Supra note 20, p. 6.

219 1994(1) CPJ, 509 (DB).

220 Section 2(1)(d), The Consumer Protection Act, 1986.

221 1995 (6) SCC, 651.

222 Supra note 24

223 Supra note 18

obligations of the professionals of allopathic and homeopathic systems of medicine and observed that the consumer protection act, 1986 applied to medical profession too. Further the court directed that the fact that medical practitioners belong to the medical profession and are subject to the disciplinary control of the medical council of India and / or State Medical Councils would not exclude the services rendered by the from the ambit of the consumer protection. Therefore, they are liable under the act to pay damages for negligence in the performance of their services to the patients as a patient is a 'consumer' within the meaning of the act, and should be awarded compensation for loss or injury caused to him due to the negligence of the doctor, applying the same tests, which are applied in an action for damages for negligence in law of torts. Accordingly, this judgement was considered to be a moral booster not only to the consumer organizations but also to the persons working for the welfare of the consumers and removed all the complexities concerning the inclusion or exclusion of medical services within the framework of the consumer protection act, 1986. Actually the judgement paved the way for granting further relief to the patients who suffered loss due to the negligence of the medical practitioners.

As in *Spring Meadows Hospitals v. Harjot Ahluwalia*[224], the Supreme Court held that is a minor child is admitted in the hospital as a patient the parents of the child can be held to be consumers under section[225], read with section[226], of the consumer protection act, so as to claim compensation for the negligence of the doctors under section[227], of the Act.

In this context, the Supreme Court while citing the verdict delivered in *V.P. Santha's* case[228], again is a significant judgement observed that

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224 AIR 1998 SC 1801.

225 Op.cit.

226 Supra note 11, p. 4.

227 Sec. 14(1((d); The redressal agency under the Act is entitled to award conpensation to the parents for mental agony caused by the medical negligence of the doctor's in view of their powers mentioned under the Section.

228 Supra note 26

government hospital rendering 'free services' to government employees would be liable to pay damages for the alleged negligence of the medical practitioners under the Act. The court further observed that where, as a part of the conditions of service, the employer bears the expenses of medical treatment provided to an employee and if his family members depends upon him, the service rendered to such an employee by a medical practitioner working in a hospital (government) or nursing home would not be free of charge and would constitute service within the meaning of section[229] of the act.

More recently, the national commission in *Nizam's Institute of Medical Sciences v. Prasanth S. Dhananka*[230], awarded Rs. 1 crore as compensation to the complainant i.e. Prasanth S. Dhananka being consumer on the alleged negligence of the doctors who did not properly operated upon the patient leading to his prolonged hospitalization.

Consumerism and the Indian Constitution:

Before discussing the Consumerism and the Indian Constitution apparently one question automatically comes in the mind i.e. who is a consumer? Generally speaking consumer means who consumes any thing or who consumes goods or who avail the services or one who buy or pay for the services. But under the Consumer Protection Act 1986 consumer is a person who buys goods for consideration which has been paid or promised to be paid or partly paid or partly promised to be paid or who hires or avails of any services for a consideration which has been paid or promised to be paid.[231] Therefore, the Supreme Law of the land i.e. Constitution of India which is a complete document also intends to safe guards the interest of the citizens of the country while giving certain fundamental privileges to its citizens at the same time gives directions to the government to safeguard those interests as well.

In this direction article[232] of the constitution specifically declares that the state shall strive to promote the welfare of the people by

229 Op.cit.

230 2009 (6) SCC 1

231 Supra note 25.

232 Article 38, The Constitution of India.

securing and protecting a social order in which justice, social, economic and political, informing all the institutions of national life. Thus the state should ensure that the welfare of the people should be given top priority including consumers welfare.

Further the constitution of India provides that it should endeavour to build an economic organization or to make suitable legislation to ensure a decent standard of life to all the workers which includes consumers as well, whereas Article[233], of the Constitution also speaks of protecting the interests of the weaker sections of the society, protecting them from social injustice including all sorts of exploitation including the exploitation of the consumers also, as now-a-days the buyer is supposed to face many types of harassments, exploitations and frauds etc. meaning thereby the seller dominate the market and consumer finds himself nowhere as compared to the powerful sellers and as a result needs protection from all sorts of injustice being inflicted upon him.

Further, the state shall raised the level of nutrition and the living standard of its people while improving the public health being its primary duty[234]. Because the consumers are likely to receive adulterated supplies of goods and other consumable articles in the market. Hence it's the prime concern of the state to check adulterated stuff which proves to be injurious to the health and safety of the consumers.

Consequently, if we analyses the aims and objectives of the consumer protection in light of the constitutional perspective, one can easily say that, it also aims at protecting the interest of the consumers and the protection, promotion and welfare of the rights of the individuals as consumers. Therefore, both constitution and consumerism are supplementary and complimentary of each other[235].

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233 Ibid, Article 46.

234 Ibid, Article 47.

235 Dr. Sukanta K. Nanda, Rights of the consumer vis-a-vis medical negligence and consumer protection act, published in NYAYA DEEP, pp. 42-43.

In the words of learned scholar[236], constitutionalism is promoted by way of constitutionally directed fundamental duties of a citizen and consumerism facilitates consumer to know about the product and services in all its aspects and concludes that constitutionalism as well as consumerism is an art and science for ensuring quality of, life, therefore, promoting consumerism is directly connected with the promotion of constitutionalism[237].

Thus, it is pertinent to mention that 'consumerism emphasizes the protection, preservation and enhancement of human life. Besides consumerism as a social movement which energies consumers, creates new responsibilities for the producers and buyers, promoting consumer's consciousness and education and their basic rights.

Concluding Observations:

To conclude with it can be said that medical negligence may be attributed to the doctors as well as to the hospitals/private nursing homes. A time of two decades have passed since the enactment of the consumer protection act and no doubt it has also played a crucial role in safeguarding the interests of the consumers (patients). But it has also witnessed many pitfalls. It has not been able to generate awareness among the people's even very few people in the urban areas know about their rights[238] particularly concerning the consumer protection.

In India, a large number of patients depends largely on private practitioners due to shortage of government hospitals in remote rural areas. Hence, majority of the cases of medical malpractices occurs in the villages. Yet a big section of the society being financially constrained have no other alternative but to resort to the public hospitals for the treatment. It is also unfair to hold the doctors solely responsible for every mishap or injury. A doctor would be liable only when he falls below the standard of a reasonable competent practitioner in his field so

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236 Prof. S.S. Singh of Indian Institute of Public Administration New Delhi who said in his key note address delivered in the national seminar on "Consumer Protection and Consumer Welfare in India", Sept, 15-16, 2007.

237 Ibid.

238 K.P.S. Mahalwar, Medical Negligence and Law, Ed,. 1991, pp. 214-215.

much so that his conduct deserves censure or is inexcusable Lord Denningin *Roe v. Minister*[239], rightly observed that we should be doing a disservice to the community, if we were to impose liability on hospitals and doctors for everything that happens to go wrong. Therefore, we must insist on due care for the patient at every point. The first and the foremost duty of the doctor is to be very cautious and careful in undertaking the patient for treatment. Actually there is not binding on medical men to undertake or accept each diseased person except in Government employment. His duty is not to take up those cases which he cannot cure or which need some specialized treatment. Therefore, the moment he accepts to treat a patient, he owes a duty to the patient to show him due competence, skill and assiduity[240].

There is also no denying the fact that industrialization and advances in the field of science and technology contributed a lot in changing the life style i.e. complete transformation of the society. Therefore, the patients being a consumers needs special care and adequate legal protection within the prevailing framework of the Consumer Protection act for protecting their interests and rights. In this respect responsibilities and duties of the government, the organization working in the concerned field should be enhanced. The patients like consumers are also required to involve themselves in this movement but the redressal mechanism prescribed under the act needs to be strengthened, so that it can function in an effective manner so as to keep an eye of vigil on the medical malpractices. In addition to it, the redressal mechanism should also ensure the active participation of the civil society in the event of cases of medical mal practices, enabling consumer justice a sense of reality.

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239 (1954) 2,QB 66.

240 1954 (2), QB 66.

Reproduction Right In Digital Media

Abstract

Copyright law provides one of the most important forms of intellectual property protection on the Internet. However, considerable challenges are presented in adapting traditional copyright law, which was designed to deal with the creation, distribution and sale of protected works in tangible copies, to the electronic transmissions of the online world in which copies are not tangible in the traditional sense, and it is often difficult to know precisely where a copy resides at any given time within the network. The most difficult aspect of adapting copyright law to the online world stems from the fact that virtually every activity on the Internet involves the making of copies, at least to the extent the law treats electronic images of data stored in RAM as "copies" for purposes of copyright law. The protection of temporary copies is by no means set out as a minimum standard in the WIPO Treaties, 1996. The Indian copyright law is also silent about the scope of the general reproduction right regarding temporary copies. If the law were to treat all forms of "copying" as infringements of the copyright holder's rights, then the copyright holder would have very strong control over use of the copyrighted work in the digital environment. Which forms of copying should be taken to be within the control of the copyright owner and which should not presents a very difficult challenge. Accordingly, the scope of the reproduction right needs to be broadened in accordance with the diversification of the means by which copies of works can be perceived. This Article aims to explore the new dimension of expanding the scope of the reproduction right in the digital age. It attempts to proffer some suggestions as to how a new paradigm for a reproduction right protection should be instituted in a manner conducive to information dissemination in the digital age.

1) Introduction

Interestingly, the history of modern copyright law has witnessed an incremental expansion of the scope of the reproduction right on a par with the technological developments in the dissemination and

exploitation of works primarily from the following three dimensions. First, originating from an exclusive right of printing books,[241] the reproduction right has been expanded in a way that the right owners' control of making copies spans all copyrightable subject-matter, including works, sound recordings, films, broadcasts, and so forth. Second, the protection of the reproduction right has been developed to target not only identical copies but also objectively[242] or substantially[243] similar copies of the work concerned. Therefore various acts of dimension-transforming copying[244] or indirect copying[245] are generally

241 Bently Lionel & Sherman Brad, *Intellectual Property Law* 133 (2004) ("When the 1710 Statute of Anne first granted copyright to books, the right was limited to the right to print and reprint copies of those books.")

242 Early in 1963, a U.K. copyright case held that "'reproduction' need not be identical reproduction since infringement of copyright in music was not a question of note for note comparison but depended upon whether the alleged infringing work was substantially the same as the original work." *See, Francis Day & Hunter, Ltd. v. Bron*, [1963] 2 W.L.R. 868, 869. *See also* Kevin Garnett et al., *Copinger And Skone James On Copyright* 392 (1999) ("For the [reproduction] right to be infringed, two elements have to be established, (a) a sufficient degree of *objective similarity* between the copyright work and the alleged information and (b) that this was the result of the plaintiff's work having been copied by defendant, i.e. that there is causal connection between the two.") (emphasis added)

243 In the U.S., "a copyrighted work would be infringed by reproducing it in whole or *in any substantial part*, and by duplicating it exactly or by imitation or simulation." *See, e.g., Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946); *Peter Pan Fabrics, Inc. v. Martin Weiner* Corp., 274 F.2d 487 (2d Cir. 1960); *Steinberg v. Columbia Pictures Indus*., 663 F. Supp. 706 (S.D.N.Y. 1987).

244 For example, Section 17(3) of the U.K. Copyright, Designs and Patents Act 1988 provides that "[i]n relation to an artistic work copying includes the making of a copy in three dimensions of a two-dimensional work and themaking of a copy in two dimensions of a three-dimensional work."

245 *Norowzian v. Arks, Ltd.* (No. 1), [1998] F.S.R. 394, 398 (holding that "copying of a book is not restricted to simply photocopying the pages from the book but extends to writing the work, retyping it any form whatsoever,

deemed to infringe copyright. Third, the scope of the reproduction right has also been broadened in accordance with the diversification of the means by which copies of works can be perceived. Stemming from an exclusive right to control the making of copies visible to naked eyes, the reproduction right now covers any copies that are capable of being perceived with the aid of a machine or device.[246]

While the aforementioned three shifts mark the major evolution of the reproduction right in the analog world where copies routinely have some permanence and stability, the advent of the digital age has profoundly altered the landscape of exploiting works through making copies, and has opened up a new dimension of expanding the scope of the reproduction right. The advances in digital technology enable the nearly-instantaneous, original-quality reproduction of and world-wide, lightning-speed dissemination of copyrighted works. In particular, temporary copies, a rare species of general reproductions of works in the analog world, have become an integral part of the dissemination and use of works in the digital environment. For instance, reading any works available on the Internet necessarily involves the temporary storage of them into the computer Random Access Memory (RAM).[247] This shift

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dictating it into a tape machine or any other means of reproducing the work in a material form."). *See also Kevin Garnett et al*., *supra* note 9, at 395 ("Indeed, in most cases of alleged infringement the copying is done indirectly, the plagiarist never having seen the original manuscript, drawing, etc only the published work for other thing derived from the original work.").

246 Under the U.S. Copyright Act 1976, "copies" are defined as: "material objects . . . in which a work is fixed by any method now known or later developed and from which the work can be *perceived, reproduced, or otherwise communicated*, either directly or with the aid of a machine or device."

247 Random Access Memory "is a type of computer storage whose contents can be accessed in any order. . . . It is usually implied that RAM can be both written to and read from, in contrast to Read-Only Memory or ROM. RAM is usually used for primary storage in computers to hold *actively-used* and *actively-changing* information, although some devices use certain

begs the questions of whether the control over making temporary copies should be accorded to right owners.

Against this backdrop, this article aims to explore new dimensions of expanding the scope of the reproduction right in the digital age. As India is currently scrutinizing the desirability of introducing certain amendments in its copyright law to keep pace with the recent technological advancements, an in-depth examination of the issues regarding the scope of reproduction right in digital environment is necessary for developing a reasonable and nuanced approach to have the proposed overhaul of the reproduction right protection phased in.

2) The Right Of Reproduction

The reproduction right the right of making copies or duplicates of protected material[248] is of course the most fundamental of all the author's rights. Since the adoption of the Statute of Anne,[249] the mother of modern copyright law, the reproduction right has been at the heart of copyright law for more than three hundred years. The scope of this right has been expanded on a par with the ever-increasing scope of copyrightable subject-matter generated by technological developments in the communication, dissemination and exploitation of works of authorship. Though recognized as a seminal right accorded to authors,[250] the reproduction right *per se* has not been unambiguously delimited by the international instruments for copyright protection.[251] Due to the lack

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types of RAM to provide long term secondary storage." *See Random Access Memory*, WIKIPEDIA, at http://en.wikipedia.org/wiki/Random_Access_Memory.

248 *See* Berne Convention Art. 9, UCC Art. IV *bis*, TRIPS Agreement Art. 14, WIPO Copyright Treaty, Agreed Statement concerning Art. 1(4), WIPO Performances and Phonograms Treaty, Agreed Statements concerning Articles 7, 11, and 15.

249 Ann., C. 19 (1709) (Eng).

250 Goldstein Paul: *International Copyright: Principles, Law and Practice*, (New York: Oxford University Press, 2001) at 249.

251 Spoor Jaap H.: *The Impact of Copyright in Benelux Design Protection Law,* in (Ed.) P. Bernt Hugenholtz: *The Future of Copyright in a Digital Environment,* (The Hague: Kluwer. Law International,1996) at 69.

of agreement on the right's scope and content, the original text for the Berne Convention did not include any provision that expressly protected the reproduction right.[252] Although reproduction right was well embedded in the copyright laws of all Berne Signatories at the time the Berne Union was established in 1886, it was not until in 1967 that the Berne Convention set out a specific article in the Stockholm Act, which expressly recognised the general right of reproduction. Under Article 9(1) of the Berne Convention, copyright owners are granted "the exclusive right of authorizing the reproduction of their works, in any manner or form". However, the ambivalence of Article 9(1) of the Berne Convention, particularly the phrase "in any manner or form", has resulted in an international rift over the scope of the reproduction right. Though a specific illustration is added to expressly indicate that the making of a sound or visual recording constitutes a manner or form of reproduction, a host of tricky questions would arise from the ambivalence of this phrase, among which whether temporary copying amounts to the reproduction for the purpose of copyright laws loom largest in this context. One may argue that temporary copies, on many occasions, will be too transitory and too volatile to be regarded as being fixed in any manner or form.[253] As long as there are no fixations of copies of works, the making of temporary copies cannot and should not be regarded as a manner or form of reproducing works for the purpose of copyright law. In fact, the ambivalence of this phrase has resulted in an international rift over the scope of the reproduction right, and has led the post-Stockholm Act debate to the question as to whether reproduction

252 Ricketson Sam: *The Berne Convention for the Protection of Literary and Artistic Works*: 1886-1986 (London: Centre for Commercial Law Studies, Queen Mary College, 1987) at 370.

253 Professor Samuelson, for example, argues that the view that RAM copies infringe copyrights would lead to absurd results. "By this logic, holding a mirror up to a book would be infringement because the book's image could be perceived there for more than a transitory duration, i.e., however long one has the patience to hold the mirror."*See* Pamela Samuelson , *Legally Speaking: The NII Intellectual Property Report*, Communications of the ACM, Dec. 1994

"in any manner or form" would cover temporary copies, particularly those momentarily stored in a computer's RAM.

In addition to the Berne Convention, it seems that other international instruments aimed at harmonizing the national laws of copyright also fail to draw the clear contours of the reproduction right. The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention)[254] expanded the boundaries of international copyright protection by according, inter alia, the reproduction right to performers,[255] phonogram producers[256] and broadcasting organizations.[257] Compared with the Berne Convention, it does not, however, make much progress in properly delimiting the scope and content of the reproduction right as a form of exclusive right enjoyed by all copyright owners. What the Rome Convention contributes to the protection of reproduction merely lies in the provision that makes it clear that phonogram producers have the right to prevent others from making *indirect* reproduction of their phonograms.[258] Akin to the Bern Convention, it does not define the term "reproduction" and clarify whether temporary copies would amount to the reproductions for the purpose of the Convention. Moreover, the Rome Convention weakens the protection of performers' reproduction right, by according them with, rather than an exclusive right, "the possibility of preventing" the reproduction of a fixation of their performances without consent.[259] Worse still, even this "possibility of preventing" is further subject to additional three specific conditions.[260]

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254 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, 496 U.N.T.S. 43.

255 *Id*. at Art. 7(1)(c).

256 *Id*. at Art. 10.

257 *Id*. at Art. (13)(c).

258 *Id*. at Art. 10.

259 *Id*. at Art. 7(1)(c).

