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PREFACE

This book is a compilation of the selected research papers received due to Call for Papers by the Alexis Foundation in July 2016.

We are extremely fortunate to work with kind and helpful people who support us, appreciate our efforts and give us guidance. We would like to thank all those who have made this book possible and acknowledge the support and encouragement extended to us by the Model Governance Foundation, INY Foundation, GNLU Centre for Law and Society, Adhrit Foundation, Agrasar Foundation, Alexis Society, Advitya Ventures, Bharat Sansthan, and India Leadership Institute.

Lastly, we would like to invite comments, suggestions and guidance from various experts and readers about this book for improvements in future. The comments/suggestions can be mailed to us at info@alexis.org.in.

- **Editor(s)**

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1. NEED FOR UNIFORM CIVIL CODE IN INDIA

Author(s): Gargi Singh[1]

ABSTRACT

Uniform Civil Code would bring all the diverse personal laws within the ambit of one particular code and would provide us with gender just laws. Everyone is speaking the same thing, people against a Uniform Civil Code ar gue that religion is a personal choice and must not be tangled with. People in favor of a Uniform Civil Code are arguing that religion is a personal choice and therefore it would not be meddled with, while rest of the personal laws of various religions would be clubbed together to justify equal protection of laws and equality before law. For the hundredth time, Uniform Civil Code excludes religion completely. Customs have been changing with times. Equality of gender is a grave concern and therefore with changing times and customs, Sati has been abolished and so has child marriage to a large extent. To some extent, because there still exist religious communities who are marrying off their children under the age of 18 and 21, substantiating their argument with the "customs" they have been following, violating the gender just principles. We need to wake them up and alter their perspective by changing their outlook, so that diverse communities and religious groups agree to the introduction of Uniform Civil Code. Social customs must not be related with religion and therefore, there is a need of a Uniform Civil Code to conclude the difference between Religion and Social customs. Not only human rights are violated in the name of religion, but also the clash 'among' genders exist due to societal pressure. Without a Uniform Civil Code, the dream would remain as it is and nobody can know how many human rights would be violated in the future. No particular religion or sect is being targeted and therefore, people should not pay heed to political arguments against the Uniform Civil Code. UCC can pave the path to equality. People who remained within the geographic boundaries of India made their choice. Solution to all the problems lies in introducing a Uniform Civil Code in India and establishing its existence in reality, rather than just in books and the Constitution of India.

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I. INTRODUCTION

The debate on Uniform Civil Code began in 1947, when the Sub-Committee on Fundamental Rights, on March 30th recommended the Uniform Civil Code to be a part of directive principles, indicating the government's commitment to a Uniform Civil Code for India.[2]Certain privileges to religious communities were granted under Article 25 and Article 26. 'Privilege' is always a preference over 'equality'. As our Preamble guarantees equality of status and of opportunity, which until now has not been achieved and when the step is being taken to unite all the personal laws into one, then resolute opponents have stood up with their arguments. India being democratic and secular has created a contradictory situation. Where democracy represents majority, secularism has been representing communalism and therefore, representation of communities is a widely debated agenda within political dimensions. Communalism is being confused with religion and therefore, the question of justice for the minority has arisen. If there was no communalism, then instead, the rule of majority would have prevailed and there would be no need to fight for the 'representation' of minority communities. For the smooth functioning of democracy, communalism should have been eliminated. State must be separated from religion as exists in France. The term laicism ("laïcité") in France means separation of religion and state; meaning that all religions are recognized by the state.[3] The Constituent Assembly's debate began to put forth the identity of Indians as citizens of India, rather representing some

[2]Christa Rautenbach, *Phenomenon of personal laws in India: some lessons for South Africa*, THE COMPARATIVE AND INTERNATIONAL LAW JOURNAL OF SOUTHERN AFRICA, Vol. 39, No. 2(JULY 2006), 241,250, Institute of Foreign and Comparative Law, available at: http://www.jstor.org/stable/23252637, (accessed on 24th June 2016).

[3] Jackie Assayag, *Spectral Secularism Religion, Politics and Democracy in India*, EUROPEAN JOURNAL OF SOCIOLOGY / ARCHIVES EUROPÉENNES DE SOCIOLOGIE / EUROPÄISCHES ARCHIV FÜR SOZIOLOGIE, Vol. 44, No. 3, Citizenship: National and Transnational (2003),325,336 ,Cambridge University Press, available at : http://www.jstor.org/stable/23999545, (accessed on 26th June 2016).

community or religious group and thereby the introduction of Uniform Civil Code became a significant issue.[4] All credit goes to communalism dominating the roots of India even before independence and therefore, the leaders did not stand on a common footing as to agree on the introduction of a Uniform Civil Code. The debate continued and it shall never cease till we put a stop on it. The modern era has introduced new challenges and our approach must assure equality towards people and gender. This is a moment in time when a traditional approach towards gender justice must be transformed into an unorthodox approach. Official recognition of every gender would justify the equality principle in the constitution of India and put us as a united nation before the world. If you want to continue being looked upon as equals, then be highly adaptable to the changes the world brings with it. Untouchability was a grave issue once and if we continue with this rigid mindset, then India might end up becoming the next untouchable before United Nations. The stand is still unclear as to what we want and how we are suppose to get it. Outsiders would not fly to our rescue, it is our duty as citizens of India to save our country from ruin by politics, in the name of religion. Uniform Civil Code would simplify the complications existing from following certain customs which dominate the other genders stripping off their dignity. Communalism and religion are exploited as hidden strategies to win political favors.

II. BACKGROUND

K T Shah, in December 1948, demanded the insertion of an article separating the state from any religious activities. He, along with M Masani was strictly against granting institutions to religious communities and never wanted to include the same in Fundamental rights. KM Munshi's proposal

[4] Shefali Jha, *Secularism in the Constituent Assembly Debates,* 1946-1950, Economic and Political Weekly, Vol. 37, No. 30 (Jul. 27 - Aug. 2, 2002),3175,3176,Economic and Political Weekly, available at: http://www.jstor.org/stable/4412419, (accessed on 26th June 2016).

was accepted and Article 25 came into existence. It says: right to "freely profess and practice" religion which is exempted from any economic, financial, political or secular activities that may be linked to religious worship." He further clarified the understanding of right to "freely profess and practice" religion which would exclude personal laws as Hindu personal laws were discriminatory and partial against women, which was inconsistent with the right to equality i.e., Article 14 of the Indian Constitution. In March 1947, an article was drafted both by K M Munshi and B R Ambedkar in which Munshi had clearly stated, "No civil or criminal court shall, in adjudicating any matter or executing any order, recognize any custom or usage imposing any civil disability on any person on the ground of his caste, status, religion, race or language"[5] whereas Ambedkar wrote: " The subjects of the Indian state shall have the right "to claim full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by other subjects regardless of any usage or custom based on religion and be subject to like punishment, pains and penalties and to none other."[6]

BR Ambedkar's proposal was incorporated in Article 16 and Article 19 but later, both were dropped. As another explanation to Article 16, no person could deny his civil obligations or duties on the ground that his religion does not permit him to do so and under Article 19, the State was not allowed to recognize any religion as the State religion. Some members were against the inclusion of Article 16 as according to them, it narrowed the concept and denuded the main content of religion and therefore, there was no point in granting the right to freely practice religion. K M Panikkar's statement further elucidated why UCC should not exist, "Where religion provides that a Sanyasi shall have no attachments to the world, to ask that he shall perform civil duties is in fact to ask him to give up his

[5] SD-II,79.

[6] SD-II, 89.

religion."[7] In brief, he meant that religion is above civil duty and therefore, there must always be an option to choose religious excuse over non-performance of a civil duty. Sanyasa is also a form of religion and a way to lead a life. Some members who supported BR Ambedkar's proposal highlighted the misunderstanding of the term religion in wider terms as people would wrongly include social customs like purdah, child marriage, and polygamy, unequal laws of inheritance and prevention of inter-caste marriage, in its ambit. He strongly suggested that the code should be applied on the people who wanted it to be applied on them. Rajkumari Amrit Kaur took the discussion further by stating that if the right to religion was stated in terms of the right to the practice of religion, then it "may even contradict or conflict with the provision abolishing the practice of untouchability"[8]. She was against the establishment of separate educational institutions and granting of state aid to religious minorities. In spite of the opposition arguements, Article 30 came into existence and religious minorities were granted their own religious institutions and state aid was also guaranteed. When this clause was discussed in the Constituent Assembly on August 30, 1947, it was sought to be amended by Renuka Ray and was to read as follows: "No de-nominational religious instruction shall be provided in schools maintained by the state"[9]. Further KT Shah argued that the religious instruction should not be permitted even in the educational institutions of minorities which are partially or wholly aided by the State. The opinion did not discourage HV Kamath, who clearly stated that minorities were entitled to state aid and recognition of their freely run educational institutions by the constitution itself. Then, how could it ban religious instruction in state aided institutions? Therefore, the only solution was to

[7] SD-II,187.
[8] Processions and marriages were the two activities that were specified by most members as part of the practice of any religion.
[9] Study,263.

justify its existence by declaring that no person could be forced to attend religious instruction in state aided institutions.

The Advisory Committee of the Constituent Assembly finally met and submitted an Interim Report on April 23,1947, in which the proviso of right to religion (right to "practice religion") barring individuals from using religious reasons as an excuse to exempt themselves from civil duties, and an article banning a state religion, was put aside. But, the right to practice religion was put under certain limitations like morality, public health and social welfare. In the interest of public health benefits, the State could prevent religious practice to some extent. Religious activities were barred as an excuse for economic, financial, political or secular activities.

The debate continued and in December 1948, Tajamul Husain, contended that the right to religion should be the right to 'practice religion privately' and also emphasized that religious instruction should be given only at home by one's parents and not in any educational institutions.[10] He also wanted to include the following clause in the constitution: "No person shall have any visible sign, mark or name, and no person shall wear any dress whereby his religion may be recognized".[11]

All the ideas and opinions by the members were convincing and still are. Therefore, Uniform Civil Code is just a dream because every time someone would support UCC, opponents would also arise, likely to cause further delay and the problem would be left hanging in the air. When India attained freedom, as Justice Kuldip singh's candid observations in Sarla Mudgal's case states: "The traditional Hindu law - personal law of the Hindus - governing inheritance, succession and marriage was given a go-by in 1955-56 by codifying the same. There is no justification whatsoever in indefinitely delaying

[10] Shefali Jha, *Secularism in the Constituent Assembly Debates,* 1946-1950, Economic and Political Weekly, Vol. 37, No. 30 (Jul. 27 - Aug. 2, 2002),3175-3180,Economic and Political Weekly, available at: http://www.jstor.org/stable/4412419, (accessed on 27th June 2016).
[11] CAD-VII, 819.

the introduction of a uniform personal law in the country. The learned judge proceeded further to observe that those who preferred to remain in India after the partition were aware of the fact that Indian leaders did not believe in the two-nation theory or the three nation theory and also that in the Indian republic, there would be only one nation - the Indian nation and no community could make a claim to be a separate entity on the basis of the religion.[12] Not only could a lawman, even a layman, could appreciate this judgment."[13]

This opinion regarding Justice Kuldip Singh's observation is highly appreciated while it is considered as an unfortunate view of the learned judge of the Supreme Court by some. This has prompted Muslim resistance to modernization of their personal laws. Justice Kuldeep Singh had stated that a uniform civil code would strengthen national integration and that the minorities should give up their commitment to the two-nation theory and agree to a uniform civil code. It was further said that the Hindus had accepted reforms in their personal laws and sacrificed for the national utility.[14]

The civil code is a set of laws governing the civil matters of the citizens in the country relating to matters like marriage, divorce, adoption, custody of children, inheritance, succession to property etc. The Common Civil Code, if enacted, will deal with the personal laws of all religious communities relating to the above matters, which are all secular in character of the Indian state and will enhance fraternity of unity among citizens by providing them with a set of personal laws which incorporates

[12] Babir K. Punj, *Common chord - A Uniform approach to the Law*, TIMES OF INDIA (1 5/8/2003).
[13] Shabbeer Ahmed and Shabeer Ahmed, *Uniform Civil Code (Article 44 of the Constitution) A Dead Letter*, THE INDIAN JOURNAL OF POLITICAL SCIENCE, Vol. 67, No. 3 (JULY - SEPT., 2006),545,551, Indian Political Science Association, available at: http://www.jstor.org/stable/41856241, (accessed on 23rd June 2016).

[14] S. P. Sathe, *Uniform Civil Code: Implications of Supreme Court Intervention*, ECONOMIC AND POLITICAL WEEKLY, Vol. 30, No. 35 (Sep. 2, 1995), 2165,2165 , Economic and Political Weekly, available at: http://www.jstor.org/stable/4403156, (accessed on 23rd June 2016).

the basic values of humanism.[15] The objective thus, is also to bring a social reform and uplift the status of women. The Uniform Civil Code is eminently desirable in the interest of modernization of society and for a common system of Justice for all. It would also satisfy Quasi-universal arguments (those of a patriarchal society frightened by the prospect of "modernity", granting women rights that might possibly be the same as those granted to men).[16]

Under Part IV of the Constitution, Article 44 states that "the state shall endeavor to enact a Uniform Civil Code for citizens throughout the country". On the other hand, under Part III of the Constitution, Article 25 provides for "Freedom of conscience and free profession, practice and propagation of religion." But, at the same time, Article 25 itself under Clause 2, clearly states that this article shall not affect the operation of any existing law.[17]

In the Indian context, the task of creating a Uniform Civil Code has been an impossible one from the very beginning by reason of the division of India into different religious groups. Hence, for more than two centuries, the Muslims had their own personal law, based on the sharia, with multiple local customary variations. The British had no desire to touch it. The nationalists in Congress needed the Muslims too much in their fight for freedom struggle and therefore could not oppose them. This was according to Oliver Herrenschmidt and the same could be assumed by Acharya Kirpalani's speech in 1955-1956 when Hindu laws were being thoroughly reformed. During this period, Dr. Ambedkar's code i.e., Hindu Code Bill was passed into fragments, Marriage (1955), Succession (1956), Minority

[15] Shabbeer Ahmed and Shabeer Ahmed, *Uniform Civil Code (Article 44 of the Constitution) A Dead Letter*, THE INDIAN JOURNAL OF POLITICAL SCIENCE, Vol. 67, No. 3 (JULY - SEPT., 2006),545,546, Indian Political Science Association, available at http://www.jstor.org/stable/41856241, (accessed on 23rd June 2016).
[16] Olivier Herrenschmidt, *The Indians' Impossible Civil Code*, EUROPEAN JOURNAL OF SOCIOLOGY / ARCHIVES EUROPÉENNES DE SOCIOLOGIE / EUROPÄISCHESARCHIV FÜR SOZIOLOGIE, 309,311, available at: http://about.jstor.org/terms, (accessed on 21st June Tuesday 2016).
[17] Shabbeer Ahmed and Shabeer Ahmed, *Uniform Civil Code (Article 44 of the Constitution) A Dead Letter,* THE INDIAN JOURNAL OF POLITICAL SCIENCE, Vol. 67, No. 3 (JULY - SEPT., 2006),545,547, Indian Political Science Association, available at: http://www.jstor.org/stable/41856241, (accessed on 23rd June 2016).

and Guardianship (1956) and Adoption and Maintenance (1956). Unfortunately, due to reasons of political interference, family laws were enacted for only Hindu women and thus the suffering of Indian women prevails. The Parsis kept their own laws, but, despite of the importance of a powerful Parsi nationalist figure, Dadabhai Naoroji (1825-1917), this was without political consequence considering their limited number. As for Jews, like Christians, they "do not have a personal law as such" but marriages and divorces had been codified since 1869 and 1872.[18]

NEED FOR UNIFORM CIVIL CODE

If UCC is introduced, then ceremonies performed in the marriage will become optional. Likewise, the registration of the marriage will become mandatory as a proof of their marriage. Monogamy will become mandatory and the laws of divorce would be the same for men and for women. This will bring consistency and prevent disintegration of the society. It will act as real instrument of empowerment for the woman. Religion is the personal choice of an individual and a Uniform Civil Code would not alter the preference of religion. Rather, it would equalize the rights of men and women in marriage, divorce, maintenance, property etc. Special Marriage Act is considered as the forerunner of Uniform Civil Code and when it was re-enacted in 1954, it permitted inter-religious marriages without the parties having to renounce their religion. In India, women are theoretically entitled to exercise the rights provided in the Constitution, whereas men are considered superior and do not deter from boasting the same. Without a doubt, we reside in a male-oriented society and only very few liberal and generous men will give in willingly what they have enjoyed over the centuries. Cooking,

[18] Olivier Herrenschmidt, *The Indians' Impossible Civil Code*, EUROPEAN JOURNAL OF SOCIOLOGY / ARCHIVES EUROPÉENNES DE SOCIOLOGIE / EUROPÄISCHESARCHIV FÜR SOZIOLOGIE, 309,313,314, available at: http://about.jstor.org/terms, (accessed on 21st June Tuesday 2016).

cleaning and other household work of "women" does not specifically exist for women to perform and men can play the same role of raising children and doing household work. Similarly, the corporate world or the world consisting of other jobs excluding household work is not specifically for men. Women are equally capable of working in their offices and outside their homes. Women are not entitled to the same rights of announcing 'Triple Talak' to get divorced, then why does the concept of announcing Talak exist? It should be completely removed, as in Egypt, Sudan, Jordon, Syria, Tunisia, Morocco, Pakistan and Bangladesh and should not be protected by the realm of religion. Muslim women were not entitled to enter into 2nd, 3rd and 4th marriage, then why is bigamy optional for men? Pandit Jawahar Lal Nehru in his speech had stated "Do not Indian women have the right to ask why monogamy should be optional for Indian Muslim men". The larger group of uneducated women often cannot differentiate between custom and religion. Ironically, other Muslim countries like Iran, Iraq, Syria, Pakistan and Bangladesh have abolished polygamy completely.[19]As decided in Sarla Mudgal's case, Uniform Civil Code is the only solution to conversion and bigamy by Hindu men.[20]

III. GENDER JUSTICE

The Constitution bestows citizenship on the basis of birth, domicile, choice, etc. Thus, it is the right of all citizens, and women in particular, to be treated equally and without being discriminated against. Therefore, the state must take this duty as its foremost and paramount concern.[21] It is never an easy

[19] M. S. Ratnaparkhi, *Uniform Civil Code: An Ignored Constitutional Imperative*, 66, available at: https://books.google.co.in/books?id=6NCQQn0ixZUC&pg=PA64&lpg=PA64&dq=Purpose+of+origination+behind+Uniform+Civil+Code+in+India, (accessed on 26th June 2016).

[20] Flavia Agnes, *Hindu Men, Monogamy and Uniform Civil Code*, ECONOMIC AND POLITICAL WEEKLY, Vol. 30, No. 50 (Dec. 16, 1995), 3238,3238, Economic and Political Weekly, available at http://www.jstor.org/stable/4403569, (accessed on 26th June 2016).

[21] Leila Seth, *A Uniform Civil Code: towards gender justice,* INDIA INTERNATIONAL CENTRE QUARTERLY, Vol. 31, No. 4 (SPRING 2005),40,43,44, India International Centre, available at: http://www.jstor.org/stable/23005979, (accessed on 3rd July 2016).

task to make laws for the minority as it is a sensitive matter for both the Hindu minority in countries like Bangladesh and Pakistan and the Muslim minority in a country like India. It has been observed, since the partition of British India that the condition of Muslim women has considerably improved while that of the Hindu minority continued as it was before. The Hindu minority stayed unaffected by the amendments made for Hindus in India, such as making monogamy mandatory, permitting divorce, granting the right of adoption to women, as also acknowledging inheritance rights of daughters in their father's property, etc. Similarly, Muslim minority had been continuing with its existence in India without any positive result towards gender just laws, even though the neighboring countries have made necessary amendments in Muslim Personal laws and improved the condition of Muslim women.

The fifteenth Law Commission of India, whose term was from September 1997 to August 2000 had submitted a number of reports to the government on the Indian Divorce Act, 1869 and recommended the daughters as coparceners in joint family property, as it was unjust to exclude their rights on the basis of sex. Finally, the suggestion by the 15th Law Commission was accepted to make alteration in Divorce Act which applied on Christians specifically. The grossly discriminating section 10 of the Divorce Act that said "a Christian man could be granted divorce on the ground of adultery alone, whereas a Christian woman had to establish adultery plus an additional matrimonial offence such as cruelty or bigamy or incest or desertion" [22] was altered for social justice and gender just laws. Recommendation of daughters as coparceners was acknowledged.

Fali Nariman in 2004 had commented upon the introduction of Uniform Civil Code by stating that one cannot speak for all the communities unless they are ready. But the question is, when would the

[22] *Id.* at 45.

communities be ready and how do we help the communities to be ready?[23] The answer to the questions lie in the statement "a readiness to reform can be created by dialogue and debate addressing the laws that discriminate against women grossly and are indefensible"[24].

A uniform civil code is the resolve to eradicate discrimination, and empower women to present them with their dignity and self-esteem. A uniform civil code will assist in breaking down those customary laws practiced in the name of religion and communalism to identify the women as independent citizens of India.[25]

"Religion is about faith—a relationship between an individual and his or her God which is entirely personal; whereas law is about specific rights of an individual as against other individuals or society at large". For instance, the Divorce Act applies to Christians, irrespective of whether they are Protestants or Catholics. However, the Catholic Church does not recognize divorce but a Catholic can get a divorce under the provisions of this Act if he or she wants.[26]

Each time a proposal is made for a uniform civil code or gender-just laws, the religious leaders or people with bestowed interest frighten the common Indian Muslim women into silence, restraining them with terror and dread that what is being suggested is the end of Islam. They terrorize the government with the spilling of rivers of blood.[27]

Legal reforms are mandatory but only possible when women folk are persistent with their struggle for the same. There should be a non-negotiable charter for women's rights. Codification and amendments

[23] *Id.* at 47.
[24] Editorials, *The long road to Gender Equality*, THE HINDU, December 7th, 2004.
[25] *Id.* at 48.
[26] *Id.*
[27] *Id.* at 53.

could be done while keeping cultural sensitivity in mind. Every tussle for land rights, resources, self-rule and a fair development process should bend towards a fair and gender just verdict.[28]

All the family related disputes should be brought under the jurisdiction of Family courts and no fees must be charged to guide the parties under dispute. Maintenance provided to the wives by their husbands should be made their right and the state must take the responsibility of recovering the maintenance amount of the husband if he delays or tries to abscond the amount.

Women are denied their inheritance rights by a way of gift to the son or by societal pressure to surrender their inheritance rights to their brothers after marriage. If the women deny to surrender, then their maternal side of the family cut all ties with the daughter and boycott her in the society. Most women fear being abandoned and thus pass on their right with a smile on their face and pain in their heart. So, the right to will away the property must be restricted to half or one-third.[29]

IV. OBSERVATIONS OF SUPREME COURT

In **Mohd Ahmed Khan v Shah Bano Begum**, an old Muslim woman, Shah Bano Begum appealed to the court against her husband who had divorced her. In 1978, 65-year old Shah Bano had filed a petition demanding alimony from her husband, who had abandoned her for another woman after over 40 years of marriage. According to Muslim law, Shah Bano was entitled to three months' maintenance.[30] The Supreme Court heard the matter years later and upheld her right to maintenance. Supreme Court held that a Muslim divorcee (Shah Bano Begum) was entitled to maintenance under

[28] Nandita Gandhi, Geetanjali Gangoli and Nandita Shah, *Drafting Gender Just Laws*, ECONOMIC AND POLITICAL WEEKLY, Vol. 31, No. 43 (Oct. 26, 1996), 2858,2860, Economic and Political Weekly, available at: http://www.jstor.org/stable/4404704, (accessed on 3rd July 2016).
[29] *Id.* at 2680.
[30] Sanghamitra Padhy, *Secularism and Justice: A Review of Indian Supreme Court Judgments*, Economic and Political Weekly, Vol. 39, No. 46/47 (Nov. 20-26, 2004),5027,5031, Economic and Political Weekly, available at: http://www.jstor.org/stable/4415807, (accessed on 29th June 2016.)

section 125 of the Code of Criminal Procedure from her husband even after the period of "iddat'.[31] Later, Muslim Women (Protection of Rights on Divorce) Act came into existence in order to nullify the judgment.

In **Ms Jorden Diengdeh v SS Chopra**, the parties were married under Indian Christian Marriage Act. It was clear from the evidence that their marriage had broken down. However, the Indian Divorce Act had not made any provision for the dissolution of the marriage on the ground of irretrievable breakdown. The court could not reach a judgment due to the various divergent rules of divorce which are applicable to various personal laws. Legislature was asked to make provision for a uniform code of marriage and divorce, which must be applicable to all the citizens of India irrespective of their race, religion or caste.

In **Sarla Mudgal v Union of India**, the Supreme Court criticized the failure of the Indian government to enact a Uniform Civil Code for India under the Indian Constitution.[32] They referred to the separation of India (with a Hindu majority) and Pakistan (with a Muslim majority) and held: "Those who preferred to remain in India after the partition, fully knew that the Indian leaders did not believe in a two-nation or three-nation theory and that in the Indian Republic, there was to be one nation - Indian nation - and no community could claim to remain a separate entity on the basis of religion."[33]

The Supreme Court, in the recent case of **John Vallamattom**, struck a chord of the legislature of its constitutional dictate under Article 44 of the Constitution to devise a uniform civil code (UCC),

[31] S. P. Sathe, *Uniform Civil Code: Implications of Supreme Court Intervention*, ECONOMIC AND POLITICAL WEEKLY, Vol. 30, No. 35 (Sep. 2, 1995), pp. 2165-2166,pg.2166, Economic and Political Weekly, available at: http://www.jstor.org/stable/4403156, (accessed on 23rd June 2016).

[32] Christa Rautenbach, *Phenomenon of personal laws in India: some lessons for South Africa*, THE COMPARATIVE AND INTERNATIONAL LAW JOURNAL OF SOUTHERN AFRICA, Vol. 39, No. 2(JULY 2006), 241,254, Institute of Foreign and Comparative Law, available at: http://www.jstor.org/stable/23252637, (accessed on 24th June 2016).

[33] Justice Kuldip's Singh observation on Sarla Mudgal's Case.

unifying all the diverse personal laws into one single code. Consequently, the judgment has rejuvenated the Uniform Civil Code debate altogether and has mandated a discussion on the issue, in the pursuit of at least recognizing the key concepts and arriving at some particular strategy towards accomplishment of the desired code.[34]

CONCLUSION

Uniform Civil Code would bring all the diverse personal laws within the ambit of one particular code and would provide us with gender just laws. Everyone is speaking the same thing, people against a Uniform Civil Code argue that religion is a personal choice and must not be tangled with. People in favor of a Uniform Civil Code are arguing that religion is a personal choice and therefore it would not be meddled with, while rest of the personal laws of various religions would be clubbed together to justify equal protection of laws and equality before law. For the hundredth time, Uniform Civil Code excludes religion completely. Customs have been changing with times. Equality of gender is a grave concern and therefore with changing times and customs, Sati has been abolished and so has child marriage to a large extent. To some extent, because there still exist religious communities who are marrying off their children under the age of 18 and 21, substantiating their argument with the "customs" they have been following, violating the gender just principles. We need to wake them up and alter their perspective by changing their outlook, so that diverse communities and religious groups agree to the introduction of Uniform Civil Code. Social customs must not be related with religion and therefore, there is a need of a Uniform Civil Code to conclude the difference between Religion and Social customs. Not only human rights are violated in the name of religion, but also the clash 'among'

[34] Krishnayan Sen, *Uniform Civil Code*, ECONOMIC AND POLITICAL WEEKLY, Vol. 39, No. 37 (Sep. 11-17, 2004),4196 Economic and Political Weekly, available at: http://www.jstor.org/stable/4415537, (accessed on 24th June 2016).

genders exist due to societal pressure. Without a Uniform Civil Code, the dream would remain as it is and nobody can know how many human rights would be violated in the future. No particular religion or sect is being targeted and therefore, people should not pay heed to political arguments against the Uniform Civil Code. UCC can pave the path to equality. People who remained within the geographic boundaries of India made their choice. Solution to all the problems lies in introducing a Uniform Civil Code in India and establishing its existence in reality, rather than just in books and the Constitution of India.