260 *Id*. These conditions include: (1) "the original fixation itself was made without their consent"; (2) "the reproduction is made for purposes different from those for which the performers gave their consent"; and (3)

Based upon the Berne Convention and Rome Convention, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement),[261] albeit heralded as the most comprehensive instrument available for the international protection of copyright, does not make any further necessary clarifications of the nature of the reproduction right.[262] With respect to the author's reproduction right, the TRIPs Agreement does not prescribe any additional provision in order to further delimit the scope and content of the reproduction right that is provided for in the Berne Convention. Nor does the TRIPs Agreement sweep away any lingering doubts about the protection of the reproduction right under the Rome Convention.[263] One should also note

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"the original fixation was made in accordance with the provisions of Article 15, and the reproduction is made for purposes different from those referred to in those provisions." Article 15 of the Rome Convention allows members to carve out limitations on the rights provided for in the Convention.

261 Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, One should note that, with respect to copyright, the TRIPs Agreement incorporates the major provisions set out in the Berne Convention and the Rome Convention, both of which only lay down the standards for copyright protection in the analog world. Article 9.1 of the TRIPs Agreement provides that "Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto." At the same time, Article 14.6 provides that "Any Member may, in relation to the rights conferred under paragraphs 1, 2 and 3, provide for conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention."

262 With respect to an author's reproduction right, the TRIPs Agreement does not prescribe any additional provision in order to further delimit the scope and content of the reproduction right than that provided for in the Berne Convention.

263 Reproduction rights accorded to performers, producers of phonogram, and broadcasting organizations are, by and large, the same as those provided for in the Rome Convention. Under the TRIPs Agreement, performers have "the possibility of preventing" others from reproducing "the fixation of their unfixed performance." Moreover, producers of phonograms enjoy the exclusive right to "the direct or indirect reproduction of their

that the TRIPs Agreement narrows the scope of performers' reproduction right down to the fixation of their audio performance.[264] Concluded in 1994, the TRIPs Agreement per se is an outdated instrument with respect to the protection of digital copyright.[265] Not

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phonograms." In addition, broadcasting organizations enjoy the right to prohibit unauthorized reproduction of fixations of their broadcasts. *See* TRIPs Agreement, *Supra* note 28, at Arts.14(1)–14(3).

264 The Rome Convention leaves the term "performance" undefined. Therefore, the reproduction right provided for in the Rome Convention, may potentially apply to all types of fixations of performances, including audiovisual ones. However, Article 7(1) of the TRIPs Agreement provides: In respect of *a fixation of their performance on a phonogram*, performers shall have the possibility of preventing the following acts when undertaken without their authorization: the fixation of their unfixed performance and the reproduction of such fixation. Performers shall also have the possibility of preventing the following acts when undertaken without their authorization: the broadcasting by wireless means and the communication to the public of their live performance." (emphasis added).

Under the Rome Convention, "phonogram" refers to "any exclusively aural fixation of sounds of a performance or of other sounds." With respect to the protection of related rights, the minimum standards set out in the the TRIPs Agreement are based upon their counterparts in the Rome Convention. Therefore, according to the above provision, the TRIPs Agreement narrows down the scope of the protection of performers' fixation and reproduction rights to their audio performances.

265 In the course of the Uruguay Round negotiations on the TRIPs Agreement, no forward-looking heed was paid to cope with the potential challenge posed by digital technology to the protection and enforcement of copyright. Therefore, digital copyright protection has not been specifically addressed by the TRIPs Agreement. Accordingly, Professor Reichman observes: TRIPs was largely a backwards-looking agreement that relied on timehonored doctrinal norms that seemed well-suited to the creative productions of the Industrial Revolution. However, it did not seriously address the problems caused by the newer technologies, especially information technologies, which fit imperfectly within the classical patent and copyright paradigms. Reichman J.H., *The TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries?*, 32 CASE W. RES. J. INT'L L.(2000) at 441, 457 .

surprisingly, it therefore remains silent on the issues arising from the protection of the reproduction right in the digital environment.

2.1 Reproduction Right Under Wipo Internet Treaties

The single most important copyright implicated by the transmission and use of works on the Internet is the right of reproduction. The advent of the Internet makes the delimitation of the reproduction right very much problematic in the digital age. Given that any transmission of protected works over the Internet involves the reproductions transitorily stored in the connected computers' RAM,[266] the question of whether right owners should be granted with the control over all temporary reproductions looms large amid the dematerialized and decentralized nature of the Internet. Against this backdrop, recognising that a uniform interpretation of the scope of the reproduction right carried outstanding significance to "secure the functioning of the copyright system in a digital future,"[267] the Basic Proposal for the draft WIPO Copyright Treaty endeavored to supply sufficient clarity by ambitiously setting up a broad provision regarding the protection of the reproduction right in the digital environment.[268] At the same time, it was also proposed that

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266 Committee on Intellectual Property Rights and the Emerging Information Infrastructure: *The Digital Dilemma: Intellectual Property in the Information Age* (Washington D.C.: National Academy Press, 2000) at 28-31 (" When information is represented digitally, access inevitably means making a copy, even if only an ephemeral (temporary) copy. This copying action is deeply rooted in the way computers work").

267 WIPO: *Basic Proposal for the Substantive Provisions of the Protection of Literary and Artistic Works to Be Considered by the Diplomatic Conference* (hereinafter WIPO Basic Proposal) (WIPO DOC. CRNR/DC/ 4, August 1996) at para 7.15.

268 Article 7 of the *Basic Proposal* provided:
The exclusive right accorded to authors of literary and artistic works in Article 9 (1) of the Berne Convention of authorizing the reproduction of their works shall include direct and indirect reproduction of their works, whether permanent or temporary, in any manner or form (emphasis added).

contracting parties should be conferred with the latitude in carving out limitations on the making of certain types of temporary reproductions.[269] Ultimately, however, due to the difficulty to reach a consensus, the delegations deleted the proposed provision, and attached an "agreed statement" to nominally delimit the scope of reproduction right in the digital environment based on Article 9 of the Berne Convention, which reads:

The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.[270]

By contrast, the WIPO Performances and Phonograms Treaty, 1996 contains two articles for the protection of the reproduction right enjoyed by Performers and Phonogram Producers respectively.[271] Under the WPPT Performers and Phonogram Producers are vested with "the exclusive right of authorizing the direct or indirect reproduction of their respective protected subjects in any manner or from". An agreed statement, in much the same way as that of WCT, was affiliated to the above provisions.[272]

The Agreed statements attached to the WCCT and WPPT make it clear that the Article 9 of the Berne convention shall apply *mutatis mutandis* to the protection of the reproduction right in the digital

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1. Subject to the provisions of Article 9 (2) of the Berne Convention, it shall be a matter for legislation in contracting parties to limit the right of reproduction in cases where a temporary reproduction has the sole purpose of making the work perceptible or where the reproduction is of a transient or incidental nature, provided that such reproduction takes place in the course of use of the work that is authorised by the author or permitted by law.

269 *See* WIPO: *Basic Proposal*, *Supra* note 34 at para 7.17.

270 Agreed statement concerning Article 1(4).

271 *See* WPPT, at Articles 7 and 11.

272 Agreed Statement concerning Articles 7,11 and 16 of the WPPT.

environment.[273] At first glance, what is clear under these two agreed statements is that permanent digital copies, for example, copies stored in floppy disks or a computer's read only memory(ROM), are protected by the WIPO Treaties 1996. Moreover, members are free to introduce new limitations or exceptions to the re-delimited reproduction right, subject to the three-step test. Yet the ordinary meaning of the second sentence of the agreed statements, in particular the term "storage", still remains largely ambiguous and obscure. Does it cover the making of temporary copies? One would answer in the negative that "in ordinary usage, 'storage' connotes a much higher level of activity than simple 'temporary' conduct".[274] On the contrary, the counter argument may simply go that the temporarily stored copy does in fact constitute a form of storage of the work. Though the term "storage" is open to varied interpretations, to elucidate the nature of obligations under the agreed statements is important in that if a broad-based reproduction right that covers the making of temporary copies has been set up in the WIPO Treaties 1996, members will be required to bring their copyright law in compliance with this minimum standard. Without the direct reference to the phrase "permanent or temporary", the agreed statements, rather than fulfil the proclaimed ambitious task to provide the clarity, fail to determine the extent to which the reproduction right should be applied in the digital environment. The ambivalence of the treaty language leaves the question as to whether the temporary copies have been covered, potentially unsettled.

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273 Neither Articles 7 and 11 of the WPPT nor the Agreed Statement concerning these two Articles elaborate on the relationship between the Article 9 (1) of the Berne Convention and reproduction right under the WPPT. However, given that these two Articles and their agreed statements are worded closely after Article 9 (1) of the Berne Convention or the Agreement concerning Article 1(4) of the WCT, it could be understood that Article 9(1) of the Berne Convention should apply *mutatis mutandis* to the protection of the reproduction right under the WPPT.

274 Ginsberg Jane: *Achieving Balance in International Copyright Law* 26 Colum.J.L & Arts 201, 204 (2003).

The tortured negotiating history of the agreed statements indicate that the international consensus regarding the scope of reproduction right was not reached at the WIPO diplomatic conference 1996. Initially, the high-protectionist position reflected in Article 7 of the draft WCT seemed to be on its way to be accepted at the Diplomatic Conference. Not only had the WIPO officials endorsed it, but it also won the support of US and EU delegations, and certain copyright-based industrial conglomerates.[275] As the Conference proceeded, considerable opposition to the proposed Article 7 emerged and it seemed this proposal "pleased few and outraged many".[276] Given the divergent stances regarding the scope of the reproduction right, a flexible agreed statement was proposed to be adopted to replace the proposed Article 7. In addition to the current structure, the proposed agreed statement contained a third sentence, stating that uploading and downloading works by computer was a reproduction within the meaning of the Berne Convention. During the vote at the plenary session of the Diplomatic Conference 1996, however, this part of the agreed statement was voted down.[277] Due to the fact that the second sentence of the agreed statement was adopted by majority vote rather than consensus, the agreed statement cannot be asserted to be part of the "context" for purpose of the interpretation as to whether temporary copying is governed by the WIPO Treaties 1996.

Some commentators argue that temporary reproductions have been protected under the WIPO Treaties 1996 because of their perceived long-standing, widely-accepted principle that views temporary reproductions as part of the reproduction right under the Berne Convention.[278] For

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275 See WIPO, *Records of the Diplomatic Conference on Certain Copyright and Related Rights Questions* (hereinafter *Records of the Diplomatic Conference1996*) (Geneva: WIPO, 1996)at 667-670. . All documents concerning WIPO Diplomatic Conference 1996 are available at http://www.wipo.int/documents/en/diplconf/index.htm.

276 *See* Ginsberg, *Supra* note 41 at 204.

277 Samuelson Pamela: *The US Digital Agenda at WIPO*, 37 Va. J. Int'l (1997) at 391.

278 Ficsor Mihaly: *The Law of Copyright and the Internet*, (London, Oxford University Press,2002) at 95-98.

instance, they posit that according to the WIPO Guide to the Berne Convention the words, "any manner or form" used in Article 9(1) of the Berne Convention "are wide enough to cover all methods of reproduction....and all other processes known or yet to be discovered".[279] Nevertheless, it should be noted that such a broad notion of the reproduction right does not necessarily represent the universally accepted scope of the reproduction right. By contrast, other commentators tend to support a narrow reading of Article 9(1) of the Berne Convention, contending that despite the use of "in any manner or form", Article 9(1) of the Berne Convention fails to proffer clear guidance on the actual meaning of the term "reproduction". It is argued that the need for the fixation to be in material form may "give rise to different views where form is invisible", particularly in the case of the storage of works into computer memories.[280]

The preceeding analysis demonstrates that the WIPO Treaties 1996 do not make it clear as to whether temporary reproduction falls within the scope of reproduction right. Instead, members have been conferred ample discretion to determine the scope of the reproduction right with respect to temporary copies, and to design limitations to this right in their municipal laws, provided that they are in line with the minimum standards and the three-step test set out in the WIPO Treaties 1996. If a member state adopts the broad based reproduction right and extends the scope of this right to cover temporary copies, the concomitant establishment of appropriate limitations or exceptions to the extended right is unquestionably permissible under the WIPO Treaties 1996.

2.2. Reproduction Right Under EC Information Society Directive

Given the fact that WIPO Treaties 1996 failed to achieve the full harmonisation of the protection of the reproduction right in the digital environment, further endeavours are still needed in order to create unequivocal standards for protection, if the desirability to do so is

279 WIPO: *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971)* (Geneva; WIPO, 1978) at 54.

280 *See* Ricketson, *Supra* note 19 at 373-74.

recognised by the whole international community. The EC Information Society Directive[281] is a major step in the development of a European Copyright Code, which achieved a certain degree of harmonisation at the present time. The Information Society Directive establishes a broad reproduction right because "[t]he single most important copyright implicated by the transmission and use of works on the Internet is the right of reproduction".[282] As a consequence of its importance, in order to get rid of divergences in the approach of member states laws concerning electronic and transient copying the Directive extends the nature of reproduction right. According to Article 2 of the Directive "Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part" of the copyrighted works. The Article also covers non-visible temporary copies of a copyrighted work in the working memory of a computer and also ephemeral copies made during transmission or use of a work in an online context.[283]

However, according to Article 5 (1) there is an exception to the reproduction right, which facilitates a special defense to online service providers and other intermediaries that innocently cache, host or transmit material that would cause infringement with respect to reproduction right, that is to say, "Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable: (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use of a work or other subject-matter to be made, and (c) which have no independent economic significance, shall be exempted

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281 European Council Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society 200/29/EC, 2001 O.J.(L 167) 10(EU).

282 Haynes David L.: *Advanced Copyright Issues on the Internet*, Computer Law and Security Report, vol. 16, no. 6,(2000) at 364, available at: http://80elin.lub.lu.se.ludwig.lub.lu.se/elimfunc=record&query=2a8535b5b351d473fe7de5f5991d45//&lang=en&start=0&fromColl=1&orgFunct=simpleeearch .

283 *Id.*, at 373.

from the reproduction right provided for in Article 2". Design of the computers and networks render necessary the creation of incidental copies of a copyrighted work in order to perform digital processing and information transformation and these copies are not functional independently, in other words they only enable processing of information and they become extinct unless otherwise they are not overwritten by a new data when the computer is switched off.[284]

2.3. Reproduction Right Under Free Trade Agreements

The recent proliferation of Free Trade Agreements (FTAs) concluded between the US and her trading partners, including Singapore[285], Chile[286], Australia[287], Central American countries[288], and Morocco[289], have set the far-reaching and stringent standards for IP

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284 Dmytrenko Olena and Dempsey James X.:*Copyright and the Internet:Building National Legislative Frameworks Based on the International Copyright Law,*available at: http://www.internetpolicy.net/practices/20041200copyright.pdf .

285 U.S.—Singapore Free Trade Agreement (hereinafter "Singapore FTA"), concluded on Jan. 15, 2003, available at: http://www.ustr.gov/Trade_Agreements/Bilateral/Singapore_FTA/Final/Final_Texts/Section_Index.html .

286 U.S.—Chile Free Trade Agreement (hereinafter "Chile FTA"), concluded on June 6, 2003, available at http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final/Final_Texts/Section_Index.html .

287 U.S.— Australia Free Trade Agreement (hereinafter "Australia FTA"), concluded on May 18, 2004, available at: http://www.ustr.gov/Trade_Agreements/Bilateral/Australia_FTA/Final/Final_Texts/Section_Index.html .

288 U.S.—D.R.-Central American Free Trade Agreement (hereinafter "D.R.-Central American FTA"), concluded on August 5, 2004, available at: http://www.ustr.gov/Trade_Agreements/Bilateral/DR_CAFTA/Final/Final_Texts/Section_Index.html .

289 U.S.—Morocco Free Trade Agreement (hereinafter "Morocco FTA"), concluded on June 15, 2004, available at: http://www.ustr.gov/Trade_Agreements/Bilateral/Morocco_FTA/Final/Final_Texts/Section_Index.html .

protection and enforcement. These FTAs have broadened the scope of reproduction right enjoyed by authors, performers, and phonogram producers, by subjecting temporary copies to this right.[290] At the same time, it is stated that temporary reproductions include "temporary storage in electronic form"[291], expressly making transitory copies stored in a computer RAM subject to the broadened reproduction right.[292] Although there are no palpable mandates pertaining to the limitations on the expanded reproduction right, it seems that contracting states have been given the discretion to introduce such limitations, provided that they are in line with the three-step test.

3) Reproduction Right Protection In India

The Indian Copyright Law mainly consists of the Copyright Act 1957[293] as amended in 1983[294], 1984[295],1992[296],1994[297] and 1999[298]. The amendments in 1994 were a response to technological changes in the means of communication like broadcasting and telecasting and the emergence of new technology like computer software. The 1999 amendments have made the copyright fully compatible with Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement. With these amendments, the Indian Copyright Law has become a forward-looking piece of legislation and the general opinion is that, barring a few aspects, the amended Act is capable of facing copyright

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290 Singapore FTA, Art. 16.4.1: Chile FTA, Art. 17.5(1); Australia FTA, Art. 17.4(1); D.R.-Central American FTA, Art. 15.5.1; Morocco FTA, Art. 15.5.1 .

291 *Id.*

292 The expansion of the reproduction right in a way that temporary reproductions are covered, "is crucial in a digital, networked world in which copyrighted material can be fully exploited without a permanent copy ever being made by the user".

293 Act 14 of 1957 that came into force on 21 January, 1958.

294 Act 23 of 1983 that came into force on 9 August, 1984.

295 Act 65 of 1984 that came into force on 8 October, 1984.

296 Act 13 of 1992 that came into force on 28 December, 1992.

297 Act 38 of 1994 that came into force on 10 May,1995.

298 Act 49 of 1999 that came into force on 15 January, 2000.

challenges of digital technologies including those of Internet. Under the Act, copyright subsists only in the material form in which the ideas are expressed. There is no copyright in ideas. Works protected by copyright are:[299]

1. Original, literary, dramatic, musical and artistic works; and
2. Cinematographic films; and
3. Sound recordings.

The definition of "literary work" under the Act includes computer programs, tables and compilations including databases.[300] "Computer Program" is defined to mean "a set of instructions expressed in words, codes, schemes or in any other form, including a machine readable medium, capable of causing a computer to perform a particular task or achieve a particular result".[301] The above definition would include computer program in source or object code.

The Copyright Act confers following exclusive rights in respect of computer programs:[302]

i. to reproduce the work in any material forms including the storing of it in any medium by electronic means;
ii. to issue copies of work to the public not being copies already in circulation;
iii. to perform the work in public , or communicate it to the public;
iv. to make any cinematographic film, or sound recording in respect of the work;
v. to make any translation of the work;
vi. to make any adaptation of the work;
vii. to do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-clauses (i) to (v).

The above rights are available to computer programs in company with literary, dramatic or musical works. But there are some rights which

299 The Copyright Act, 1957; at Section 13.
300 *Id.,* at Section 2(o).
301 *Id.,* at Section 2(ffc).
302 *Id.,* at Section 14 (a).

have been specifically guaranteed in respect of computer programs, such as, to sell or give on hire, or offer for sale or hire, any copy of the computer programme, regardless of whether such copy has been sold on hire on earlier occasions.[303]

The 'reproduction right' of the copyright owner under Section 14(a)(i) (read with Section 51) of the Act is very wide. It gives the right to reproduce the work in any material form including the storing of it in any medium by electronic means. However, the reproduction right spelled out by the Act does not expressly cover temporary copies, including those momentarily stored in the computer RAM. Case laws are yet to clarify whether reproductions taking place in Internet communications come under the purview of the right of reproduction given by the law and until that is done, opinions will vary on temporary reproduction and permanent reproduction and on the legality of the temporary reproduction.

Without any concomitant specific interpretations of the reproduction right the legality of temporary copies continues to be a question mark on the Indian copyright law.

4) Expanding The Scope of The Reproduction Right

The WIPO Treaties 1996 leave the issue regarding whether the reproduction right can regulate the making of temporary reproductions unsettled. The Indian Copyright law is also silent on this issue. This begs the question of whether temporary copies should be protected by the reproduction right or not. There is a strong desirability and feasibility of expanding the scope of the reproduction right to cover temporary copies. The reasons for such expansion of the scope of reproduction right are discussed as follows:

a) The Incentive to Produce and Disseminate Works

Central to the copyright law is the issue concerning the optimal way to provide creators with the incentive to produce new works by conferring a set of finely-grained exclusive rights upon them. The incentive needed to create a new work can be measured by the ease with

303 *Id.*, at Section 14 (b).

which a competitor in the marketplace is able to copy the work at issue in the absence of copyright protection.[304] If a copier can easily enter into competition with creators in the marketplace by the way of offering lower prices and deprive them of a reasonable opportunity to recover their authorship investment, creators would have less, or even no incentives to produce and disseminate new works of authorship.[305] Therefore, copyright protection should be strengthened in accordance with the increasing ease with which the copiers are able to vie with copyright owners in marketplace.

Hence, the issue pertaining to the protection of the reproduction right in the digital networked environment, concerns an inquiry into whether the lack of the control over temporary copies will undesirably facilitate the aforesaid incentive-destruction competition and, in turn, disincentivize copyright owners to create and distribute any new works of authorship to any significant degree. A comparison between the ways of copying in the analogue and digital eras, will proffer the answer. In the analog world, the reproductions of works are routinely permanent and stable, making it hard to physically disseminate such reproductions as widely as possible. While copying an entire work is relatively onerous to achieve in many circumstances, the quality of the copying is unavoidably no better that of the original copy. The confluence of these factors naturally creates the so-called "state-of -the-art" limitation[306] on

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304 Lunney Glynn S.: *Reexamining Copyright's Incentive-Access Paradigm*, (1996) 49 Vand. L. Rew. 483 at 492 ("If the need for incentives turns on the ease with which a competitor can copy a work of authorship in the absence of copyright").

305 *Id.* at 11.

306 Hardy Trotter: *Property (and Copyright) in Cyberspace*, 1996, Univ. Chicago Legal Forum 217 (1996). According to Professor Hardy, in general, there are four factors limiting copying: (1) entitlement-like protection; (2) contract-like protection; (3) state-of-the-art limitations; and (4) special-purpose technical limitations. With regard to the state-of-the-art limitation, he observed:

"For any medium of expression, making a copy entails costs, yet obviously different media entail very different copying costs. Technological changes affect this cost. For example, if a manuscript must be written out by hand

copying and therefore largely impels consumers to purchase, instead of copying, the works. The arrival of the digital age, however, has fundamentally altered the landscape of the "state-of-the-art" limitation which is prevalent in the analogue world. Indeed, with the aid of the digital technology, users can make a near-perfect temporary copy of the work that is poised to be instantaneously disseminated to any targeted person at any Internet-connected corner of the globe. Therefore, the ubiquity of the computer and the Internet, rings the death knell for the "state-of-the-art" limitation in the digital age.

Against this backdrop, without the control in temporary reproductions, copyright owners are confronted with an adverse situation that copiers can easily enter into competition with copyright owners and further undermine the marketability of their works in the digital or even analogue environment. In the digital networked environment, copiers bear almost no marginal cost to make copies of books, songs and movies in the form of digital temporary reproductions, ubiquitously available to users in India and abroad who have access to the Internet. To do so, copiers can easily offer either lower-priced copies, or free access to and use of copies. Under these scenarios, copiers' prodigious appetite will eat into not only the copyright owners' pies in the online market, but more seriously their offline market where they are currently obtaining lucrative profits. Copiers' usurpation upon copyright owners' online and offline markets by flooding the Internet with low priced or even free-of-charge temporary copies of works, will undoubtedly strip copyright owners of the reasonable opportunity to recover their initial authorship investment. In that way, the absence of the control over temporary

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to make a copy, the cost of doing so —in time, money and 'trouble'— imposes a natural limit on how money copies one will make of the manuscript. … Readily accessible, inexpensive copy machines only produce black and white copies on poor quality paper. Photographs reproduce especially poorly".

copies will arguably lead to the diminution in the copyright owners' incentives to create and disseminate new works of authorship.[307]

b) The Function-Based Test

Regarding the proper scope of the reproduction right, the capability of a copy to effectively communicate a work to users, represents a new benchmark with which the question as to whether making such a copy would amount to an infringement of reproduction right could be determined. On the surface of the reproduction right, lies a right conferred upon authors to stop others from copying the whole or a substantial part of their works. Beneath the surface of the reproduction right, however, lies a right to deter the non-permissive dissemination of those copies capable of communicating the reproduced contents to users. If a copy were unable to make the author's expression of ideas perceptible to users, unquestionably, it would not constitute a reproduction for the purpose of copyright law. By contrast, should a copy be capable of enabling users to perceive the authors' expression of ideas either in direct or indirect way, it would amount to a reproduction of work when this copy conveys a substantial part of the work. In this case, copyright owners should be vested with the right to stop others from copying their works from the very beginning so that their economic interests would not be prejudiced.

In fact, this function-based approach was first proposed by Professor Kohler, the "godfather" of Continental-European copyright law.[308] According to Professor Kohler, the question as to whether "a copy of work is intended to serve as a means of communicating [the work] to others" is the decisive criteria to determine the scope of the reproduction right.[309] The scope of this right covers any reproductions used for communicative purpose the suitability of the fixation for

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307 Haochen Sun: *China and the Internet: Towards a New Paradigm for Copyright Protection in the Digital Age*, (2005) at 141-142, available at www.ssrn.com

308 Hugenholtz P. Bernt; *Catching and Copyright: The Right of Temporary Copying*, 22 EIPR 482, 485 (2000).

309 *Id.*

making the work apprehensible. The apprehensibility of a reproduction can be achieved through human eyes or machine reading. Any temporary copies that enable works to be perceived or communicated directly, or with the aid of machine indirectly, therefore would constitute reproductions for the purpose of copyright law. More importantly, this function-based test to determine the boundaries of the reproduction right has been adopted by the U.S. Copyright Act. It is provided that copies should enable the work to be "perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device".[310] This proviso indicates that as long as a copy is perceptible directly by human eyes or with the aid of the machine, it may constitute a reproduction for the purpose of copyright law. If the copy were unable to be perceived or communicated directly or indirectly, the making of such a copy would otherwise not be subjected to the reproduction right.[311]

c) The Blurred Distinction between Temporary and Permanent Copies

The traditional argument against a merged control of temporary and permanent copies largely derives from the fixation requirement for reproduction which entails that permanent copies are sufficiently stable and thus endure for a long duration. By contrast, temporary copies are too fleeting and last too short a time to be qualified as being fixed for the purpose of copyright law.[312] This argument may well be infallible when

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310 17 U.S.C.A. § 101. With respect to this provision, Professor Goldstein observes that "reproducing a work on microfiche, audio tape, video tape or disk will violate the reproduction right since, although the copied work will not be directly perceptible, it can be apprehended through the use of a microfiche reader, tape player or computer". *See* Paul Goldstein: *Copyright* (New York, Aspen Law & Business, 1998) § 5.2 .

311 *See* U.S. Copyright Office: *Digital Millennium Copyright Act § 104 Study*, (August 2001) at 567. available at http://www.copyright.gov/reports/studies/dmca/dmca_study.html

312 Litman Jessica: *The Exclusive Right to Read*, 13 Cordozo Arts & Ent. L.J. 29, 42 (1994) (Arguing that "the better view of the law is that the act of reading a work into a computer's random access memory is too transitory to create a 189 F. Sup reproduction").

it comes to the protection of reproduction right in the analogue environment, because hard copies, if not all, are routinely kept in material form for sufficiently long enough to be deemed as reproductions for the purpose of copyright law. Yet the distinction between temporary and permanent copies based upon duration, as these commentators have contended, is in fact dubious, or at best, misleading in the digital environment. In this context, one may ask the question if these two types of reproductions are differentiated in terms of duration, how long should a reproduction endure in order to be regarded as the temporary one? Should it be one second, minute, hour, day, month, or any longer? *Ellison v. Robertson*[313] indicates that it may be meaningless to attempt to distinguish between the permanent and temporary copies based upon duration. The *Ellison* court held that the storage of online postings in the defendant's server for fourteen days was a transitory reproduction, because the three-day difference between the storage at issue and that in *Netcom,* in which identical storage for eleven days was regarded as transitory reproduction[314], was insufficient to distinguish the two cases.[315] Indeed, given the insurmountable difficulty, recent report cautions that any attempt to differentiate between permanent and temporary reproductions would be theoretically and practically infeasible:

> [A]ttempting to draw a line based on duration may be impossible. ...Even if this distinction were possible under the statute, the concept of permanence is not helpful in this context. Magnetic disks and tapes can be erased; printed works decompose over time, or can be destroyed deliberately or accidentally. Separating some temporary copies from others based on their duration poses similar difficulties. ...The line

313 p. 2d 1051 (2002).

314 See *Religious Technology Center v. Netcom Online Communication Services, Inc.*, 907 F. Supp. 1361, 1368-1370 (N.D.Cal. 1995) By referring to temporary storage of copies, the *Netcom* court held that intermediate copies may be retained without liability for only a limited period of time.

315 *p. 2d 1051 (2002),* at 1070.

would be difficult to draw, both in theory and as a matter of proof in litigation.[316]

On the contrary, the court in *CoStar Group, Inc. v. LoopNet,Inc.*[317], attempted to shed new light on the way with which the distinction between the temporary and permanent copies can be drawn:

> 'Transitory duration' is thus both a qualitative and quantitative characterization. It is quantitative insofar as it describes the period during which the function occurs, and it is qualitative in the sense that it describes the status of transition.[318]

Consequently, the court argued that downloading the copyrighted software onto either the computer's RAM or ROM, involved a permanent injunction, because such a reproduction "[functioned] in the service of the computer or its owner".[319] Conversely, the storage of materials in an ISP's server for the purpose of automatically transmitting works over the Internet, was likely to be a transitory reproductions.[320] Therefore, it is the function that will determine whether a reproduction is temporary or permanent in nature. This criterion, however, is fraught with problems. On the one hand, it is circular in that it would still rely upon the duration of reproduction to determine if the function is intended for long, medium, or short-term uses of works. On the other hand, the functions of reproductions *per se* are difficult to define and need to be judged on a case-by-case basis. Nevertheless, the codification of the reproduction right necessitates a unitary definition of this right.

d) Increasing Acceptance of Temporary Copies as Part of the Broad Reproduction Right

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316 *See* U.S. Copyright Office, *Supra* note 67, at 113.

317 373 F. 3D 5449 (2004).

318 *Id.* at 551.

319 *Id.* ("When the computer owner downloads copyrighted software, it possesses the software, which then functions in the service of the computer or its owner, and the copying is no longer of a transitory nature").

320 *Id.* ("This, however, is unlike an ISP, which provides a system that automatically receives a subscriber's infringing material and transmits it to the Internet at the instigation of the subscriber").

With the fast development of digital technology, there appears to be an irreversible tendency that an increasing number of countries will explicitly accept the broad-based reproduction right, embodied with the right to prevent others from making of temporary copies. First and foremost, the U.S. and the E.U., the two giants who have been expanding the boundaries of international protection of copyright, have embraced the broad-based reproduction right. In U.S., *MAI System Corp. v. Peak Computer, Inc.*[321] and its progeny[322], held that making copies into a computer's RAM may constitute an infringement of the copyright owner's reproduction right. The E.U. members took the lead to statutorily extend the scope of the reproduction right to cover temporary copies. The Directives on the Legal Protection of Computer Program[323], Legal Protection of Databases[324], and Copyright Protection in Information Society[325], expressly state that temporary copies fall into the ambit of the reproduction right.

The recently concluded FTAs between the U.S. and its trading partners, as mentioned earlier, broaden the scope of reproduction right enjoyed by authors, performers, and phonogram producers, by subjecting temporary copies, including RAM copies to this exclusive right.

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321 991 F. 2d 511, 519 (9th Cir. 1993).

322 *See,* e.g., *Advanced Computer Services of Michigan, Inc. v. MAI Sys. Corp.*, 845 F. Supp. 356 (E. D. Va. 1994); *Marobie-FL, Inc. v. National Ass'n of Fire and Equipment Distributors and Northwest Nexus, Inc.*,983 F. Supp. 1167, (N.D. III 1997); *Stenograph L.L.C. v. Bossard Associates, Inc.*, 144 F. 3d 96, 102 (D.C.Cir. 1998); *Intellectual Reserve , Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F. Supp. 2d 1290, (D. Utah 1999). Citing *MAI* , courts in these cases found that making a RAM copy infringed the copyright owners' reproduction right.

323 Directive on the Legal Protection of Computer Program, Council Directive of 14 May, 1991 on the Legal Protection of Computer Programs, at Article 4(a).

324 Directive 96/ 9/EC of the European Parliament and f the Council of 11 March on Legal Protection of Databases, at Article 5(a).

325 Directive 2001/29 of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, at Article 2.

Therefore, developing countries who have acceded into these FTAs, are obligated to extend the scope of the reproduction right to cover the temporary copies.

The above examination of the national laws concerning the scope of the reproduction right, albeit not exhaustive, is sufficiently comprehensive to draw a conclusion that the increased acceptance of the fact that temporary copies fall within the ambit of the reproduction right will usher in a broader reproduction right in the future international copyright law. Against this backdrop, it is better for India to join the trend in expanding the scope of the reproduction right.

4.1 Pro-Public Interest Limitations

To vest copyright owners with an unbridled control over temporary copies would give rise to number of problems. First and foremost, the free flow of information which is the lifeblood of the digital age will be unduly hampered.[326] In most circumstances, temporary copies momentarily loaded into the computer RAM form the basis from which digital information transmission and retrieval can be achieved. If every transitory storage in computer RAM were subject to the reproduction right, at least Internet service providers (ISPs) acting as passive conduits for communications would be confronted with myriad problems in successfully and efficiently transmitting information, be it copyrightable or not, over the Internet. As the *Netcom* court has succinctly pointed out, "it does not make sense to adopt a rule that could lead to the liability of countless [ISPs] whose role in the infringement is nothing more than setting up and operating a system that is necessary for the functioning of the Internet."[327] Otherwise, holding ISPs liable for making RAM copies for the purpose of merely acting as conduits for communications would "result in liability for every single [computer] server in the worldwide

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326 Hoffmann Gretchen McCord , *Arguments for the Need for Statutory Solutions to the Copyright Problem Presented by RAM Copies Made During Web Browsing*, 9 TEX. INTELL. PROP. L.J. 97, 108-14 (2000).

327 Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc., 907 F. Supp. 1361, 1372 (N.D. Cal. 1995).

link of computers transmitting [messages] to every other computer."[328] Designed to prevent the domino effect of this type, the U.S. Digital Millennium Copyright Act (DMCA)[329] offers "safe harbor" for ISPs in this scenario. Under the DMCA's safe-harbor provisions, passive and conduit-functioning ISPs are automatically immune from secondary liability by temporary storing works for "transitory digital network communications"[330] and "system caching."[331] Second, the effective

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328 *Id*. at 1369. *See also* Doe v. GTE Corp., 347 F.3d 655, 659 (7th Cir. 2003) ("A web host, like a delivery service or phone company, is an intermediary and normally is indifferent to the content of what it transmits.").

329 Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

330 This exception covers ISPs who offer transmitting, routing, or connections for third party content, "through an automatic technical process without selection of the material" by them, and who simultaneously make the "intermediate and transient" storage of such material. *See* 17 U.S.C. § 512(a) (2000). To qualify for this exception, ISPs must satisfy the five conditions set forth in this exception: (1) The transmission of the material must have been "initiated by or at the direction of a person other than the service provider"; (2) The acts relating to communication must be "carried out through an automatic technical process without selection of the material by the service provider"; (3) The service provider cannot select the recipients of the material except as an automatic response to the request of another person; (4) Copies of materials must not be maintained on service providers' system or network in a manner "ordinarily accessible to anyone other than anticipated recipients" and "ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary"; (5) The material must be "transmitted through the system or network without modification of its content." *See* 17 U.S.C. § 512(a)(1)–(5).

331 This exception covers ISPs who offer "intermediate and temporary storage" of the third party material that "is carried out through an automatic technical process for the purpose of making the material available to users of the system or network." *See id*. § 512(b)(1). Additionally, an eligible ISP must meet the following five statutory conditions: (1) The service provider shall not make any modification to the material transmitted; (2) The service provider shall comply with "rules concerning the refreshing, reloading, or other updating of the material

application of certain limitations on copyright may be adversely affected. Admittedly, the application of certain limitations on copyright entails making temporary copies as an indispensable step to achieve the objectives embedded into these limitations. For instance, with respect to reverse engineering of a computer program for the purpose of interoperability, users need to temporarily load copies of decompiled source code into a computer's RAM in order to have them displayed on the computer screen.[332] If right owners are vested with blanket control over temporary copies, the dynamics of these limitations would be arguably eroded. Third, copyright owners may be given the control over the communication of works in the private domain. The right of communication to the public prohibits the non-permissive transmission

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when specified by the person making the material available online in accordance with a generally accepted industry standard data communications protocol for the system or network through which that person makes the material available, except that this subparagraph applies only if those rules are not used by the person described in paragraph (1)(A) to prevent or unreasonably impair the intermediate storage to which this subsection applies."; (3)The service provider shall not "interfere with the ability of technology associated with the material to return to the person" who makes such material available on the service provider's system; (4) The service provider "permits access to the stored material in significant part only to users of its system or network that have met" the conditions set by the person who makes such material available, "such as a condition based on payment of a fee or provision of a password or other information"; (5) The service provider shall comply with notice-and-take-down procedure. *See id*. § 512(b) (2)(A)–(E).