2. THE NATIONAL FOOD SECURITY ACT, 2013 - A CRITIQUE

Author(s): Amulya Chinmaye, Diksha Jain[35]

ABSTRACT

The National Food Security Act, 2013 aims to ensure food and nutritional security to the people of the country. The Act through its various provisions seeks to cover seventy-five percent of the rural population and fifty percent of the urban population. Although the Act has attempted to incorporate several measures to tackle the problems of food insecurity in India, it fails to comprehensively deal with the problem. As pointed out above there are also many errors in the language used in the Act which may create several problems of interpretation in future. Also, it does not provide a clear and precise definition of the term 'priority households', which is the main criticism leveled against it. It also fails to provide for certain specific cases which are within the scope of food security. Lastly, the authors feel that no sudden and immediate emergency had arisen that needed the President to exercise the power granted to him under Article 123 of the Constitution. The Act has not been formulated in isolation of political agendas keeping in mind the upcoming 2014 elections.

I. INTRODUCTION

The post-independence era of India witnessed several incidents of severe famines and droughts which exhausted India's agricultural production and placed a severe strain on the economy, demanding imports of as much as 10 million tonnes of food grains to feed the dying-hungry mouths of the time.[36] Emerging as the largest importer of food grains, the nation depended heavily on the United States for an ad-hoc assistance of imports through ships, which then was popularly known as surviving on a 'ship-to-mouth' existence. Considering the loss of several lives and the growing gap between food

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[36] Devinder Sharma, *Agriculture and Food Security: Background & Perspective,* < http://infochangeindia.org / agriculture/ backgrounder/agriculture-and-food-security-background-a-perspective.html> (Visited on 12th August, 2013).

production and population growth, the government vigorously undertook the implementation of 'grow more food' through the Green Revolution and made massive efforts to boost the agricultural production.

The Green Revolution has helped India in becoming substantially self-sufficient in the production of food grains over the years and the country has seen an ample availability of a variety of food products. However, even today, one-thirds of the Indian population lies below the poverty line and many people in the rural areas are deprived of food. India faces grave challenges in ensuring economic access to food and its absorption by people for better nourishment. The USDA regards India as a front-runner with 246 million food insecure people and accounts for almost 30% of the total food deprived people in developing countries.[37] Also, it is ranked 65 out of 79 countries on the Global Hunger Index from the International Food Policy Research Institute.[38]

The concept of guaranteeing a supply of essential food grains has its roots embedded in the British system of 'rationing', a social policy which was deliberately retained by the Indian Government to ensure a planned economic development.[39] However, the first introduction of a National Food Security Bill in India was seen with the dawn of the 21st century when the bill was tabled in the Parliament in 2011. The bill marked India's first legal step to meet the Millennium Development Goals and effectively reduce hunger statistics in the country.[40] It sought to create a statutory entitlement for the included population and its obverse, namely a legal obligation for the government. This initiative denotes a paradigm shift in addressing the problem of food security from the current welfare approach

[37] International Food Security Assessment, 2011-21, USDA.
[38] Gulati, Gujral and Nandakumar, *National Food Security Bill: Challenges and Options*, Commission For Agricultural Costs And Prices, December 2012.
[39] *Public distribution system in India-evolution, efficacy and need for reforms,* <http://www.fao.org/docrep/x0172e/x0172e06.htm> (Food and Agriculture Organization).
[40] Southvik Biswas, *Is India's food security bill the magic pill,* <http://www.bbc.co.uk/news/world-asia-india-23159706>, July 3, 2013.

to a right-based approach by conferring legal rights upon the eligible beneficiaries. Thus, the bill was construed to be India's best shot at battling issues of chronic malnutrition and hunger.

The bill which was introduced in the House of People in 2011 was referred to the Department-related Parliamentary Standing Committee on Food, Consumer Affairs and Public Distribution which submitted its report in January 2013. However, the 2011 bill was not passed in the Parliament. Subsequently, the legislators recognized the urgency to provide a law addressing the issues of hunger and malnutrition and promulgated an Ordinance on 5th July 2013. This Ordinance was then enacted into the National Food Security Act, 2013 subsequent to the Parliament's approval on September 12, 2013.

This article seeks to interpret and analyze the various provisions of the National Food Security Act, 2013 (hereinafter, The Act).

II. THE NATIONAL FOOD SECURITY ACT, 2013

The Ministry of Law and Justice introduced The National Food Security Ordinance, 2013 in the Lok Sabha on 5th July, 2013 and the same was passed into the Act in September, 2013. The Act seeks "*to provide for food and nutritional security in human life cycle approach, by ensuring access to adequate quantity of quality food at affordable prices to people to live a life with dignity and for matters connected therewith or incidental thereto.*"[41]

The Preamble of the Act embodies the need to bring into effect the Act and duly recognizes its constitutional obligations as under of the Constitution of India to ensure food security to the people of the country to live a dignified life. Empowered under clause (1) of Article 123 of the Constitution,

[41] Preamble to the National Food Security Act, 2013 (No. 7 of 2013)

the President promulgated the Act which proposes to cater to the nutritional needs of two-thirds of the country's population through highly-subsidized food grain distribution.

The Act consists of 13 chapters and 3 Schedules. The first 2 chapters primarily lay out the definition of various terms and phrases used in the course of the Act and envisages provisions for the supply and distribution of food grains to the beneficiaries as according to the categories they fall under. Chapter III provides for an alternative to the grain distribution by suggesting a provision of food security allowance to those beneficiaries in case of a non-supply. Chapter IV delegates the respective State Governments with the responsibility of identifying the various households, either eligible or prioritized, which would be entitled to seek the subsidies.

The Act also houses provisions for reforms of the prevailing PDS system and mechanisms for grievance redressal. In Chapters 8-10, it imposes several obligations on the Central and State Governments and also the local authorities to ensure food security among the people, and demands in Chapter 11 that there be transparency in the system and accountability of the governmental authorities.

Schedules 1-3 envisage subsidized prices of the TPDS, the nutritional standards to be met, and the provisions for advancing food security respectively.

III. PURPOSE & OBJECT OF THE ACT AND THE RIGHT TO FOOD CASE

The purpose or object has an overall reference to the mischief which the enactment is designed to remedy.[42] In the present case, the mischief which the enactment seeks to deal with is food insecurity in the country, where a large part of the population is unable to arrange for a two square meal. This has been considered as a major evil which hampers the progress of our nation. Also, a need was felt

[42] Benion on Statutory Interpretation, 5th edn, (Lexis Nexis Publications), p. 483.

to raise the nutritional levels and the quality of food intake as the larger part of the population was malnourished. Therefore, the Act is to be construed keeping in mind this background.

Purpose & Object: The Act aims to provide for:

1.) Food and Nutritional Security in human life cycle.

2.) Ensuring Access to adequate quantity of quality food at affordable prices

3.) To enable people to live a life with dignity.

Hence, the provisions of the Act are to be construed keeping in mind the said Purpose and Object.

It is important to note here the landmark Supreme Court judgment in PUCL v. Union of India[43] popularly known as the 'Right to Food' case. In this case, the court held that the Right to Food forms an integral part of the Right to life enshrined under Article 21 of the Constitution of India. Further, various important orders have been issued during the gearing of the case which would be helpful while construing and understanding the Act. Some of these orders include making special provisions for certain specific and vulnerable groups such as the destitute, old-aged, widows, and children up to fourteen years of age. It also issued guidelines for making the Public Distribution System effective and speedy, for reducing corruption in the implementation of such schemes, for making authorities more accountable and for increasing transparency. The provisions of the Act would also be critically analyzed keeping in mind the said orders of the Supreme Court in this case.

[43] *PUCL* v. *Union of India,* (Writ Petition [Civil] No. 196 of 2001).

IV. INTERPRETATION OF CERTAIN IMPORTANT TERMS USED IN THE ACT

1) **Priority Households:** The Act fails to provide a clear and precise definition of the term 'priority households". Also, no uniform method has been prescribed for the identification of such households and the task has been left to the respective State governments. However, households under the Antodaya Anna Yojana and those under the Below Poverty Line are said to approximate for the "priority households".[44] They are said to constitute the most vulnerable section of the society.[45] It has also been suggested by various experts to include the households just above the poverty line in the said group of "priority households".

2) **Antyodaya Anna Yojana:** This Scheme of the Government was launched on 25th December, 2000. Antyodaya Anna Yojana is mainly preserved for the poorest of the poor.[46] It seeks to identify such people from within those already covered under the Below Poverty Line bracket. The term 'poorest of the poor" is meant for those people whose buying power is so meager that even at BPL tariff, they cannot purchase food grains all around the year.[47]

3) **Targeted Public Distribution System:** This system is a part of the Public Distribution System which pertains to the management and distribution of food grains throughout the country. The Targeted System is specially evolved to provide a mechanism for effective and efficient allocation of food grains to the Below Poverty Line group. Hence, the focus of the Targeted Public Distribution System is on

[44]Report of the Expert Committee on National Food Security Bill, Pg.3, <http://eac.gov.in/reports/rep_NFSB.pdf> (Visited on 14th August, 2013)
[45] *Id* at Pg. 5.
[46]Antyodaya Anna Yojana (AAY), <http://www.indianyojana.com/anaaj-yojana/antyodaya-anna-yojana.htm> (Visited on 14th August,2013).
[47] *Ibid.*

the poor.[48] However, the definition given under Section 2(23) of the Act fails to define the term with consistency, in accordance with its intended use and purpose. It does not mention in the definition, the group which is its intended beneficiary i.e. the poor. Instead, it uses it generally for the Ration Card Holders.

4) **Food Security:** The term is a wide and dynamic one. An analysis of the definitions given by various Organizations and Institutions show that the essentials of food security are[49]:

a) Availability at all times to all people of adequate food supplies,

b) Physical, economic and social access to such quantities,

c) Such availability and access should exist at all times,

d) The food must be safe and nutritious to meet the dietary needs for an active and healthy life.

However, the definition of the term provided in Section 2(6) of the Act fails to provide for and consider such essentials, which will be discussed and criticized in a later section of this article.

V. COMPARISON WITH CHATTISGARH FOOD SECURITY ACT, 2012

Under this Section, a comparative analysis of the Chattisgarh Food Security Act, 2012 and the National Food Security Act has been made in terms of language of different provisions, the way they are drafted and the cases specifically covered by them in light of the Supreme Court orders in the Right to Food case.

Definition and Identification of 'priority households'.

[48] Public Distribution System, <http://dfpd.nic.in/?q=node/101> (Department of Food & Public Distribution) (Visited on 9th August, 2013) .
[49] Food Security: Concepts and Measurement, <http://www.fao.org/docrep/005/y4671e/y4671e06.htm#fn27> (Food and Agriculture Organization).

The Chattisgarh Food Security Act clearly defines and contains provisions for the identification of 'priority households'. It specifically mentions the categories of the household to be included in the said group. The benefit of such clear specifications is that it gives meaning to the whole of the Act, provides clarity as to know which provisions are made for which group, provides ease of interpretation to the Court in case a problem as to interpretation arises.

On the other hand, as mentioned before, the Act fails to provide a precise definition of the term 'priority households'. Thus, it is suggested that the Act should also contain even though not very specific but certain broad guidelines as to define and identify the term.

Definition of the term 'eligible households'.

Section 2(3) of the Act defines 'eligible households' as 'households covered under the priority households *and* the Antyodaya Anna Yojana'.

Now, Section 2(1) (i) of the Chattisgarh Food Security Act defines eligible households as '*either* an Antyodaya household *or* a priority household'.

Here, it is pertinent to note that 'eligible households' has been defined differently in both the legislations although what they intend to convey is the same. The use of the Conjunctions 'or/either' in the Chattisgarh Act makes it very clear that any household which is either an Antyodaya household or a priority household would be an eligible household. However, in the Act, the use of the word 'and' makes the definition ambiguous and unclear as to whether:

a) A household should be covered under both Antyodaya Anna Yojana and Priority household to be called as an 'eligible household'

b) Alternatively, whether it should be covered under either of them to be called as an 'eligible household'.

Thus, this may *prima facie* create a problem of interpretation of the term 'eligible households' as to which households would be included in the said group. Further, the problem is aggravated by the fact that the term 'priority households' has not been specifically defined in the Act.

Thus, it is suggested that the word 'and' should be replaced by the word 'or' so as to give the term its intended meaning.

Inclusion of Certain Provisions in accordance with the Supreme Court orders:

The Chattisgarh Food Security Act comprehensively deals with the orders of the Supreme Court issued in the Right to Food Case. The Supreme Court in its various orders issued overtime in the case directed to make special provisions for vulnerable groups such as the destitute, migrants, widows, disabled persons, etc. The Act pays due attention to these orders and has specially included provisions for providing food security to these groups.

For ex. Chapter III of the Act titled 'Entitlements of Special Groups' and Section 15(2) specifically provide for the definition and identification of such groups.

However, such provisions are missing in the Act which creates a gap between the purpose and object of the Act, where despite of the clear Supreme Court Orders regarding provisions for special and vulnerable groups, no provisions have been made in this regard.

Hence, it is suggested that provisions in accordance with the Supreme Court orders should be included to further the Object and purpose of the Act.

CRITICISM OF CERTAIN PROVISIONS OF THE ACT

Erroneous Definitions

Section 2(6): Definition of Food Security

The definitions of food security acceptable in the general sense, as defined by various international forums are:

"*Food security is a situation that exists when all people, at all times, have physical and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life*".[50] (World Food Summit, 1996)

"*The words food security means the basic availability and access to enough food by all at all times, for an active and healthy life. It includes a minimum ready availability to nutritionally adequate and safe foods, and an assured ability to acquire acceptable foods in socially acceptable ways.*" [51]

Therefore, according to these definitions the essentials of food security include:

- Food availability: The main essence of food security is the aspect of availability of adequate quantities of food of appropriate quality, to all people, at all times which may be made available through domestic production or imports.
- Food access: In addition to availability, accessibility by all individuals to those adequate amounts of appropriate foods for a nutritious diet is of prime importance in ensuring food security. The accessibility should be in socially acceptable ways.

[50] *Food Security',* Policy Brief, Issue 2, June 2006, FAO Agriculture and Development Economics Division. Available at <ftp://ftp.fao.org/es/ESA/policybriefs/pb_02.pdf> (Visited on 12th August, 2013).
[51] American Institute of Nutrition Life Sciences Research Office (LSRO) of the Federation of American Societies for Experimental Biology, 1990.

- Utilization: To meet a state of physiological well-being, the food should be supplemented by the effective utilization by non-food inputs such as adequate diet, clean water, sanitation and health care.
- Stability: Food security can be considered to be achieved when there is stability and consistency in the accessibility and availability of food. The populous must not be under the fear of losing access to food as a consequence of sudden shocks or even cyclical events.[52]

But, in the present Act, 'Food Security' is defined as -

"The supply of entitled quantity of food grains and meals specified under Chapter II".[53]

The objective with which the Act came into being was to provide for the basic human food supplements in adequate proportions and appropriate standards at affordable prices to meet the constitutional obligations of ensuring food security to the people of the country.

The Act, in the definition, plainly provides for the supply of the food grains and meals to entitled persons but does not encompass the other aspects of food security such as assurance of availability and accessibility of food. The provisions of the Act, however, fail to fulfill the objective with which it was made. Firstly, the legal meaning of food security as encapsulated in the Act lacks in carrying forward or bringing to reality the essence of the objective. Secondly, the definition in the Act does not convey in the full sense the multidimensional aspects of food security as done by the internationally accepted definitions, which may result in a conflict of interpretation. Therefore, this conflict between the definitions and the objective might pave way for discrepancies in their interpretation.

[52] Gulati, Ganguly and Shreedhar, *2011: Food and Nutritional Security In India – A Stocktaking Exercise*; ICAR & IFPRI (Feb 2011)
[53] § 2(6), National Food Security Act, 2013.

VI. CIRCULAR REFERENCES OF THE PROVISIONS

Certain provisions of the Act tend to be tautological in nature by making circular references to different clauses of the Act. One such example would be of Section 2(3) of the Act which holds

"*eligible households means households covered under the priority households and the Antyodaya Anna Yojana referred to in sub-section (1) of section 3*."[54]

This definition requires a perusal of section 3(1) of the Act to understand the ambit of eligible households. This subsection holds –

"*Every person belonging priority households as identified under sub-section (1) of section 10, shall be entitled to receive 5 kilograms of food grains per person per month at subsidized prices specified in Schedule I from the State Governments under the Targeted Public Distribution System:*

Provided that the households covered under the Antyodaya Anna Yojana, shall to the extent as may be specified by the Central Government for each State, in the said scheme, be entitled to 35 kilograms of food grains per household per month at the prices specified in Schedule I."[55]

The Act further requires the interpreter to peruse Section 10(1) which states,

"*The State Government shall, within the number of persons identified under section 9 for rural urban areas, identify –*

(a) *The households to be covered under the Antyodaya Anna Yojana under the extent specified under sub-section (1) of section 3 in accordance with the guidelines applicable to the scheme.*

[54] § 2(3), National Food Security Act, 2013.
[55] § 3(1), National Food Security Act, 2013.

(b) *The remaining households as priority to be covered under the Targeted Public Distribution System in accordance with such guidelines as the State Governments may specify.*

Provided that the State Government may as soon as possible, but within such period not exceeding 180 days after the commencement of the Act, identify eligible households in accordance with the guidelines framed under this sub-section.[56]

As seen in the above-mentioned sections, the Act fails to coherently define a conclusive way of the determination of these sections. The nature of conflict is such that the construction of the Act, in place of firmly defining the word or phrase in question, makes irrelevant or unnecessary perusals into the subsequent provisions of the Act. Again, the references given in the subsequent provisions further refer the 'terms' to the previously read sections, which in reality provides no exactness about the definition. Thus, in the process, the interpreter would not be able to deduce the actual legislative intent and demarcate the ambit of the provisions.

Lack of Distinction

(a) As seen earlier, the term 'eligible households' is used to connote the households covered under the priority households and those under the Antyodaya Anna Yojana scheme. Under section 2(14), 'priority households' have been defined as households identified as such under section 10.

Section 10(1) (b) states,

"The remaining households as priority to be covered under the Targeted Public Distribution System in accordance with such guidelines as the State Governments may specify."[57]

[56] § 10(1), National Food Security Act, 2013.
[57] § 10(1)(b), National Food Security Act, 2013.

Thus, the legal meaning refers to those households which are included under the TPDS. Section 3(1) provides that –

"*Every person belonging to priority households, identified under sub-section (1) of section 10, shall be entitled to receive…*"[58]

The same section, under subsequent subsections (2) and (3) provides for entitlements for 'eligible households' which it holds to have been referred to in subsection (1). However, subsection (1) of section 3 clearly provides entitlements only for priority households and **not eligible households**. Hence, the terms 'eligible households' and 'priority households' mentioned in the Act, are interchangeably used lacking effective distinction and demarcation between the two.

The underlying concern with the bill is the failure to clearly establish the method of classification of the populace covered under the act. It issues no direction to the Centre or State governments to identify the priority households and the primary beneficiaries of the bill.[59] It hinges on a lasting division of the population into three groups, without any clarity as to how the groups are to be identified.[60] The provisions fail to provide exactness on the scope and ambit of these terms. In reality, the terms widely differ from each other. In the general sense, eligible households (in the present context) would imply those who are qualified to avail the rights as under the TPDS whereas priority households would imply those households of preference to whom the services of the Act should primarily cater to.

[58] § 3(1), National Food Security Act, 2013.
[59] *India and the Food Security Bill*, 3rd December, 2012, <http://www.shoutoutuk.org/2012/12/03/food-security/> (Visited on 9th August, 2013).
[60] Jean Dreze, 'Mending the Food Security Act', 23 May,2011 Updated: May 24, 2011 02:48 IST <http://www.thehindu.com/opinion/lead/article2042980.ece?homepage=true>

(b) Another such faulty construction of the Act is seen in Section 5 whereby it seeks to provide for the nutritional entitlements to 'every child up to the age of fourteen years' by supply of age appropriate mid-day meals through local bodies like *anganwadi* and Government-aided schools.

Unlike the rest of the Act, where every entitlement is subject to the criteria of priority and eligible households, the only classification of children made by this section is in terms of age of the child. The amount and type of meal entitled depends entirely on the age of the child. There seems to be a profuse lack of distinction between groups of children – whether the provisions apply to general or all children or only to those children belonging to the eligible households for whom the other provisions of the bill apply. It fails short on differentiating and providing clarity/consensus which might act as an obstacle in understanding the legislative intention of the Act.

(c) Targeted Public Distribution System: This scheme was launched by the Government with special focus on the poor persons. The States are required to formulate and implement foolproof arrangements for identification of the poor for delivery of food grains and for its distribution in a transparent and accountable manner through the fair price shop. However, the TPDS provisions that this Act incorporates provides 'essential commodities to the ration card holders' and does not specifically intend to distribute the entitlements to the poor sections of the society. The phrase 'ration cards holders' can imply even those person who belong to the APL category and can avail the food grains at subsidized prices, which negates the purpose with which this Act was brought into effect. Thus this Act in effect contravenes the legislative intent of the TPDS social welfare scheme and brings out in itself an ambiguity with regard to the beneficiaries of the entitlements under the Act.

(d) Priority households: The Act for the purpose of distribution of food grains, broadly groups the population into three – priority households, eligible households and those covered under the Antyodaya Anna Yojana Scheme. It delegates the State Governments to identify persons belonging

to the priority households in sections 9 and 10 but nowhere in the course of the Act, does it lay out a definitive criterion for the State government to identify them. As the very meaning of 'priority households' is undefined, the rest of the provisions in the Act also stand unclear to the interpreter.

(e) The term 'meal' as used in the Act is used to denote "cooked meal or ready to eat meal or take home ration, as prescribed by the central government." The Supreme Court commissioners in the Right to Food case had directed the Government that their draft of the 2011 bill contradicts its orders as apex court explicitly banned the role of profit making contractors and suppliers selling ready to eat meals to children. The order had laid down that the definition of meal should incorporate the words 'locally produced' and exclude 'ready to eat food'.[61]

(f) No Safeguards provided with reference to the Mid-day meal Scheme**:** In light of the Mid-day meal tragedy in Chhapra, Bihar where children died after consuming the government provided Mid-day meal, the provisions of the Act seem insufficient. Under the National Food Security Act, the National Mid-day Meal Scheme will become part of the larger National Food Security programme.[62] The provisions contained in Section 5 to Section 7 merely talk about the different age groups to which the benefits are to be provided and the way it is to be provided. No provisions regarding the maintenance of quality or safeguards have been provided in the Act. Moreover, no penalties have been imposed and no accountability has been assigned to some specific authority in case non-compliance occurs leading to such tragedies as in the Chhapra case.

[61] Nitin Sethi, *Food Security Bill Violates SC Rulings, Say Court Commissioners,* <http://articles.timesofindia.indiatimes.com/2011-10-17/india/30289219_1_apex-court-nfsb-priority-households>, The Times of India, 17th October, 2011.

[62] *Case for A Food Security Programme,* Economic & Political Weekly, July 27, 2013 at p. 7.

VII. CONCLUSION

The National Food Security Act, 2013 aims to ensure food and nutritional security to the people of the country. The Act through its various provisions seeks to cover seventy-five percent of the rural population and fifty percent of the urban population. Although the Act has attempted to incorporate several measures to tackle the problems of food insecurity in India, it fails to comprehensively deal with the problem.

As pointed out above there are also many errors in the language used in the Act which may create several problems of interpretation in future. Also, it does not provide a clear and precise definition of the term 'priority households', which is the main criticism leveled against it. It also fails to provide for certain specific cases which are within the scope of food security.

Lastly, the authors feel that no sudden and immediate emergency had arisen that needed the President to exercise the power granted to him under Article 123 of the Constitution. The Act has not been formulated in isolation of political agendas keeping in mind the upcoming 2014 elections. Further amendments need to be made to the Act in order to completely do justice to its objective.

3. MEDICAL PROFESSIONALISM DURING ARMED WARFARE: THE RELEVANCE OF ETHICS IN PROMOTING EQUALITY IN ACCESS TO MEDICATION

Author(s): Amulya Chinmaye[63]

ABSTRACT

Medical personnel are crucial to maintaining military stability and upholding the ideals of international humanitarian law during conflicts. Treatment procedures and their professional codes of conduct during armed rebellion are intertwined with military strategies. As martial commandments frequently influence triage decisions, abuse of human rights becomes rampant. Even if undesirous of disobeying medico-ethical standards, medics may be compelled to follow orders of superiors. At such times, the stalemate between military orders and ethical principles of medicine needs serious deliberations. On June 30, 2015, the International Committee of the Red Cross endorsed the Ethical Principles of Health Care in Times of Armed Conflict. These guidelines seek to resolve ethical dilemmas that medical professionals face while serving in challenging military environments. Discussing the complexities of military medical ethics, the author highlights that the ICRC guidelines, although commendable, are insufficient to wholly address the issue. Finally, the author attempts to provide solutions to resolve the conflict.

I. INTRODUCTION

From the Holocaust to the Syrian refugee crisis, wartime dehumanization is not unusual. What must be accomplished along with stabilizing and controlling the situation is providing medicinal respite to the injured and the sick. At times of heightened oppression, the military and relief forces require all

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conceivable medical care to recuperate and continue fighting. Thousands are left wounded and distressed, with few medical personnel available to provide relief/necessary aid. Paucity of internal resources and medical staff necessitates assistance from peace-keeping operations and curative troops of organizations such as the United Nations and the International Committee of the Red Cross (hereinafter, 'ICRC').

In such circumstances, the role of medical professionals is of paramount importance. Their responsibilities intensify with the mounting pressure of insurgency. Several factors – such as time constraints, the need to take immediate action or judiciously utilize medical resources, snowballing injured persons, non-availability of the requisite medicines or basic necessities, threat to their person/property, etc. – influence the treatment meted out to those incapacitated by war.

A medical practitioner's resolve to upkeep his medical ethics is of utmost important in such situations. Each year, medical professionals swear by the modern Hippocratic Oath and are bound by similar ethical standards in handling and treating patients.64 Based on principles of non-maleficence and beneficence,65 the Oath seeks to ensure the best possible cure for ailing patients. While it may be easy to reasonably exercise one's judgment and set aside his/her prejudices during peacetime, the same becomes exponentially difficult during times of violence. The medical personnel are likely to face multifaceted ethical conundrums which could adversely impact the accessibility of medical attention.