332 For an introduction to reverse engineering of a computer program for the purpose of interoperability, see Pamela Samuelson & Suzanne Scotchmer, *The Law and Economics of Reverse Engineering*, 111 YALE L.J. 1575, 1607-12 (2002). For leading cases which validate decompilation of software for the interoperability purpose, see Sega Enters., Ltd. v. Accolade, Inc, 977 F.2d 1510 (9th Cir. 1992); Sony Computer Entm't, Inc. v. Connectix Corp, 203 F.3d 596 (9th Cir. 2000). The E.U. has adopted a similar position on these issues. *See* Directive on the Legal Protection of Computer Program, Council Directive of 14 May 1991 on the Legal Protection of Computer Programs art. 6.

of works to any member of the public.[333] Conferring upon authors the right to making temporary reproductions with no tailor-made exceptions, the scope of the right of communication to the public will be in fact broadened. Users may well be held liable for transmitting works to those in the private domain, say their family members, on the grounds that they infringed the copyright owners' right of making temporary reproductions by storing copies of their works in computer RAM or other media. Finally, free access to and use of noncopyrightable elements contained in a copyrighted work may be unduly impeded. In the public domain, there are oceans of works that are unqualified for copyright protection in the original or whose term of protection has expired.[334] These works are of course free for everyone to use. One should note that vesting the control over temporary copies connotes that right owners, to a large extent, are afforded with tightened control over access to as well as use of works of authorship in the digital environment. Absent any limitations on the protection of temporary copies, copyright owners, however, would be empowered to weed out free uses of noncopyrightable works in many circumstances, giving rise to the phenomenon of "the enclosure of information."[335] As Professor

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333 Pursuant to the WCT, right owners "enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them." *See* WCT at Art. 8.

334 Hardy Trotter , *Computer RAM "Copies": Hit or Myth? Historical Perspectives on Caching as a Microcosm of Current Copyright Concerns*, 22 U. DAYTON L. REV. 423, 462 (1997) ("This evolution enables courts to develop a new copyright law that is based not on tangible reproduction — useful for an era of books, magazines, and the like — but rather on controlling *access to* and use of information — an alternative focus necessary for today's world of intangible, digital works of authorship.") (emphasis added).

335 *See, e.g.*, Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. Rev. 354 (1999); James Boyle, *The Second Enclosure Movement and the*

Reese has succinctly pointed out, "while a Web site that posts factual information not subject to copyright protection has no copyright claim against a competing Web site that posts the same factual information, the first Web site nevertheless might have a copyright claim based on the storage of the pages containing the facts in the RAM of the second Web site's computers in the course of extracting the factual information."[336] In order to ameliorate the adverse impacts on the flow of information occasioned by the expansion of the reproduction right, the following three limitations should be properly carved out in the Indian copyright law. In general, these limitations would play an important role in providing guidance on the extent to which temporary copies are outside the ambit of the reproduction right. First of all, making temporary copies as a necessary part of the technical process of making or receiving a communication should be permitted. This type of new limitation has been adopted by jurisdictions, including the E.U.[337] in which the copyright law expressly provides for a right to control the making of temporary reproductions. In order to comply with the three-step test, India should provide for additional limits on the application of this limitation. For the purpose of keeping the limitation applicable only in "special cases," it should be prescribed that the aim of this limitation is to facilitate the *necessary* technical process of making or receiving a

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Construction of the Public Domain, 66 LAW & CONTEMP. PROB. 33 (2003)

336 R. Anthony Reese, *The Public Display Right: The Copyright Act's Neglected Solution to the Controversy over RAM "Copies"*, U. ILL. L. REV. 83, 144 (2001) ("The RAM copy doctrine would also allow copyright owners to control displays that are not transmitted 'to the public'").

337 Article 5(1) of the E.U. Information Society Directive provides: Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable: (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.

communication of works. In addition, it should also be provided that this limitation is not applicable to making temporary copies as the step to use an infringing copy of the work. The combination of these two requirements aims to ensure the compliance with the rest of the two prongs of the three-step test: first, the new limitation only covers temporary copies that have no independent economic significance yet constitute an essential step to bring the communication of works to fruition; and second, it excludes the act of using infringing works through the making of temporary copies, thus protecting right owners' interests from being unreasonably prejudiced. In general, the limitation carved out in this case should permit "acts which enable browsing as well as acts of caching to take place, including those which enable transmission systems to function efficiently"[338] and users to "obtain data on the use of the information."[339]

Moreover, the provisions regarding fair use and compulsory licensing provided for in the Indian copyright law should still be applicable to the expanded reproduction right. This step is aimed at giving leeway to users to make temporary reproductions as a necessary step to effectively use the general limitations on copyrights. Additionally, a regular review of limitations on the reproduction right should be undertaken to make the law sufficiently responsive to the changing circumstances. With sufficient sympathy to the users' potential needs, the review may consider the desirability to provide for new limitations or to repeal old limitations on the reproduction right.

5) Conclusion

The advent of the Internet has made the delimitation of the reproduction right very much problematic in the digital age. Given that any transmission of protected works over the Internet routinely involves temporary reproductions, particularly the ones transitorily stored in the connected computers' RAM, the question of whether authors should be granted control over all temporary reproductions looms large amid the increasingly dematerialized and decentralized communication of information over the Internet. The preceding comparative normative analysis demonstrates that the international instruments for the protection of

338 E.U. Information Society Directive, Recital 33.

339 *Id*.

copyright right, including the WIPO Treaties 1996, do not make it clear as to whether temporary reproduction falls within the scope of the reproduction right provided therein. Instead, members have been conferred ample discretion to determine the scope of the reproduction right with respect to temporary copies, and to design limitations on this right in their municipal laws, provided that they are in line with the minimum standards and the three-step test set out in the Berne Convention and the WIPO Treaties 1996. If a member state adopts the broad-based reproduction right and extends the scope of this right to cover temporary copies, the concomitant establishment of appropriate limitations or exceptions to the extended right is unquestionably permissible under the Berne Convention and WIPO Treaties 1996. Indeed, what weight and scope of should be given to the reproduction right will likely be a source of contentious debate and discussion in coming years. Given the fact that the WIPO Treaties 1996 fail to achieve the full harmonization of the protection of the reproduction right in the digital environment, further endeavors are still needed in order to create unequivocal standards for protection, if the desirability to do so is recognized by the whole international community. In fact, such efforts have already been made in certain bilateral negotiations for higher standards for the protection of digital copyright. Recent Free Trade Agreements concluded between the U.S. and some of her trading partners, broaden the scope of the reproduction right enjoyed by authors, performers, and phonogram producers, by subjecting temporary copies to this right. The EC Information Society Directive also establishes a broad reproduction right with a special defense to online service providers and other intermediaries.

The study demonstrates the desirability of extending the scope of the reproduction right to cover temporary copies. The control over making of temporary reproductions has a significant economic relevance to copyright owners' interests, which sustain and enhance their incentive to create and distribute works of authorship. In digital environment, the distinction between the temporary and permanent copies becomes undoubtedly amorphous. Given that any attempt to draw a dividing line between temporary and permanent copies is awash with technical and theoretical difficulties, the better idea is that copyright owners should be vested with the right to control the making of temporary copies. A merged, non-

discriminatory protection of both temporary and permanent copies, irrespective of their duration, is indeed the only available avenue to overcome the difficulty in delimiting the boundaries of reproduction right based upon the distinction between temporary and permanent copies in the digital environment. However, vesting copyright owners with an unbridled control over temporary copies would give rise to number of problems regarding flow of information as shown by the study. Therefore, there is a need to carve out appropriate limitations for providing guidance on the extent to which temporary copies are outside the ambit of the broad-based reproduction right. Moreover, the provisions regarding fair use and compulsory licensing provided for in the Indian copyright law should still be applicable to the expanded reproduction right. The test in each case of alleged violation should be the economic incentive of the alleged infringer having temporary copies. The fundamental question to be asked and answered in such cases should be COPYING FOR WHAT ? If the alleged infringer has obtained some economic benefit by exploiting the temporary copy he should be held liable, otherwise not. Recognizing that fitting temporary copies into the copyright regime would surely open up a new dimension for the protection of the reproduction right India should tap into this new dimension of copyright protection in order to spur the growth of her copyright industry and to promote information dissemination for the Indian people.

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Investigation Power of Securities and Exchange Board of India:

An Overview

To maintain fairness and integrity in the stock market, foster its orderly development, build investor confidence, its regulation is necessary. Unfair means and high-risk taking decision in stock market has a potential of yielding windfall gains in the short run. Therefore, market participants, if not regulated, have a tendency to conceal material information, take disproportionate risks, indulge in unfair practices, and resort to cheating. Regulations and development of securities markets go hand in hand. Regulations, by enforcing set rules and practices, help in enhancing fairness and integrity of the market place. This leads to more and more participation in the market and enable the market to grow. A growing market, on the other hand, poses increased and new kinds of challenges requiring a dynamic regulatory framework to deal with such challenges.

It may be stated that there was no single authority to regulate and administer securities market. With the need of better and more comprehensive law and better enforcement agency, thoughts paying attention on the creation of a Securities and Exchange Board of India. Thus, in order to bring about effective co-ordination in the activities of all departments concerned, stock exchanges concerned, the SEBI was set up in April, 1988[340] as an apex body of securities with the main aim of protecting the investors' interest. The main laws governing the conduct of participants in securities market in India are the Companies Act, 1956; the Securities Contracts (Regulation) Act, 1956(SCRA); the SEBI Act, 1992; and the Depositories Act, 1996.

The SEBI got legal teeth through an ordinance issued on 30 January 1992, which was repealed by the SEBI Act, 1992 on 4th April. The preamble of this Act, outlines that the protection of investors' interest, development and regulation of securities market and matters connected

340 *The* Securities and Exchange Board of India was constituted under the Resolution of the Government of India in the Department of Economic Affairs No.(44) SE/86 dated April 12,1988.

with these are the main objectives of this Act. The urgency of strengthening SEBI's role as a regulator came about as an immediate reaction to the market scandal of 1992 master minded by Harshad Mehta and other bull operators.

It is an acknowledged fact that the SEBI Act of 1992 was mostly a list of responsibilities of the regulator and was devoid of reasonable statutory backing for discharging those responsibilities. Many shortcomings in the legal provisions of the SEBI Act were noticed, particularly with respect to SEBI's power of inspection, investigation and enforcement .SEBI Act was amended in the year 2002 to meet the requirements of changing needs of the securities market.

As SEBI is the regulator of securities market in India, in USA, Securities and Exchange Commission (SEC) fulfills the purpose of market regulation[341] and in UK, Financial Services Authority (FSA) fulfills the purpose[342].

Powers with Securities and Exchange Board of India

The SEBI is a body corporate. It consists of (a) a chairman appointed by the Government, (b) two members from amongst officials of the Ministry of Government of India dealing with finance and administration of the companies appointed by the Government (c) one member from amongst the officials of the Reserve Bank (d) five members of whom at least three should be whole time members, nominated by the Government.[343] SEBI has the power to call periodical returns[344], any information or explanation from recognised stock exchanges.[345] It can direct enquiries to be made in relation to affairs of governing body of stock exchange or any member of the stock exchange and submit report to SEBI.[346] It can approve bye-laws (or its

341 http://www.Sec.gov.

342 http://www.fsa.gov.uk.

343 Securities and Exchange Board of India(Amendment)Act,2002.(sec:-3)

344 Powers delegated to SEBI under Securities Contracts (Regulation) Act, 1956.(Section 6(1)).

345 *Id.* Sec:-6(3)(a)

346 *Id.* Sec:-6(3)(b)

amendments) of the recognised stock exchanges.[347] The public companies are compelled by SEBI for listing of securities in any recognised stock exchange.[348] If a stock exchange refuses to list security, appeal can be laid before SEBI in this connection.[349] It has the power of making or amending rules of stock exchange relating to voting rights of members of stock exchange.[350] Every recognised stock exchange is asked by SEBI to furnish a copy of the annual report[351], in addition it has the power to supersede the governing body of a recognised stock exchange [352] and to suspend business of a stock exchange.[353] It has also the power to prohibit contracts of sale and purchase of securities in any area or state.[354] The SEBI has the same power as are vested in a Civil Court under the code of Civil Procedure.[355]

In *Karnavati Fincap v. SEBI* [356] It has been held that SEBI has powers to call for information and summon a person even if no enquiry

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347 *Id* .Sec:-9(1)

348 *Id*. Sec:-21

349 *Id*. Sec:-22

350 *Id*. Sec:-7A(2)

351 *Id*. Sec:-7

352 *Id*. Sec:-11

353 *Id*. Sec:-12

354 *Id*. Sec:-16

355 Powers: In respect of the following matters, namely:

i) The discovery and production of books of accounts and other documents, at such place and time as may be specified by it.

ii) Summoning and enforcing the attendance of persons and examining them on oath;

iii) Inspection of any books, registers and other documents of any person at any place;

iv) Inspection of any books, register, or other document or record of the company;

v) Issuing commissions for the examination of witnesses or documents.

356 (1996)87Comp.cas.186.

has been instituted against him. SEBI also has the power to issue directions under SEBI Act, 1992.[357]

Powers of Investigation

The SEBI (Amendment) Act, 2002 enhanced powers of SEBI substantially in respect of inspection, investigation and enforcement. SEBI was earlier given powers to call for information , undertake inspection, conduct inquiries and audits of the stock exchanges, other self-regulatory organisations, intermediaries and persons associated with the securities market. However, powers to call for information and records from other entities like banks or any other authority or corporation in respect of any transaction in securities which is under investigation or inquiry, was granted much later by the Amendment Act in 2002.

In a significant move, SEBI Regulations, 2003, now empowers SEBI, to restrain persons from accessing the securities market and prohibit any person to deal in securities; suspend any office bearer of any stock exchange or self-regulatory organisation from holding such position; and also to impound and retain the proceeds or securities in respect of any transaction which apparently violates regulations. Further, SEBI may issue a warning or censure, temporarily suspend or cancel the registration of an intermediary found to be guilty prima facie.[358] SEBI was also granted the power under SEBI (Amendment) Act 2002, to pass an order requiring a person to cease and desist from committing or causing a particular violation of any of the provisions of the SEBI Act, or any of the rules or regulations made there under, if it finds, after an enquiry, that such person has violated or likely to violate the said provisions. In case of listed public company, which is not a registered intermediary, the SEBI can exercise these powers only if it has reasonable grounds to believe that the company has been indulging in

357 Sec: 11B.

358 *Ibid.*

insider trading or market manipulation.[359] In addition, SEBI was armed with powers of investigation.[360]

The main purpose of investigation is to examine alleged or suspected violations as well as to gather evidence and identify persons behind irregularities and violations such as price manipulation, creation of artificial market, insider trading and public issue related irregularities, takeover violations and other misconducts, etc.

Investigations start with Preliminary stage, it is made to check whether the matter warrants a formal investigation. At the preliminary investigation, information is sought and collected from all available sources including stock exchanges, depositories, company and brokers, if required.[361] On the findings of the preliminary investigation, a case is taken up for formal investigation.[362] The SEBI Act then provides for calling of information from witnesses, etc. After completion of investigation, action is taken by enforcement division as per the recommendations of the approving authority.[363]

Study reveals that the focus of SEBI shifted to speedy completion of the investigations in the recent years[364], but despite significant advancement in the coverage of laws as well as improvement in supportive infrastructure, the regulator often finds itself helpless in preventing securities crimes and in protecting small investors when a scam brews. SEBI was indeed ill-equipped to take care of the scams in the mid-1990s, as it was balancing its role as a developer as well as regulator of the growing capital market and did not have sufficient statutory powers to convict and punish the guilty. However, even a decade later, SEBI is yet to be effective in detecting, preventing or punishing major frauds despite having complied with most of the International organisation of securities commission norms[365].

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359 Sec:-11D of SEBI Act, 1992.

360 Sec:- 11C.Inserted by SEBI (Amendment) Act 2002.

361 Annual Report of SEBI, 2004-05.

362 Ibid.

363 Ibid.

364 www.Sebi.gov.in .

365 As per SEBI Annual Report 1999-2000.

Market Scams are posing new challenges to the regulator. Starting from "Big Bull" Harshad Mehta Scam, then Ketan parakh Scam, leaving small investors high and dry, now the latest Raju's Satyam scam.

Mr. B.Ramalinga Raju (former chairman of Satyam Computers Services Ltd.) admitted in his letter, that the statement of accounts of Satyam Computer Services Ltd. provided to the Stock exchanges were not true. In this context, Securities and Exchange Board of India (SEBI) ordered an Investigation into the affairs relating to buying, selling or dealing in the shares of Satyam Computer Services Ltd.

As a first step in the investigation, SEBI ordered inspection of the Satyam Computer Services Ltd. in accordance with the provisions of the SEBI Act.[366] Sec 11C (5) of the SEBI Act gives it power to examine in person Ramalinga Raju or any other employee of Satyam. Market regulator described the fraud in Satyam as "the worst in the history of the country".[367]

SEBI examined the request of Satyam Computer Services for exemption from certain provisions of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997. The Board recognised the special circumstances that have arisen in the affairs of the company and concluded that the issue needs to be dealt with in the general context. Accordingly, it was decided to appropriately amend the regulations and guidelines to enable a transparent process for such acquisition.[368] The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 has been amended vide; Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) (Amendment) Regulations, 2009 on 28-01-2009. The said Amendment mandates disclosures regarding pledge of shares by the promoter and persons forming part of the promoter group to the company and by the company to the stock exchanges where shares of the company are listed.[369]

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366 Ref.: PR NO.12/2009 dated January 07, 2009.

367 FRONTLINE, Vol.26, Issue-04, Feb.14-27, 2009.

368 THE HINDU, Feb 3, 2009, p.18.

369 Ref. Circular No. SEBI/CFD/DCR/TO/152750/2009 dated February 3, 2009.

In an Interim Report on the Satyam investigation, SEBI has made out a case to prohibit Satyam's previous auditors and the audit firm Price water house coopers from auditing accounts of listed companies for a certain period.[370] SEBI is investigating insider trading of shares by the promoter and his family as authorities suspect that the promoters made large profits by rigging share price.[371] .

As an encouraging step to protect the interests of the investors, the SEBI has released guidelines related to monetary aid that investor associations may seek for legal proceedings. Aid for a legal proceeding would not exceed Rs 20 lakh if the case was before the Supreme Court. The guidelines would come into force after the SEBI investor protection and Education Fund Regulations were notified.[372] At present, there are 23 such SEBI-registered investors' associations, who can avail of this aid, provided they prove 1,000 or more investor have been impacted. The funding will be approved on a case-to-case basis.[373]

As Satyam is listed on New York Stock Exchange in US and in this connection, on behalf of the US shareholders class action suits were filed, alleging that senior executive of Satyam had violated the federal securities law by issuing false and misleading statements. The suits are still pending in the US courts.[374]

Class actions or a representative action is a form of lawsuit where a large group of people collectively bring a claim to court. This form of collective lawsuit originated in the United States. All the members seeking the class action may not get equal compensation from the respondent. Apart from the compensatory damages awarded in these cases, the other category is the punitive damages. Under class action law suit everybody, including board members, can be prosecuted.

In India Government is planning to codify class action as law. A clause for filing Class action Suit has been included in the new company law Bill in India. Once enacted, the provision will empower shareholders to hold companies and their managements responsible for wrong-doing

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370 The Economic Times, Monday, July 13, 2009.

371 *Ibid.*

372 Business Standard, Thursday, Aug 13, 2009.

373 *Supra* note 29. (July 17, 2009)

374 *Supra* note 29.

though the principles of class or representative action by shareholders against managements have been upheld by various courts in India, these are yet to be reflected in law.[375]

Conclusion

Nevertheless SEBI has done a good job in many cases like Ketan parekh by banning him for 14 years, no doubt a little late and has introduced a number of measures to reform India's capital market in recent years, as revealed by the present study. It has succeeded to a considerable extent, in bringing up the Indian market to international standards, but, one finds a number of pointers towards SEBI from an examination of various news reports, like failure of the stock exchanges as SROs and Political involvement in SEBI's working and SEBI's incapability to conduct consistent, proactive and thorough investigations with concrete evidence, possibly due to lack of clear audit trails, lack of transparency in investigations, as the detailed investigation reports are not made public. Many questions arise like how big scams escape the scanners of SEBI. To catch the small intermediaries is not a big deal but to stop the big scams to happen matters, as it destroys hard earned money of innocent investors. The problem is multiplied by the fact that there are different sets of regulations under different regulatory bodies that are not as much in coordination as they are in a mature system like that in the US, where the SEC has full cooperation from the SROs, the Department of Justice (DOJ) and other criminal investigation services.

Suggestions

In the light of foregoing discussion, the following suggestions have been made.

- Under Sec 11C (1) of SEBI Act, Board may order an investigation when it has a reasonable ground to believe that the transactions in securities market are being dealt with in a manner detrimental to the investors or the securities market or any person associated with the securities market has violated any of the provisions of this Act or the rules or regulations or directions. So Board has to wait for a reasonable ground, and up to that time scammers will do their job.

375 http://www.HG.org.

It is, therefore, suggested that Sec 11C (1) be amended by replacing the word reasonable ground by simple doubt.

- SEBI has failed many times in proving its cases owing to lack of evidence. Despite the desirous changes that the 2002 amendment brought in, SEBI has not been able to utilise this to its best. There should be a strong and more efficient investigative mechanism to aid the SEBI in its investigations for insider trading. It is suggested that SEBI should welcome any kind of information that leads to the discovery of the practice of insider trading and it should also encourage people to share with it, any kind of information relating to insider trading activities by giving away rewards. As its US counter part SEC gives away rewards to the individuals who provide them with any kind of information leading to the discovery of an insider trading Scam.
- It is suggested that necessary amendments shall be made in the Act where by the provision regarding monetary penalty for giving false information may be added to the Act, as was opined by Kania Committee in 2005 and has yet not been acted upon.
- The SEBI should have power to award compensation to the investor. It is not enough that the culprit is punished. The culprit needs to be punished in an exemplary manner which becomes a lesson for others. The Investor should have means to recover his loss caused by the culprit.
- An Investor normally deals in securities through an intermediary, whose acts of omission and commission can cause loss to him. Investor in order to choose the right intermediary through whom he may transact business, and may be useful to help him in taking informed decision by making details of brokers available to him. The details may include the form of organisations, management, capital adequacy, liabilities, defaults and penal actions taken by regulator and self-regulatory organisations against the broker in the past and other relevant information. Similarly the details about the issuer should be available to investors/public. If possible, the issuers/ intermediaries may be rated and their ratings are disseminated.
- SEBI has indeed tried to plug the loopholes in the system, which is clearly visible in the way it swiftly modified and amended its regulations but the number of rules, etc., prescribed by the SEBI has become too large; it has been adding to, and changing them too often and in a back and forth fashion. This has led to a very high level of

uncertainty and confusion and it is difficult for anybody to determine what rules are currently in force. This needs to be corrected.

- The regulator should take more aggressive preventive measures and effectively discourage frauds in the market through severe economic disincentives. It is further suggested that Sec 11C(6) be amended to enhance the imprisonment term from one year to two years and fine from one crore to two crores, on failure to produce to the investigating authority, any information which is his duty. So that it will act as a deterrent to the person concerned.
- Annual report should be published on time.
- Detailed study over SEBI should be included in the syllabus of LL.B and LL.M.

Apart from the above suggestions, it is also submitted that the regulatory system's credibility will be blamed for its inadequacy in stopping series of scams and acts like market manipulation till the time SEBI will have coordination with the other market participants; till the time SEBI will have an open eye on the market; till the time laws or regulations are rationalized to fully empower SEBI to carry out its functions as the principal regulator; till the time the SEBI will have efficient investigating officers; till the time SEBI drastically upgrades its investigation efficiency; till the time SEBI will use its powers granted under sections like 11C fully in real sense; till the time there is more convictions; and till the time SEBI, SAT and Supreme Court find ways to save the interest of small investors.

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Female Participation in Dowry Crimes: A Challenge to Feminism

Feminism is a phenomenon which primarily concerns the liberation of women. The movement strikes the discriminatory treatment on the ground of sex and is concerned about emancipation of women by emphasizing on de-recognition of gender in shaping a person's social, political, or economic identity. Therefore principally they campaign on issues concerning plight of women and to accord due recognition to women as a group within societal framework by altering the discriminatory environment.

A.Taylor defines feminist as a person who recognized the validity of women's own interpretation of their lived experiences and needs protest against the institutionalized injustice perpetrated by men as a group against women as a group, and advocates the elimination of that justice by challenging the various structures of authority or power that legitimate male prerogatives in a given society[376]. The feministic movements, be it may traditionalistic, egalitarianistic, protectionist or separatist, primarily observe sexuality and gender as a root cause of indiscriminate subjugation of women in a social set-up[377].

The demand for equal rights and status has thus been the impenitent feature of feminism. The same movement has been witnessed in India, though the concept of women liberation is of antiquity in India. Social female reformers of 19th century freedom struggle and contemporary women activists have fought for rights and law reforms from feministic perspective. They have challenged that the law discriminates against women and have demanded the intervention of the law to prohibit violence against women in this part of the world. The social, political

376 Walter Margaret, *Feminism: A very short introduction*, Oxford, 2005

377 Freedman, Estelle.B, No Turning Back:*The History of Feminism and the future of women*, Ballantine Books (2002)

and economical status of women though has improved a little but the instances of violence against women have increased.

Principally the feministic concept in the western mould has created a wedge between the sexes in India as family ties are too emotional in India defying the rationale and reasonable expected response. Moreover, the attack on discrimination rather than an education and awareness of female as a class to respect and sensitize their sexuality seems to be a cause of inflation in incidents of violence.

The horrifying aspect of unleash of violence against women is the participation of women as an abettor, actor and accomplices in such incidences of violence. Contemporary criminal researchers have seriously unveiled that women is no more an entity unsusceptible to violence but an equally dangerous criminal. Going by these researches and data of National Crime bureau there seems to be no differentiation of sex in criminal activities as the total cognizable crimes committed by the females are figured at 151309 during 2005. Although women commit almost all types of crimes nevertheless, the numbers of women detected for having committed crimes are not many in comparison to male crime doers. Because even today, the general assumption is that women are less likely to be suspected of crime, when suspected, they are less likely to be charged and prosecuted and finally if prosecuted, they are less likely to be convicted[378].

Certainly a new cultural climate is developing and taking hold which makes crimes by women a matter of grave concern for criminologists, penologists and functionaries of criminal justice administration. Too much has been said about the emancipation of women in recent times by the feminists but never there has been a serious concern determining the role of women against women. It is presumed that women commit more crimes against women because they get more opportunities to meet, mix and mingle with each other and for a longer period.

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378 Katherine S. Williams, *Text book on criminology*, (2001) pp. 490-91

Dowry And Dowry Crimes: The Legislative Attempts

In all dowry related crimes women are invariably made a party in the criminal proceedings. On account of the compulsive element in the demand of dowry, the woman is often subjected to cruelty and harassment from the husband and in-laws. Virtually this harassment and cruel treatment often takes a horrifying form of suicide or murder. The offenders of causing death relating to demand of dowry always try to give an impression of suicidal or accidental death, but the relatives of the victim or the victim accords otherwise. In order to curb this menace, Dowry Prohibition Act was enacted by the Indian Parliament in 1961. The object of the Act is to prohibit the evil practice of giving and taking of dowry. However, this enactment was proven to be insufficient in curbing the menace of dowry and instances of dowry death. Therefore, the rigors of law was strengthened and consolidated with the insertion of special provisions in the Indian Penal Code viz. sections 304-B and 498-A. The obvious reasons for inclusion of these rigorous provisions were difficulty in factual ascertainment and the proof of the incriminating facts in the peculiarity of the situation[379].

Sec. 498-A was inserted in the year 1983[380] to prevent the menace of dowry deaths. This provision provides that if any woman is subjected to any cruelty or harassment relating to any unlawful demand of dowry by the husband or any of his relative, the said person could be held guilty[381]. Even this provision was not sufficient to curb deaths on

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379 The Law Commission of India in its 91st report pointed out these two impediments in connection with dowry death cases

380 Inserted by Criminal Law (Amendment) Act (Act 46 of 1983)

381 S.498.A: Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation: For the purpose of this section, "cruelty" means (a) any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health(whether mental or physical) of the woman; or (b) harassment of the woman where

account of dowry demands. Therefore, in 1986 a further provision was inserted in the Indian Penal Code which consolidated and imposed rigorous punishment for dowry deaths[382]. This provision provides that if an unnatural death of a woman occurs within 7 years of her marriage for the demand of dowry, such death shall be presumed as dowry death and the husband or any relative of the husband liable for it can be punished with imprisonment from 7 years to imprisonment for life[383].

Necessary amendments were made in the Criminal Procedure Code[384] whereby it was made mandatory to get the body examined by the nearest civil surgeon by a police officer if:

I. the case involves suicide or death of a woman within 7 years of marriage raising reasonable suspicion as to cause of suicide/ death and or

II. any relative of woman has made a request in this regard[385].

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such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

382 Inserted by Act 43 of 1986

383 Section 304-B: Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within 7 years of her marriage and it is shown that soon before her death, she was subjected to cruelty or harassment by her husband or any relative of her husband for or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death. Explanation: For the purpose of this sub section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961)

384 Section 174 (3) substituted by Act 46 of 1983

385 Section 174(3): When-(i) the case involves suicide by woman within 7 years of her marriage; or (ii) the case relates to the death of a woman within 7 years of her marriage in any circumstances raising a reasonable suspicion that some other person committed an offence in relation to such woman; or (iii) the case relates to the death of a woman within 7 years of her marriage and any relative of the woman has made a request in this behalf; or (iv) there is any doubt regarding the cause of death; or (v) the police officer for any other reason considers it expedient to do so,

Furthermore the nearest magistrate has been empowered to hold inquest and inquiry[386] to ascertain the cause of death in addition to the investigation conducted by the police officer in dowry death cases. The court can take cognizance of an offence punishable under section 498-A of IPC upon a police report or upon a complaint made by the aggrieved person or by her father, mother, brother, sister or by her father's or mother's brother or sister or with the leave of the Court by any other person related to her by blood, marriage or adoption. This provision has specified the categories of persons who can complain of an offence under section 498-A. Therefore court cannot take cognizance on the complaint made by a stranger[387].

The Law Commission has expressed deep concern about the detection of crimes related to dowry death as well as meaningful prosecution of offenders because such crimes are invariably committed within the safe precincts of a residential house. The criminal is a member of the family; other members of the family are either guilty associates in crime, or silent but conniving witnesses to it. In any case, the shackles of the family are so strong that truth may not come out of the chains. There would be no other eye witnesses, except for the members of the family[388]. Keeping in view the impediments in the pre existing law in securing evidence to prove dowry related deaths, necessary legislative

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He shall, subject to such rules as the State government may prescribe in this behalf, forward the body, with a view to its being examined, to the nearest civil surgeon, or other qualified medical man appointed in this behalf by the State government, if the state of the weather and the distance admit of its being so forwarded without risk of such putrefaction on the road as would render such examination useless.

386 Section 176(1) of Criminal Procedure Code, 1973 substituted by Act 46 of 1983

387 Section 198-A of Criminal Procedure Code, 1973 substituted by Act 46 of 1983

388 Supra note 4

insertion relating to presumption of dowry death or proof of certain essentials was made in Evidence Act[389].

Section 113-A[390] provides that in case of commission of suicide by a woman within a period of 7 years of marriage and where she has been subjected to cruelty by her husband or the relatives of her husband, it shall be presumed by the court that such cruelty had been abetted by her husband or such relative of her husband.

Section 113-B[391] has also been similarly worded and is applicable in case of dowry death. Its applicability depends upon the commission of dowry death and cruelty or harassment in connection with demand of dowry. The Court will draw a presumption that the person who has caused such cruelty or harassment has caused the death of the woman. These changes have no doubt strengthened the rigors of law in cases of dowry deaths but have been very controversial on account of their misuse. In almost all the cases, generally the family members of the husband especially the mother in law are made accused in the criminal proceedings. This accusation warrants a scrutiny as to role of a woman in dowry related offences. One has to determine whether woman as mother in law is insensitive to the plight of daughter in law, again a woman. It needs to be determined whether they are main perpetrators of the crime or abettors or accomplices of the crime or just mute spectator of the crime. It may be a chance that their role in the crime is negligible and they are made the accused just because they are the family members of the husband of the deceased.

Aggressors or Victims: The Judicial Determination

A clear discernment has been made in this regard through significant judicial pronouncements of the Apex Court concerning dowry related crimes.

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389 Sections 113-A and 113-B

390 Supra note 5

391 Supra note 7

In *Lichhamadevi v. State of Rajasthan*[392], the mother in law was charged as main accused for commission of dowry death. The trial Court acquitted the mother in law on account of insufficiency of evidence but High Court as well as Supreme Court found the mother in law guilty. However, they deprecated the role of the investigating agencies in not charge sheeting the other family members who were also present at the crime scene.

In *Wazir Chand v. State of Haryana*[393], a case was filed against husband, mother in law and father in law of the deceased for causing harassment to her on account of dowry. The trial Court acquitted the mother in law for lack of evidence but the conviction of husband and father in law was assailed by the trial Court, High Court and Supreme Court.

In *Harbans Lal v. State of Haryana*[394], the husband and the mother in law were charged for causing murder on account of dowry as they have set the bride on fire after sprinkling kerosene oil. The trial Court acquitted the accused persons but the High Court of Punjab and Haryana reserved the acquittal order and their conviction was upheld by the Supreme Court also.

In *State of West Bengal v. Ori Lal Jaiswal*[395], the mother in law and husband were charged for causing harassment to the daughter in law who committed suicide on account of physical and mental cruelty. The trial Court held the accused guilty but the High Court set aside the conviction as it was based on the statements of the mother and brother of the deceased and same was not corroborated by independent witnesses. But the Supreme Court convicted them for causing harassment on account of dowry. However lesser punishment was given to mother in law considering her age.

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392 AIR 1988 SC 1785
393 AIR 1989 SC 378
394 AIR 1993 SC 819
395 AIR 1994 SC 1418

In *Salamat Ali v. State of Bihar*[396], the husband, mother in law, father in law were charged for causing dowry death. The trial Court convicted all the three persons and conviction was confirmed by the High Court. However, the Supreme Court confirmed the conviction of the husband but acquitted the parents on account of absence of specific clinching evidence against them.

In *State of Himachal Pradesh v. Nikku Ram*[397], the husband, mother in law and sister in law were charged for dowry death as the bride had committed suicide on being unable to bear the mental and physical cruelty meted to her for bringing insufficient dowry. The trial Court, High Court and Supreme Court acquitted them of the charges of causing dowry death but convicted mother in law for causing hurt.

In *Sham Lal v. State of Haryana*[398], the husband, father in law and grand mother in law were charged for dowry death as the deceased had died of burn injuries under abnormal circumstances. The trial Court acquitted the grand mother in law as she was in her 80's and was not in a position to cause dowry death.

In *Pawan Kumar v. State of Haryana*[399], the husband, father in law and mother in law were charged for causing dowry death as the deceased had died of burn injuries. The trial Court as well as the High Court held all of them guilty. However Supreme Court acquitted the parents by giving them the benefit of doubt but upheld the conviction of husband.

In *Rajayyan v. State of Kerala*[400], the husband, mother in law and two sisters in law were charged for dowry death as the deceased committed suicide by jumping into well because of physical and mental harassment on account of insufficient dowry . The trial Court acquitted all of them on account of insufficient evidence but High Court convicted the husband which was further upheld by the Supreme Court.

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396 AIR 1995 SC 1863
397 AIR 1996 SC 67
398 AIR 1997 SC 1873
399 AIR 1998 SC 958
400 AIR 1998 SC 1211

In *Smt. Shanti v. State of Haryana*[401], the husband and mother in law were charged for dowry death as the deceased had died of burn injuries.. The trial court acquitted both the accused by giving them benefit of doubt but High Court convicted both of them. However the Supreme Court reversed the conviction of mother in law as she was residing separately from her son in a separate house and there was no evidence to pin point her presence at the crime scene at the relevant time.