[64] Emily Woodbury, 'The Fall of the Hippocratic Oath: Why the Hippocratic Oath should be Discarded in Favor of a Modified Version of Pellegrino's Precepts', July 2012 GUJHS Vol. 6, No. 2: 9-17 <https://blogs.commons.georgetown.edu/journal-of-health-sciences/issues-2/vol-6-no-2-july-2012/the-fall-of-the-hippocratic-oath-why-the-hippocratic-oath-should-be-discarded-in-favor-of-a-modified-version-of-pellegrino%E2%80%99s-precepts/> accessed 3 December 2015.

[65] Admin, 'Hippocratic Oath & Autonomy', January 28, 2009 Institute of Catholic Bioethics, St. Joseph's University, < http://sites.sju.edu/icb/hippocratic-oath-autonomy/> accessed 3 December 2015.

Medicine is about using one's knowledge effectively to cure and prevent illnesses.66 For a doctor, aiding and curing a patient's infirmities should take precedence – be it a military officer or a militant, a civilian or a combatant. However, marred by individual choices, their State's military laws, national identities and social-covenants, medical personnel are seen derogating from the principles of equal need-based treatment and instead adopting preferential management of the wounded.67 To deprive those needing immediate care and remedies violates international principles of humanitarian law and amounts to an outrage on human dignity.

To feasibly resolve this situation, the conflict between a practitioner's integrity and the military laws governing him need to be examined. In this stride, the relevance of application and entrenchment of military medical ethics cannot be understated. This essay is an attempt to recognize the moral conundrums and ethical dilemmas medical personnel are subject to in conflicting areas and warfronts. It discusses the ICRC's adoption of 'Ethical Principles of Health Care in Times of Armed Conflict and Other Emergencies', and deduces appropriate conducts of such personnel considering their duties as guided by the spirit of their profession and national/international martial requirements.

II. WHY PRACTICE MEDICAL ETHICS?

"Integrity without knowledge is weak and useless, and knowledge without integrity is dangerous and dreadful." — Samuel Johnson68

[66]Michelle Mclean, Vikram Jha, John Sandars (2015) 'Professionalism under fire: Conflict, war and epidemics', (2015), Medical Teacher, 37:9, 831-836, <http://dx.doi.org/10.3109/0142159X.2015.1044951> accessed 3 December 2015.
[67] Michael L. Gross, 'The Limits of Impartial Medical Treatment during Armed Conflict', (Ash gate, 2013) Ch 4, Military medical Ethics for the 21st Century: 71-84 <http://poli.hevra.haifa.ac.il/~mgross/images/publications/Gross%20Limits%20of%20Impartial%20Medical%20Care%20in%20Armed%20Conflict%202013.pdf> accessed 3 December 2015.
[68] Samuel Johnson, 'Integrity', The Samuel Johnson Sound Bite Page <http://www.samueljohnson.com/integrit.html> accessed 5 December 2015.

Medical ethics provide guidelines for medical professionals to handle ethical problems that arise while treating patients.69 It involves the application of moral principles into medical practice70 which seek to propound the degree of freedom that can be exercised by the health-care professionals in their decision-making.71 When practitioners find themselves in situations where discourse with their colleagues is not possible or uncertainty looms over their actions, these principles usually serve to aid their decision-making. Following such honorable standards is viewed as an essential of upholding the trust confided in them by patients and more importantly, the society at large.72

Primarily based on four basic tenets,73 medical ethics seek to resolve any moral questions professionals may face –

Patient autonomy – this principle assumes that patients are prudent to make decisions pertaining to their health. Granting autonomy in their decision-making, medical ethics oblige medical practitioners to provide them with full information to aid their decision-making process. This forms the basis for informed consent of the patient to become subject to the practitioner's medical care.

Non-maleficence – although medical treatment entails its own risks, this principle obliges practitioners to refrain from intentionally, either through commission or omission, harming their patients.

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[69]'Basic Ethical Principles', Society, the Individual, and Medicine, uOttwaa<http://www.med.uottawa.ca/sim/data/Ethics_e.htm> accessed 4 December 2015.

[70] Dr. Laurence Knott (current version: Dr. Roger Henderson), 'Medical Ethics', Patient, (January 28, 2015) 2445 (v26 <http://patient.info/doctor/medical-ethics> accessed 4 December 2015.

[71] Vivienne Nathanson, 'Medical ethics in peacetime and wartime: the case for a better understanding', (2013) International Review of the Red Cross, 95 (889), 189–213 <https://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwi9y8Li-sHJAhUBqZQKHX-hD0gQFggcMAA&url=https%3A%2F%2Fwww.icrc.org%2Fen%2Fdownload%2Ffile%2F13524%2Firrc-889-nathanson.pdf&usg=AFQjCNGyQM-wXfzom2Y_jbKsyyRmxOJ8mA&sig2=1iej1n_icWBtXofBPvBYdA> accessed 4 December 2015.

[72] 'Principles of Medical Ethics', Preamble, American Medical Association (adopted in 1957 and revised in 2001) [available at: http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/principles-medical-ethics.page?]

[73] Thomas R. McCormick, 'Principles of Bioethics', 2013 University of Washington School of Medicine <https://depts.washington.edu/bioethx/tools/princpl.html> accessed 5 December 2015.

Beneficence – under this principle, the practitioner is under an obligation to not only benefit the patient, but also to promote the best interests of the patients. This also underlines the notions of confidentiality, non-disclosure and trust.

Justice – this principle recognizes that as resources are scarce, investing all resources on one (or a few) patient(s) would not do justice to all those in need. Hence, on the lines of distributive justice, it propounds allocation to each patient his share of resources.

While catering to medical needs of military operations, the observance of these medical codes of conduct during becomes extremely pertinent.74 This is because the society compels strict adherence to international humanitarian principles while/whereas military superiors require obedience to their decisions. Being answerable to both, medical personnel must also ensure compliance with the principles of non-maleficence, beneficence and justice. Warfare leaves medics torn between compliance to their profession, commanders, and conscience.75 This may cause medics to derogate from these ethical obligations and partake in human rights violations such as partiality in treatment, medical negligence failure to take adequate care et al. Thus, it becomes highly relevant for a medical professional serving on the war-field to internalize these ethical standards before yielding to or refusing obedience to military orders.

The ethical principles of non-maleficence and beneficence require obedience at all times. The same is not the case with the principle of patient-autonomy. As during armed conflict, if given a choice,

[74]Carwyn Hooper, 'A century on, do civilian and military medical ethics differ?', 2014 The Conversation < http://theconversation.com/a-century-on-do-civilian-and-military-medical-ethics-differ-28833> accessed 5 December 2015.
[75]Dave Lounsbury, 'Dilemmas of Wartime Medicine', February 2002, NOVA <http://www.pbs.org/wgbh/nova/military/dilemmas-wartime-medicine.html> accessed 5 December 2015.

wounded soldiers might reject medical aid to escape redeployment. Thus, in military medical ethics, granting full autonomy may not always positively serve military interests.76

III. MEDICO-ETHICAL COMPLEXITIES ON THE WAR-FIELD

As opposed to peacetime, healthcare during armed conflicts may cause lapses of professionalism on the part of medics. While functioning under optimal conditions may not present ethical conflicts, non-optimal circumstances cause physicians to derogate from basic human rights. Several factors cause the decision-making capacities of medical professional to falter. In addition to the objective of saving lives, there is an additional burden to render wounded soldiers fit, or as Gross77 puts it, to 'salvage the maximum number of soldiers and returning them to duty.' When pressurized to first treat those who can be redeployed, a doctor's objective of saving lives directly conflicts with taking lives of who need care the most.

The biggest limit of medical treatment during armed conflicts is impartial treatment.78 Article 12 of the Geneva Conventions (1949) demands priority treatment only in case of urgent medical needs – be it of a compatriot combatant or an adversary. Yet, reservations on impartial care assume prominence during wars as79 –

Firstly, military operations necessitate triage of patients based on their fitness rather than their medical needs. Most often than not, doctors on operational-fields function under pre-determined standards and hesitate to step out of such canons. One classic example of this is of the Northern African

[76] Defense Health Board, 'Ethical Guidelines and Practices for U.S. Military Medical Professionals', 2015 <http://www.nursingworld.org/DocumentVault/Ethics_1/Defense-Department-Report-Ethical-Guidelines.pdf> accessed on 5 December 2015.
[77] Michael L. Gross, 'Medical Ethics during War', 2008 Vol. 15, Issue 1, Lahey Clinic <https://lahey.org/About_Lahey/Publications/Lahey_Clinic_Medical_Ethics_Journal/Medical_Ethics_Winter_2008.aspx> accessed 5 December 2015.
[78] *Supra* at n. 4.
[79] Ibid.

campaign during World War II.80 Notwithstanding supply insufficiencies, prioritizing distribution of penicillin to soldiers with STDs who could be redeployed rather than seriously wounded and diseased troops left several dead of pneumonia and injuries. Thus, such decisions are usually of life and death.81

Partiality may arise even while offering medical assistance to enemy-soldiers. Supply crunches create a 'two-tiered' system of medical resources with the best resources offered to compatriot soldiers.

Lastly, 'military ethics' require prioritization of care of comrades over detainees.

There exist two other problematic aspects – the compulsion for military physicians to succumb to pressures and administer psychotropic medications both on soldiers and prisoners of war.82 While the former may be drugged to lessen their wartime depressive disorders, the latter may be involuntarily infused – during interrogations or hunger strikes (as in Guantanamo) military commandos resort to cruel and torturous mechanisms to extract from captured prisoners, enemy whereabouts and strategies.83 The question of medico-ethics in such situations was one of the significant outcomes of the Gulf-War.84

The second concern is as to the certification. Physicians are required to certify medical and fitness conditions of patient-soldiers to martial superiors against their orders. Such modalities may again clash

[80] George J. Annas, 'Worst Case Bioethics: Death, Disaster, and Public Health', 2010 Oxford University Press 114 < https://books.google.co.in/books?id=jVLiBwAAQBAJ&pg=PT91&lpg=PT91&dq=Northern+African+campaign+during+World+War+II+penicillin+military&source=bl&ots=PDv0jdRPdi&sig=tBgGoY3EhRXltF5r8tdVp9P8a48&hl=en&sa=X&ved=0ahUKEwjmnbnV0sXJAhWCVo4KHfbPC9cQ6AEIKDAC#v=onepage&q=Northern%20African%20campaign%20during%20World%20War%20II%20penicillin%20military&f=false> accessed 04 December 2015.
[81] *Supra* at n. 9.
[82] George J. Annas, 'Military Medical Ethics – Physician First, Last, Always', 2008 N Engl J Med359:1087 <http://www.nejm.org/doi/citedby/10.1056/NEJMp0805975#t=citedby> accessed 04 December 2015.
[83] Annas, 'Human Rights Outlaws: Nuremberg, Geneva, and the Global War on Terror', (2007) 87 Boston U. L. Rev. 427<https://www.bu.edu/law/central/jd/organizations/journals/bulr/volume87n2/documents/ANNASv.2.pdf> accessed 04 December 2015.
[84] SH Miles, 'The New Military Medical Ethics: Legacies of the Gulf Wars and the War on Terror', 2011 27(3): 117-23 Bioethics, Blackwell Publishing Ltd. <http://www.ncbi.nlm.nih.gov/pubmed/21752039> accessed 04 December 2015.

with maintaining secrecy over a patient's condition. There exist risks of redeployment of soldiers into war-fields as done in Iraq or Afghanistan even against medical orders.85

Yet another conundrum is with regard to rescuing lives at the cost of jeopardizing one's own life. Introduction of biosensor technologies has enabled rescue-mission teams to identify and monitor vital signs of life to salvage soldiers.86 Higher professionalism requires doctors to shield life with all possible inputs from their side – nonetheless, physicians need to analyze whether or not to send out rescue teams at the cost of another life to sites of constant firing. Failure to act herein might adversely affect combatants' motivations to actively participate in the warfare. Moreover, the expectations of a combatant vary from those of a medic despite their operations in the similar hostile-environments.87 While the former stands free of any duty of care for causing injury to a fellow combatant,88 medical professionals remain subject to international conventions that admonish medical negligence.

While ethical principles are based on humanitarian considerations, it cannot be uniformly expected of a medic to overlook the fact that his patient probably held a gun at his head shortly before. To retain an ethical perspective at such an encounter is exceptionally rare.89

[85] Ibid.
[86] Edmund G. Howe, 'New Biological advances and Military Medical Ethics', Ch 2 Bio-inspired Innovation and National Security<> accessed 02 December 2015.
[87] Janet Kelly, 'Is Medical Ethics in Armed Conflict Identical to Medical Ethics in Times of Peace?', 2013 Cambridge Scholars Publishing Ltd. ISBN (13): 978-1-4438-4414-7 < https://books.google.co.in/books?id=8TgyBwAAQBAJ&dq=janet+kelly+armed+conflict+identical&source=gbs_navlinks_s> accessed 02 December 2015.
[88] Richard Scorer, 'Combat Immunity and the Human Rights Act, Jun 2015 < http://www.slatergordon.co.uk/media-centre/blog/2015/06/combat-immunity-and-the-human-rights-act/> accessed 02 December 2015.
[89] Lieutenant Commander Kathryn J. Cook, *Medical Ethics and Military Conflicts – What Would You Do?*,< https://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjWmc6u1cXJAhWUwI4KHQODBIAQFggcMAA&url=https%3A%2F%2Fwww.usnwc.edu%2FPublications%2F-Luce-nt-%2FArchives%2F2013%2FEthics%2FK-Cook_Medical_Ethics_and_Military_Conflicts-What_.aspx&usg=AFQjCNHxpOx35EXQExkHU_A7Ma7UR0HvMQ> accessed 03 December, 2015.

However, some may argue that since the decisions are made quickly, there is not much contemplation over the dual loyalty by practitioners.90 While this may probably be true to a slight extent in emergency cases, nevertheless, it cannot be disputed that when presented with two equally-injured patients, the doctor would be influenced by militia commands to prioritize treatment of the home-soldier. The dilemma becomes all the more discernible when the patient's condition is not as bad. For instance, if a male practitioner posted in conservative Middle Eastern conflict zones has to treat a woman whose religion prohibits interaction and contact with unfamiliar persons,91 such a doctor finds himself in a fix. While his professional integrity might lead him to take action, the fear of dogmatic criticism and possible international ramifications may cause him to withhold action.

All of the above and much more – subjective predispositions, cultural, political and ideological differences, time constraints and fear of repercussions (both nationally and internationally) – indicate that the spirit of the Hippocratic Oath is as relevant as ever.92 These complex problems coupled with life-and-death situations, national or international interests and security clearly challenge professional ethics depicting medical participation in armed conflicts is no easy task.

IV. INTERNATIONAL HUMANITARIAN LAW AND THE ICRC

"Be it in Mali, Yemen or Syria, doctors and nurses are exposed to threats and violence aimed at thwarting their medial duties every day."93

[90] *Supra* at n. 4.
[91] *Supra* at n. 24.
[92] Dr. Daniel Sokol, *A guide to the Hippocratic Oath*, BBC News, October 26, 2008 <http://news.bbc.co.uk/2/hi/7654432.stm> accessed 02 December 2015.
[93] Mr. Peter Maurer (President of the International Committee of the Red Cross), *Healthcare in Danger: Launch of a Common Core on Ethics*, June 30, 2015 <https://www.icrc.org/en/event/ethical-principles-health-care-times-armed-conflict-and-other-emergencies> accessed 02 December 2015.

International humanitarian law, and not human rights law, is the champion of according protection to victims and regulating military operations in armed conflicts.94 It compels States to handle conflicted conditions within pre-determined humanitarian precincts established through agreements facilitated by non-State actors and multi-lateral negotiations. Any breach of such laws warrants legal action against the personnel and the State-party involved therein. Despite the UN peacekeeping troops not being subject to humanitarian law (as the UN is not a signatory of the Geneva Conventions, 1949 by virtue of being a non-State actor),95 the troops are obliged to adhere to the 'form and spirit' of these conventions.96

The global pioneer of human rights, the United Nations Declaration of Human Rights, 1948 provides a guiding light to all other international covenants in their stride to protect human rights. The four Geneva Conventions of 1949, which have been signed by almost all nations to provide for modalities of armed conflict, and their Additional Protocols, recognize customary humanitarian law to bind even States which have not ratified the Protocols.97 In addition, specific declarations such as the World Medical Association's Regulations in Time of Armed Conflict (Declaration of Havana),98 have enumerated the approach to wartime medical ethics. Moreover, the Geneva Conventions have also

[94] ICRC, 'Healthcare in Danger: The Responsibilities of Health-care Personnel Working in Armed Conflicts', < https://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwj5_MKk1sXJAhWDcI4KHSwhDcsQFggcMAA&url=https%3A%2F%2Fwww.icrc.org%2Feng%2Fassets%2Ffiles%2Fpublications%2Ficrc-0739-part-i.pdf&usg=AFQjCNEOPRuTuOUYP7alihQHmvoIErFGSg> accessed 02 December 2015.
[95] J Tobin, 'The challenges and ethical dilemmas of a military medical officer serving with a peacekeeping operation in regard to the medical care of the local population', 2005 Journal of Medical Ethics, Vol. 31, 31:571–574, < http://jme.bmj.com/content/31/10/571.full> accessed 01 December 2015.
[96]Regulations for the United Nations emergency force (UNEF), of 20 Feb 1957 United Nations Treaty Series 1957;271:168.
[97] 'Applicable international law', Syria, Rulac, Geneva <http://www.geneva-academy.ch/RULAC/applicable_international_law.php?id_state=211> accessed 05 December 2015.
[98] Adopted by the 10th WMA General Assembly, Havana, Cuba, Oct 1956. < http://www.wma.net/en/30publications/10policies/a20/> accessed 05 December 2015.

created rights for medical personnel to be protected for responsibly discharging duties in accordance with appropriate standards of health-care and medical ethics.99

In particular, ICRC has played a monumental role through its Advisory Services in assisting States to implement and adhere to international humanitarian law.100 It has issued a guide, Healthcare in Danger: The Responsibilities of Health-care Personnel Working in Armed Conflicts, through which it seeks to 'guide health-care personnel adapt their working methods to the exigencies of armed conflicts and other emergencies and other emergencies.'101 Herein, the medical personnel are mandated to treat the sick and wounded, not to abandon them under any circumstances, refuse action against health ethics and respond to health-care needs.102 Recognizing that/the fact that medico-ethical dilemmas arise during armed conflicts, the ICRC, along with four other organizations103 on June 30, 2015, endorsed the model on Ethical Principles of Health Care in Times of Armed Conflict and other Emergencies.104

The World Medical Association's International Code of Ethics released in 2004105 held out that wartime medical ethics are no different from medical ethics of peacetimes to emphasize the overarching notion of protection of life.106 Adopting a similar approach, the ICRC-Ethical Principles

[99] Rule 25, Customary International humanitarian law database https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter7_rule25> accessed 05 December 2015.
[100] Ranu Purohit, 'Health Care during Armed Conflict: A Socio-Legal Perspective' September 18, 2015 SSRN <http://ssrn.com/abstract=2662665> accessed 5 December 2015.
[101] *Supra* at n. 29.
[102] Ibid section 2 – 30.
[103] The World Medical Association (WMA), the International Committee of Military Medicine (ICMM), the International Council of Nurses (ICN) and the International Pharmaceutical Federation (FIP).
[104] The ethical principles may be availed at: <https://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0ahUKEwilrrWj2sXJAhXBG44KHbFfCVwQFggiMAE&url=https%3A%2F%2Fwww.icrc.org%2Fen%2Fdownload%2Ffile%2F9567%2Fethical_principles_of_health_care.pdf&usg=AFQjCNETJv9NiQPZb16I7t5__PA3GqEC1Q> accessed 5 December 2015.
[105] World Medical Association, 'International Code of Ethics', Adopted by the third General Assembly of the WMA, London 1949 < http://www.wma.net/en/30publications/10policies/c8/> accessed 5 December 2015.
[106] *Supra* at n. 22.

explicitly provide for patient-centered ethics even during wartimes by stating the ethical obligations of medical professional remain unchanged from those of peacetimes.107 Thus, medics are to act in the patient's best interests (if possible, with consent) and at times of conflicting-loyalties, oblige their patient's needs.108 Misusing health-facilities meant for the wounded109 and engaging in cruel/inhuman treatment is prohibited.110 No impartialities are to creep into their services to patients except 'upon clinical need and available resources.'111 Confidentiality as to a patient's medical information is to be maintained112 and healthcare for the purposes of politics or publicity is to be avoided.113

The ICRC-Ethical Principles do not bring out substantial modifications but rather seem to reiterate in a condensed manner, the previous position of medical ethics. The potential of these principles in resolving the complications of armed conflict as discussed in the previous section is not very promising. The multi-dimensional military medical ethics need further deliberations and ample policy discourse.

V. CONCLUSION & RECOMMENDATIONS

From the above, it is evident that the ethical ambiguities of military medical ethics remain unsettled. The challenges of war render physicians incapable of realizing these ethical principles into practice. To achieve medical neutrality during war, the ICRC recommends recognition and discussion of the dilemma as the forerunner to resolving it.114 WMA's and ICRC's objectives which state that medical

[107] *Supra* at n. 39, principle 1.
[108] Ibid. principle 6.
[109] Ibid. principle 4.
[110] Ibid. principle 5.
[111] Ibid. principle 7.
[112] Ibid. principle 8.
[113] Ibid. principle 9.
[114] *Supra* at n. 29.

ethics should trump law (wartime or otherwise) cannot be accepted in entirety. On the contrary, Howe, very much utilitarian-in-thought, suggests 'prioritization of military missions' over military medical ethics.115 Considering the large interests, ethical justifications for trade-offs to disburse medical resources on re-deployable combatants has remained the trend. He opines that even as soldiers with neurotic disorders (such as combat immunity) are forced to reenter the field, 'the ethical priority should remain to do the necessary to maximize the mission's success.' Yet, he maintains his stance on not yielding to grossly unethical means for national security.

What, then, should surely prevail in a conflict between the medical ethics and military responsibilities? Perhaps there is no single answer to this. As no two situations evoke similar medical responses, there can be no straitjacket formulation as to what course of action should take precedence. Each situation would have to be judged independently considering an array of factors: the primary factors being the patient's physical needs, degree of injury and the risks entailed with treatment and non-treatment.116 Neither a wholly command-oriented approach nor a wholly-ethical stance can resolve the impasse.117 A middle-ground must be struck through an optimal synthesis of all three parameters – legal, professional and personal.

Addressing peripheral issues may also resolve the ethical qualms of wartime. For instance, following international protocols and superior's commandments, military medical officers are often seen disregarding the medical needs of the indigenous people.118 An example of this is of the abysmal healthcare infrastructure in Syria, which has left lakhs of people injured, vulnerable to communicable

[116] *Supra* at n. 24.
[117] *Supra* at n. 22.
[118] *Supra* at n. 30.

diseases with increasing mortality rates.119 Thus, adoption of medical stability operations120 (as the United States did during the Vietnam War)121 that cater to the needs of the local people could help inexperienced regimes to garner support at times of fragmented loyalties.

Further, familiarization of peacekeeping troops with the socio-cultural sensitivities of the local civilian population and imbibing respect for their societal ethos122 is required to prevent abuses of human rights. Well-acquainting the medical personnel and the combatants of the confines of law within which they can operate – be it military, national or international – is the key to reduce casualties and unnecessary breach of laws. Such education proves dually-effective for it also ensures protection of lives of the medics. The ICRC has advocated123 this aspect and has also emphasized on loss of protection of non-combatants for wielding force needlessly. Except in self-defense or to protect the lives of patients, doctors-on-field are prohibited from stepping in the shoes of combatants.124

Honest communication with the soldiers is also extremely important. As seen in the Gulf War,125 false information regarding availability of immunization supplies led to rampant frustration among soldiers. To determine the extent of dissemination of truth by medics should involve wise exercise of discretion which would not hamper war-interests, nor betray the soldiers' trusts.

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119 Kherallah, Alahfez, Sahloul, Eddin and Jamil, 'Health care in Syria before and during the crisis', (2012) Avicenna J Med. Jul-Sep; 2(3): 51–53 <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3697421/> accessed 03 December, 2015.

120 "*Medical stability operations are the conduct of stability operations in the health sector, whether or not this includes military engagement with the health sector.*" See, JB Baker, 'The Doctrinal Basis for Medical Stability Operations', 2010 Military Medicine Vol. 175 <http://publications.amsus.org/doi/pdf/10.7205/MILMED-D-09-00072> accessed 05 December, 2015.

121 Robert J. Wilensky, Military 'Medicine to Win Hearts and Minds: Aid to Civilians in the Vietnam War', 2004 Texas Tech University Press < https://books.google.co.in/books?id=eR25rVQVyIsC&dq=medical+stability+operations+(as+the+United+States+did+during+the+Vietnam+War&source=gbs_navlinks_s> accessed 05 December, 2015.

122 *Supra* at n. 30

123'Practice Relating to Rule 142. Instruction in International Humanitarian Law within Armed Forces', ICRC <https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule142_sectiona>> accessed 5 December 2015.

124 Ibid.

125 Pat Rattigan, 'Vaccination – Assault on The Species', Project Freedom Network < http://www.jacobsm.com/projfree/vacination_asault_on_the_species.html> accessed 5 December 2015.

Lastly, involvement and articulation of opinions of medical personnel who have faced wartime dilemmas becomes crucial to ensure that standards of medical ethics do not evolve strictly in concurrence with military necessities.126

At the outset, it is important to take cognizance that ethical principles underpinning military medical officers would take us a long way in upholding human rights as envisioned by the United Nations in the 1948 Declaration. The need of the hour is for a committee to seriously deliberate on these issues and restructure the prevailing medical codes of professionalism concerning armed conflicts. The ICRC's recent efforts in that stride, although commendable, have not addressed wartime-ethical concerns in entirety. While conflict related variables cannot be controlled, the least we can ensure is to have in place, a robust guiding light to tackle future impasses between ethics and duties.

[126] Miles, 'The New Military Medical Ethics: Legacies of the Gulf Wars and the War on Terror' (2011) Bioethics 27(3):117-23Blackwell Publishing Ltd.<http://www.ncbi.nlm.nih.gov/pubmed/21752039> accessed 4 December 2015.

4. INTERNATIONAL RELATIONS IN THE NUCLEAR ERA: A STUDY ON INDIA'S APPROACH TOWARDS THE NUCLEAR SUPPLIERS GROUP

Author(s): Nisha R[127]

ABSTRACT

Key international discussions are achieved through diplomacy and foreign policy. Discussions on preservation of nuclear energy are upcoming in the international sphere. Today's politically realist world is governed by States preserving their nuclear capacity through foreign policies drafted by their Statesman. Different States have entered into international relationships with another in an effort to unify the various foreign policies and govern nuclear trade. This creates a balance of power among the international players in the area of nuclear energy who in turn seek prestige by showcasing their nuclear power. India is a State who wants to pursue their nuclear trade by attaining a global position as a legitimate nuclear State. To satisfy this objective, India has attempted to become a member of the Nuclear Suppliers Group, a cartel that governs nuclear trade among the States. This article focuses on India's attempt to become a member of the Nuclear Suppliers Group. Though India sought many votes in its favor, her entry into the Nuclear Suppliers Group was met with opposition and India's application for membership, although not rejected, was put on hold. This article attempts to study India's relationship with the member States of the Nuclear Suppliers Group and the dynamics involved therein. It concentrates, in particular on China's fervent opposition to India's membership in an effort to maintain a balance of power, as well as the remaining member States' strategic play to put up a unified opposition. The article also discusses the issues presented by the opposition for India's membership into the Nuclear Suppliers Group, namely the issue on lack of participation in the Treaty on the Non- Proliferation of Nuclear Weapons (NPT). Lastly, the article attempts to study the various criticisms surrounding India's attempt for membership into the Nuclear Suppliers Group and its overall effect in the balance of power, foreign policy and diplomacy of India.

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I. INTRODUCTION

Diplomacy and foreign policies have much importance in the current era. With the advent of globalization and industrialization, States are focused on carrying on trade with other States, boosting their own economy, participating in international politics and power play. To bring out a country's national power, diplomacy is the key. Through diplomacy, a nation will conduct its foreign affairs for national power in peace and war.[128] Nuclear technology is of prime significance and States now take a keen interest in preserving and advancing nuclear technology according to their national interests. Diplomatic ventures and foreign policies on nuclear energy are emerging concepts in the international realm.

India's role in the international realm is a paradox. India can boast of its growing stable economy, democratic certifications, benign international role and its millennial old culture but at the same time, it is also grappled with political instability, insurgency, poverty and regional disputes regarding Kashmir.[129] To aim for a global seat is a difficult task when India has not yet completely secured regional cooperation through its foreign policy. And this is excluding the creeping problem of whether Asia is big enough for two world powers, namely India and China to exist. This article studies India's bid for membership into the Nuclear Suppliers Group [hereinafter referred to as 'NSG'], a top nuclear trade governing cartel and the international diplomacy involved therein.

[128] HANS J MORGENTHAU, POLITICS AMONG NATIONS 158-159 (7th ed. 2005).
[129] Oliver Stuenkel, *India's National Interests and Diplomatic Activism: Towards Global Leadership?,* available at http://www.lse.ac.uk/IDEAS/publications/reports/pdf/SR010/stuenkel.pdf, (Sept. 3, 2016).

II. THE CONCEPT OF POLITICAL REALISM

International relations are defined as the official relationship among the States whose affairs are conducted by their authorized representatives. One may look into the past issues, the current conflicts, the institutional, legal and normative norms, the ideas of the States to study international relations.[130]

A school of theory propounds that we live in a world where conflicting interest prevails and morality can never be fully realized. Political Realism is a concept governed by laws. For realism, theories are adopted into foreign policies which are determined after looking into the prior political acts performed and the foreseeable consequences of these acts.[131] The one who formulates these policies is the statesman who represents an interest and communicates to others. Sometimes a statesman with good intention would be formulating those policies which are not morally right or politically successful. Let's take the example of Neville Chamberlain, a statesman whose politics of appeasement were the fruits of good motives to assure the peace and happiness of his subjects. Yet his policies inevitably assisted the Second World War. Sir Winston Churchill was more concerned with policies to preserve personal and national power, yet they proved to be of high political quality.[132] An important limitation to understanding the policies drafted in a political realist world would be that they are always made for different situations. Hence it becomes important to formulate foreign policies at the right instance in the right way. Off late, there has been a prevailing assumption of a nuclear war. If a State wanted to make a foreign policy to engage in a nuclear war, it would think of a nuclear war as any other war but greater in the magnitude of its consequences. When the State starts with the theory and assumption of nature of the nuclear war, it can rationally formulate a foreign policy where it need not try to avoid

[130] HANS J MORGENTHAU, POLITICS AMONG NATIONS 9 (7th ed. 2005).
[131] HANS J MORGENTHAU, POLITICS AMONG NATIONS 3-13 (7th ed. 2005).
[132] *Supra* n.4

it but legally prepare itself to survive it. [133] Further, there is also a growing blur between domestic and international interests. Nuclear policies are one such item that depends on a multitude of Governments and many different national interests.

India's foreign policy is shaped by first Prime Minister Nehru who said, "*We have to develop close and direct contacts with other nations and to cooperate with them in the furtherance of world peace and freedom. We propose as far as possible, to keep away from the power policies of groups, aligned against one another, which have led in the past to world wars and which may again lead to distress on an even vaster scale. We believe that peace and freedom are indivisible and the denial of freedom anywhere must endanger freedom elsewhere and lead to conflict and war.*" Thus India preaches non alignment, non- imperialism and colonialism, cooperation, and observes faith in the system and working of the United Nations. [134] With the advent of nuclear era, more focus is being given on combatting and preventing wars, thus promoting world peace. All in all, a war with nuclear weapons could mean the end of human race, preferably mass destruction.[135] Prime Minister Jawarharlal Nehru opposed any kind of nuclear program in India and wished for global disarmament. But he also realized the necessity of nuclear energy for science and development. India's nuclear policies include emphasis in flexibility in deciding the number of nuclear weapons to possess, a no first use policy where India shall use nuclear weapons only for retaliation, nuclear disarmament and adopting non usage of nuclear weapons against a non-nuclear weapon State etc.[136]

[133] HANS J MORGENTHAU, POLITICS AMONG NATIONS 20-23 (7th ed. 2005).
[134] DR. S.R. MYNENI, INTERNATIONAL RELATIONS AND ORGANIZATIONS 51 (3rd ed. 2015).
[135] DR. S.R. MYNENI, INTERNATIONAL RELATIONS AND ORGANIZATIONS 112-113 (3rd ed. 2015).

[136] *M.A. Part–I Political Science Paper-II Foreign Policy and Diplomacy with special reference to India,* UNIVERSITY OF MUMBAI, available at http://archive.mu.ac.in/myweb_test/M.A.%20(Part%20-%20I)%20(Group%20E)%20%20-%20Political%20Science%20Paper%20-%20I%20-%20Foreign%20Policy%20&%20Diplomacy%20with%20Special%20Referance%20to%20india%20(Eng).pdf, (Sept. 6, 2016).

III. DIPLOMACY REVOLVING AROUND BALANCE OF POWER

The ultimate aim of politics is to achieve political power through foreign policies and diplomatic relations. Today States like U.S, Soviet and China are actively participating in international politics compared to twenty years ago. Political power would be defined as man's control over the minds and actions of other men. Now a diplomatic venture is usually judged by how much such policy contributes to the national power of the State. For example when a loan tends to be unprofitable, a banker still gives the loan on account of it serving the foreign policies of the nation.[137] One cannot remove the struggle for power and an inclination to dominate from basic human nature. Thucydides said, "*Of the gods we know and of men we believe, that it is a necessary law of their nature that they rule wherever they can*."[138]

Balance of power is regarded as one of the most fundamental principles governing international politics. The doctrine of Balance of Power was formally incorporated for the first time in '*Ad Conservendum in Europa Equilibrium'*, an international agreement. The basic feature of this Doctrine is that there is equilibrium of power among the nations. There is a constant struggle for dominance as every nation wants to carry out their national interest which may or may not be harmonious with another nation's national interest. That being the case, nations enter into alliances with others to keep one nation from dominating over others. In this way, there are opposing alliances and thus nations establish a system of balance of powers.[139]

However, some say that with the advent of nuclear era, total wars have started to take place, and nuclear weapons have given different dimensions to balance of power. There is a concept of 'Balance of Terror and not power in the world'. Robert Oppenheimer and Hans Morgenthau state that nuclear

[137] HANS J MORGENTHAU, POLITICS AMONG NATIONS 31-40 (7th ed. 2005).

[138] Thucydides, Book V, section 105

[139] DR. S.R. MYNENI, INTERNATIONAL RELATIONS AND ORGANIZATIONS 291-299 (3rd ed. 2015).

weapons have changed the minds of policy makers making them decide whether to use or not to use force to protect their national interest. This presents the Doctrine of Dilemma in Foreign Policy.[140] According to the Policy of Prestige, a nation lays down the impression and makes the world community believe that it has a certain desirable quality.[141] Many countries now seek prestige through nuclear weapons. Indians too displayed their first explosion in 1974 hoping to boost their prestige. According to Dr. A.P.J.Abdul Kalam, the 1998 series of tests in research and development showed that India had the size and weight to carry out nuclear research. While prestige is equated to be a sign of a nation's power, it is pertinent to note that the five permanent members of the United Nations Security Council have declared their nuclear weapons as a sign of prestige. Enlarging this group to include non- nuclear States would help international relations.[142] We can look into the intricate play between the Doctrine of Balance of Power and Policy of Prestige with the help of the recent case of India's attempt to become a member of the NSG.

IV. INDIA'S BID FOR MEMBERSHIP INTO THE NUCLEAR SUPPLIERS GROUP: A CASE STUDY

BACKGROUND

The Nuclear Suppliers Group is a group of nuclear supplier countries formed in 1974 succeeding India's nuclear test in Pokhran demonstrating that nuclear power built for peaceful purposes and advancement can also be shaped into weapons proving to be a balance of terror;[143] whose main objective is to contribute to the non- proliferation of nuclear weapons based on two sets of guidelines

[140] DR. S.R. MYNENI, INTERNATIONAL RELATIONS AND ORGANIZATIONS 309-311 (3rd ed. 2015).
[141] Barry O. Neil, *Nuclear Weapons and the Pursuit of Prestige*, UNIVERSITY OF CALIFORNIA, available at http://www.sscnet.ucla.edu/polisci/faculty/boneill/prestap5.pdf, (Sept. 10, 2016).

[142] *Id.*

[143] Shivani Balaji, *What is NSG? What benefits will India gain if it enters NSG? Why are other countries opposing India's membership,* QUORA, available at https://www.quora.com/What-is-NSG-What-benefits-will-India-gain-if-it-enters-NSG-Why-are-other-countries-opposing-Indias-membership, (Sept. 12, 2016).

for nuclear related exports and imports. NSG guidelines are in consistency with various treaties like Treaty on the Non-Proliferation of Nuclear Weapons (NPT), the Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco), the South Pacific Nuclear-Free-Zone Treaty (Treaty of Rarotonga), the African Nuclear-Weapon-Free Zone Treaty (Treaty of Pelindaba), the Treaty on the Southeast Asia Nuclear-Weapon-Free Zone (Treaty of Bangkok), and the Central Asian Nuclear-Weapon-Free Zone Treaty (Treaty of Semipalatinsk).[144] There are currently 48 nuclear supplier countries.[145]The main functions of NSG include authorizing a supplier country to transfer nuclear related technology and information when satisfied that such transfer will not contribute to the proliferation of nuclear weapons and supervising over countries that sometimes do not share the ideals or follow the objectives of Treaty on the Non-Proliferation of Nuclear Weapons [hereinafter referred to as 'NPT'].

Previously the NSG had granted India a waiver to access and trade in nuclear technology with the world based on past track record on India's commitment to the NPT and NSG though not being a member to both. The NSG Statement had recorded India's energy needs and allowed for civil nuclear cooperation and negotiations with IAEA.[146]

Now India had contested for membership into the NSG on May 12th, 2016, needing to assert herself as a legitimate nuclear State.[147] NSG takes initiatives based on consensus of all members mainly during Plenary Meetings held annually. This article discusses the impact of the Plenary Meeting of 2016 held in Seoul from 23rd to 24th of June, 2016. The meeting discussed the issue of "Technical, Legal and

[144] *About the NSG*, NSG NUCLEAR SUPPLIERS GROUP, available at http://www.nuclearsuppliersgroup.org/en/about-us, (Sept. 12, 2016).
[145] *Chair's Corner*, NSG NUCLEAR SUPPLIERS GROUP, available at http://www.nuclearsuppliersgroup.org/en/chair-s-corner , (Sept. 12, 2016).
[146] Statement on civil nuclear co-operation with India (2008)

[147] Anwar Iqbal, *NSG to take up Pakistan's, India's membership requests this week*, DAWN, available at http://www.dawn.com/news/1266036, (Sept. 12, 2016).

Political Aspects of the Participation of non-NPT States like India and Pakistan in the NSG" and the NSG relationship with India.[148]

V. ADVANTAGES TO INDIA

A permanent membership into the NSG could procure a better international market for the export and import of nuclear information and technology, making India a key player in this market, wherein the commercial nuclear norms have been established. Further Indian nuclear projects are run on traditional technology; with a membership in the NSG, India will have access to foreign technology and can sell its indigenous technology to others in the market. India could request to have plutonium trade stopped by substituting it with its thorium energy program.[149] It will also encourage the upcoming 'Make in India' project by providing greater confidence to investors investing billions of dollars in our nuclear technology. [150] Lastly, India being the third country in the world for largest emitters of carbon would need to set up nuclear power production to reduce fossil fuel energy. NSG would help in achieving this with ease.[151]

VI. CRITICAL ANALYSIS OF THE NSG DEBATE

The crux of the issue lies with the opposition by China and six others to India's membership into the NSG. A statement from the NSG stated, "*Participating governments reiterated their firm support for the full,*

[148] Public Statement Plenary Meeting Of The Nuclear Suppliers Group Seoul, Republic Of Korea (2016)

[149] *Why India wants to be in the NSG:10 Things You Need to Know*, F. WORLD, available at http://www.firstpost.com/india/why-india-wants-to-be-in-the-nsg-10-things-you-need-to-know-2852272.html, (Sept. 10, 2016).

[150] *Supra* n.16

[151] Shailaja Neelakantan, *How Exactly India Will Benefit from being a Member of Nuclear Suppliers Group*: *6 Examples*, THE TIMES OF INDIA, available at http://timesofindia.indiatimes.com/india/How-exactly-India-will-benefit-from-being-a-member-of-Nuclear-Suppliers-Group-6-examples/articleshow/52699296.cms?gclid=CjwKEAjwgdS-BRDA7fT68f6s8zMSJADZwHmvRCG-uux33q30osZ0IqSHaRxrde8q4NWQKFFPkm9aCRoC0B3w_wcB, (Sept. 5, 2016).

complete, and effective implementation of the NPT as the cornerstone of the international non-proliferation regime".[152] This became of more prominence because it showcased the dismal diplomatic man oeuvre as this decision was taken nearly twelve hours after the Chinese President Xi and Prime Minister Modi attended the SCO Summit in Tashkent. Another disappointing outlook took form when Switzerland did a U turn to join the group opposing India's entry into NSG. Switzerland had previously agreed to fully support India in this endeavor.[153]

China has fervently opposed India's entry into the NSG, claiming that it would affect its 'national interest' and 'touch a raw nerve' with Pakistan who has similar credentials like India. [154] National interest is the main force for diplomacy and formulating foreign policies. Brooking's Institute defines it as, "*The general and continuing ends for which a nation acts*." Every nation's leader focuses on its national interest while conducting foreign affairs. Now this may be harmonious or conflicting.[155] In the current event, China had conflicting interests with India, though India sent its diplomatic envoy, Mr. Jaishankar, an expert in nuclear related issues, to Beijing to explain that the membership to the NSG bore no ulterior political or strategic motives but was rather just to help expand its clean and green nuclear technology. [156]

China contended that India could not be granted membership due to its lack of participation in the NPT. The State added that it had not opposed India's membership as the topic pertaining singularly

[152] Public Statement Plenary Meeting Of The Nuclear Suppliers Group Seoul, Republic Of Korea (2016)

[153] Nidhi Razdan, *After 'Yes' to PM Modi, Switzerland Lets Down India at Nuclear Club NSG*, NDTV, available at http://www.ndtv.com/india-news/after-yes-to-pm-modi-switzerland-changes-its-mind-1422989, (Sept. 10, 2016).
[154] *Why NSG Membership is Important for India,* BUSINESS TODAY, available at http://www.businesstoday.in/current/economy-politics/why-nsg-membership-is-important-for-india/story/234049.html, (Sept. 10, 2016).
[155] DR. S.R. MYNENI, INTERNATIONAL RELATIONS AND ORGANIZATIONS 114-118 (3rd ed. 2015).
[156] Ashok Sajjanhar, *Why the Nuclear Suppliers Group is so Important for India*, MAIL ONLINE INDIA, available at https://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=12&cad=rja&uact=8&ved=0ahUKEwjk4du-oofPAhVMQY8KHTCFC-EQFghSMAs&url=http%3A%2F%2Fwww.dailymail.co.uk%2Findiahome%2Findianews%2Farticle-3653026%2FWhy-Nuclear-Suppliers-Group-important-India.html&usg=AFQjCNEdxpoqF8t3yn77mfg32pEWAwryIA&sig2=0yiHd6i7hOd2ovcBSr74Ug&bvm=bv.132479545,d.c2I, (Sept. 10, 2016).

to India had never come up during the session, and that NSG sessions had only spoken broadly of non-NPT States and that NPT was 'really an issue' for all the members.[157] China pledged that if favor in the form of non-NPT membership were to be granted to India, the same would have to be granted to Pakistan.

Others say otherwise. Critics argue that most of China's reasons are baseless. Most importantly, India's entry into NSG would change the geopolitical situation of South Asia which would hamper China's position in the nuclear market. Strategic diplomacy would be on equal footing for both countries. India's ability to get nuclear resources from an international market would lessen the need for domestic resources for her defense. China and Pakistan both have cause to fear this.[158] China's argument in favor of Pakistan is also blunt owing to the fact that Islamabad was once caught selling nuclear weapons secrets to Libya and was defamed globally. [159]India and Pakistan cannot be treated on equal footing. Meanwhile Pakistan's movement to oppose India's entry is partially owing to the fact that it does not want India to possess sophisticated technologies in the nuclear field and fears that if India becomes a member it could prevent Pakistan from becoming a member taking a similar stance to how China has been down voting India. [160]

China has also lobbied around six other member countries to reject India's application for membership. Brazil and Turkey called for a "criteria-based" process to be put in place to decide

[157] Suhasini Haidar, *NSG Plenary Ends without Movement in India's Application*, THE HINDU, available at http://www.thehindu.com/news/national/nsg-plenary-session-nsg-delegation-heads-reconvene-to-discuss-indias-entry/article8767842.ece, (Sept. 12, 2016).
[158] Manu Balachandran, *China has Foiled India's bid to join the Nuclear Suppliers Group*, QUARTZ INDIA, available at http://qz.com/714493/china-has-foiled-indias-bid-to-join-the-high-table-of-the-worlds-nuclear-powers/ , (Sept. 12, 2016).
[159] *India's Bid for Nuclear Suppliers Group Membership: All You Need to Know,* INDIA TV, available at http://www.indiatvnews.com/news/india-india-s-bid-for-nuclear-suppliers-group-membership-all-you-need-to-know-333047, (Sept. 10, 2016)
[160] *Supra* n.16

membership into the NSG, while Austria, Ireland, New Zealand and Switzerland reiterated the NPT question. [161]

Treaty on the Non-Proliferation of Nuclear Weapons seeks to prevent the spread of nuclear weapons and related technology and to promote cooperation among the nations for peaceful uses and scientific advancement of nuclear energy. NPT primarily recognizes U.S., U.S.S.R., U.K., France and China as nuclear weapon States [hereinafter referred to as 'NWS'], who have to follow the principle of disarmament and the rest as non- nuclear weapon States [hereinafter referred to as 'NNWS'], which have to forgo nuclear arms production and their nuclear facilities shall be subject to inspection by the IAEA.[162] Article 1 of NPT[163] states that the NWS cannot transfer nuclear weapons and related technology to the NNWS and Article II states that the NNWS cannot accept or take the assistance of the NWS for the same.[164] Article VI commits the parties to the Treaty to pursue negotiations for global nuclear disarmament. Ratifying the NPT would mean that India has to forego developing or acquiring nuclear arms which would threaten our national security. We would have to dismantle our existing nuclear weapons and place them under international safeguards as we would be declared as a NNWS under the NPT. [165] If India were to have no nuclear deterrent, it would be left defenseless against China and Pakistan, another non NPT member.

But NPT is just a mere technicality. The Nuclear Suppliers Group had no formal coded criteria for entry of new members to the group. Rules of Procedure were adopted by consensus in the Aspen

[161] *Supra* n.30
[162] *Nuclear Non Proliferation Treaty (1968),* ATOMICARCHIVE.COM, available at http://www.atomicarchive.com/Treaties/Treaty6.shtml, (Sept. 5, 2016).
[163] Treaty on the Non-Proliferation of the Nuclear Weapons, art. I, July 1, 1968, 729 UNTS 161
[164] Treaty on the Non-Proliferation of the Nuclear Weapons, art. II, July 1, 1968, 729 UNTS 161
[165] *The Nuclear Nonproliferation Treaty (NPT) at a Glance*, ARMS CONTROL ASSOCIATION, available at https://www.armscontrol.org/factsheets/nptfact, (Sept. 5, 2016).

Plenary Meeting in 2001, which included consideration of five factors for membership into NSG. Thus "*A new Participating Government should:*

1. *Be able to supply items (includes transit items) covered by the Annexes to Parts 1 and 2 of the Guidelines;*
2. *Adhere to and act in accordance with the Guidelines;*
3. *Have in force a legally-based domestic export control system which gives effect to the commitment to act in accordance with the Guidelines;*
4. *Be a party to the NPT, the Treaties of Pelindaba, Rarotonga, Tlatelolco or Bangkok or an equivalent international nuclear non-proliferation agreement, and in full compliance with the obligations of such agreement(s), and, as appropriate, have in force a full-scope safeguards agreement with the IAEA;*
5. *Be supportive of international efforts towards non-proliferation of weapons of mass destruction and of their delivery vehicles."*[166]

Let us discuss two important reasons in India's favor. Firstly, NSG Guidelines are no more than the word applies; they are guidelines that are not mandatory to be looked into when considering a country's membership application. The NPT participation could be considered as a guiding principle only. The term 'Factor' and 'Criteria' are interchangeable. INFCIRC/539 states that "*Factors [are] taken into account for membership*". This in turn does not mean a factor to be a requisite condition for membership. Criteria on the other would imply that all or one would be a necessary prerequisite for membership.[167] Secondly, India meets the technical requirement of NSG and MTCR. There is a political ring to the aspect as the 2008 waiver acknowledges India as a 'De Facto' nuclear weapons

[166] G. Balachandran, Reshmi Kazi and Kapil Patil, *Membership Expansion in the Nuclear Suppliers Group*, INSTITUTE FOR DEFENSE STUDIES AND ANALYSES, available at http://www.idsa.in/specialfeature/membership-nuclear-suppliers-group_gbalachandran_220616, (Sept. 4, 2016).
[167] MARK HIBBS, TOWARD A NUCLEAR SUPPLIERS GROUP POLICY FOR STATES NOT PARTY TO THE NPT 12-13 (2016).

State.[168] The NPT mainly requires internationally-traded nuclear technology to be safeguarded. India has been a staunch supporter of this objective though it declines to disarm and join the NPT as a "non-weapon-State".[169] India satisfies this criterion as the only Nuclear Weapons State to have negotiations for a Nuclear Weapons Convention.[170]

Also in regards to the above mentioned guidelines, India has already achieved the third factor with the help of nine strong legislations bent toward this purpose, including, Foreign Trade Development and Regulation Act [hereinafter referred to as 'FTDR'] of 1992, the Atomic Energy Act of 1962, the Customs Act of 1962, and the Weapons of Mass Destruction [hereinafter referred to as 'WMD] Act of 2005. The WMD Act incorporates international practices in export controls, technology transfers, brokering, transit controls etc. which are on par with the standards prescribed by the NSG.[171] Further India's nuclear non- proliferation regime has been well recognized by many countries. To this effect United States in a communication titled "Food for Thought" Paper on Indian NSG Membership, argued that NSG should "*Be supportive of international efforts towards the non-proliferation of WMD and their delivery vehicles and have in force a legally-based domestic export control system which gives effect to the commitment to act in accordance with the Guidelines.*"[172]

India pursued extensive diplomatic efforts to this cause. Two of the country's highest level officials went to other countries to discuss India's bid for NSG, namely, Prime Minister Modi who visited

[168] Rajeswari Pillai Rajagopalan and Arka Biswas, *India's Membership to the Nuclear Suppliers Group*, ORF ISSUE BRIEF, 1-8 (2016).
[169] *India, China & NPT,* available at http://www.world-nuclear.org/information-library/safety-and-security/non-proliferation/india,-china-npt.aspx, (Sept. 2, 2016).
[170] Ambikesh Kumar Tripathi, *Contemporary Challenges To India's Foreign Policy,* 1 INTERNATIONAL JOURNAL OF SOCIAL SCIENCE & INTERDISCIPLINARY RESEARCH, 1-12 (2012).
[171] *Supra* n.41
[172] *NSG Confidential,* ARMS CONTROL ASSOCIATION, available at https://www.armscontrol.org/system/files/nsg1130.pdf, (Sept. 5, 2016)

Ireland[173] and President Pranab Mukherjee who went to Sweden.[174] The Modi Government has been relentlessly and aggressively pursuing favorable votes from all the members since the last NSG bid in 2008. The Modi Government visited leaders of Canada, Kazakhstan, Britain, New Zealand, Switzerland, and Japan, all members of NSG to rally support for India.[175] India also reaffirmed its good relationship with Britain. Achievements to India's diplomacy can also been seen from the recent visit to Mexico rallying unequivocal support in its favor, in comparison to its stark opposition before. [176]Yet one can argue that despite the efforts, there were many limitations to this case that India did not foresee.

Critics argue that India should have paused from the aggressive diplomacy to get some kind of informal response from China acknowledging our membership into the NSG and ascertain the cost to receive a positive response. In the words of political scientist John Mearsheimer, the world is inherently insecure and the great powers are locked in a tragic competition to be, and remain, number one. The hegemon of the day will do everything to prevent a rival from taking over, and no one will aid another in achieving primacy.[177] This is the case with China who is aiming for supremacy. Each nation has to aggressively pursue its own national interest in the international sphere. There can be give and takes, but there ain't no such thing as a free lunch. Appeasing China should not have been some last minute plan. During the NSG talks, India left most diplomacy to U.S hoping U.S would

[173] *Modi Seeks Ireland's Support for India's bid in UNSC, NSG,* THE HINDU, available at http://www.thehindu.com/news/national/prime-minister-narendra-modis-visit-to-irealand-and-joint-press-conference-with-ireland-prime-minister-enda-kenny/article7681802.ece, (Sept. 5, 2016).
[174] *Media Statement By The President Upon The Conclusion Of His Visit To Sweden And Belarus En Route From Minsk To New Delhi,* THE PRESIDENT OF INDIA, available at http://presidentofindia.nic.in/press-release-detail.htm?1562, (Sept. 8, 2016).
[175] Seema Sirohi, *Indian Diplomacy in Full Flow at Nuclear Security Summit, Eyes Firmly Set on NSG Next*, THE WIRE available at http://thewire.in/27135/indian-diplomacy-in-full-flow-at-nuclear-security-summit/, (Sept. 2, 2016).
[176] *Supra* n.29
[177] Manoj Joshi, *India's Abortive NSG Bid and the Kautilyan Lessons it Needs to Learn,* THE WIRE, available at http://thewire.in/46014/indias-abortive-nsg-bid-and-the-kautilyan-lessons-it-needs-to-learn/, (Sept. 1, 2016).

assure it a seat without actively engaging and taking time to build rapport with China and the opposition itself. [178]

India should not rush into something without having an exit strategy.[179] Understanding the enemies and having a strategy in place that could be used as a bargaining chip, having the effect of damaging the other's national interest, are lessons India needs to learn from the China opposition. Having an alternate plan, like for instance, pursuing the thorium energy export avenues could be plausible.[180] Foreign policies may be about summits and conferences, but these are primarily plans which have been carefully analyzed with the pros and cons worked out beforehand. To expect the ruling Government or the Indian Prime Minister to charm their way through countries to favor India is naïve.