In *Babu Ram v. State of Punjab*[402], the husband, father in law and mother in law were charged for causing dowry death on the basis of dying declaration. The trial court acquitted the parents of the charges on the plea of alibi but convicted the husband. However the High Court convicted all of them as it could not find any reason in disbelieving the dying declaration. The Supreme Court upheld the finding of the High Court concerning the conviction of the parents but gave benefit of doubt to the husband as his role was not reasonably ascertained in the totality of the circumstances.

In *State of Punjab v. Gian Kour*[403], the husband, father in law, mother in law, and sister in law were charged for causing murder an account of dowry on the basis of dying declaration. The trial Court convicted mother in law and sister in law by relying on dying declaration. But the High Court acquitted them on account of presence of thumb mark on the dying declaration which remained unsatisfactorily explained as post mortem report revealed that both the thumbs were 100% burnt. The Supreme Court also upheld the acquittal on the same ground.

In *Satpal v. State of Haryana*[404], the husband and mother in law were charged for dowry death. However the mother in law died before the commencement of the trial.

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401 AIR 1998 SC 2628
402 AIR 1998 SC 2808
403 AIR 1998 SC 2809
404 AIR 1999 SC 1476

In *Ram Kumar v. State of Haryana*[405], the husband and mother in law were charged for dowry death. The trial Court convicted them which was upheld by the High Court and Supreme Court

In *Kans Raj v. State of Punjab*[406], the husband, mother in law, brother in law and his wife were charged for dowry death. The trial court convicted all of them but the High Court acquitted all of them and the Supreme Court confirmed the acquittal of other persons except husband. However the Supreme Court pointed out that the family members of the husband cannot in all cases be held to be involved in the demand of dowry. In cases where such accusations are made, the overt acts attributed to persons other than husband are required to be proved beyond reasonable doubt.

In *Satvir Singh v. State of Punjab*[407], the husband, father in law and mother in law were charged for dowry death. The trial court convicted all of them which was confirmed by the High Court as well as the Supreme Court.

In *Mungeshwar Prasad v. State of Bihar*[408], the husband, father in law and mother in law were charged for dowry death. The trial Court convicted all of them which was confirmed by the High Court. However the Supreme Court acquitted the mother in law and father in law as they were of 80 years of age at the time of the death of the deceased. Therefore, the age becomes one of the factors for doing away with the conviction.

In *Ram Badan Sharma v. State of Bihar*[409], the husband, father in law and mother in law were charged for dowry death. The trial court convicted the husband and father in law but acquitted the mother in law on the basis of reasonable doubt about the presence in the house at the relevant time as she was sick during the said period and was under

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405 AIR 1999 SC 1490
406 AIR 2000 SC 2324
407 AIR 2001 SC 2828
408 AIR 2002 SC 2531
409 AIR 2006 SC 2855

treatment at Calcutta. The same decision was upheld by the High Court and Supreme Court.

In *M. Srinivasulu v. State of Andhra Pradesh*[410], the husband and mother in law were charged for dowry death. The trial Court convicted both of them. The High Court convicted the husband but acquitted mother in law on account of absence of clinching evidence. However the Supreme Court acquitted the husband also.

In *Narayan Murthy v. State of Kerala*[411], the husband, father in law and mother in law were charged for dowry death. The trial court acquitted all of them on account of insufficiency of evidence but the High Court held the husband guilty whereas acquittal of mother in law was upheld and father in law died during the pendency of the trial. However the Supreme Court upheld the order of the trial Judge as there was contradiction in the statements of brother and mother of the deceased as well as other important witnesses. Hence it led to the acquittal of the accused persons.

The Concluding Obsevations

The cases mentioned hereinabove depict that out of the twenty cases, the mother in law was convicted in six cases by the Apex Court for the involvement in the dowry related crimes; whereas in fourteen cases, she was acquitted of the charge on account of clear cut deficiency in evidence, age factors as well as in some cases, benefit of doubt was given to her. However even the 30% conviction rate of the women in dowry related crimes is sufficiently high to put forth the point that the relationship of mother in law and daughter in law is strained relationship. Proper sensitization of the women is therefore necessary to curb the menace of dowry and dowry deaths because a woman can well understand the problems of a woman and their increased sensitization and education can do a lot good to eradicate this evil from the society. All the charioteers of the feministic jurisprudence should give a serious

410 AIR 2007 SC 3146
411 AIR 2008 SC 2377

thought to this existing dimension. However in 70% of the cases the mother in law is unsuccessfully charged for dowry death just because she happens to be a member of the family of husband. This emerging trend needs to be deprecated.

The Hon'ble Apex Court has pin pointed in the case of *Pawan Kumar v. State of Haryana*[412], that often innocent persons are also trapped or brought in with ulterior motives. This places an arduous duty on the court to separate such individuals from the offenders. Hence the court have to deal such cases with circumvention, sift through the evidence with caution, scrutinize the circumstances with utmost care.

In *Kans Raj v. State of Punjab*[413], the Supreme Court deprecated this tendency when the Hon'ble Court pointed out, "…A tendency has, however developed for roping in all relations of the in laws of the deceased wives in the matters of dowry deaths which, if not discouraged, is likely to affect the case of the prosecution even against the real culprits. In their over enthusiasm and anxiety to seek conviction for maximum people, the parents of the deceased have been found to be making efforts for involving other relations which ultimately weaken the case of the prosecution even against the real accused."

At times the investigating agencies adopt a casual approach while charging some persons for causing dowry death whereas leaving the main accused scot free. Such tendency is also deprecated by the apex Court[414].

The investigating agencies should not blindly charge the women of a family for causing dowry death unless and until there is substantial evidence against them. The higher acquittal rate of the women pinpoint that the role of women in dowry related cases has not been properly ascertained by the investigating agencies. If the investigating agency feels that the evidence is insufficient or reasonable ground of suspicion

412 Supra note 24
413 Supra note 31
414 Supra note 17

exists, it can release the persons on execution of a bond with or without sureties and can direct such persons to appear before a magistrate as and when so required[415]. Henceforth the investigating agency should make use of their power to determine the sufficiency of evidence against the persons charged for dowry deaths and not to implicate every person of the family of the husband.

The voluntary organizations as well as religions organizations can also contribute in creating proper awareness campaign amongst the masses concerning dowry deaths. Special programmes need to be chalked out for the females so that they are in a position to stand out and resist the dowry demands by their male counterparts. Since females are the first teacher of the progeny, therefore their sensitization in this regard will certainly help in nurturing a progeny which shall be gender sensitive resulting ultimately in the upliftment of women as a class.

Due attention should be paid to psychologically distributed entities and establishment of psychological clinic can provide an answer to smoothen the nerves of such persons so that they do not infuriate violence, be it may men or women.

Dr. Sanjay Gupta*

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415 Section 169 of Criminal Procedure Code, 1973

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The Jammu and Kashmir Agrarian Reforms Act, 1976 : A Critical Analysis

Introduction

The Jammu and Kashmir State prior to 1947 was under the grip of feudal ownership of cultivable land and the actual tillers (in absolute majority up to the extent of ninety nine percent) were tenants-at will. One of the major planks of Jammu and Kashmir National Conference under the leadership of Sheikh Mohd. Abdullah in launching the struggle to transfer political power to the representatives of the people by abolishing the princely rule of Dogra dynasty hinged on the slogan *'land to the actual tillers'*[416].

It was towards the middle of the year 1944 that All Jammu and Kashmir National Conference laid before itself the ideal of '*New Kashmir*'. The 'New Kashmir' or '*Naya Kashmir Charter',* adopted and announced by All Jammu and Kashmir National Conference, contained the basic policy which was to be followed by the future democratic Governments of the State[417]

In this backdrop, an endeavour has been made to make a critical analysis of the important agrarian legislations in the state of Jammu and Kashmir with special reference to The Jammu and Kashmir Agrarian Reforms Act, 1976.

The Big Landed Estates Abolition Act, 1950

In Jammu and Kashmir, the first major leap forward in the direction of agrarian reforms came into existence in the shape of The Big landed Estates Abolition Act. When all other States in India and the legislatures therein were in their infancy and sleeping over the matters, it was very bold and drastic leap forward cutting at the base of the diseased system pertaining to lands, which had almost eaten up the very roots of the

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416 *Khushwant Singh, 'Flames of the Chinar - Sheikh Abdullah an auto biography,' 357-58 (1982)*

417 *Alastair* Lamb, 'Kashmir - A Disputed Legacy 1846-1890', 215 (1995)

development in agriculture like a termite. It had very brave and blunt slogan of *'Land to the tillers'* and that too *'without payment of any compensation'*. The notable point which makes this achievement a big leap in administrative history of J&K is that a very large chunk of land was transferred to a large number of tenants without any compensation within a short period of five years. This led to an economic cum social revolution in the rural areas. A powerful wave of happiness and prosperity ushered in eighty percent population of the State. It removed a heap of socio-economic indignities being suffered by the landless tillers. It ensured a dignified social status and rich life to vast multitude of rural poor. It was a remarkable socialist relief conferred upon the poor landless peasantry. As far as the question of rights of landlords is concerned, it can be said that the hue and cry made by them was all exaggerated, useless, self centered and purely mean. The Government had left with them sufficient quantity of land for their use. Whatever the Government took from them was either lying useless or was not properly utilized and the Government took it for better utilization and for general betterment.

The Jammu and Kashmir Agrarian Reforms Act, 1972

The process of agrarian reform was carried on further by enacting The Jammu and Kashmir Agrarian Reforms Act of 1972 and then the Agrarian reforms Act of 1976 The Act of 1972 was different from BLEA[418] Act in two main respects viz., it provided that payment was to be made to the ex landlords in lieu of extinguishment of their rights in land and secondly, it provided for abolition of absentee landlordism. As a result of which ownership rights were conferred on many tenants[419]. Constitutional validity of this Act was challenged in the *Supreme Court in Kh. Fida Ali v State*[420], on the ground that the landowners had been

418 The Big Landed Estates Abolition Act, 1950

419 *Swami Raj Sharma, 'Agrarian Reforms in the Jammu and Kashmir State-A Big leap forward,' in Satpaul Sahni,' Jammu and Kashmir Landmarks in State Public Administration', 26 (2002)*

420 AIR 1974 SC 1522

rendered landless and compensation to be paid was illusory and that the Act was not saved by the provision of Article 31-A of the Constitution of India.

The Supreme Court however held that the golden web throughout the warp and woof of the Act was the feature of personal cultivation of land and that it contained a clear programme of agrarian reforms in taking stock of the land in the state which was not in personal cultivation (section 3) and which though in personal cultivation was in excess of the ceiling area (Section 4).Court further ruled that there was no discrimination in favour of the orchard owners in not including land which was an orchard on the first day of September 1971 within the definition of land under the Act since orchard was reckoned along with the 'land' for the purpose of determination of the ceiling area under the Act and a levy of annual tax was imposed even in the case of orchards in excess of ceiling area. The full bench of the State High Court again in *Rehim* v *Ama*[421]remarked that the Agrarian Act of 1972 was passed with the object to

a) Abolish the system of absentee landlordism including the allied forms of intermediaries
b) To make the tiller the owner and
c) To set a ceiling on land holding

The implementation of the 1972 Act caused some confusion and unnecessary litigation. So, initially the operation of this Act was suspended and thereafter repealed and in its place Agrarian Reforms Act of 1976 was passed. Most of the provisions and basic scheme of the 76 Act is similar to that of 72 Act. One major change brought about is that in the Act of 1972, 'ceiling area' applied to orchards also whereas in the Act of 1976, orchards have been taken out of the definition of ceiling area so that, now the restriction of 12½ standard area does not apply to orchards. It applies to 'land' only and 'land' as defined in section 2 (9)

421 AIR 1975 J&K 33; 1975 JKLR 140; 1975 KLJ 210

means the land which was occupied or was let for agricultural purposes or for purposes subservient to agriculture or for pasture. The other prominent features of The Jammu and Kashmir Agrarian Reforms Act, 1976 are:-

1. Absentee land lordism has been abolished totally except in the case of gumpas of Ladakh district and places of worship, waqfs, and dharamshallas. So, if a person was not cultivating his land during kharif crop 1971, his rights are deemed to have been extinguished and vested in the State with effect from 1st May 1973.[422]
2. The personally cultivated land found in excess of ceiling area of twelve and a half standard acres is to vest in the State free from all encumbrances. The important point is that the ceiling fixed for both the tenant and landlord is same i.e. twelve and a half standard acres.[423]
3. The ownership of a dwelling house and the land appurtenant thereto in occupation of a person who was a tiller, or a member of a scheduled caste or is a landless agricultural labourer, or is a Gujjar or a Bakarwal or Gaddi or is a landless labourer engaged in occupation ancillary to agriculture, has been given to such person if he has been in occupation of such house for a continuous period of ten years on the date of commencement of the Act or if such house has been built at the expense of such person or any of his predecessors - in - interest.[424]
4. Opportunity is given to persons whose rights in land have been extinguished and who were entitled to recover rent in kharif 1971 directly from the tillers, to resume land for bona-fide personal cultivation.[425]

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422 Sec-4
423 Sec-5
424 Sec-6
425 Sec-7

5. It also provides for vesting of ownership rights in land in prospective owners i.e. the tillers or their legal heirs, in accordance with the procedure provided.[426]
6. There is provision for payment of rent by the tiller to the State unless and until such land in either resumed by the ex-landlord or is vested in ownership rights to the tiller. Land and rights taken away or abridged by virtue of the operation of the Act are deemed to have been acquired by the State for which payment is to be made in accordance with the provision made in schedule III.[427]
7. Number of restrictions has been imposed to curb the utilization of agricultural land for non agricultural purposes.[428]
8. The Act has also taken care of matters like transfer of land to non state subjects, encroachment of state land etc.[429]

This Act came into force from 13th of July, 1978 and in the same year it was challenged on the ground of its being constitutionally ultra vires. The Supreme Court once again in *Prem Nath Raina* v. *state of Jammu and Kashmir*[430]held the Act valid on the ground that the Act is a measure of agrarian reform and so saved by Art 31A from the challenges under arts14, 19 or 31 of the constitution. The Court observed that the dominant purpose of the statute is to bring about a just and equitable redistribution of land, which is achieved by making the tiller of the soil the owner of the land which he cultivates and by imposing ceiling on the extent of land which any person, whether landlord or tenant, can hold. The full bench of the State High Court in *Jagtu and others v. Badri and others*[431] explained the purpose of this Act which is:

a. To transfer land to the tillers for their personal cultivation,

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426 Sec-8
427 Secs.-9,11
428 Sec-13
429 Secs.-17,26
430 *AIR 1983 SC 920*
431 *AIR 1980 J&K 192*

b. To abolish absentee landlordism and give land to the actual tillers subject to the ceiling area, and
c. Distribution of land amongst the landless so that the land is utilized in the most beneficent way in orders to achieve the goal of welfare State set before it by the founding fathers of the constitution.

While the Big landed Estates Abolition Act, 1950 was a revolutionary but an experimental measure, which freed the tiller from the fetters of serfdom, the Agrarian Reforms Act of 1976 is the Magna Carta, the basis of the tillers economic, social and personal freedom, which provides him ample opportunity for the development of his personality and places him at par with all other sections of society[432].

But there are certain anomalies, shortcomings, procedural inequalities and hurdles in the implementation of this social legislation, which, if taken care of by the legislature by making suitable amendments,shall make this Act a big leap in real sense.The various shortcomings are-

1. The Act is silent regarding the time limit within which a dispute should be settled in order to accomplish the constitutional obligation. In most of the cases, the time consumed exceeds even the period spent in civil litigation in civil courts. It defeats the whole objective behind the legislation and the very spirit of the legislation in fructuous. The trial under the Act must be speedy one and if not settled within a limited time, it must be referred to higher authorities without delay.
2. The conferment of absolute ownership rights under sec 8 of the Act in favour of the prospective owners is subject to the payment of prescribed levy amount. In a large number of cases, the prospective owners were either unable or unwilling to pay this amount, with the result the implementation of the Act got stuck up in these cases.

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432 *'Naya Kashmir, Jammu and Kashmir National Conference', redrafted by G.M Shah, 15 (1987)*

3. In the section 9 of the Act a provision has been made that a landlord is entitled to recover rent with effect from 1st May 1973. In the garb of this provision, the exlandlords are filing recovery proceedings against their tenants, getting decrees of thousands and thousands of rupees since 1 May 1973. The tenants in some cases were forced to abandon their tenancy land being not in a position to satisfy their decrees. This provision should be amended by adding the words *'recoverable only if due'*. It will facilitate in removal of ambiguity from the above said section of the legislation[433].
4. In case of ejectment of tenants otherwise than in due of course of law, section 27 has been prescribed, but the law is silent vis-à-vis the payment of produce to the tenant during the period of his remaining out of possession due to forcible ejectment. The tenant suffers adversely for years together; sometimes he gets possession even after twenty or more years. There is no provision to compensate a gullible farmer in such like cases.
5. In resumption cases, it is given that a landlord may resume land for his bonafide personal cultivation. This bonafide has been repeated thrice in the section 7 of the Act but it has not been applied in resumption cases in letter and spirit. Resumptions have been granted to the landlords indiscriminately and the word bonafide given therein has thus lost its significance in implementation.
6. There is mandatory provision in section 13 of the Act that no tenancy shall be created or continued after coming into force of the Act. In practise this part of the enactment has not been implemented in letter and spirit.

433 *M.L. Misri and M.S. Bhatt, Poverty Planning and Economic Change in Jammu and Kashmir,87 (1993)*

7. In section 27, a suitable provision should be carved out by which the tenants may become entitled to receive produce of the lands, for the period for which they remain out of possession because of forcible ejectment. The produce must be given physically, on spot.
8. In the penalty clause i.e. section 38, for contravention of any lawful order, a provision must also be made for the payment of adequate compensation to the aggrieved party, by the person who contravenes any lawful order.
9. The indemnity clause saves Patwaris, Tehsildars and other officers for anything which is done by them in good faith. These officers have misused this indemnity and created a mess by changing girdwaris time and again for ulterior considerations.