Further in current diplomacy, one should keep in mind that morality has no say in the game. North Korea is bribed to not go rogue, Pakistan has been awarded for proliferation of nuclear technology and selling trade secrets. China helped Pakistan with nuclear technology and now talks of NPT as a bible the NSG must follow. Yet idealism and moralism are marginalized in India's foreign policy.[181] Critics say that India needs to revise its policy decisions. Our diplomatic tactics in dealing with the members of the NSG has passed through fanfare rather than substance or finesse. A major drawback of open diplomacy is the idea that the diplomats who are representatives of the people would be

[178] Jyotiraditya M. Schindia, *NSG: A tale of a diplomatic faux pas,* HINDUSTAN TIMES, available at http://www.hindustantimes.com/analysis/nsg-a-tale-of-a-diplomatic-faux-pas/story- U6p8v6jRcpVCZ5k46h0hZJ.html , (Sept. 5, 2016).
[179] R Jagannathan, *India's NSG dream: It's time to assess true nature of China's opposition,* F.INDIA, available at http://www.firstpost.com/india/indias-nsg-dream-its-time-to-assess-true-nature-of-chinas-opposition-2855392.html, (Sept. 6, 2016).

[180] *Id.*
[181] Huang Zenghduo, *The Success and Limitation of India's Multilateral Diplomacy,* CHINA INSTITUTE OF INTERNATIONAL STUDIES, available at http://www.ciis.org.cn/english/2014-01/26/content_6640234.htm, (August 23, 2016).

obliged to heed to public opinion and pass through the watchful eyes of the opposition. The Congress Party had declared that this little feat of the Modi Government was a 'desperate diplomacy that failed to attain its goal'.[182] Advance publicity would cause a rift in negotiations. Further facts and exactness cease to exist and diplomacy acquires emotional and moral characters. [183] Thus one can say the diplomats of the opposing nations almost never come to a conclusion when the negotiations are affected by publicity.

Naysayers have also stated that besides pinpointing China, there were also minor players who opposed us. Ultimately it is the 'processes where the stratagem is. There was also a coordinated strategy played by Austria, New Zealand and Ireland to increase pressure on US with a united front.[184] These States questioned the procedural requirements, though minute were important. India had also possibly overlooked Brazil's and South Africa's cause as just a neutral player who would support India if consensus was reached, though both countries were strong nuclear nations who signed NPT.[185]

Once upon a time, a cat once distracted a class, so the teacher asked his students to tie the cat to a tree. Since then the cat came every day and the process was repeated. This in turn passed onto the next generations of cats and students. After years of this practice, the students forgot the reason why the cat was being tied in the first place but a custom had developed where a cat needed to be tied to a

[182] Lisa Curtis, *Despite Setback, India Should Press on — Supported by U.S. — with NSG Membership Bid* , THE DAILY SIGNAL, available at http://dailysignal.com/2016/07/11/despite-setback-india-should-press-on-supported-by-u-s-with-nsg-membership-bid/, (August 23, 2016).
[183] DR. S.R. MYNENI, INTERNATIONAL RELATIONS AND ORGANIZATIONS 352-353 (3rd ed. 2015).

[184] Seema Sirohi, *Process as Punishment: How India Misread Signals from the NSG*, THE WIRE, available at http://thewire.in/46175/process-as-punishment-how-india-misread-signals-from-the-nsg/, (Sept. 2, 2016).
[185] *Id.*

tree to start the class. Likewise many critics believe that India's NSG bid is just another manic quest borne out of the custom of merely chasing after it for many years.[186]

India was set on an idea for a 'merit based approach' to evaluate its application for membership and not a strictly 'criteria based approach'.[187] India's membership in reality may not be fruitful as she has to put stringent restrictions on its nuclear trade which it had avoided arduously. Moreover despite the access to an international nuclear market, trade would still be ultimately governed by each individual State's interest and foreign policies which can still be prone to rejecting nuclear trade with India. Also India had already had a unique waiver to deal in nuclear trade; the membership to NSG does not give any benefits than the waiver already did. Thus although the hold of the membership to the NSG for India was a step back in diplomacy, it really did not hamper the effect of India's foreign policy in the nuclear regime.

Would this be called 'diplomatic failure'?[188] Diplomacy in its very nature would include negotiations. If failure is equivalent to not achieving that cent per cent success then diplomacy in its true sense can never succeed. Thus what often needs to be considered is if the negotiations can result in a nation reaching closer to its ultimate objective. In this case, India has managed to garner more friends than foes. Though India could have been more proactive as is evident by the 2008 waiver, yet setbacks in diplomatic ventures are essential to reach the ultimate objective. NSG has now talked about

[186] Satyabrata Pal, *Why India's Manic Quest for Membership of the Nuclear Suppliers Group is Misplaced*, THE WIRE, available at http://thewire.in/43821/indias-manic-and-confused-quest-for-membership-of-the-nuclear-suppliers-group/, (Sept. 2, 2016).
[187] Devirupa Mitra, *India Wants NSG to Follow 'Merit-Based' Approach to Membership, Not 'Criteria'*, THE WIRE, available at http://thewire.in/43144/india-wants-nsg-to-follow-merit-based-approach-to-membership-not-criteria/, (August 20, 2016).
[188] Prakash Nanda, *India's thwarted NSG membership bid is setback, not 'diplomatic failure'*, F.WORLD, available at http://www.firstpost.com/world/indias-thwarted-nsg-bid-is-a-setback-not-a-diplomatic-failure-2864230.html, (Sept. 2, 2016).

developing a mechanism for non NPT members to apply for membership into the NSG. India's NSG bid cannot be categorized as a 'diplomatic failure'.

Ultimately despite the arguments for and against India's diplomatic ventures and attitude towards the different members of the NSG, it is pertinent to note that the Plenary Meeting's decision is not final. This ordeal has proven that Indian diplomacy had managed to convince the majority of the member States to pledge for its cause leaving only a numbered handful to persuade. In or out of NSG, India's dynamic diplomacy and foreign policies have now taken new shapes. India has started to proactively shape its foreign policy rather than merely reacting to the actions of others taking a turn from the traditional conservative foreign policy that India had always pursued.

VII. CONCLUSION

Ministry of External Affairs (MEA) spokesperson Vikas Swarup said, "*Today, the Indian diplomacy doesn't have fear of failure. If we don't get desired results it only means that we redouble our efforts*".[189] India's play in the NSG is significant to understand its role in diplomacy in the modern democratic and the current nuclear era. India may have to rethink its stand on NSG Guidelines and the NPT. We may have to change our foreign policy to suit the needs and rethink our lobbying efforts with countries opposing our stand with the NSG. Though one can conclude by saying that India does have the potential to showcase our nuclear standing and learn from the NSG affair.

[189] *Didn't Get Expected Result at NSG, but it's not Diplomacy Failure: MEA,* THE TIMES OF INDIA, available at http://timesofindia.indiatimes.com/india/Didnt-get-expected-result-at-NSG-but-its-not-diplomacy-failure-MEA/articleshow/52927379.cms, (Sept. 14, 2016)

5. A CRITICAL ANALYSIS OF THE LABOUR LAWS IN INDIA ALONG WITH THE WAGE GAME DEBATE

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ABSTRACT

This paper will seek to understand how the labour industry in India works and why it is important to have effective laws to protect the vulnerable population working in the informal sector which is an important part of India's labour force. The question is how effective laws can be used to increase the productivity of the labour force including both men and women. The paper then also focuses on the wage game debate as to how women who, today constitute a substantial portion of the working population in India are still denied equal payment for equal work. The argument here is that the labour market in India is structured in such a way that instead of creating favorable working conditions for women, it is highly unfavorable for them and this extends to both the formal and informal sector.

I. INTRODUCTION

Labour in India is more of a problematic and complicated category. It has multiple dimensions and has manifested itself in different forms over the years. One of the common-place and popular understanding of the term labour is that of an old and malnourished farmer toiling away at his field in the afternoon sun. When we hear the word 'worker' we also imagine a well built worker wearing a blue jumpsuit, carrying his lunchbox and dedicating his life to the machine. From Karl Marx to Charlie Chaplin, we have all come across life-size depictions of the labourer and the worker in theories, books and cinema which has conditioned our understanding regarding them.

The word Labour has a profound place in Indian history. Even before imperialism, feudal Indian society was characterized by unequal relations between the landlord and the indentured labourers

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where the latter had to provide service on the lands of the former for a petty sum of money or a share of the crops.

In the present times, the labour market in India is characterized by the dual existence of the formal and informal sector. The informal sector is, at the moment, in dire need of substantial laws that can take care of its stakeholders or in other words, the people who are working in this sector. Estimates say that 92% of the Indian population is engaged in the informal sector. This means that a total of only 8% of the population who are working and earning can actually enjoy job security benefits.

One of the major reasons as to why we see a boom in the number of jobs in the informal sector is due to the fact that some entrepreneurs who are low on capital and do not have access to government agencies to obtain government clearances to start businesses, voluntarily move to the informal sector. The very fact that the entrepreneurs operating in this sector are off the government radar allows them to operate illegally. It also allows them to pay meager salaries to their employees as they are not protected by any unions or legal contracts.

Further, the informal economy has also seen an expansion from the 1990's as globalization intensified around the world. Even though globalization can create many jobs and markets for employment, many of these jobs and new markets are inaccessible to small scale workers or marginal labourers. They are also inaccessible to the wide number of informal workers who are not skilled enough to work in the kind of jobs that are created by globalization.

What is happening as a result is that people are not getting access to reasonable incomes and hence, are deprived of better life chances. Further, they also do not get paid for the labour that informal sector workers put into their work. Their salaries might not compensate for the total amount of time that they put into their daily work. For instance, the amount of work performed and time put into the

daily work, on an average by a part-time maid far exceeds the work performed on an average by a woman who might hold a corporate job in an MNC.

The problem is further exacerbated by the fact that the maid who might be working hard to earn enough wages might also have her job once she is pregnant as her owner might fire her once she is unable to work on a regular basis.

This small example nonetheless tells us that it is high time that the informal sector of the country gets defined and protected by better and far more encompassing laws. This is due to the reason that it is the informal sector in India which has the highest concentration of productive labour which is yet to be utilized to be in an optimum manner.

This requires proper laws that would guarantee the welfare of workers, while at the same time, ensuring the accountability of the worker. Moreover, in the academic discourse, there is also a recognition that women tend to concentrate in the most precarious of livelihoods. Hence, providing legal protection to the employees of this sector can be a step towards the protection of women who have the right to work outside their homes and earn equal wages.

The existence of the informal economy increases the problems of the labourers in India. It is not possible to negate or ignore the existence of this gigantic and integral part of the Indian economy. However, it is possible to ensure that the employers and employees are guaranteed better livelihood options through the introduction of steadfast, strong and protective laws.

TRADE UNIONS- THEIR IMPORTANCE IN THE INDIAN LABOUR MARKET

Historically Indian labour relations have been defined by the triad between the employers, employees and the trade unions. To discuss labour relations and labour laws, it is important to discuss trade unions as it is a significant mechanism for ensuring labour harmony. Trade unions historically have been mediating between the employees and employers to ensure industrial harmony. Some of the historic trade unions are that of All India Trade Union Congress (AITUC) and Centre of Indian Trade Unions (CITU). These are perhaps some of the few trade unions. Nonetheless, at the state and regional level, there exist multifarious trade unions.

Since independence, these trade unions have played an important role in putting forward the interest of workers. The pertinent question remains whether strikes and dharna can actually effectively influence law making.

The trade unions became more prominent and have started to play an increasingly important role in the mediation of industry related conflicts after the passing of the Trade Union Act in the year 1926. In turn, this gave trade unions in India a legal status by allowing them to be registered and also granted them immunity from any kind of criminal prosecution. It also empowered the trade unions with the power to solve any kind of disputes arising between the labour and the management.

Notwithstanding its undeniable merits, the trade union Act also suffers from weakness. It fails to make the trade unions accountable to the labour populations they seek to represent. The Railways strike of 1974 under the leadership of George Fernandes saw approximately seventeen lakh railway workers going on a strike for the demand of hike in pay-scales. The strike was also brutally suppressed by Indira Gandhi, the then Prime Minister. What made things only worse was that the leaders did not arrive at a conclusion after consultation with the labourers. It was a political level decision.

One of the important conditions for the labour force of a country to turn into a productive force is that it requires proper and favourable working conditions. Since the underlying purpose of performing work and labour is to earn wages, it is naturally better to ensure that labourers are given proper and sustainable wages. The strike of 1974 evinces the compelling results when alienation sets in, and labourers, who are the drivers of economic development in a country revolt against the repressive working conditions.

The Act of 1926 also does not restrict any trade union from being a part of political activities or active politics. The very fact that a lot of trade unions have political alliances with various political parties creates a barrier between members of the union and the trade union leaders. Involvement with political parties also tends to influence the overall decision making process of the trade union. The act being passed even before Indian independence, lies on the verge of becoming obsolete and needs to be revised.

The case of the 1974 Railways strike perhaps tells us why it is of utmost importance to have a stable labour force in the country.

II. WHY LABOUR LAW?

The Ministry of Labour and Employment, Government of India defines labour law as "Labour law also known as employment law is the body of laws, administrative rulings, and precedents which address the legal rights of, and restrictions on, working people and their organizations. As such, it mediates many aspects of the relationship between trade unions, employers and employees. In other words, Labour law defines the rights and obligations as workers, union members and employers in the workplace. Generally, labour law covers:

1. Industrial relations – certification of unions, labour-management relations, collective bargaining and unfair labour practices;
2. Workplace health and safety;
3. Employment standards, including general holidays, annual leave, working hours, unfair dismissals, minimum wage, layoff procedures and severance pay.

Further labour laws in India operate at two levels:

1. Individual level
2. Collective level

The first one concerns the individual labourer regarding his working conditions and the right to have legal contracts for work, which would give him the access to regular salary. The second right which functions at the collective level relates to the resolution of conflicts between the tripartite relationship of the management, the employees and the trade unions.

The significance of labour laws relates to the establishment of a better working culture among the employees and also makes sure that the interests of all three parties i.e the employees, the employers and the trade unions are protected.

III. CRITICISM OF THE LABOUR LAWS IN INDIA

Many economists and sociologists have argued that labour laws in India have been blindly in favour of the employees and workers rather than in favour of the employers and entrepreneurs. Many of them also argue that in India, the ease of doing business declines due to the existence of archaic laws and labour related regulations. A claim that may be justified from the side of the entrepreneurs who might not have the required contacts and facilities to get bureaucratic clearances to get their enterprise kicking or who might not have the required funds to start their own business.

A lot of small scale entrepreneurs who employ 10 or less than 10 workers may not have the legal knowledge to make sure his startup has the required license or the required legal clearances to start his business. A lot of times, it has also been seen that the entrepreneurs or owners would bribe labour inspectors to get off the hook of the governments. This leads to a kind of legal stagnation in which the people working in hazardous situations or in the informal sector do not get recognized and hence, are denied of opportunities or benefits they rightfully deserve. What this results in is the need to make comprehensive labour laws.

Labour law quite interestingly is also known as industrial law. To make sure that the labour laws work in the favour of workers, it is important to have a sharp and clear demarcation between laws related to labour welfare and industrial reforms. This is because certain important aspects of labour like that of dignity of labour, wage rate and time required to perform labour cannot be discussed merely under industrial law. Thus, an inclusive look at the labour law would be most desirable for a robust labour population.

IV. THE INDUSTRIAL DISPUTE ACT, 1947

One of the most important laws affecting the labour relations in India is that of the Industrial Disputes Act, 1947. Chapter 5 of this law states that any entrepreneur wishing to fire an employee or worker has to take the approval of the government. This act does not let the labour market to be flexible enough to induce any kind of labour related reforms. Moreover, it does not allow promising entrepreneurs to enhance employee performances so as to enhance the productivity of their firms. Thus, there is a need to codify laws into mutually agreeable ones while holding consultation with the workers and the management.

The laws become problematic if they are too numerous in number as labour related issues are enlisted in the concurrent list of the Indian Constitution. This implies that both the state and central governments are open to make labour related laws which create a whole new set of problems.

Existing laws also have a lot of problems. Even the ones that claim to protect the interests of the people working in the informal sector. For instance, the **Minimum Wages Act of 1948** vouched for providing minimum wages to the people working in employments that have ten or more people working in them. However the employments must be a part of the scheduled establishments which do not take into account the home based workers or domestic workers. The Beedi and Cigars Workers Act remains a state based labour act which does not extend to the rest of the country and hence a lot of industrial outworkers remain excluded from the benefits of this act even today.

Similarly, the Workmen's Compensation Act, 1923 has the provision of providing compensation to workers in case of death or accidents that occur while working in the workplace. However, the limit of compensation or the price to be offered for people in different occupations has not been specified. Further, the procedure for availing the compensation was not clarified. As a result, the Act is open to manipulation and deceit on the part of the relatives of the victims. Additionally, ex gratia compensation has not reached the ones who require it the most.

Another important act is that of the **Payment of Gratuity Act of 1972** which provides gratuity or a fund as a retirement benefit for any person who has worked beyond 5 years in an establishment. The act however does not make it clear whether the person has to be employed in the formal or informal sector in order to claim compensation. Moreover, in the unorganized sector, especially if the employer fires a worker, then he may not only terminate his pay scale but at the same time, also make sure that the worker is not paid any post retirement benefits.

The most important thing to be noted here is the fact that out of the total 440 million workforce of India, only 8% of them are eligible for availing the benefits of this act and are working in the formal sector. As a result, the remaining 92% of the people working do not get access to better incomes or social security and also they have to spend on child education and health out of their meager incomes.

In the year 2008, the **Unorganized Sector Social Securities Act** was introduced in which it sought to identify the casual workers, industrial outworkers and contract based workers under the ambit of the employee regulatory authority so as to enable them to avail regular income and job related benefits. The act binds the Central government in giving the workers of the unorganized sector the minimum benefit that they deserve. This has been proposed to be done by identifying the people working in the unorganized sector and providing him or her with a social security number and a social security card which will solve all their problems.

Unfortunately, the law does not really identify or define what is actually social security. It is also not clear if the act intends to provide social insurance or social security as the terms are not identical but are different. Further, it is also unclear as to how the people who need to avail the benefits are to be identified or in another sense, what kind of establishments under the unorganized sector can be actually recognized as beneficiaries to this act.

Another process confronting the process of labour laws in India is the problem of fixing definite wages for definite time of work. Further, the process of fixing wages for the employees of the unorganized sector is also more of an ambiguous nature as consumption rates and time taken by the workers in different occupations to perform different kinds of work may vary from establishment to establishment. Hence, uniform labour wage standards are required to be devised which would ensure proper wages for every worker.

Before concluding this sector on the critique on labour laws, it is important to note that in India, where almost a substantial part of the population is below the poverty line and still suffers from unemployment, the relationship between an employer and employee is essentially that of the power bearer and the oppressed. Workers, even today, in the absence of comprehensive laws, still have to work in exploitative conditions. The problem with perhaps every law in India is that it is not really well equipped with the dual character of the Indian labour market.

The implementation of labour laws is also another problem. If India considers itself to be a real democratic country, then it has to ensure that organization of labour struggle is an important human right. If labour laws are to be considered as an important steps towards its projected goals of labour empowerment, then through its proper implementation, they should bring them social justice.

However after the Second Commission of Labour (SCL) submitted its report in the year 2002, the government of India has been moving swiftly ahead in making the labour market of India flexible enough to grant the ease of doing business here especially for foreign multinational companies. However, this has led to another problem as the unskilled labour now has to compete with highly skilled labour that works for the global firms. The agricultural sector has suffered the most as they now to have grow expensive crops in drought prone areas produced by the MNC's, the knowledge of which they never acquired.

The increasing suicides in the Marathwada region of Maharashtra can be perhaps explained by a new division of labour in which the huge transnational companies dictate small farmers of backward regions of the country as to what crops to grow, leading to vicious cycles of debts in which the farmer has no say whatsoever but takes huge loans to get access to these expensive seeds and outputs. Thus, the rich farmers gets more benefited at the expense of the small and marginal farmers. Leading to a new kind of inequality in which the 'haves' become richer and 'have nots' become poorer and destitute.

V. GENDER INEQUALITY AND LABOUR

Talking about inequality, it is evident that as far as labour relations are concerned, it has been seen that women suffer the worst kind of discrimination here. The discrimination is in the amount of wages paid to women in comparison to men. Since the last decade, there has been a lot of struggle undertaken to vouch for equality in wages between both men and women. However, the underlying notion among employers (of which 93% still happen to be men both in the formal and informal sector) that women are not capable of hard mental and physical labour unlike men is intrinsic to the understanding of the subjugated position of women in labour relations existing since prehistoric times. The whole sphere of labour relations is patriarchal because of the reason that ranging from wages and recruitment to legislation everything is in favour of men. Amendments in such laws have also been opposed vehemently over the years.

Historically, there has been a tendency to devalue the labour of women no matter how strenuous and time taking the work is. The fact that the labour of housewives have not been paid or compensated with any kind of monetary value is evidence of this historic devaluation.

As mentioned before in the paper, the labour market in India is that of a dualistic nature in which there are two sections of the economy: the formal and informal sector. Owing to this segmentation of the economy, there is the prevalence of highly unregulated casual work and agricultural work. According to a paper of UNIFEM, WEIGO and ILO set of papers, there is a huge concentration of women in non-farm work than in agricultural farm work.

This non farm work extends to include casual work and industrial out workers in which women are substantial in number and in South Asia, far extends that of men. This is especially true for the women working in the self employed sector. The lack of a written contract, no access to income based work and also no maternity benefits in informal work opens women to a whole new range of exploitation

and recourse to law also do not help them as judicial recourse is pro male than being pro female. Compensation also tends to devalue a woman's potential and capacity for intensive work.

The problem is further aggravated as women who earn also do not have control to their own incomes. The fact that women spend a substantial amount of their incomes on childcare and their family's well-being while men spend on alcohol or on gambling, leaves them with a very meager amount of money to spend on their own education or own well-being. UNIFEM- WIEGO-ILO paper also shows that women employed in casual work receive less wages than men on an hourly basis.

The justification of the subordination of women in labour relations cannot be found anywhere. The fact that it is deeply entrenched in the political economy of a patriarchal world makes it impossible to deal with and oppose.

The existing laws in the labour relations like that of the **Maternity Benefit Act of 1961** seeks to regulate employment for women before and after childbirth. It aims to give assurance for women while they are at home looking after their children that their employment rights would be protected.

It can extend to establishments having more than 10 workers however it does not cover employees who are covered by the Employees State Insurance Act, 1948. This is indeed problematic as the Employees State Insurance Act does not effectively cover almost all the employees who work in the informal sector. For instance, it is clearly stated that the act is applicable to the factories employing 20 or more workers who earn Rs 400 or below. This leaves the domestic workers or the women who work as industrial out workers or home based workers without any protection or any maternity benefit. Also, women who work in other non recognized establishments such as beauty parlours or spas are denied of these benefits as most of these establishments might not even have an operating license.

VI. THE SUMANGALI SUM

In South India, since the 1990s in Coimbatore, there was a tradition of child labour known as the Sumangali scheme, where prospective young girls who belong to poor families are recruited to work in the garment industry of Tamil Nadu. Here, the girls from poor families are picked up to work in these factories by recruiters and are made to stay in dormitories. The girls are hired for three or four years for which they are paid a sum. After the termination of their contract, they are paid a lump sum for their dowry.

This is likened to soft trafficking as the living conditions of these girls in the so called dormitories are not of human conditions. In the absence of proper contracts, they are also open to exploitation and forgery.

The **Equal Remuneration Acts** that was passed in the year 1976 sought to provide equal wages for both men and women for an equal amount of work done. It also gave women the freedom and right to work in their workplace without having to face any kind of assault or discrimination. Consequently, there was the introduction of the **Vishakha Guidelines** which stated the legal procedure to lodge complaints against sexual complaints and harassment faced by women in their workplaces. However, the need of the hour is to make sure these laws are effective for its purpose and to make accountable the stakeholders involved to ensure labour and gender parity, especially in the labour market of India. Can the above mentioned laws be used to abolish something as harmful as the Sumangali scheme?

Why do women still face sexual harassment and economic exploitation even today in their workplaces? Why is it that a female contract worker belonging to a certain caste does not find a job as her jobber or contractor belongs to a different caste?

Lastly, the only way in which women can prove themselves to be meaningful stakeholders of the labour market is through education. The introduction of universal education for the girl child and later on, the introduction of technical education for women which would equip them for better employment opportunities in the upcoming technical and software industries of the country would be a big step forward.

The test of labour laws today would be to see if it can encompass the entire informal and formal sectors of the Indian economy. Women like sex workers and domestic maids who, through their work try to eke out a living, also need to be taken into considerations while framing such laws.

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6. THE UNIFORM CIVIL CODE AND GENDER JUSTICE: ANALYZING THE JUDICIAL OPINIONS ENTRENCHED AND ADDRESSING THE DEMAND FOR INCUMBENT POSITIVE REFORMS

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ABSTRACT

Women have been regarded as the ones who constitute the pedestal in the society, and to whom respect and piety is attributed. The important position of women within the social realm has been reinforced by the virtue of several scriptures of an antiquarian existence, those of which have commanded a due respect upon the respective segments constituting its followers, and thereby, instituting such practices within the cultural archetypes that have been diligently executed. However, the paradox in society as it operates at present, is as regards to the fact that - despite the conditioning as to attributing an implementation of the norms of cultural significance, women have been entrenched with the status that seeks an upliftment of that embedded, which constitute, the infliction of atrocities or the abridgement of the rights, and thereby, seek to progenate and execute the events constituting the ideology of gender injustice. Such a concept of gender injustice, has been imparted in the prominent institution within the realm that comprises of where various personal laws are exercised. A realizations as to such situations that seek to be instituted with modifications or a removal from the context, as is necessary, is integral for any development as to various spheres that the country seeks to be vested with – has been a prominent opinion as promulgated through various landmark Judgements by the Hon'ble Judiciary of the nation. Such opinions are conditioned with the drive to establish a realization for the incumbent need of instituting the norms conditioning the Uniform Civil Code. Thereby, the paper analyzes the stance, as projected by the Judiciary, in advocating the implementation of the Uniform Civil Code as the measure to undertake the eradication of such stipulations embedded in the myriad Personal Laws that seek to propagate an arbitrary and adverse distinction which is deprived of rational ground. The paper explores the various landmark and recent Judgments of the Court, that have regarded the

establishment of Uniform Civil Code to be an incumbent venture for the removal of the instance of gender injustice being projected, within the realm of significant issues of importance such as maintenance and ownership rights of women etc. The paper seeks to emphasize upon the judicial opinions that entrench that - the establishment of the Uniform Civil Code shall trigger the execution of the principles embedding Gender Justice, which shall in turn operate for the developments as to the social realm in all its spheres constituted. All the concepts and issues, in relation to get title, are elucidated upon in the paper, in a systematic manner, for a detailed analysis of the situations that require a due understanding and awareness.

I. THE UNIFORM CIVIL CODE AND GENDER JUSTICE: ELUCIDATING THE EXPANSIVE REALMS CONSTITUTED

(A) The Concept of Uniform Civil Code: The concept of the establishment of a Uniform Civil Code advocates the the execution of such laws, that are conditioned with the elements of Secularism, with the laws so framed being imparted with the application to the citizenry holistically and without the inclusion of the personal laws that they maybe be governed by.

It specifies that, the caste, religion, tribe et al, of a particular citizen shall not pose as a bar towards the formulation and the imparting of the laws of a secular and holistic nature, so as to regulate their conduct, even though such laws framed might be in contravention to the personal laws that condition the orderly behaviours of their respective religions communities. Such a uniform applications of the laws and norms framed within the social realm, are regarded as being relevant, so as to accelerate the process of the development of the nation, by the virtue of the myriad welfare - based mechanisms addressing all sections of the citizenry and seeking to remove every element of undue forms of discrimination in practice. The 'common areas', where, there shall be the uniformity as to the norms, as advocated under the concept of Uniform Civil Code, relate to the provisions concerning marriage, maintenance, divorce, adoption and administration of property.

The Uniform Civil Code has been instituted under the Constitution, and the State has been imparted with the duty to execute the same, by the means of the constitutional machinery, through the stipulations enshrined under the Article 44 relating to the Directive Principles of the State Policy. The

Article 44 of the Indian Constitution stipulates as follows –

44. Uniform civil code for the citizens The State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India

Although the Directive Principles of State Policy are not legally enforceable, the same stand as the welfare goals that must be duly executed by the Government, so as to accomplish the prosperity as to the citizenry who pose as the building blocks of the nation and determine its development.

(B) <u>The Concept of Gender Justice</u> : The Concept of Gender Justice is that of an expansive character, which cannot be adequately described by the virtue of a single definition that tends to cover all the aspects comprising the ingredients as concerns to this term Geneder Justice, although capable of being explained in many mannerisms, in its core has its reference to certain emancipatory projects that promote the rights at the helm of the women and the interests that concern them, along with their needs that shall be duly considered in the laws so formulated by the legislative machinery. Such needs, as projected by the women or any gender, that can be regarded as acquiring a position, wherein, an enhancement in relation to the same or the upliftment of status becomes incumbent, shall duly guide the norms, so framed, within a society and the various machineries of governance shall seek to enforce such rights as afforded to the two genders and ensure a safeguarding and implementation of the same.

The Concept of Gender Justice, as implemented in its practical sense, within the context of the prevalent socio - economic factors operating within the social diaspora, relate to the emergence of the

need as to enhancement of the protection imparted towards the rights exercised by the women, and the due consideration of the existence and the significance of such rights guaranteed within the framework of the socio - economic policies so constructed.

"Gender justice is about more than simply questioning the relationship between men and women. It involves crafting strategies for corrective action toward transforming society as a whole to make it more just and equal and it means 'a place in which women and men can be treated as fully human'. Moreover, it implies moving away from arbitrary to well-reasoned, justifiable and balanced-that is, fair-social relations."4 – as has been prominently opined with rather precise correctness.

Gender Justice and implementation of this concept, by the virtue of such norms or policies formulated and applied, is constructed to achieve certain positive outcomes pertaining to the society as a whole, by resolving an issue which is of a significant nature and addresses to one particular dimension at a time. The issue is that which relates to the disparities as to the two genders, in terms of the treatment meted out and the rights and privileged conferred .The concept of gender justice is based upon the foundation of such a goal, that relates to the removal of such adverse distinctions without a rational or reasonable basis, along with the eradication of the bias being afforded to one gender, while projecting an adverse stance towards the opposite gender. The Right to Equality does not advocate the presence of the situations, where there is the eradication of all forms of inequalities, whether pertaining to the posts, salaries etc. Such a situation is neither practical enough and nor desirable, as one shall get what is due to the concerned individual. The distinction with an intelligible differential does not impart a handicap as to the stipulations comprised within the realm of the Article 14 of the Constitution, or towards the entire equality code enshrined.

However, discrimination on the grounds of gender are artificial and evasive and absolutely unreasonable and irrational, and the concept of gender justice seeks to fight against such progenation of a notion, that upholds the validity of the gender - based discriminative forces.

The concept of gender justice maybe regarded as both an outcome and a process, and the analysis of the concept in this mannerism enables the derivation of a greater degree of clarity, as to what may be regarded as that which is sought to be achieved and how the same maybe distinguished from the process constructed to meet such ends and attain such objective, as is a requisite. The factors attached with the concept of gender justice and the implementation of the same, along with its conditioning elements in the social framework - also enable churning out the incumbent understanding as to the fact, that, the process of instituting gender justice also has an implication towards the establishment of accountability as one of its significant constituents. Accountability, with the concept and the noble process of gender justice, relates to the responsibility and the answerability imposed as a duty on the part of those social institutions, that have been afforded to undertake the progenation of situations that trigger justice and ensure that the functioning of the various mechanisms operating within the social realm, indeed, bestow justice and thereby, ensure the large scale welfare of the citizenry.

II. ACTUALIZING THE PRINCIPLES CONDITIONING GENDER JUSTICE: A PARADOX

The women have been imparted with a position commanding obeisance, by the virtue of such a respect being extended towards them, for being the constituents of the archetypes within the cultural diaspora shared by the Indian community. The divine existence in its form as a goddess has been worshipped, with the entrenchment of a devotion towards a superlative entity and thereby, the values that relate to respecting the females have seen their progenation through such antiquarian practices.

Even in the scriptures that have been compiled as part of the various religious communities, a position of significance has been imparted to the Goddess and the pious figures of the sort, who are regarded as being deserving of immense respect for their might.

However, in reality, the practices stand as a contradiction, and the beliefs as the aforementioned, which are enshrined as part of the antiquarian norms, are deprived of an execution.

The concept of gender injustice has been that of a prevalent existence, and which is palpable in almost of the religious sects and community that comprise this phenomenon of an unfavorable nature within their personal laws. Some of these personal laws have shockingly discriminatory provisions that indicate the tendency of creating a bias towards one gender in an undue manner ,while leaving the matter of extending the requisite protection and security to the opposite gender on a flimsy ground – a situation that astounds by the reason of it having its formulation in the course of the 21st century, the era that is touted to be rendered with the the element of modernity and advancement conditioning the opinions, ideologies and the being.

Perhaps, the existence of such antiquarian norms that are embedded with the element of discriminative tendency, have created an adverse distinction against one sex, by the reason of their foundation lying in the elements characterized by the thought processes and ideologies instilled by the citizenry of that period. Such a factor of the presence of some massively unfavourable tendencies to impose undue segregation of an adverse character, are also determined and justified in the context of the socio - economic realm through which they have evolved.

In such a situation, the prevalence of the creation of not only gender - based equality but the gender justice, as well, becomes highly incumbent for a nation like India, in order to attain the status of being regarded as a developed nation, India will have to first break free from the process that dictates

mediocrity and unjust classification, and evasive and arbitrary distinctions with no rational foundation to justify its existence. The right to equality, as guaranteed under the Article 14 of the Constitution, advocates the fact and an incumbent obligation imposed upon the State, that, it shall endeavour to treat equals in equal circumstances in a equal manner, and that the like shall be treated like and not that the unlike shall be treated like.

Therefore, the Article 44 which forms an important constituent of the equality code, promulgates that the discrimination, when based on rational grounds and not otherwise, is no offence to such equality code enshrined in the Constitution. It is indeed the discrimination on the grounds of caste, creed, gender etc., which are unacceptable by the virtue of them being unjust and unfair.

The Supreme Court has also regarded the formulation of the legislation promoting Uniform Civil Code to be required for a nation such as India, as it has been envisaged under the Article 44 of the Constitution.

III. GUARDIANSHIP RIGHTS: A DELIBERATION ABOUT ERADICATING THE UNLAWFUL DISCREPANT ELEMENTS

Further, another leap produced by the Court, in this context, to impart an enhancement as to their position, was by the virtue of the decision extend by it in the case of ***Ms. Githa Hariharan & Anr vs Reserve Bank Of India***[1]**,** where the Court deliberated upon the guardianship rights exercised by the women, and introduced some far - reaching changes in that context, to ensure an improvement as to same, in sync with the modern operating factors. In the case, the question was pertaining to the position of a mother as a natural guardian, and there were several opinions about the sane with discrepant implications, and the Court was vested with the responsibility to formulate a decision as to the interpretation of the same. The Court, thereby, held that any attempt to extend to the mother the inability to pose as the natural guardian of the child is offensive to the Article 14 of the Constitution,

and thereby, shall stand countered. Such is also violative of Article 15, due to the arbitrary and unjust discrimination being executed. This shall not be welcome in the society that comprises the nation in the modern era, and the newly operating socio - economic situation in this context.

Another issue in this context, is that which mentions the controversy as to the rights of the children conceived out of a wedlock, with such right relating to those that determine their ability to undertake the inheritance from relatives and father in the capacity of an heir. The discriminating stipulations, in this regard, incorporated by the virtue of the provision under the Hindu Succession Act, is that - In case a child is born to a Hindu, who has converted to a religion other that Hinduism, then the child of such a person shall be deemed as being disqualified to undertake an inheritance, as to the assets possessed at the helm of his Hindu relative. Such a disqualification is devoid of an existence, in the case, if the person concerned does not initiate the conversion and thereby, the child shall be liable to receive the property by the rules of succession.

Such a provision also has two exceptions, which propound that, the child shall not be disqualified, if

- In the case of minors, child has been raised as a Hindu.
- In the case of an adult, the person was a Hindu at the time when the succession opened.

However, these exceptions attached to the concerned section of the Hindu Succession Act, tend to also operate as a discriminatory proposition by the virtue of them being based on unfair grounds for depriving a child of the right to inherit, on the ground of the conversion of his father, whereas, the same benefit is within the access of the Hindu cousins of such a child. The ground of distinction, thereby, has been made through antiquarian considerations.

IV. OWNERSHIP RIGHTS AND WOMEN: A PROGRESSIVE STANCE

Further, the Supreme Court, in ***Thota Sesharathamma And Anr vs Thota Manikyamma***[2], undertook the interpretation of the Section 14 of the Hindu Succession Act, and thereby, introduced a significant change and development in such an interpretation imparted to the aforementioned section. The Apex Court, accordingly, transformed the woman's limited ownership of property, as guaranteed under the erstwhile provisions of the section, to that which enable them to retain the full ownership of property instead. This was a change that was much sought after, taking into regard the changed conditions of the modern times and the incumbent requirements to ditch the mediocre thought process - based notions of a medieval nature. Such a change also represents the country's stance in marching towards development. The Supreme Court also opined –

"….Article 15 (3) relives from the rigour of Article 15(1) and charges the State to make special provision to accord to women socio-economic quality…As a fact Article 15(3) as a forerunner to common code does animate to make law to accord socio-economic equality to every citizen of India irrespective of religion, race, caste or religion".

V. THE POIGNANT RIGHT TO CLAIM MAINTENANCE: A JUDICIAL APPRAISAL

However, despite the introduction of the improvement as to the law existing in one ground, there tends to be the incorporation of such situations of unfavorable existence, as regards to certain other grounds, which then demand appropriate and relevant solutions. Such is the situation in the matter of maintenance awarded to wives, as part of the various personal laws.

Under the Hindu law, a non - Hindu wife can claim maintenance from her husband, however, on the other hand, there is a provision as to the fact that the Hindu wife shall be rendered with such a provision of privilege incorporated that she can choose to separate from the husband, and in that case,

even if she converts to another religion subsequently, she anyway has the right to claim maintenance and such a right has not been abridged.

In the ***Mohd. Ahmed Khan vs Shah Bano Begum And Ors***[3]**,** challenge was projected in this regard, by the virtue of the opinion of the Apex Court, that decided to modify the discriminative stipulations concerning maintenance**,** as in the case of a Muslim wife, considering that such modifications will thereby aid in the advancing of the position, and inculcate the ideology of being developed in various spheres, by also framing norms that can appreciate the requirement of the modernism.

The Court, in that case, passed the judgment, that, the Muslim women, as per the provisions of the Criminal Procedure Code, are also be entitled to receive maintenance, for a period beyond the term of *iddat*. This is opposed to the stipulation in the erstwhile rule, which provided for the extension of the maintenance only to the *iddat* period. Indeed, a progressive movement was initiated to incur a positive change in the stipulations of a mediocre making.

However, the legislature indeed enacted another legislation by the name of the Muslim Women (Protection of Rights on Divorce) Act 1986 (MWA, 1986), which sought to bring about a different proposition, as concerns to the provisions dished out previously in the Shah Bano case.

The Act includes the stipulation that enlists that – 'A Muslim husband is bound to maintain his wife only during *iddat* period unless both spouse submit to court at appropriate time that they would desire to be governed by Criminal Procedure Code.

There is a requirement of a legislation that should incorporate a position, as extended by the Apex Court that seeks to ensure the welfare and the provision of benefit to the women. Such welfare – based stipulations are required, so as to ensure that the divorced wives do not become destitute, and that, they enjoy a high standard of living, and are provided with the execution of their right to dignity.

VI. GROUNDS OF DIVORCE AND OTHER ASSOCIATED RIGHTS IMPLICIT: ANALYZING THE DISCRIMINATORY FACTORS AND REMEDIES EMBEDDED

In another context as to the grounds of divorce, another element of discrimination exists in the area of the right to seek divorce. This right stands at the condition that the right exists only if the spouse that is a non - convert and not the other way around, wherein, even a converted spouse can seek divorce on such a ground as the aforementioned. These stipulations indeed imbibe the tendency to regard, whether intentionally or not, conversion as a matrimonial offence – which indeed is a situation, that implies unfairness and and an unfavourable element of mediocrity, that should be rationally done away with.

Another provision that has been a matter of heated debate and also a representative of certain relevant instance of adverse distinctions created, is that of divorce. For instance, the stipulation where the husband can take to inflicting unilateral divorce, according to his own whims and fancies, but the right of this sort is not imparted as concerns to the wife, and instead an aversion is inflicted on this ground. This is an instance of rather inhuman treatment, and indeed a matter which leaves behind a situation to ponder about and improve, and thereby, remove the vice of evasive and arbitrarily established distinctions. Also, in the case of divorce, in order to be sought at the helm of a woman, it might require the consent of the husband to be delivered first.

In the matter which concerns succession - based rights, there tends to be instances of gender - based discrimination, attributed by the virtue of the fact, that, there is the establishment of the provision that stipulates that the existence of the brother. A provision as this, requires modification, so as to ensure that the norms thus established, are indeed of a superlative requirement , catering to the changes in the socio - economic sphere, and the modern times and philosophies , wherein, it indeed is the notion of equality that is promoted and pervasively believed in. It is established by the virtue of

the execution of the rule and norms that the provisions such as these could be adequately modified so as to ensure that, they operate to ensure the welfare of all, and indeed strive towards triggering the development that it seeks to establish in almost all spheres.

Another issue in this regard, is also that in relation to the marital issues, as in the case of the Christian women who attempt to seek divorce, but the same tends to be the restricted, paying regard to the relevant grounds for the institution of the same. The provisions incorporated are conditioned by the discriminatory elements, and thereby, require a due modification as to undertaking the removal of such elements comprised, with the same being against the equality code enshrined under the Constitution.

The discriminatory nature, is in relation to the fact, that, although the husband is rendered with the possession of the right to divorce his wife on the ground of the proof of the existence of a charge of adultery against her, an option of this nature was something that the Christian women were deprived of, and thereby, the issue required an adequate solution as to its removal. The Christian women by merely establishing the charge of adultery against the husband were not believed as to being in a legitimate position to demand for divorce on such a ground. In order to adequately ask for the establishment of such dissolution of marriage, she also had to provide the proof as to the additional charges of cruelty or desertion, as specified under the Indian Divorce Act 1869.

However, in 1997, a change was instituted in this respect, as to the fact that, the Christian woman was rendered with the right to seek divorce on the mere ground of cruelty, and no additional grounds in relation to the same had to be proved for the purpose of claiming the establishment of divorce.

This was by the virtue of the decision rendered by the Bombay High Court, wherein, the opinion was entrenched by the way of the case at hand, which established the fact that, cruelty and desertion shall

pose as two separate and distinct grounds for obtaining divorce. These two grounds shall be treated independently, with clear segregation between the two, in the matter relating to the establishment of the dissolution of the Christian marriage solemnized.

However, as concerns to the Hindu Marriage Act, the ground on which the **divorce** can be sought are in myriads, and thereby, more expansive as compared to the stipulations comprised in the certain other personal laws, whether codified or otherwise. For example, under the Hindu Marriage Act, the grounds of divorce can pertain to the following -"adultery, cruelty, desertion for two years, conversion in religion, an unsound mind, suffering from venereal disease or leprosy or if the spouse has renounced the world and has not been heard from for seven years. Also no resumption of co-habitation for one year after the decree of judicial separation, no restitution of conjugal rights for one year after decree for restitution of conjugal rights, or if the husband is guilty of rape, sodomy or bestiality"

There shall also be the initiation as to the attempt in eradicating an adverse stance, as concerns to instituting the **grounds as the irretrievable breakdown of marriage and the divorce by mutual consent, to be the adequate arena for seeking of divorce,** at the helm of the parties, and shall thereby be regarded as the legitimate grounds in this respect. These factors shall be made as the uniform operating factors, which are regarded as the legitimate grounds for dissolution of marriage, irrespective of the religious faith practiced by the concerned parties. Further, a critical analysis of the grounds of divorce, as incorporated in the various laws that are enshrined and codified, further entrench the implication as to the material fact and requirement that, there shall indeed be a degree of uniformity as to such personal laws and the divorce related stipulations comprised.

In the case of ***Naveen Kohli v. Neelu Kohli***[4]**,** the Court abided by a stricter position as to the issue, when it sought to undertake the dissolution of a marriage that had subsisted for 33 years and the

parties involved posed as mismatched people living under the same roof. The Court entrenched the stance as concerns to the fact that the irretrievable breakdown of marriage, which is a phenomenon of utter prevalence as constituting a marital tie, shall be legitimately regarded as being a ground of divorce, and thereby, the dissolution of such a marital tie.

Therefore, in the league of such an opinion, as entrenched by the Court, it extended stringent directions to the Union of India to undertake a due modification of the Hindu Marriage Act, 1955, in a manner so as to duly incorporate the stipulation that permits in treating the **irretrievable breakdown of marriage as a legal ground** for the imparting of divorce.

The Court, therefore, while undertaking the dispatch of the judgement, put forth commands to the persons and bodies like the Secretary, Ministry of law and justice, Department of legal affairs, Government of India , who were thereby directed to initiate appropriate steps in that direction.

By the virtue of the Judgement, the Parliament took to triggering the formulation of the such a law, which was regarded as the Marriage Laws (Amendment) Bill, 1981 (No.23 of 1981), which allowed to impart the legitimacy to the phenomenon of treating the factor of irretrievable breakdown of marriage as a singular ground on which pleading of divorce shall stand as valid – indeed, a welcome change in the context that progenated several issues due to such non - incorporation.

In the case of ***Ramesh Jangid v. Sunita***[5], the facts were such that, there was the extension of a demand by the wife in the direction of her husband, that he shall duly undertake a separation from his own parents and shall not occupy the same arena or space with them, and that instead of that practice, he shall abide by living separately with her in a residence. However, in order to decide upon a stance taking into consideration the facts and circumstances of the case, the Court decided to negative the contention of the wife, out of such issues taken into account that caused the Court to believe that an

execution of the demand shall not stand as a favorable practice. The Court, thereby, refused to accept the plea of the wife to live separately with her thus abandoning his parents, on the ground that they had already maintained an estranged position, as regards to her husband and her conduct was conditioned by her decision of living separately from her husband for a span of about 13 years. She also prohibited her husband from seeking to establish any relationship of a physical nature during that period, thereby, projecting a complete aversion.

The Court opined that – *"The differences that have grown up between the parties, the distance which has widened for over a decade cannot be brushed aside lightly. Thus irreparable break down of marriage is obvious."*

VII. POLYGAMY AND PROMINENTLY OPERATING DISCRIMINATIVE FACTORS ENSHRINED: CHALLENGES INFLICTED AND REDRESSAL OF GRIEVANCE RENDERED

In the case, there was the filing as concerns to a PIL, relating to the palpable prevalence as to the practice that is indeed of a dismal nature, shall be deprived of such an implementation as is imparted, and the fact that the execution of the same tends to derive the backing as to the laws, whether they are of a staturory character or not, also require adequate attention so as to undertake the efficient and requisite rectification or the removal of the same.

Thereby, the PIL was filed at the helm of the persons concerned, further imparting challenges to the Hindu, Muslim and Christian laws, whether in their staturory or otherwise, by virtue of the reason extended that such laws are conditioned with the elements that are discriminatory in nature, and thereby seek an adequate removal from the context. There was the urge as concerns to undertaking a due removal of the tendencies that imply gender - based discrimination and the eradication of the institution of such tendencies within the realm comprised in the various personal laws. However, as regards to this issue of significance entrenched by the virtue of the PIL filed, seeking an adequate

solution for the removal of the situation that spells unfavourable elements, the Apex court extended the opinion that was conditioned with a rather conservative stance as to the issue addressed. The Court regarded the position as to the issue, claiming that - *"involves issues of State polices with which the court will not ordinarily have any concern."*

Such a decision, as progenated by the Court became the object of public scrutiny and also derived massive criticism as to the opinion put forth. It was touted that, by the virtue of dishing out a decision of this nature, the Court attempted to abdicate its role as a protector of the right to equality on the ground of gender.

Another matter is as concerns to the concept of Polygamy. Polygamy has been had been taken as a practice that commenced at the time of the ancient and medieval wars, and which was further progenated due to the factors consequential to a war - based event, wherein, there was a dearth of men, as they might die during the course of such a warfare.

Hence, the emergence of this practice was rather incumbent to satisfy the formulation of marital relations. But the concept in its nature has some rationality, when placed in the context wherein it emerged, and in the modern realm, a practice of this sort has no practical usage and is rather exploitative.

The Muslim personal laws entrenched the permissions to carry out polygamy and the associated practices, with the same being legal in its sphere. However, although the same has been imparted with the element of validity, it has the element of discrimination attached. Thereby, due to many instances of discrimination, it required several changes, especially when the same is applied and mentioned to have a rigid usage. The discriminative stipulations attached to this, is by the virtue of the fact that, a

right has been imparted to the Muslim man to practice polygamy, but polyandry is not permitted in the case of Muslim woman.

In the case of ***Seema* v. *Ashwani Kumar*[6],** the Court entrenched the opinion as to the integral fact that, as concerns to a marriage that gets solemnized, there shall be abiding as against the provision of the incumbent nature that, such marriage so contracted shall be duly registered, with such a provision having its application regardless of the religion that is exercised at the helm of the concerned parties. The Court held that, such a stipulation was an imperative requirement, taking into consideration the circumstances produced, and thereby, addressing to the issues. The Court regarded that the execution of a provision of this sort is imperative for the creation of safeguards, as concerns to the practice initiated by the husbands in denying the marriage and thereby, deserting their spouses accordingly. They would also undertake the ulterior conduct concerning the denial as to the demands imposed against them, as concerns to the provision of maintenance or the custody of the children, or the matters in relation the the inheritance of property and assets.

The Court also directed the Government to formalize the provisions that specify the consequences pertaining to the non - registration of marriage, with such consequences being listed in a cogent manner, and the same being applicable to the parties belonging to any religion whatsoever.

The Law Commission also recommended, by the virtue of the report produced in the year 2008, that, *"It is high time we took a second look at the entire gamut of Central and State laws on registration of marriages and divorces to assess if a uniform regime of marriage and divorce registration laws is feasible in the country at this stage of social development and, if not, what necessary legal age with such reforms may be introduced for streamlining and improving upon the present system.*

VIII. INFERENCE

There is the imperative requirement as to undertaking the realization as concerns to the significant fact, that, it shall be known that the concept as concerns to nationhood, is characterized by the significant elements and determinants that are concerning the existence of a single constitution, flag and citizenship, and that such an ideology deserves due implementation, also in terms of undertaking the uniformity as to the laws among the various communities and religions, that formulate a heterogeneous character, and thereby, also seek an integrity, so as to eradicate the discriminating elements that can be constituted in that context.

Article 44 of the Indian Constitution enshrines the provisions to the effect, that the State shall endeavour in the securing of a Uniform Civil Code for the citizens constituting its territory and thereby, by the virtue of the same, ensure a welfare in relation to the citizenry. However, the obligation as to securing and establishing a Uniform Civil Code is not only enforced by the way of the stipulations comprised in the Article 44 of the Constitution, but such is also derived by the virtue of the International laws towards which the nation has its obligation. Such International laws and other treaties etc. ratified by the nation, also require a due execution of the laws that seek to undertake a removal of the discriminative elements in relation to gender, and thereby, seek to ensure a due actualization of gender justice and not a mere phenomenon that is contrary to the tendency that is sought to be enshrined. Such ratifications are those relating to the Universal Declaration of Human Rights, 1948 and the Declaration on the Elimination of Discrimination Against Women, 1967.

Also, about 27 years ago, the Equal Remuneration Act was formulated as an improvement as to the condition of gender justice, and in the course of undertaking the same and within that context, the following opinion was put forth - *"The next logical step is to make a law to secure equal rights to women. An Equal Right Act would largely achieve the objective of common civil code. In the alternative, parallel reform of each*

personal law to give effect to the Human Rights declared by the United Nation would help in the emergence of common pattern of personal laws, paving the way for uniform code, and a beginning could be made in the direction but it seems that the Political will is lacking."

Therefore, the securing of unity and integrity, as to the nation and as guaranteed under the Preamble, requires an incumbent implementation, for ensuring the welfare of the citizenry. The discrepant elements, as comprised in the various personal laws, also cause the progenation of the elements of inequality, which thereby require a due eradication in the interest of the nation. For the purpose of establishing an incidence as that, the promotion and execution of the stipulation as to the Uniform Civil Code becomes imperative.

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7. CORPORATE SOCIAL RESPONSIBILITY AND WOMEN EMPOWERMENT: DRAWING A NEXUS

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ABSTRACT

Women Empowerment is a very broad concept in itself. It demands utmost sincerity and persistent efforts to achieve this gargantuan task. Moreover, to eradicate all the social evils which make the lives of the women miserable, to put an end to the social and mental trauma that every women is subjected to, to make women realize that it's not their ultimate goal to get married and have kids but have a choice, to accord the same status to our sons and daughters, we can't completely rely on the government. Being an essential part of the society, these corporate giants can be the harbinger of change in this regard. Such positive initiatives undertaken by the corporate structures are helpful for them as it helps in building their positive image before the consumer. People are encouraged to approach such companies which give preference to the needs of the society from which they extract resources. Image building is effectively achieved. Such companies are able to generate more profits in the long run as they gain not only the trust but also the respect of their consumers. The above mentioned companies are shining illustrations of this proposition.

I. INTRODUCTION

Image building is an essential prerogative for the corporate sector. In their endeavour to portray a perfect picture before the world, companies believe in setting up a value based foundation. Transparency, accountability and consistency go a long way in satisfying the shareholders and meeting their expectations. Efficiency and profit maximization assist in establishing a keen sense of professional morality which is conducive to corporate growth. By fulfilling its core functions, a company is able to infuse the spirit of respect, trust, fairness and reliability. Consequently, the foundation of a value driven system is laid down.

Globalization has ushered the era of modern economic development under which corporate sector operates in association and not isolation. The role of business in society is ever expanding and cannot be limited by profit or loss that it generates. Besides, profit earning and customer satisfaction are not the sole and exclusive criteria of business. Being a part of the society gives rise to dependency and ultimately obligations tend to arise.

Such scenario has led to burgeoning of the concept of Corporate Social Responsibility. After deriving so much from their surroundings, companies are bound to return back and act along principles of reciprocity.