This Act was initially scheduled to be fully implemented by the end of sixth five year plan i.e. ending 1984-85, but it could not be achieved due to various reasons, one such reason being the lukewarm attitude adopted by the political leadership towards the implementation of this Act. Then, the implementation was sought to be completed by the end of seventh five year plan, but till the end of March 1994 only 90% of the

villages were covered. The latest information relating to the implementation of the Act, based on data collected from the revenue department, is provided in the Table below[434]:

	Kashmir Division	Jammu Division	Total
Area involved under section 4.	12.53 lac kanals	22.59 lac kanals	35.12 lac kanals
Total number of villages where Section 4 has been implemented	3256	3419	6675
Total number of prospective owners declared	535970	326870	862840

434 *Information collected from Revenue Department, Jammu April 2010(unpublished)*

Total area where prospective owners have been declared as owners under Section 8 and 12.	10.35 lac kanals	19.58 lac kanals	29.93 lac kanals
Balance area under Section 8 and 12.	1.02 lac kanals	1.62 lac kanals	2.64 lac kanals
Number of resumption applications received			22464
Total number of application disposed off			21971
Balance of applications			493
Amount of Levy recovered from ex-owners			1315.47lacs
Total levy distributed			838.03 lacs
Balance (levy to be disbursed)			477.44 lacs
Total number of SC/ST/OBCs who have been given ownership rights	98895	106200	205095

The data makes it clear that the implementation of the Act is still not complete. Lot of work is yet to be done. It is hoped that in coming years, the implementation shall be done on war footing so that it does not turn out to be an unfinished agenda.

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Probation and Parole as a Rehabilitative Technique with Special Reference to Their Provisions in the State of Jammu and Kashmir

Abstract

No one in this world is a born criminal. In other words, criminals are not born but made. The occurrence of crime is dependent upon variety of factors. The earlier penological approach held custodial measures to be the only way to curb crime. But the modern penological approach has ushered in new forms of sentencing whereby the needs of the community are balanced with the best interests of the accused. The concept of Probation and Parole is one that attempts to reintroduce convicts back to the civilized society. As the ideology of modern criminal jurisprudence is shifting from traditional deterrent methods to the rehabilitative, reformative, correctional and clinical methods so for the correction of criminals, application of clinical methods like probation and parole become the need of present social milieu. The present research deals with the concept of probation and Parole. It also shows that how Probation and Parole act as rehabilitative techniques including a special focus on their provisions in the State of J&K.

Introduction

Dostoevski stated that "Humane treatment may raise up one in whom the divine image has long been obscured. It is with the unfortunate above all, that humane conduct is necessary".

Crime is a deviance from normal behaviour which affects the community at large has undergone refinement in the long course of its evolution. Scholars have speculated regarding the nature, effect and modes of control of this antisocial behaviour. The unending debate regarding the measures that the community should adopt to prevent anti

social behaviour has been inconclusive; however, it has unfolded the facets of the extremely complex social phenomenon.

In the light of this development about the concept of crime, the punitive and deterrent devices stand rejected and in their place humane approach, correction and treatment of the offender within the same social milieu of which he is part have been accepted as better devices for reformation and rehabilitation of the deviant member of the society.

The traditional methods of curtailing crime were based on the theory of deterrence and retribution. The objective of punishment was punitive and repressive. The methods used to punish a wrong were meant to bring him into the disgrace in society or to shun him out of society. These methods mainly consist of corporal punishment (flogging, branding and multiliation), death and banishment or transportation.

It shall be interesting to highlight latest example by the scholar of the applicability of humane approach for bringing transformation of three terrorists lodged in Egg Cell better known in the crime world as Anda Cell (It is an egg shaped cell in the Jail Barracks). The dangerous prisoners are kept in such egg cells to ensure tight security. The three terrorists were undergoing life imprisonment for their alleged involvement in terrorist activities. The continuous solitary confinement made them totally indifferent and hardened but a surprise was in store for them when Dy. Inspector General Bhushan Upadhaya of Nagpur, a well known Urdu poet walked to their cell to inquire about their well being and advised them to spend time by pray to God and reading the Holy Quran. Initially none of them showed any interest. But wisdom prevailed over them after constant counselling and some humanitarian gestures. Today the three appeared to be changed human beings spending their days by reading holy books and asking for some books and also for newspapers[435].

This case has been referred to impress upon the need of humane approach towards prisoners so as to bring positive transformation

435 Daily Excelsior, April 26, 2005.

enabling such prisoners to become better human beings. Custodial Parole and Probation are glaring examples of representing humane instinct in the process of correctional techniques in Prisons.

The idea of rehabilitation is a relatively new phenomenon in human history, although in practice, some forms of rehabilitative behaviour are characteristics of all social groups. The aim of rehabilitation is to change the offenders in such a way so as to block their deviant impulses. For doing so, it is necessary to alter their individual psyche or to modify their attitude or to provide with job skills. Hence the task of rehabilitating criminals is essentially to motivate them in a way as to abide by the law and make them useful members of the same social milieu from which they have deviated.

Meaning of Probation and Parole

The term Probation has been derived from the Latin word Probare meaning 'test or to prove'. It is a form of criminal sanction imposed by court upon an offender just after the verdict of guilt but without the prior imposition of a term of imprisonment.[436]

Probation can be defined as the postponement of final judgement or sentence in a criminal case, giving the offender an opportunity to improve his conduct and to readjust himself to the community, often on condition imposed by the court and under the guidance or supervision of an officer of the court.

The United Nations Department of Social Affairs 1951 (Probation and Allied Measures) has defined Probation as a process of treatment prescribed by the court for persons convicted of offences against the law during which the probationer lives in the community and regulates his own life on condition imposed by the court or the other constituted authority and is subject to the supervision of a Probation officer[437].

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436 Encyclopedia of Crime and Justice; Vol. (3) 1240.

437 Probation and Related Measures (New York: United Nations, department of Social Affairs, (1951), p. 287.

The American Bar Association defines the use of the term probation as a sentence not involving confinement which imposes conditions and retains authority in the sentencing court to modify the conditions of sentences or to re-sentence the offender if he violates the conditions[438].

In India Probation seems to have been accepted as a sentencing disposition, allowed only to selected offenders who are being placed in the community with conditions and under the supervision of the officer of the court[439].

The word Parole comes from a French word "je donne ma Parole" meaning 'I give my word'. While the dictionary definition is 'Word of honour'. The term Parole was first used in a correctional context in 1847 by Samvel G. Howe, a Boston Penal reformer[440].

"Parole is the release from a penal or reformative institution, of an offender who remains under the control of correctional authorities, in an attempt to find out whether he is fit to live in the free society without supervision"[441].

Dr. Sutherland considers Parole as the liberation of an inmate from prison or correctional institution on condition that his original penality shall revive if those conditions of liberation are violated[442].

Origin and Development

The history of Probation can be traced back to the medieval concept of 'benefit of clergy' surviving in England and America until the middle of the nineteenth century. The privilege of benefit of clergy' permitted clergy and other literates to escape the severity of criminal law.

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438 Donald J. Thalheimer: Cost Analysis of Correctional Standards: Community Supervisions. Probation Restitution and Community Service Vol II 2. (1978).

439 S.C. Counsel: probation of Offenders Act and Rules (Central and States) 5th Ed. 2 (1980).

440 Hassin M. Soloman; at 179.

441 Gillin J.L. : Criminology and Penology (3rd Ed.) P. 339.

442 Sutherland and Cressey: principles of Criminology (6th Ed.) p. 575.

The age old proverb is “Great ideas have often modest beginnings”. This happened in Boston in 1841, when John Augustus, a modest shoe maker took the first bold step. As a private citizen he was able to convince a Boston judge to release petty offenders to him without imposition of sentence for a short period of time with the promise that offender upon returning to court, would show convincing signs of reform.

Parole did not develop from any specific source or experiment, but is an outgrowth of a number of independent measures, including conditional pardon, apprenticeship by indenture, the transportation of criminals to America and Australia, the English and Irish experiences with a system of ‘Ticket on leave’ which means prisoners were released into free atmosphere only on one condition of presenting surety for good behaviour, and the work of American prison reformers during nineteenth century.

The Government of India in 1934, suggested to provincial governments to enact probation laws and the same was complied with by quite a few of them. But later on a uniform Central Act was passed in the country in the year 1958 viz., Probation of Offenders Act, 1958. Whereas after the repeated protests which were launched by political offenders necessitated that the prisoners should be treated humanely and also gave the impetus to each state to set up their own Parole Boards during later 20^{th} century.

Probation and Parole as Rehabilitative Techniques

The traditional concept of punishment has been transformed. Now there is shift from coercion to correction. The germ of the rehabilitative ideology is contained in the phrase ‘bringing into line’. Rehabilitation consists of an attempt to restore discredited individuals to the status of full fledged participating members of the society. Now the point arises is that how probation and parole act as rehabilitative techniques. To answer this point various methods are discussed.

1) Creation of healthy relationships

Probation and Parole helps in making sound relationship between the probation officer or field workers and the offenders and sound relationship makes an easy way for treatment of the offenders.

2) Case work as a means of rehabilitation

The officer while dealing with the case of offender gets at the root of the problem of the offender and encourages him to have positive attitude towards future life by counselling, advice and suggestions.

3) Home visits as means of rehabilitation

Probation and Parole involves in them the provision of home visits which give an opportunity to look at the emotional situation of the offender. Involvement of the offender in family matters gives him a moral boost and courage to change himself.

4) Change of environment as a mean of rehabilitation

Parole and Probation stresses upon the change in the environment of offender because unhealthy environment is one of the causes of deviation. But the question of changing environment should be decided according to the needs of each individual.

5) Incorporation of religious feelings

The process of probation also includes the incorporation of religious feeling in the offenders and indulging in him the feeling of being a human being and not an animal.

6) Employment as rehabilitation

The release of offender on probation and parole provides him (offender) with a chance to do any job as per his liking and capacity or skill. In this way his interest towards living a dignified life emerges out and help him to maintain his social standing with other people.

All these methods help to constitute probation and parole as competent rehabilitative techniques, but this alone is not enough, both are granted after going through the proper procedure and both the techniques involve certain services which are almost in parallel position to each other.

Parallel Services

Pre-Sentence Report		Pre-Parole Report

Court		Board

Probation Supervision		Parole Supervision

Jammu and Kashmir Scenario

As far as our state is concerned the State of Jammu and Kashmir has separately enacted laws which are enforced and implemented only in the State. J&K Probation of offenders Act, 1966 is one of those separately enacted legislation.

The object and purpose of the aforesaid enactment is same as that of probation of Offenders Act, 1958, which is a central legislation to provide a chance to the offenders to change themselves and to rehabilitate them.

The provisions of Jammu and Kashmir Probation of Offenders Act are similar to the Central Act. This enactment was passed by the J&K State legislature, received the assent of the Governor on 28th October, 1966. It has been enforced from 15 January 1970 in the districts of Jammu and Kashmir vide S.R.O. No. 23, dated 15th January, 1970 and has been enforced in the cities of Jammu and Srinagar from 15 May, 1969, vide S.R.O. 267 dated 3rd May, 1969.

Besides, Jammu and Kashmir Probation of Offenders Act, 1966, J&K Probation of Offenders Rules, 1968 have also been made. These rules have been made by Government in the exercise of powers conferred by section 17 of J&K probation of Offenders Act, 1966. This list of rules includes various rules which have to be followed by Prison authorities for the proper implementation of J&K Probation of Offenders Act, 1966. The important rules which are relevant to the present Article are mentioned below:

Rule 6 : District Probation Officer[443]

443 J&K State Jail Manual 2000.

The Government shall appoint or nominate a District Probation Officer in each district to be incharge of the work of Probation throughout the District. Subject to the control of District Magistrate, the District probation officer shall supervise, control and be responsible for the proper performance of the work of probationer within the District of which he is incharge.

Rule 7 : District Probation Committee

A District probation Committee shall be comprised of following members:

a) District Magistrate (Chairman)
b) District Probation Officer (Secretary)
c) Members nominated by government for a period of three years :
    1) Not exceeding six officials from among Judiciary, Police, Education Prisons, Social Welfare and other concerned departments of the district.
    2) Not exceeding five non-officials who may include inter-alia representatives of societies, employers and social workers in the district.

Rule 24: Supervision of Probationer

The Probation Officer shall act as a friend and guide of the Probationer. For this purpose, he shall, subject to any provision of the supervision order, require the Probationer to report to him at stated intervals, meet him frequently and keep in close touch with him.

Rule 25 : Rehabilitation and aftercare of Probationer

a) Training facilities;
b) Employment opportunities;
c) Social Security Services and Public Health and Welfare Agencies and other sources, if necessary;
d) Financial aid towards rehabilitation if available;
e) Contacts and association with suitable person and useful organizations.

J&K State Jails Advisory Board

As far as the grant of Parole is concerned, this job is performed by an Advisory Board in the State of J&K. It is the State Advisory Board which takes the burden of grant of Parole to the offenders. J&K State Jails Advisory Board will have the following composition:

a) Chairman – Inspector General of Prisons and Correctional Services.
b) Members – Two social workers from the field of correctional work.
   - One representative of the Administration of justice;
   - One representative of Police Department;
   - Two representatives of correctionsl services;
   - Representatives of Director of Education, Director of Social Welfare, Director of Industires and Commerce and Director of Agriculture and University Department engaged in training and research in Criminology and correctional work.

Working of Board

The J&K State Jail Advisory Board shall meet at least once a year and at such other times as the Chairman may decide. As and when necessary, the Board may send certain matters for the views of experts from the fields related to correctional work. The quorum for a meeting of the Board shall be seven including the Chairman.

The State Advisory Board has shown keen interest in the need of implementation and enforcement of the provisions granting Parole to the offenders, provided the offender should follow all the conditions and he must also has the germs of rehabilitation in him. It is only after the deep scrutiny of the case the offender is released on Parole. Besides the J&K Jails Advisory Board, the Government of the J&K is also working for this purpose As per a News Article: J&K Government has set free 92 prisoners, held under the State Public Safety Act, 1978. As many as 53 were released after their imprisonment was quashed by the State High Court, 9 prisoners had been released on Parole and while 26 on the recommendations of Review Committee headed by State's Financial

Commissioner (Home). 4 others were released on the recommendations of the state[444].

Conclusion

Probation and Parole is the need of modern time where the stress is not upon the punishments but upon the reformation of offenders. So to fulfil these needs judiciary and Parole Boards/advisory Boards are working enthusiastically and are never loosing chance to keep offender unbenefitted if his case has all the needed requirements. Keeping the reformation of offenders into mind the scholar wants to conclude with few lines:

I am part and parcel of society,
I am your Pal,
I am your kith and kin,
Let me go out, give me a chance to remould.

Shuchi Sharma❁

444 Kashmir Times, Jammu dated 19 June.

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Supreme Court Revisits the Law on Muslim Gifts: A Case Comment on Hafeeza Bibi v. Sheikh Farid (2011)

I. Introduction

Registration of some classes of documents is compulsorily required under the various statutes like Transfer of Property Act, Contract Act etc. The (Jammu and Kashmir) Registration Act, Svt 1970 (1922 A.D) is a specific Legislation which under section 17 enumerates the documents which require compulsory registration under the Act. The first class of document which is enumerated under clause (a) sub section (1) of section 17 of the Registration Act (hereinafter referred as 'the Act') is an 'instrument of gift of immovable property'. Thus as a general rule gifts relating to immovable property must be registered under the Act. The Act lays no exceptions to this rule as such; however, a repugnancy arises among the Statutes regarding the compulsory registration of the Gifts of immoveable property made by a Muslim. The (Jammu and Kashmir) Transfer of Property Act, Svt 1977(1920 A.D.) saves under section 129 any rule of Muslim Law relating to gifts thereby exempting such gifts from the requirement of registration under section 123 of the Transfer of Property Act. However, the Registration Act, without any exception for Muslim gifts, mandates compulsory registration for all gifts pertaining to immovable property. Given this context the pertinent question arises- whether the Muslim gift of immovable property is compulsorily registrable under section 17 (1) (a) of the Act? This question assumes more importance because under Muslim Law a man can give away the whole of his property during his lifetime by way of a gift leaving his heirs high and dry.[445]

The present paper in light of various High Court judgments and the recent Supreme Court Judgment in Hafeeza Bibi's Case attempts to

445 See Asaf A.A. Fyzee, Outlines of Muhammadan Law, 4th Edition, Oxford University Press, p.217.

explore the law relating to the compulsory registration of the Muslim gifts of immovable property.

II. Instrument of Gift: Definition and the requirement of registration

The word "gift" is not defined in the Registration Act but in common parlance it is understood in much the same sense as it is defined in sec.122 of The Transfer of Property Act, which reads:

> *"Gift" is the transfer of certain existing moveable or immovable property made voluntarily and without consideration, by one person called donor, to another called the donee and accepted by or on behalf of the donee.*
>
> *Such acceptance must be made during the lifetime of the donor and while he is still capable of giving. If the donee dies before acceptance the gift is void.*

Sec.123 of the Transfer of property Act requires that the transfer of immovable property by way of gift must be effected by a registered instrument signed by or on behalf of the donor, and attested by atleast two witnesses. Thus, a document by which rights in immovable property are surrendered without any consideration is in effect a 'deed of gift' which under sec.17 (1) (a) requires registration.[446] Section 17(1)(a) is not attracted when the deed of gift relates to moveable property, but all instruments of gift of immovable property must be registered whatever be the value of property.[447] An unregistered gift deed, therefore, cannot be used to create a title to immovable property.[448]

An instrument of gift which effect an immediate transfer of ownership falls under this clause though the instrument provides that

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446 Hira Singh V. Punjab Singh, 1925 Lah 183; 78 IC 113.

447 Proto Kolitah v. Mottea Kolitah, 11 WR(Civil) 334; 2 BLR (App) 45.

448 See Rup Narain Panday v. Sheo Sagar Tewari, 1939 Pat 258; M.E.Tin v. Usheva Mi, 1927 Rang 335 at p. 1.

whenever called upon by the donee, the donor would execute a registered gift deed.[449]

In Hafeeza Bibi v. Sheikh Farid (dead)[450], R M Lodha J, observed:

> *…the expression 'instrument of gift of immovable property' ……. [means] ……. an instrument or deed which creates or completes the gift, thereby transferring the ownership of the property from the executants to the person in whose favour it is executed. In order to affect the immovable property, the document must be a document of transfer; and if it is a document of transfer it must be registered under the provisions of the Registration Act.*

III. Gift under Islamic law and the requirement of Registration

The essentials of a valid gift, according to Islamic law are aqid (i.e., tender and acceptance or declaration and assent) and milk (seisin)[451]. The Privy Council in the case of Mohammad Abdul Ghani and Anr. V. Fakhr Jahan Begum and Others[452] referred to "Muhammadan law" by Syed Ameer Ali and approved the statement made therein that three conditions are necessary for a valid gift by a Muslim:

a) Manifestation of the wish to give on the part of donor ;
b) The acceptance of the donee , either impliedly or expressly;
c) The taking of possession of the subject matter of the gift by the donee, either actually or constructively.

According to section 129 of the Transfer of Property Act no rule of Mohamedan law shall be affected by chapter VII of the Transfer of Property Act relating to gifts.[453] It, therefore, follows that an oral gift made by a Muslim is a valid gift and does not require registration, which

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449 S. Chinna Buddha Sahib v. Raja Subamma, (1954) 2 MLJ (Andh) 113.