The recently amended **Companies Act** of **2013** has become the first legislation in the world to authorize compliance with corporate social responsibility (CSR) for every company that is established in India. As per the existing law, the companies having net worth of rupees **five hundred crore** or more, or turnover of rupees **one thousand crore** or more or a net profit of rupees **five crore** or more during any financial year shall be falling within the ambit of the companies for whom CSR is compulsory[191]. Consequently the obligation can no longer be limited to moral spheres. Now it is incumbent upon companies to act in this manner.

This is a modification of vast proportions and it makes it essential to look into the phenomena of Corporate Social Responsibility in an entirely different light. The one-dimensional and laissez faire approach of companies has been shed and replaced by social awakening. They are acting as instruments of social change and this recent legislative initiative would act as a catalyst to ameliorate the existing situation. This research paper is thus an attempt to steer away from the monetary profits

[191] Section 135 of the Companies Act, 2013

that are reaped by these companies and to concentrate upon their valuable contributions in ushering a social change in a diverse country like India.

II. TRACING THE ORIGIN AND EVOLUTION OF CORPORATE SOCIAL RESPONSIBILTY

People's desire being an impetus for a constructive social change is not a matter of wonder. Questions with respect to the effect of human intervention have been available in different structures for quite a long time, extending over the old, established, medieval, commercial, mechanical and corporate periods in a few or different structures. Until, most recent years of twentieth century, there was no unequivocal notice of the term 'Corporate Social Responsibility' or CSR anywhere. However, it has been pervasive in the society since time immemorial.

Hinduism speaks about *nishkama karma*.[192] **Buddha** speaks about living in the community, being part of it and helping the other attaining enlightenment. **Bible** speaks about loving one another and supporting the needy. **Gandhi** propagates the ideal of '***swaraj***' — with which he advocates love for one's own State.[193] According to **Tilak**, '*swaraj*' meant Dharma Rajya in the sense that together with the love for the State, each one has also a moral duty towards one's own State.[194] It is worth noting the ever meaningful words of the great Indian Philosopher, **Dr. Radhakrishnan**[195]:

> "*We should like our generation to go down in history not as one which split the atom and made hydrogen and nuclear bombs, but as the one, which brought together the peoples of the world and transformed them into world*

[192] Eknath Easwaran, The Bhagavad Gita, (Nilgiri Press, California, 2008), 52. See also: George Joseph M., A Gandhian Prospective Paradigm for Culture, Kuruvilla Pandikattu (ed.), Gandhi: The Meaning of Mahatma for the Millennium, Cultural Heritage and contemporary change series, IIIB, South Asia, Vol.5, (CRVP, Washington, 2001), 141
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community and we have to develop new methods of human relationships and build bridges of understanding, goodwill and togetherness for World Federation and enduring peace, progress and prosperity on our planet"

The essence of CSR has not arose in the present but has been growing since decades. Involvement of the business in the various social issues was a common activity among the leading companies in the first half of the twentieth century.

A noteworthy example is **J. Irwin Miller**, Chairman and CEO of Cummins Engine Company, who presented a comprehensive view of CSR in a 1975 interview in Organizational Dynamics. Although the interview was conducted in 1975, he began putting his philosophy of business into practice in the 1930s.

Hence we can conclude that though this fanciful term (CSR) was recently coined, the idea behind it however was prevalent from the very outset of the modern civilization. From the times unknown, there has been appeal to be concerned for the common good, for the community, for uplifting the weaker section etc.

III. CORPORATE SOCIAL RESPONSIBILITY: HOW TO DEFINE?

A large number of scholars attempted to define, redefine, and clarify the concept of corporate social responsibility that they saw being assumed by, imposed upon, and played out by business entities. In addition, scholars sought to connect and integrate the principles and activities into a more comprehensive conceptual model.

While there is no universal definition of Corporate Social Responsibility, it generally refers to transparent business practices that are based on ethical values, compliance with legal requirements,

and respect for people, communities, and the environment. Thus, beyond making profits, companies are responsible for the totality of their impact on people and the planet.[196]

Corporate social responsibility has experienced numerous stages in India. The capacity to have a huge effect in the general public and enhance the general personal satisfaction has unmistakably been demonstrated by various companies. All the corporate organisations ought to attempt and realize an adjustment in the present social circumstance in India with a specific end goal to have a successful and enduring answer for the social troubles. Associations between organizations, NGOs and the Government ought to be encouraged so that a mix of their abilities can be effectively used to bring positive social changes.

Since government alone is inadequate in alleviating social problems it can greatly benefit from support and cooperation of business, voluntary agencies, institutions, charitable organizations, etc. Through voluntary commitment to CSR, companies send a positive signal of their behaviour to their various stakeholders. Thus they make an investment towards future and enhance their profitability.

In recent years, the concept of CSR has gained prominence to the extent that it has become ubiquitous. Earmarking a fraction of the profit generated for undertaking social responsibilities is a noble gesture. However, ushering a social change through positive steps and initiatives is truly remarkable which requires uncompromising integrity.

What is social change? How is it effectuated? What are its constituents? These are some of the questions that have vexed the human mind over the years. The term in itself is abstract in nature and generally

[196] Michael Stohl, Cynthia Stohl & Nikki C. Townsley, A new generation of global corporate responsibility. In Steve May, George Cheney & Juliet Roper (Eds.), The debate over corporate social responsibility, (Oxford University Press, New York, 2007), 30.

connotes a modification in the pattern of behaviour of individuals that ultimately results in ushering a change in the society.

According to **John A. Perry**[197] change occurs on both, societal and cultural levels. When change happens in society, it does the same in the semblance of an alteration in the patterns of interaction. That is, as a result of change, some members of society assume new statuses and fill new roles. For instance, the abolition of slavery was a social change because it gave former slaves liberty from the chains of slavery and a new status—that of free persons—in which they could assume new roles as per their free will. This kind of change, social change, occurs through planning, reform or revolution. As may be gauged, infusing a social change is not a cakewalk. It is a phenomenon of immense magnitude that involves three stages, i.e., *planning, reform and revolution*. Human mind tends to dwell upon established norms, standards and behaviour. Accepting a change or deviation from the usual path thus becomes difficult and challenging. An instance illustrating this hypothesis is the fact that we have customs and precedents as a core source of law in both national as well as international spheres. Stepping aside from the treaded path and taking the road less travelled contributes in bringing a revolution. It takes time, dedication, perseverance and an unyielding attitude to safeguard oneself from succumbing under the pressure of societal dogmas.

Indian Society: What needs to be modified?

As a part and parcel of social responsibility, companies are expected to understand culture, traditions, structure and organization of the society. The most pressing issues with regards to Indian society are population explosion and poverty, closely followed by illiteracy and adverse health. Status of women is pitiable despite more than 60 years of independence. Moreover, rampant corruption, official

[197] John A. Perry, '*Contemporary Society: An Introduction to Social Science*', 12th ed., Pearson Education Inc., 2010,p. 266.

lethargy, bribery, favouritism coupled with government's half hearted efforts further aggravates the situation. The endeavours of companies in such affected spheres have been separately dealt with.

IV. CORPORATE PHILANTHROPY: A FACET OF CORPORATE SOCIAL RESPONSIBILITY

Corporate Philanthropy is an organization's method for offering back to its group - neighbourhood, local, national or global - through money related gifts and non-money commitments, for example, time, ability and tangible products like PCs, solution, sustenance and reading material. Organizations can donate to foundations and charities by giving specifically from the organization's money or resources, raising money through its workers and others.

An important advantage that companies get from their philanthropic practices is the unflinching support of communities and the surrounding markets. Essentially, by making the use of profits which are derived from the community to help and work for that same community businesses can greatly increase their prospects of future revenue flows. Market development can also occur through the improved reputation of the business. The goodwill that a company can generate through corporate philanthropy can increase customers' interest and favourable opinions of the company.

Corporate social responsibility manages corporate generosity as well as different issues that influence the environment, buyers, human rights, store network sustainability and transparency for the greater good of the majority. Organizations that incorporate social obligation into their missions see to it that they have an everlasting impact. In addition to the satisfaction and immense contentment that one gets from helping others, taking responsibility for their social effect helps the organizations to build a strong relationship with their stakeholders. This can help in building a good reputation and it also opens the opportunity for the expansion of business. Engaging the community can also help in formulating new ideas and product innovations.

According to the paper, ***The Ethicality of Altruistic Corporate Social Responsibility***, written by **Prof. Geoffrey P. Lantos**[198], CSR is classified into three types:

1. Ethical CSR: Moral mandatory fulfilment of a firm's economic responsibilities, legal responsibilities, and ethical responsibilities.

2. Altruistic CSR: Fulfilment of an organization's philanthropic responsibilities, going beyond preventing possible harms (ethical CSR) to helping alleviate public welfare deficiencies, regardless of whether or not this will benefit the business itself.

3. Strategic CSR: Caring corporate community service activities that accomplish strategic business goals.

Based on these classifications, corporate philanthropy is just one dimension of CSR. The way that philanthropy is so frequently confused for CSR is presumably on the grounds that it was the most widely recognized technique organizations used to do good for a long time. Moreover, a large number of the fundamental CSR procedures looked more like acts of philanthropy. Many a times, CSR is confused with philanthropy, yet the terms are far from being synonyms. As per the **Oxford English Dictionary**, philanthropy is the desire to promote the welfare of others, expressed especially by the generous donation of money to good causes. Further it helps to build a good image for organization pretty much as CSR does; however, the former has a restricted scope. The limitation of philanthropy is that it is completely based on charitable grounds devoid of any element of either sustainability or any straight benefit to the company. CSR encompasses and goes beyond philanthropy.

[198] Geoffrey P. Lantos, (2002) "*The ethicality of altruistic corporate social responsibility*", Journal of Consumer Marketing, Vol. 19 Iss: 3, pp.205 - 232

V. WOMEN EMPOWERMENT

Women empowerment is in vogue nowadays. People are finally becoming conducive to the fact that both men and women need to be treated equally. Centuries of exploitation, suppression, dogmatic beliefs and sectarian ideologies led to tarnishing the very existence of women. However, endeavours are being made now to empower women to achieve and grow independent of male support or dominance.

STATUS OF WOMEN IN ANCIENT, MEDIEVAL AND MODERN INDIA

The position which was enjoyed by the women in the **Rig-Vedic period** deteriorated in the later Vedic progress. Women were denied the privilege to read and study, widow remarriage was also prohibited. They were denied the privilege to legacy and property. Numerous social shades of malice like child marriage and dowry system began to weaken the status and importance of women in the society.

During the **Gupta period**, the status of ladies massively crumbled. Dowry system and the *sati pratha* (Sati is an obsolete Hindu funeral custom where a widow immolated herself on her husband's pyre shortly after her husband's death) became prominent.

During the **British Raj**, numerous social reformers, for example, **Raja Rammohun Roy**, **Ishwar Chandra Vidyasagar** and **Jyotirao Phule** started to raise voice regarding the improvement of the status of women. Their endeavours prompted the abolition of Sati and the formulation of the **Widow Remarriage Act**. Later, stalwarts like **Mahatma Gandhi** and **Pt. Nehru** supported the women rights. As an after-effect of their concentrated endeavours, the status of women in social and political life started to rise in the Indian culture.

Taking into account the thoughts championed by our establishing fathers for empowerment of women, numerous social, monetary and political provisions were consolidated in the Indian Constitution. Women in India now take an interest in previously uncharted territories, for example, training, sports, governmental issues, media, workmanship and society, administration and science and innovation. In any case, because of the established patriarchal attitude in the Indian culture, women are still defrauded, embarrassed, tormented and abused. Indeed, after sixty eight of independence, women are still subjected to segregation in the social, monetary and instructive field.

In the words of **Malala Yousafzai**, "*We cannot all succeed if half of us are held back*". It's very pertinent that women are given the same recognition and opportunities as her male counterparts to realise their full potential and contribute towards the betterment of the society.

There is no denying the fact that women in India have gained an extensive ground in almost seven decades of Independence, yet regardless they need to battle against numerous social injustices and moral disasters in the male-dominating society. Numerous insidious and patriarchal components still win in the advanced Indian culture that opposes the forward walk of its female population. It is unexpected that a nation, which has as of late acclaimed the status of the primary Asian nation to perform its Mars mission in the maiden attempt, is situated at the rank 130 among 188 nations over the globe on the premise of **Gender Inequality Index**[199]. There has been improvement in the status of women; however their actual strengthening is still anticipated.

[199] Gender Inequality Index, 2015, Available at: 2015_human_development_report.pdf page (240), Accessed on 15th September, 2016.

The status of women in our country has been the subject of intense discussion and critique. The limitless injustices that women have suffered in our country since ancient times have created a gulf too deep to be bridged. Promoting gender equality and ameliorating the standard of lives of women has been the aim of numerous legislations and organizations. **Article 14**[200] conferred equal rights and opportunities on men and women**, Article 15**[201] prohibits discrimination against any citizen on numerous grounds including sex, **Article 15(3)**[202] laid down that the state can make special provision for women**, Article 16(1)**[203] guarantees that no citizens shall be discriminated against in respect of any employment in office under the state**, Article 39(a)**[204] focuses that the citizens, men and women equally, have the right to an adequate means to livelihood**, Article 39(d)**[205] talks about equal pay for equal work for both men and women, **and Article 42**[206] concerning about maternity relief are of specific importance in this regard. Nevertheless, female infanticide, domestic violence, dowry deaths, sexual harassment, rape, abortion are some of the atrocities that innumerable women have to face every day.

Swami Vivekananda quoted that,

> "*There is no chance for the welfare of the world unless the condition of women is improved; it is not possible for a bird to fly on only one wing.***"**

Subsequently, keeping in mind the end goal to accomplish the status of a developed nation, India needs to channelize the immense potential of its women into a viable human asset and this is possible only through the empowerment of women.

[200] Article 14, the Constitution of India, 1950.
[201] Article 15, the Constitution of India, 1950.
[202] Article 15(3), the Constitution of India, 1950.
[203] Article 16(1), the Constitution of India, 1950.
[204] Article 39(a), the Constitution of India, 1950.
[205] Article 39(b), the Constitution of India, 1950.
[206] Article 42, the Constitution of India, 1950.

Empowerment of women implies their liberation from the awful grasps of social, political, cast, economic and gender based segregation. It means granting women the absolute freedom to make all the important decisions of her life. Women empowerment does not signify *'idolizing ladies'* rather it implies supplanting patriarchy with equality.

Complete metamorphosis in a day is not something people can dream of. However, some form of a positive change in the scenario is bubbling. It's not just government and non-governmental organizations but also the corporate sector which is actively supporting the cause of the women.

In order to make a difference, companies are assuming a stricter stance so as to curb instances of sexual harassment at workplace. Sexual harassment is a clear violation of woman's right to gender equality as guaranteed under **Articles 14** and **15**, her right to live with dignity under **Article 21**[207] and her right to work with dignity in a safe environment under **Article 19 (1) (g)**[208] of the Constitution of India. Gender sensitization committees are formed. After the landmark case of **Vishakha v. State of Rajasthan**[209] onus has been laid upon the employer to ensure that no detrimental effects are suffered by women.

Acts like the **Dowry Prohibition Act, 1961**[210] prohibits the request, payment or acceptance of a dowry. Asking or giving dowry can be punished by imprisonment as well as fine; **Protection of Women from Domestic Violence Act, 2005**[211], accommodates a more viable assurance of the privileges of women who are casualties of abusive behaviour at home. A violation of this Act is culpable with both fine and

[207] Article 21, the Constitution of India, 1950.
[208] Article 19(1)(g), the Constitution of India, 1950.
[209] *Vishakha v. State of Rajasthan*, (1997) 6 SCC 241
[210] Section 4, Dowry Prohibition Act,1961
[211] Preamble, Protection of Women from Domestic Violence Act, 2005

detainment; **Sexual Harassment of Women at Work Place (Prevention, Prohibition and Redressal) Act, 2013**[212], helps to create a conducive environment at the workplace for women where they are not subjected to any sort of sexual harassment.

According to the **73rd** and **74th Constitutional Amendment** Act, all the local elected bodies, namely the panchayats and municipalities reserve one-third of their seats for women. Such procurement was made to build the powerful position of women in the issues concerning the legislature.

Women' Reservation Bill is a pending Bill in India which proposes to hold 33% of all seats in the Lok Sabha and in all State Legislative Assemblies for women. If passed, this Bill will give a huge boost to the position of women in political affairs of the nation.

VI. THE NEXUS BETWEEN CORPORATE SOCIAL RESPONSIBILITY AND WOMEN EMPOWERMENT

The paper now throws light on the significant actions, initiatives and programs undertaken by some of the companies to raise the status of women in the society and grant them the utmost freedom to cross the thresholds of the ever critical society.

- **ITC**

ITC Limited or **ITC** is an Indian conglomerate with its headquarters in **Kolkata**, **West Bengal**. ITC is at the forefront in following government's mandatory Corporate Social Responsibility Act. What makes it different from others is its unique way of doing things; it doesn't take it as a charity, but rather a means to enhance its business. It's method of dovetailing social responsibility with its business makes it *sui generis* among different conglomerates in India. ITC's social initiatives, like integrated watershed development and farm and social forestry, have been undertaken to with a strategic focus on enriching

[212] Preamble, Sexual Harassment of Women at Work Place (Prevention, Prohibition and Redressal) Act, 2013

the larger socioeconomic context in which the company operates, thereby contributing to its businesses.

Women empowerment is the talk of the hour and ITC has left no stone unturned in contributing towards the upliftment of the status of the women. ITC tries to empower women and girls by educating them, making them financially independent, thereby empowering and emboldening them. ITC collaborates with NGO's working with village women and it organizes them into **micro credit groups**[213]. Each member of the group contributes monthly to create saving corpus. Then corpus is used to extend soft loans, thereby wearing the role of informal 'moneylenders'. These groups function autonomously and freely take their own decisions which include sanction of loans and collection of the repayments. Well-managed micro-credit groups receive additional support from the company in the form of seed money for activities of self-employment. Venture funds which are provided by ITC have already spawned many women entrepreneurs. Their earnings, ranging from **Rs 70** to **Rs 150 per day**[214], in addition to supplementing their household incomes, go a long way in enhancing their self-esteem. This promotes women entrepreneurship, thus making it commensurate with government's policy of empowering women by making them financial independent. Socially, it elevates women's position in society, as they are no longer dependent on men for their daily needs. This creates financial literacy among village women, thereby making rural India finance literate.

[213] '*Corporate Social Responsibility: Women Empowerment*', ITC, Available at http://www.itcportal.com/sustainability/corporate-social-responsibility.aspx, Accessed on 15th September, 2016.

[214] '*A Self-sustaining corporate responsibility model*', Hindustan Times - 16 Sep 2003, Available at http://www.itcportal.com/media-centre/press-reports-content.aspx?id=738&type=C&news=self-sustaining-corporate-responsibility-model, Accessed on 15th September, 2016.

Other than the micro credit scheme, it also imparts skills to women to enhance their employability. Pickle-making, fish-processing, vermin-composting, spice processing and incense-rolling in rural areas and *chikankari*, garment-sewing, driving and computer-aided secretarial training in semi-urban areas to name a few. This program is helping women across **Andhra Pradesh**, **Karnataka**, **Madhya Pradesh**, **Uttar Pradesh** and **Bihar**. ITC also imparts education to rural children with special focus on girls and tries to make retention ratio higher. This empowers women in the longer term. It's initiative of building toilets give women their dignity which they have been deprived of. So, its approach in empowering women is multi-sectoral.

The indomitable spirit of the chairman of the company has played a very important role in taking it to such high levels. The enthusiasm of its chairman **YC Deveshver**'s insatiable desire is to bring the change in society by aligning business with social responsibility.

- **HINDUSTAN UNILEVER LIMITED**

HUL is India's largest FMCG Company headquartered in **Mumbai**, **Maharashtra**. It is one of the India's most trusted brands, mired in controversy for just two times. One was due to mercury incident in Kodaikanal and other was for racism in its *'Fair and Lovely'* advertisement. It has been able to resuscitate after these controversies and changed its perception through its social initiatives of empowering women and children.

The company's social responsibility initiatives have been commendable and have affected a lot of people. It has worked on the same platform as that of ITC, of integrating its business with social responsibility, which is quite effective in the long run as it goes on building a good reputation of the

company. One such initiative is project **Shakti**[215], which it has collaborated with self-help groups. It partnered women entrepreneurs called *Shaktiammas* from the rural areas of **Andhra Pradesh** and fourteen other states by offering them various kinds of opportunities for business. The underlying objective was not merely to expand the direct reach in rural areas, but also build brands through the power of local influencers. There are around **45,000** [216] *Shaktiammas* on board, taking products to across **1 lakh** villages and over **30 lakh** households every month. It soon incorporated men into its purview, thereby increasing household income. *Shaktiammas* and *Shaktimaans* are not paid employee of the company, they are like portable shops trying to sell HUL's product, where it doesn't have distribution network. A Shakti entrepreneur typically earns an average of **Rs 1,000 per month.**

It is quite different from charity, where a company doesn't get anything in return. In these kinds of project, they not only help rural people but also increase their outreach and enhance their distribution network.

Another initiative taken by HUL to empower women and to change its perception is the opening of the **Fair & Lovely Foundation**[217]. The key focus of Fair & Lovely Foundation is to make a meaningful difference to the lives of the young girls who receive the scholarship. The foundation strives to give scholarship to young to pursue higher education, imparts vocational training and career guidance. Kick-started in 2003, the initiative has impacted the lives of thousands of women from **India**, **Bangladesh**, **Pakistan, Egypt** and **Saudi Arabia** with more countries added to the list each

[215] '*CSR Policy- Annexure A*', Hindustan Unilever Limited, Available at https://www.hul.co.in/Images/csr-policy-annexure-a_tcm1255-436264_en.pdf, Accessed on 15th September, 2016

[216] Ibid

[217] '*Fair and Lovely gives scholarships to 225 deserving girls*' Hindustan Unilever Limited, Available at https://www.hul.co.in/news/news-and-features/2013/fair-and-lovely-foundation-gives-scholarships-to-225-deserving-girls.html, Accessed on 15th September, 2016

year. It gives scholarship of Rupees **1 lakh** to deserving women, selected by national application process.

- **COCA-COLA**

Coca-Cola is a carbonated soft drink manufactured by the Coca-Cola Company of Atlanta, Georgia. COCA-COLA has been in news for controversies like animal testing issues, labeling issues, environmental issues and a lot of others. However it has brought a lot of changes like changing the brand ambassador from Sachin Tendulkar to Sourav Ganguly, replacing it's tagline 'Open Happiness' by 'Taste The Feeling' and working a lot for women empowerment through initiatives like **5by20**.

5by20[218] is an initiative taken by COCA-COLA to empower women financially, educationally and socially. Launched in the fall of **2010**, 5by20 is aimed at ensuring the economic empowerment of 5 million women entrepreneurs across its global value chain by 2020. It collaborates with NGOs and other such organizations to increase the outreach. There are four programs under 5by20 which helps to breakdown social and economic barriers and provide a level playing field. These programs include access to business skills training, financial services, assets, and support networks of peers and mentors. The program enabled **131,000** women in 2011 when the focus was on four pilot markets: **Brazil**, **India**, the **Philippines** and **South Africa**.

Ekocool Solar Powered Cooler[219] is one such program under 5by20. In rural areas, where electricity rarely comes, it becomes difficult for shop owners to sell cold drinks. Under this initiative, COCA COLA provides these owners solar powered coolers. Since, most of the shops are handled by women in rural areas (as men go for farming and other activities), the ultimate beneficiaries are women. These

[218] '*Sustainability: 5by20-Women Economic Empowerment Initiative*', Coca-Cola, Available at http://www.coca-colaindia.com/sustainability/we/5by20-women-economic-empowerment-initiative/, Accessed on 15th September, 2016

[219] '*Sustainability:Ekocool Solar Powered Cooler*', Programs under 5by20, Coca-Cola, Available at http://www.coca-colaindia.com/sustainability/we/5by20-women-economic-empowerment-initiative/programs-5by20/, Accessed on 15th September, 2016

coolers are provided with charging ports which can be used by women to further increase their income. Since, electricity comes barely for 7-8 hours and in addition to that on a low voltage, women can extract income by offering charging points in return for money. They can charge their lanterns and use it for domestic purposes. This is another such instance where companies are trying to sell their products along with empowering women to overcome barriers.

Parivartan[220] is second program under 5by20, where retailing capability particularly in the areas of cash and, stock management; shop management and customer interactions, of women is ameliorated. Buses have been converted into classroom where people from COCA COLA University teach these future retailers. This program has successfully trained **10,000** women retailers till now. Since, most of the women in India are employed in informal sector, where they don't get teaching of any kind, COCA-COLA's initiative has been commendable in teaching them and helping them in scaling their business.

Pragati[221] is third program under 5by20. It focuses on building the retailing capabilities of women entrepreneurs by providing training, product knowledge and business start-up support to women retailers. Most of the women in rural India want to start something of their own, but due to lack of knowledge, they aren't able to do that. Pragati helps them at the base level by providing adequate knowledge of initiating a business venture and how to scale them up. The program is conducted by Hindustan Coca Cola Beverages Private Limited (HCCBPL), in remote parts of rural India.

[220] '*Sustainability:Parivartan'*, Programs under 5by20, Coca-Cola, Available at http://www.coca-colaindia.com/sustainability/we/5by20-women-economic-empowerment-initiative/programs-5by20/, Accessed on 15th September, 2016

[221] '*Sustainability:Pragati'*, Programs under 5by20, Coca-Cola, Available at http://www.coca-colaindia.com/sustainability/we/5by20-women-economic-empowerment-initiative/programs-5by20/, Accessed on 15th September, 2016

Unnati is the last program under this initiative. It's a supply chain initiative that would acquaint women mango farmers with modern techniques of production and agricultural practices. This project is supplementing government's initiative of educating farmers of modern agricultural practices. It's been supported by Coca-Cola India Private Limited (CCIPL). Around **1,000** women have been covered under this initiative till now.[222]

We can see that COCA-COLA is striving to empower women, whether it's financially, retailing, common education, modern techniques of production, business management and cost management. These initiatives of COCA-COLA are strengthening the rural sector which is the backbone of Indian economy.

- **JINDAL STEEL AND POWER**

Jindal Steel & Power has been the consistent performer in social responsibility. It's work has been recognized at the national level. The presentation on CSR activities of JSPL **'Asha-The Hope'** was commented as 'exemplary' and was selected among best three cases which were screened in the CSR case study competition organized by the All India Management Association, New Delhi.

While other empower women by providing them education, making them financial independent, honing their skills, Jindal Steel & Power limited empowers women not only b aforementioned ways, but also strives to ameliorate the health conditions of women and environment. It is working constantly to improve the health of women through its various projects and schemes.

The **KishorI health program**'s central vision is health improvement of adolescent girls through regular medical check-up, haemoglobin check-up, awareness creation and nutrition

[222] '*Sustainability:Unnati*', Programs under 5by20, Coca-Cola, Available at http://www.coca-colaindia.com/sustainability/we/5by20-women-economic-empowerment-initiative/programs-5by20/, Accessed on 15th September, 2016

supplementation.[223] It strives to improve female adolescent health by targeting anemia-control through timely detection and rectification. Generally, it is seen that rural girl's perform much worse than boys on health indicators, due to gender discrimination and poverty issues. Jindal Steel &Power is working immensely to eradicate this gap through its various schemes. It also creates awareness among rural community through its initiative **Vatsalya**[224]. The program strategically emphasizes on the holistic health and sanitation issues and along with that it mobilizes the society on their rights.