450 Jugdement delivered on May 6, 2011 by R.M. Lodha and SS Nijar JJ.

451 See Tara Parsana Sen v. Shandi Bibi, 1922 Cal 68.

452 1922 (49) IA 195.

453 Bishun Prasad v. Mohammad Nazir, 14 PLT 559.

otherwise is not a valid gift under section 123 of the Transfer of Property Act.[454]

In the context of sec.17 (1) (a) the pertinent question is about the applicability of the clause (a) to written gift executed by a Muslim in the light of section 129 of the Transfer of Property Act and the rules of Muslim law relating to gifts. The courts for a long time obscured the answer.

In **Sankesula Chinna Budde Saheb v. Raja Subbamma[455],** the Andhra Pradesh High Court, after noticing three essentials of gift under the Muslim law, held that if a gift was reduced to writing, it requires registration under section 17(1) (a) of the Registration Act. It went on to hold that even if by virtue of section 129 of the Transfer of Property Act, a deed of gift executed by Muslim was not required to comply with the provisions of sec.123 of the Transfer of Property Act still it had to be registered under sec.17 (1) (a) of the Registration Act when the gift related to Immoveable property.

A full bench of the Andhra Pradesh High Court in the case of **Inspector General of Registration and Stamps, Govt. of Hyderabad v. Smt.Tayyaba Begum,[456]** was called upon to decide on a reference made by the Hyderabad Stamp Act whether the document under consideration therein was a gift deed or it merely evidenced a past transaction. The High Court applied the test – whether the parties regarded the instrument to be receptacle; was it intended to constitute a gift or was it to serve as a record of a past event? What is the purpose which it was designed to serve?

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454 See Mulla, Principles of Mohamedan Law, edited by M. Hidayatullah C.J., (19th ed. 1990), Butterworths India, pp. 112-121; Syed Mohd. Salim Hashmi v. Syed Abdul Fateh, AIR 1972 Pat. 279.

455 (1954)2 MLJ 113.

456 AIR 1962 AP 199; in this case it was held that a Muslim Lady executing a document on stamp paper that she had already gifted the property but *"ba rafa nuks ainda"* (in order to silence all doubts) regarding immoveable property she executed the gift deed, would nonetheless require registration.

Similarly, the Madras High Court in **Amir Khan v. Ghouse Khan**[457] held that the Muslim could create a valid gift orally, if he should reduce the same in writing, the gift will not be valid unless it is duly registered.

In **Ghulam Ahmad Sofi v. Mohd. Sadiq Dareel And others**[458] the question for consideration before the Jammu and Kashmir High Court was – whether in view of provisions of sections 123 and 129 of the Transfer of Property Act, the rule of gifts in Muslim law stands superseded; and whether it is necessary that there should be a registered instrument as required by sections 123 and 138[459] of the Transfer of

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457 (1985) 2 MLJ 136.

458 AIR 1974 J&K 59.

459 Section 138 of the (J&K) Transfer of Property Act, reads as;

138. Transfer of immovable property after due registration;

1) No transfer of immovable property, except in a case governed by any special law to the contrary, shall be valid unless and until it is in writing, registered and the registration thereof has been completed in accordance with sub-section (3) of section 61 of the Registration Act, 1977.
2) No Court shall entertain a suit for pre-emption in respect of transfer of any such immovable property unless the transfer complies with the provision of sub-section (1).
3) No person shall take possession of, or commence to build or build on, any land in the Province of Kashmir which has been transferred or has been contracted to be transferred to him unless and until such transfer becomes valid under the provision of sub-section (1).
4) No person who has obtained a transfer of immoveable property referred to in sub-section (1) shall apply for and obtain from any Revenue or Settlement Officer or Court any alteration in any existing entry in any Settlement record or Paper, unless person produces before such officer or Court a duly executed registered instrument the registration whereof has been completed in the manner specified in sub-section (1).
5) And no such officer or Court shall alter or cause to be altered any such entry except upon the production of an instrument registered in the aforesaid manner:

Property Act. The facts leading to this reference are as follows. A suit for partition was brought by Mohd Sidiq Dareel in the Court of Sub Judge (Judge Small Causes Court) Srinagar on the ground that he had purchased 7 shares from Mst. Zooni out of the joint property left by Mohd Sofi her ancestor. It was pleaded on behalf of the first defendant that Mst. Zooni had already relinquished her entire title in favour of her brother Ghulam Ahmad Sofi the defendant therefore she had no title left to transfer it to the vendee plaintiff. The trial Court held that the plea raised by the defendant as regards the oral gift made by Mst. Zooni in favour of her brother was established. It therefore dismissed the suit of the plaintiff. On appeal before the District Judge the legal character of the transaction of the oral gift was challenged on behalf of the plaintiff. The learned District Judge discountenanced the proposition of the oral gift. He found that in order to constitute a valid gift there must be a registered instrument for this purpose. Transfer of property without such an instrument was invalid. He therefore decreed the suit of the plaintiff. A further appeal was taken by Ghulam Ahmad Sofi the defendant before the High Court. An argument was advanced that the oral gift was valid in the instant case, and that Sections 123 and 129 of the Transfer of Property Act did not supersede the Mohammadan Law on the subject. As Mst. Zooni had already gifted away the suit property in favour of her brother, therefore, there was no title or interest left in her to transfer it by sale to the plaintiff.

The Full Bench of the Jammu and Kashmir High Court held:[460]

> *……. that an oral gift made under the Muslim law would not be affected by section 123 of Transfer of Property*

Provided that nothing in this section applies to a lease of agricultural land for one year or to a lease of any other land for a period not exceeding seven years:

Provided also that nothing in sub-section (3) and (4) shall be deemed to apply to transfers by will or by any rule of intestate succession or by the operation of the law of survivorship.

460 The Full Bench consisted of S. Murtaza Fazl Ali, C.J., Main Jalal-ud-din and Syed Wasi-ud-din, JJ.

Act and the gift if it has otherwise all the attributes of valid gift under the Muslim law would not become invalid because there is no instrument in writing and registered. Therefore the answer to the question formulated would be in the negative i.e., that sections 123 and 129 of the Transfer of Property Act do not supersede the Muslim law on, matters relating to making of oral gifts, that it is not essential that there should be a registered instrument as required by sections 123 & 138 of the Transfer of Property Act in such cases .But if there is executed an instrument and its execution is contemporaneous with the making of the gift then in that case the instrument must be registered as provided under sec.17 of the Registration Act, If , however, the making of the gift is an antecedent act and the deed is executed afterwards as evidencing the said transaction that does not require registration as it is an instrument made after the gift is made and does not therefore , create, make or complete the gift therefore transferring the ownership of the property from the executants to the person in whose favour it is executed.

On the contrary, in **Md. Hesabuddin and Others v. Hesaruddin and Others**[461]**,** the question before the Gauhati High Court was whether a gift of immoveable property written or ordinary unstamped paper is valid? The single judge of High Court held:

……. it cannot be taken as a sine qua non in all cases that wherever there is a writing about a Mohammaden gift of immovable property , there must be registration thereof. The facts and circumstances of each case have to be taken into consideration before finding whether the writing requires registration or not.

461 AIR 1984 Gau 41, relying upon Jubeda Khatoon v. Moksad Ali, Air 1973 Gau 105.

In **Nasib Ali v. Wajid Ali**[462] , the contention raised before the division bench of Calcutta High Court was that the deed of gift not being registered under the Registration Act, is not admissible in evidence. The Court held that a deed of gift by a Muslim is not an instrument effecting, creating or making the gift but a mere piece of evidence. The Court observed:

> *……. a gift … even if it is evidenced by writing , unless all the essential forms are observed, it is not valid according to law (Muhammaden law). That being so a deed of gift executed by a Mohammaden is not the instrument effecting, creating or making the gift but a mere piece of evidence. It may so happen after the lapse of time that the evidence of observance [of essentials of Hiba under Mohammaden law] might not be forthcoming, so it is sometimes thought prudence , to reduce the fact that a gift has been made into writing. Such writing is not a document of title but is a piece of evidence.*

In **Karam Ilahi v. Sharafudin** [463] the Allahabad High Court held that if the gift deed was valid under the Muslim law it was nonetheless valid because there was a deed of gift which, owing top some defect, was invalid under section123 of Transfer of Property Act.

Mulla in his Principles of Mohammadan Law [464] states:

> *Section 129, Transfer of Property Act, excludes the rule of Mohammadan law from the purview of section 123 which mandates that the gift of immoveable property must be effected by a registered instrument as stated therein. But it cannot be taken as sine qua non in all cases that whenever there is a writing about a Mohammedan gift of immovable property there must be registration thereof. Whether the writing requires*

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462 AIR 1927 Cal 197.

463 (1916) 38 All. 212.

464 edited by M. Hidayatullah C.J., (19th ed. 1990), Butterworths India.

registration or not depends on the facts and circumstances of each case.[465]

The controversy expressed in the decision of various high courts was ultimately set at rest by the Supreme Court of India in **Hafeeza Bibi V. Shaikh Fareed (dead)**[466]**,** wherein the Apex Court elaborately dealt with the Law relating to the registration of the Muslim Gifts.

Facts in Hafeeza Bibi's Case

The appeal, by special leave, arises from the judgment of the High Court of Andhra Pradesh dated September 13, 2004 whereby the Single Judge of that Court set aside the judgment and decree dated April 27, 1988 passed by the Principal, Subordinate Judge, Vishakhapatnam and remitted the matter back to the trial court for the purpose of passing a preliminary decree after determining the shares to which each party would be entitled. The factum of the case was that one Shaik Dawood had three sons; Shaik Farid, Mehboob Subhani and Mohammed Yakub. He also had five daughters; Sappoora Bibi, Khairunnisa Begum, Noorajahan Begum, Rabia Bibi and Alima Bibi. All the five daughters were married. His wife predeceased him. Shaik Farid, Sappoora Bibi, Khairunnisa Begum, Noorajahan Begum and Mohd. Iqbal (son of Alima Bibi) - hereinafter referred to as `plaintiffs' - filed a suit for partition against Mehboob Subhani, Mohammed Yakub and Rabia Bibi (hereinafter referred to as `defendant 1', `defendant 2' and `defendant 3' respectively). The son and daughters of Syed Ali, who was brother of Shaik Dawood, were impleaded as other defendants (hereinafter referred to as `defendants 4 to 7'). The parties are governed by Sunni Law. The plaintiffs averred in the plaint that Shaik Dawood died intestate on December 19, 1968 and the plaintiffs and defendants 1 to 3 became entitled to `A' schedule properties and half share in `B' schedule properties. The plaintiffs stated that the defendants 4 to 7 are entitled to other half share in `B' schedule properties. But Mohammed Yakub -- defendant 2 -- contested the suit for partition. He set up the defence that

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465 Ibid p.120.

466 Jugdement delivered on May 6, 2011 by R.M. Lodha and SS Nijar JJ.

Shaik Dawood executed hiba (gift deed) on February 5, 1968 and gifted his properties to him. Shaik Dawood put him in possession of the hiba properties on that day itself. The hiba became complete and the plaintiffs were fully aware of that fact.

The trial court framed four issues. The issue relevant for the purpose of the present appeal is issue no.2 which is to the effect whether hiba dated February 5, 1968 is true, valid and binding on the plaintiffs. The trial court, after recording the evidence and on hearing the parties, answered issue no. 2 in the affirmative and, held that plaintiffs were not entitled to the shares claimed in the plaint. Consequently, the trial court dismissed the plaintiffs' suit. Thereafter, the plaintiffs challenged the judgment and decree of the trial court before the High Court. Inter alia, one of the arguments raised before the High Court on behalf of the appellants was that the gift dated February 5, 1968 being in writing was compulsorily required to be registered and stamped and in absence thereof, the gift deed could not be accepted or relied upon for any purpose and such unregistered gift deed would not confer any title upon the defendant 2. The High Court was persuaded by the argument and held that the unregistered gift deed would not pass any title to the defendant 2 as pleaded by him. The High Court allowed the appeal; set aside the judgment and decree of the trial court and sent the matter back to that court for the purposes of passing a preliminary decree.

Issue in Hafeeza Bibi's Case

The question for determination in this appeal was- As to whether or not the High Court is right in its view that the unregistered gift deed dated February 5, 1968 is not a valid gift and conveyed no title to the defendant 2.

Judgment in Hafeeza Bibi's Case

The Apex Court held that the position is well settled, which has been stated and restated time and again, that the three essentials of a gift under Mohammadan Law are; (i) declaration of the gift by the donor; (2)

acceptance of the gift by the donee and (3) delivery of possession. Though, the rules of Mohammadan Law do not make writing essential to the validity of a gift; an oral gift fulfilling all the three essentials make the gift complete and irrevocable. However, the donor may record the transaction of gift in writing. Asaf A. A. Fyzee in Outlines of Muhammadan Law,[467] states in this regard that writing may be of two kinds : (i) it may merely recite the fact of a prior gift; such a writing need not be registered. On the other hand, (ii) it may itself be the instrument of gift; such a writing in certain circumstances requires registration. He further says that if there is a declaration, acceptance and delivery of possession coupled with the formal instrument of a gift, it must be registered. Conversely, the author says that registration, however, by itself without the other necessary conditions, is not sufficient.[468]

Thereupon the division bench of the Court observed:

> *In our opinion, merely because the gift is reduced to writing by Mohammedan instead of it having been made orally, such writing does not become a formal document or instrument of gift. When a gift could be made by Mohammedan orally, its nature and character is not changed because of it having been made by a written document. What is important for a valid gift under Mohammedan law is that three essential requisites must be fulfilled. The form is immaterial if all the three essential requisites are satisfied constituting valid gift, the transaction of gift would not be rendered invalid because it has been written on a plain piece of paper. The distinction that if a written deed of gift recites the factum of prior gift then such deed is not required to be registered but when the writing is contemporaneous with the making of the gift, it must be*

467 Fifth Edition (edited and revised by Tahir Mahmood) at p. 182.

468 Supra note 20 Para 27.

registered , is inappropriate and does not seem to us to be in conformity with the rules of gifts in Mohammaden law.[469]

The Apex Court further observed:

We find ourselves in express agreement with the statement of law from Mulla (see above); principle of (Mohammadan Law), page 120……. (i.e.)……it is not the requirement that in all cases where the gift made is contemporaneous to the making of the gift then such deed must be registered under Section 17 of the Registration Act. Each case would depend on its own facts.[470]

In this case the Supreme Court approved the views of Calcutta High Court in Nasib Ali case and the Gauhati High Court in Md. Hesabuddin case. The court further observed that the judgments delivered by Andhra Pradesh High Court, Jammu and Kashmir High Court and Madras High Court do not lay down the correct law.[471]

IV. Exemption of Muslim Gifts from Registration and the Doctrine of Constructive Notice

Registration of a document is notice of all the facts stated in that document[472] The purpose of the Jammu and Kashmir Registration Act, 1977, as disclosed in its provision is to provide information to people, who may deal with property as to the nature and extent of rights which a person may have affecting that property. In other words it is to enable people to find out whether any particular piece of property, with which they may be concerned, has been made subject to some particular legal obligation. Further registration gives solemnity of form and legal

469 Ibid Para 29.

470 Ibid Para 31.

471 Ibid Para 33.

472 Avtar Singh, The Transfer of Property Act, (2nd ed. 2009), Universal Law Publishing Co., p.25.

importance to certain classes of document by direction that they shall be registered.[473]

Another purpose is to perpetuate documents which may afterwards be of legal importance; and the general purpose is to put on record and enquire what the particulars are and in case of land what obligations exist with regard to it.[474] The provisions of the Registration Act are very carefully designed to prevent forgeries, procurement of conveyances or mortgages by fraud or undue influence.[475]

In **Brahma Nath v. Chandra Kali,** [476] Patna High Court observed:

> *The real purpose of registration is to secure that every person dealing with property, where such dealings require registration may rely with confidence upon the statements contained in the register as a full and complete account of all transactions by which his title may be affected unless indeed he has actual notice of some unregistered transaction which may be valid apart from registration.*

Given this context, the relevant question is-whether the exemption of Muslim Gifts operates against the spirit of the Registration Act or does it make the doctrine of constructive notice ineffective vis-à-vis Muslim gifts of immovable property? The answer of course will be in negative. Under the Muslim Law requirement of delivery of possession to complete a gift reinforces the doctrine of constructive notice. Muslim Law of gift attaches great importance to possession or seisin of the property gifted (*Kabz-ul-Kamil*) especially of immovable property.[477] The *Hedaya* says that seisin in case of gift is expressly ordained and

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473 See Malik, The Registration Act, 1908, (2nd ed. 2011), Dehli Law House, p. 144.

474 See Sanjeeva Rao, Registration Act, (11th ed. 2005), Law Publishers (India) Pvt. Ltd., p. 113.

475 K. Roy and Bros v. Ramanthdas, AIR 1945 Cal. 37 at p.40; Baharat Indu v. Hakim Mohammad Hamid Ali Khan, AIR 1921 P.C. 93.

476 AIR 1961 Pat. 79.

477 Kathessa Umma v. Narayanath, AIR 1964 SC 275 at 277.

Baille [478]quoting from the *inayah* refers to the *Hadis* of Prophet declaring that 'a gift is not valid unless possessed'. Explanation II appended to Para 8 of Section 3 of the Transfer of Property Act reads as:

> *Any person acquiring any immoveable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof.*

It follows that the actual possession operates as a constructive notice of the title. Therefore, the requirement as actual delivery of possession of the subject matter of the gift operates as constructive notice even without the registration.

V. Conclusion and Suggestion

It is clear from the above analysis that the Muslim gifts of immoveable property do not require registration unless and until such gifts only evidence a transaction and do not in itself effectuate a transaction. The kind of confusion which has been created is the result of the varying requirements of registration of gifts under Registration Act and other Statutes. It is suggested that a new clause (a) should be substituted for present clause which should encompass all documents which are required to be registered under other statutes. The text under section 17 (1) (a) may after amendment read as[479]:

> *Section 17 (1) the following documents shall be compulsorily registered;*
>
> *(a) instruments which under any Law require registration for giving validity to the transactions effected thereby;*

This will ensure two things. Firstly it will bring all the statutes requiring registration in conformity with the Registration Act, Secondly exemption under other statutes for registration will be also applicable under the Registration Act, which will primarily save any rule of Muslim

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478 Digest, p.508.

479 See sixth Report of Law Commission of India, 1957.

Law relating to gifts as provided under section 129 of Transfer of Property Act.

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