Government is working immensely to promote jute industry by giving tax sops, making favorable policies and creating among people, as jute is a natural fiber- the golden fiber that is 100 % bio-degradable and abundantly available. Jindal Steel & Power is also working on this theme through its initiative **Odifab**[225]. It's a platform that showcases the various jute products manufactured by the women of the villages. Odifab is a registered trademark and is undoubtedly one of the most sought-after livelihood options amongst young women residing in the nearby villages. It's also an environment friendly initiative as jute is 100% bio-degradable.

In a world where everyone is moving from chemicals to herbal and non-chemical products, emergence of new companies claiming to be a champion of non-chemical products, Jindal Steel & Power Company is not far behind in this segment. It is trying to bring herbal products in market through its social responsibility initiative and simultaneously is effectively contributing towards improving the status of women.

[223] '*Livlihood:Kishori Express'*, Jindal Steel & Power, Available at http://www.jindalsteelpower.com/sustainabilities/women-empowerment.html, Accessed on 15th September, 2016
[224] '*Livlihood:Vatsalya'*, Jindal Steel & Power, Available at http://www.jindalsteelpower.com/sustainabilities/women-empowerment.html, Accessed on 15th September, 2016
[225] '*Livlihood:Odifab'*, Jindal Steel & Power, Available at http://www.jindalsteelpower.com/sustainabilities/women-empowerment.html, Accessed on 15th September, 2016

Eco-spa[226] is an initiative directed towards achieving sustainable livelihood along with a simultaneous promotion of micro-enterprise where women from local villages bring together locally grown fruits, vegetables and herbs to produce high-quality herbal body care products for the urban and affluent market. The company acts as a linkage between those who use organic products and those who produce them.

All products at Eco-Spa are hand-crafted and involve very limited usage of machines. Thus, these local producers are getting the market for their herbal products through the conduit called as Jindal Steel & Power. Company is giving direction to these entrepreneurs which they were devoid of before. World is becoming more sensitive and aware of women issues. The brouhaha and hype that was created about women bleeding earlier is now subsiding and Jindal Steel & Power is working in this area through its initiative **Sshodashi**[227], sanitary napkin manufacturing cum training unit. With technical inputs from the National Award winning inventor and patent-owner, this low cost sanitary napkins training cum production centre was launched. The low cost sanitary napkin manufactured under the name of 'Sshodashi' brings in a sea-change in a young girls' life and carries a long-lasting impact. Better menstrual hygiene along with low cost helps women to be independent and give them energy to face so called 'stigma'. It enables younger women to go to college and work places, thereby helping them.

Solving environment and health issues has been the company's main proposition, but along with this it is directly helping women to be sagacious and financially independent through its various initiatives. **Akriti**[228] is one such initiative, in which company is setting centers where women make hand made

[226] '*Livlihood:Eco Spa*', Jindal Steel & Power, Available at http://www.jindalsteelpower.com/sustainabilities/women-empowerment.html, Accessed on 15th September, 2016

[227] '*Livlihood:Sshodashi*', Jindal Steel & Power, Available at http://www.jindalsteelpower.com/sustainabilities/women-empowerment.html, Accessed on 15th September, 2016

[228] '*Livlihood:Akriti*', Jindal Steel & Power, Available at http://www.jindalsteelpower.com/sustainabilities/women-empowerment.html, Accessed on 15th September, 2016

products and sell them. *Sujan-stitching* and tailoring unit, where it is effectively making use of Indian women's skill in tailoring to make them financially well off.

Sugandhi[229] is another program which involves rolling of agarbatti (incense stick). This again provides earning opportunity making women financially strong.

Thus, we can see that Jindal's Steel & Power is working quite hard to make significant changes in the current scenario. They strive to work on various issues related to women through its experience and innovation that no other company has been able to do yet. Its initiatives and programs are elaborative and have reached even those sectors which haven't been worked upon yet. It is rightly called as India's best performing company in social responsibility.

- **TATA GROUP**

Tata Group is India's leading business conglomerate and the most diversified one. It is one of the world's best and most trusted brands. It has been at the forefront of every sector be it IT, FMCG, automobile, education and others. It has brought many changes in India through its various initiatives, whether giving workers some sort of social security as early as 1900 under **Jamsetji Tata** or opening up high quality research centers like **The Energy and Research Institute** (TERI**)** and **Tata Institute of Social Science** (TISS). TATA has left an indelible mark in Indian society through its unique legacy of combining business with philosophy.

They have strongly advocated women rights and tried to empower them through its various initiatives. They not only preach the same to others, but themselves follow it ardently, which is evident in its board of director's composition, which had a women member as early as 1960. Following this legacy, TATA has started various initiatives to empower women and their legacy.

[229] '*Livlihood:Sugandhi*', Jindal Steel & Power, Available at http://www.jindalsteelpower.com/sustainabilities/women-empowerment.html, Accessed on 15th September, 2016

TATA Power which is India's largest integrated power company has been working relentlessly in furthering the cause of women. It has aligned its campaign with that of government's '**Beti Padhao**'[230], thereby, employing a focused strategy with emphasis on literacy, scholarships, and empowerment, to mitigate gender discrimination.

TATA power is burning the midnight oil in **Chembur**, where it has set up **women self help groups** and **domestic violence registration centres**. These self help groups provide training and vocational skills to women which are quite helpful in income generation. Tata Power has also set up three case registration centers to provide counseling and legal aid services to the victims of domestic violence. In India, where most women are not able to register a domestic violence case due to ignorance or lack of legal aid, TATA power is empowering them through its initiative.

Furthermore, the company has installed 52 solar lights in the areas which are deprived of sufficient lighting to ensure and provide safety of the women. This initiative has benefited more than **56,000** people. Thus, we can see that TATA power is sincerely focused on enriching the lives of Chembur citizens.

While on one hand it is providing skills to women to make their lives better, on the other, it is providing means for successful deployment of their skills through the project called **Vartika**[231]. It is a special program designed to endorse value-added traditional embroidery crafts and develop market linkages for women to give a steady boost to their earnings in Mundra. The aim of this project is to provide hands-on training to women to enhance their skills in arts and crafts. Therefore, it is making

[230] *'Tata Power aligns with Beti Padhao programme to fortify its women empowerment initiatives'*, TATA, Available at http://www.tata.com/article/inside/Tata-Power-aligns-with-Beti-Padhao-programme-to-fortify-its-women-empowerment-initiatives, Accessed on 15th September, 2016

[231] *'Tata Power launches 'Project Vartika' for women empowerment and self reliance in Mundra, Gujrat',* TATA, Available at http://www.tata.com/media/releasesinside/Tata-Power-launches-Project-Vartika-for-women-empowerment-and-self-reliance-in-Mundra-Gujarat, Accessed on 15th September, 2016

women economically independent. Making women to earn as same as men, thereby enhancing their position in the family. TATA power is paving a way for a society where women are treated as same as men.

In a nation, where women constitute less than 20% of the membesr of the parliament, where participation of women is minuscule in the electoral process, TATA tea is trying to bring a change by launching a campaign called **Jaago Re**. At the time ofthe general election in 2014 Tata Tea had launched another hard-hitting campaign, the **Power of 49**[232]. The initiative was aimed at highlighting the fact that women form as much as 49 percent of the electoral base, and can effectively exercise immense power in the upcoming general elections in India. Through this initiative, TATA tea is trying to show that how many women can contribute to society if they are represented in electoral process equally. This initiative is quite different from all the other initiatives undertaken by various companies as none have tried to raise the issue of low repression of women in electoral process before.

Role models make a powerful change in society, as their work titillates others to work in the same direction. The affection and respect that role models get, provokes other to tread on the same line. Based on this TATA Steel started a project called **Tejaswini**[233], which creates local role models for women. It is an inter-woman self-help group competition conceived in **2009** and is conducted once a week for a period of four months every year. Women are trained to handle bulldozers which are primarily conceived as a men's job. Through this initiative, TATA is trying to blur the difference between jobs meant for men and women.

[232] '*Power of 49:Empowering Women Voters'*, TATA, Available at http://www.tata.com/article/inside/Power-of-49-Empowering-women-voters, Accessed on 15th September

[233] *'Women Empowerment'*, TATA Steel, Available at http://www.tatasteel.com/global-network/tata-steel-kalinganagar/tata-steel-parivar/r-and-r-initiatives/women-empowerment.asp, Accessed on 15th September

TATA has always been the initiator of change whether in the field of education, business or in social responsibility. Whatever they do, is followed by others as it has been seen in their 'Power of 49' campaign and TATA uses its position to bring a positive and a better change in the society. Their sincerity can be gauged from the fact that they were the highest spender in Corporate Social Responsibility in 2013-2014. 2% of their profit is required by companies to be spent on social sector, under the Corporate Social Responsibility Act, but TATA, due to its benevolence and hunger for change have spent over 2%. It is truly an inspiration for all the other companies.

VII. PROPOSED RECOMMENDATIONS

1. Relaxation in the criteria for companies to fall under the purview of fulfilling their Corporate Social Responsibility. This will remarkably increase the CSR activities and bring substantial changes in the society.
2. Compulsion of undertaking projects and performing activities concerned with the empowerment of women. It will aid in accelerating the rate of upliftment of the status of the women in our country.
3. Reaching out to the companies through campaigns and other medium and conveying to them the need of giving back to the society. This will ensure that CSR is undertaken by the companies not just for the sake of fulfilling the statutory obligation and the true essence of it is not lost in the process.
4. Periodical and authentic rating to be awarded (and published) to the companies on some common parameters and ranks awarded accordingly. This will incentivise the companies to work harder and win the trust of its stakeholders.

VIII. CONCLUSION

"There is no tool for development more effective than the empowerment of women"

The aforementioned quote by **Kofi Annan** sums up the importance of empowering women to get them to the same level as men and even higher.

Women Empowerment is a very broad concept in itself. It demands utmost sincerity and persistent efforts to achieve this gargantuan task. Moreover, to eradicate all the social evils which make the lives of the women miserable, to put an end to the social and mental trauma that every women is subjected to, to make women realize that it's not their ultimate goal to get married and have kids but have a choice, to accord the same status to our sons and daughters, we can't completely rely on the government. Being an essential part of the society, these corporate giants can be the harbinger of change in this regard. Such positive initiatives undertaken by the corporate structures are helpful for them as it helps in building their positive image before the consumer. People are encouraged to approach such companies which give preference to the needs of the society from which they extract resources. Image building is effectively achieved. Such companies are able to generate more profits in the long run as they gain not only the trust but also the respect of their consumers. The above mentioned companies are shining illustrations of this proposition.

8. NEED FOR UNIFORM CIVIL CODE FOR UNIFICATION OF INDIA

Author(s): Hunney Mittal

ABSTRACT

Women empowerment is a much talked about reform. As Swami Vivekananda once said "All nations have achieved greatness by paying proper respect to women and a country can't progress by neglecting its womenfolk, just as a bird cannot fly only on one wing". However, our personal laws have made sure that women don't get a chance to be independent, as they have become subject to many social constraints curbing their advancement, and ultimately the nation suffers due to this. This has greatly affected the achievement of women empowerment. Articles 14 and 15 of the Constitution do not give anyone the authority to discriminate anyone, on the basis of race, caste, place of birth and sex. However, personal laws are being given the authority to have an overriding effect of the law of the land. Different laws governing people belonging to different religions has led to many differences being cropped up. Political parties have many times lured on this opportunity to take advantage by playing politics on such a sensitive issue, delivering hate speeches and targeting a particular religion.

I. INTRODUCTION

India is a vast country, with 1.28 billion people, spread over 3270000 km2. As many as 1652 languages existed in the country, as per the 1961 census (880 still in use and 22 official languages), which is a very unique thing. The country inhibits people from various religions of which, there are 7 major religions and 4 of them took birth in the country itself. Having a 5000 year old civilization, the country is also known as a 'land of religions'. Religious values have been deeply rooted in the lives of Indian people. So much so, that even some of our civil laws are based on religious values. The personal laws today, that dictate our conduct, trace their history back in time, when the society was ruled by the male

counterparts, whereas women were considered not more important than a doormat. Texts of Manu clearly lay bare the status of the fair sex. Women were considered as an object, for 'distracting' men, and were supposed to be in the custody of their fathers, husbands, brothers and sons. They were not allowed to live independently, under any circumstances, as they were termed as 'incapable' in doing so. Men, in those times, were advised not to fall prey to the beauty of a lustrous woman. This has also been reflected in the personal laws made at that time, which ipso facto favored the male counterparts.

Article 39 of The Indian Constitution, lays down certain duties, which the State has to achieve overtime, though these are not legally binding i.e. DPSP (Directive Principle of State Policy). Amongst these various Articles, is Article 44, which states that the State shall endeavor to achieve a uniform civil code throughout the Territory of India. However, even after over 6 decades of independence, the country is still governed by the old patriarchal laws, that continue to govern the civil domain. Before the British came to India, people belonging to different religions were subject to the customary laws of their religion, in both, the civil and criminal domains. The Hindus were governed by the texts of Vedas and Upanishads, along with various other religious texts. For the Muslims, Quran had been the main source of their personal laws. Overtime, these texts got manipulated which resulted into certain social evil practices, like that of sati, child remarriage, concept of 'blood money' among Muslims being cropped up. However, when the British came, they took serious measures to curb all the heinous acts, and made a uniform criminal law barring the enforcement of all the personal laws in the criminal domain. Laws like Indian Penal Code 1860 and Code of Criminal Procedure 1973 were enacted. Civil laws too were enacted to some extent like, The Indian Contracts Act 1872 and Civil Procedure Code 1908. However, no measures were taken to enact the laws regarding adoption, marriage, divorce and succession, as this would have invited criticism from the communities, resulting into a political unrest. The Second law Commission of India, 1833, constituted under the President-

ship of Master of the Rolls observed: "it is our opinion that no portion, either of the Mohammedan law or of Hindu law, ought to be enacted as such in any form by a British legislation….The Hindu law and Mohammedan law derived their authority respectively from Hindu and Mohammedan religion. It follows that, as a British legislature cannot make Mohammedan or religion, so neither can it make Mohammedan or Hindu law".234 Hence, to maintain cordial relations among both the communities, these were left untouched. Also, after the independence of the country, during the meeting in The Parliament, while framing The Constitution, it was accepted that the idea is to secure harmony through uniformity but for that purpose, it wasn't necessary to regiment the civil law of people including the personal laws, and the society was not ready to accept a uniform law and give up on their ideas. This was thus considered to be a gradual goal to be achieved overtime, and must be progressed with passing time.235 That's the reason why Uniform Civil Code was included under Article 44 as a part of DPSP. Much part of the Hindu law was codified after Independence, whereas Muslim law was left untouched and is still not codified to a great extent. People from other communities apart from Muslims, Parsis, Jews and Christians were brought under the purview of the Hindu law, as it being an act made by the legislatures. Different religions have different ideologies, e.g. marriage amongst Hindus is considered to be a sacrament and union of souls, while amongst Muslims, it is a kind of contract, though it has religious values too. What is more surprising, is to notice, that even in a particular religion, not all the people are governed by the same laws. Further bifurcation has been made under different schools, which have different laws. The Muslim law, for instance, has three different schools namely Shia, Sunni and Motazila and the Hindu law has two schools named

[234] M.P Jain, *Outlines of Indian Legal History* 640 (Mumbai: N.M Tripathi Pvt. Ltd. 1990)

[235] *Constituent Assembly of India - Volume VII,* **http://parliamentofindia.nic.in/ls/debates/vol7p11.htm**, *visited on March 22, 2016*

Dayabhaga and Mitakshara. Even now, as far as the domains of adoption, divorce, succession and marriage are concerned, people are subject to their personal laws, and not a uniform law.

II. MARRIAGE AND DIVORCE

The laws of marriages in India are majorly governed by The Hindu Marriage Act 1955 and Muslim personal law. For people from other communities, Special Marriage Act 1954 was enacted, which can also be an alternative for the Hindus and Muslims, if they do not want to marry under their personal laws, or if they want to marry someone from another religion. Marriage (nikah) among Muslims is not a sacrament but a civil contract236. The Quran specifically refers to marriage as "Mithaqun Ghalithun" which means, "a strong agreement". The Rajasthan HC, in the case of Hasina Bano Vs Alam Noor237, held that marriage in Islam is a "permanent and unconditional civil contract", made between two persons for mutual enjoyment and procreation and legalizing of children. However, the relationship of both the contracting parties is not determined as a pure civil contract, but is determined in a combination with the religious connotation238. There are three types of marriages in the Muslim law, which are valid (sahih), irregular (fasid), void (batil) and different rules are there for Shia and Sunni239. There are restraints imposed on Muslim males, as they can marry either a Muslim or a kitabia (Jew and Christian) girl. If he marries a non Muslim and a non-kitabia girl, it shall be termed void in the Shia law and irregular under the Sunni law. An irregular marriage can be made valid when the religion of the wife is converted to Islam. These retrains are however, even tighter with the Muslim women as they cannot marry any non Muslim male, lest the marriage be void.

[236] *Hedaya,* 25 ; Baillie, 4
[237] A.I.R. 2007 Raj. 49
[238] *Mahmad Usaf Abasbhai Bidiwale Vs Harbanu Mansur Atar,* (1978) Mah. LJ. 26
[239] Dinshaw Fardunnji Mulla, *Principles of Mahomedan Law,* 20th edition, pg 333

As per Section 4(c) of Special Marriage Act 1954 in which the minimum age to get married for a boy is 21 years, while that of a girl is 18 years. However, J B Pardiwala, in Mujamil Abdul SattarMansuri Vs State of Gujarat240, set aside an FIR and followed the Muslim law by allowing a Muslim girl of 17 years to marry, as she had already attained puberty. Countries like USA, Australia, where there is a uniform civil code, the marriageable age is the same for all the people in the country irrespective of which religion they belong to.

Another horrific practice is the concept of having four wives at the same time (Polygamy),241 allows men to have up to four wives at a time. But, certain restrictions are also imposed on this, as has been mentioned in the Quran. In the Quran, it is written, that if a man is neither supporting any orphans, nor being entrusted to protect the possessions of orphans, then it is not lawful for him to marry more than one wife242. Also, if and only if a man is able to treat all his wives justly, he has a right to marry four wives or else he should marry one243, which is practically impossible to achieve in today's time. But the Muslim law fails to recognize the importance of these lines and simply allowed a man to marry four wives, which has led to widespread exploitation of the provision with non-Muslims converting themselves to Islam, specifically for the purpose of polygamy, e.g. Dharmendra, the practice which was banned in the Sarla Mudgal Case244.

The Hindu Law, on the other hand, considers marriage as a sacrament because it is said to be completed on the fulfillment of sacred rites and rituals. Even The Hindu Marriage Act, 1955, recognizes saptapadi as an essential ingredient for the recognition of a Hindu marriage. Since, it being

240 *(Criminal Miscellaneous Application No.19811 of 2013 decided on 01.12.2014)*
241 Baillie, 30, 154 *; Ameer Ali*, 5 edn.., Vol. 2, pg 280
242 *Multiple wives (A Quranic view)*, http://www.quran-islam.org/articles/part_3/polygamy_in_quran_(P1411).html, visited on March 22, 2016
243 4:3, Quran
244 AIR 1995 SC 1531

a sacrament and not just a contract, Hindu marriages are irrevocable and the dissolution of marriage is considered a sin. So, both the husband and wife try to adjust to work it out. Since the act was enacted after the independence, much of the unjustified provisions were done away with e.g. the practice of sati, bigamy and dowry that was to be given by the wife's parents to the husband's parents. However, even though the act was formulated 6 years after independence, it didn't give freedom to Hindus to marry out of their religion. Hence, it was limited to all those who were Hindus, which include four communities namely Jains, Sikhs and Buddhist and any other person who was a Hindu by religion. Before the enactment of the act, bigamy was a common practice, which was prohibited later by the act. Discrimination however, arises in the Hindu Law, as in a case when the wife converts to a Muslim or a Christian. After the conversion, she loses all her civil rights that she has against her husband. Another sexist, controversial and debated issue, is the practice of triple talaq which has raised criticism against the Mohammedan law, as it is so oppressive against women and also violates Section 494 of The Indian Penal Code, 1860. The primary reason that the Muslim laws were not codified was that, doing the same would uncover the blanket of invisibility that it wore, which would invite animosity from other communities and consequently greater insecurity for the Muslim community. Along with this, Muslim women are not allowed to have more than one husband245. A Mohammedan woman marrying another man during the lifetime of her husband is liable to be booked under sec 494246. How can a law be justified, if it prima facie violates the law of the land? The women are thus, forced to live an insecure life, as her husband can divorce her as per his whims and fancies. There have been many cases that have come up in the court, in which the wife didn't even have a clue that she had been divorced. What is more astonishing to know is that ironically, the methods of divorcing wives have reached an all new level, with divorces happening over chats and Skype. In the case of Mohamed

[245] Dinshaw Fardunnji Mulla, *Principles of Mahomedan Law,* 20th edition, pg 334
[246] *Nandi Vs Crown* (1920) 1 Lah. 440; *Hamad Vs Emperor* (1931) A.L. 194, 134, I.C. 589

Ahmad Khan v. Shah Bano247, the wife approaches the court, as after the divorce, the husband stopped paying the maintenance after the period of iddat, which is the minimum period after the divorce or the death of the husband, a wife cannot remarry. This was however, in contradiction with Sec 125 of Cr.PC, which provides for the maintenance of the ex-wife. The Judges however, decided in favor of the wife, by saying that there is no conflict between the provisions of section 125 and those of the Muslim Personal Law, on the question of the Muslim husband's obligation to provide maintenance for a divorced wife, who is unable to maintain herself. This judgment was however, overruled owing to the political pressure and resistance from the Muslim community, by passing a new act in the parliament which was The Muslim Women (Protection of Rights on Divorce) Act 1986, which restricted the maintenance to be paid up to the period of iddat. This provision has been greatly misinterpreted, as going back in the time will explain the real reason behind it. In those days, after being divorced, the wife used to remarry just after the iddat period, as it used to be a common practice in those times. Three decades after the case, another woman (Shayara Bano v. Union of India) has filed a writ petition in the Supreme Court for inter alia, declaring Sec 2 of The Muslim Personal Law (Shariat) Application Act, 1937, unconstitutional, which validates triple talaq as valid divorce, along with the practice of polygamy,248 though it had already been invalidated by the apex court in the landmark judgment of Shamim Ara v. State of UP249 In another recent case of Rihana Sultana Begum v. Hashmi Syed Mujib250, the Bombay HC has held that even if the parties are governed by Mohammedan Law and provisions of Muslim Women (Protection of Rights on Divorce) Act, 1986 are applicable, still the maintenance is not required to be confined only to iddat period but till the lady

247 1985 SCR (3) 844
248 Ashok KM, *SC set to hear challenge against Triple Talaq and Polygamy,* http://www.livelaw.in/sc-set-to-hear-challenge-against-triple-talaq-and-polygamy/, visited on March 22, 2016
249 Appeal (CRL.) 465 of 1996
250 Criminal Writ Petition No. 544 of 2003

gets remarried.251 The Act doesn't take account of the rights of a woman, provided to her by the customary laws, to seek divorce. This system is known as Khula, which is a counterpart to divorce by men, on the behest of women. In this, the wife has to just approach the qazi for divorce, and the husband doesn't even have the right to know the grounds of divorce. This also, has been ignored and not brought into recognition.

Yet another difference which arises in different laws, is the minimum separation period which is necessary after filing for divorce by the couple. It is 1 year amongst the Hindus, while the same is of 2 years among Christians. For this, a Christian couple moved to court, challenging its validity. The judges, however, asked the government of its stand, as to whether they want to make it happen or not. The bench remarked that it has become 'confusing' to decide.252

III. ARTICLE 25

Article 25 of The Indian Constitution, provides for the freedom to profess, practice and propagate any religion. Every person has a right to practice his religion freely, subject to public order, morality, health and other provisions relating to fundamental rights. In the case of Javed v. State of Haryana253, it was held, "what are protected under Article 25 are religious faiths and not a practice which may run counter to the public". Also, in the case of Khureed Ahmad Khan v. State of U.P. & Ors.254, it was held by The Supreme Court, that the matter is no longer res integra, as polygamy was not an integral part of the religion, and a practice does not acquire a sanction simply because it was permitted. Though

[251] Ashok KM, *Divorced Muslim Women also entitled to maintenance till she gets remarried: Bombay HC*, http://www.livelaw.in/divorced-muslim-woman-also-entitled-maintenance-till-gets-remarried-bombay-hc/

[252] Utkarsh Anand, *Uniform Civil Code: There's total confusion, why can't it be done, SC asks govt.*, http://indianexpress.com/article/india/india-news-india/uniform-civil-code-supreme-court-asks-govt-why-cant-it-be-done-tell-us-your-plan/ , visited on March 22, 2016

[253] (2003) 8 SCC 369

[254] ILC-2015-SC-MAT-Feb 2

the personal law of Muslims permit having four wives, but it could not be said that having more than one wife is part of religion255.

ADOPTION

There is no general law of adoption in India, and people are subject to their various laws of adoption, based on the religion they belong to. While the adoption laws among Hindus are governed by the Hindu Adoption and Maintenance Act 1956, Muslims and Christians have no concept of adoption in their customs. Hence, they have to approach the court as per the Guardians and Wards Act, 1890 to legalize adoption. Adoption among Hindus is more of a sacrament than a secular act. Also, the Supreme Court has held that adoption in Hindus, is a two-fold objective; for the performance of funeral rights and for the continuance of one's lineage. Among Hindus, the father has a better right over the mother when the child is above 5 years of age and the prior right of mother is claimed only when the child is below 5 years. As per the act, a Hindu man cannot adopt a non Hindu child i.e. Muslims and Christians, and the adoption of a non-Hindu shall not be recognized by the Act. Also, there are restrictions imposed, like a couple cannot adopt a boy if they already have a Hindu boy and same applies in the case of girls as well. Also a legally wedded Hindu, cannot adopt a child by her own. This can only be done under the name of her husband. The act is not child-oriented but parent-oriented, as it is a religion specified act, which gives more weightage to the religion of the child than his betterment. However, the Juvenile Justice (Care and Protection) Act, 2015, places no restriction on the adoption of child of same sex and allows even a single person, including a single woman, to adopt a child (Section 57(3)), as is restricted in Hindu Adoption and Maintenance Act, 1956. A major discrimination that Hindu law provides for, is in the case where the son converts to another religion

[255] *Badruddin Vs Aisha Begum, (*1957) All LJ 300

other than those that are allowed. In such a situation, this has to be seen whether the son converted before or after the children were born.

Since there is no concept of adoption among Muslims, 'Kafala' system has been recognized, under which a child is placed under a 'kafil', who provides for the well being of the child, including financial support and thus, is legally allowed to take care of the child though, the child remains the true descendant of his biological parents and not that of the "adoptive" parents.256 This has also been recognized by the United Nations. Parsis and Jews too, are subject to the laws of the Guardian and Wards Act, 1890.

The intent behind every adoption, is to serve a two way benefit. One, it helps the childless couples to have the pleasure of raising a child and second, the greater and the more important objective is, to fill colors in the life of an orphan and giving him all the love and comforts of life, which he is deprived of, so that he can earn a living for himself and live his life like a normal person. Why should religion be an obstacle in this? Justice P.N. Bhagwati in his landmark judgment in Laxmikant Shukla v. Union of India257 said "no child can grow his full stature, outside the framework of a family." Article 39 of The Constitution of India, directs the government to make special provisions through legislation programmes & approaches, to ensure that the tender age of children is not abused & that even those living under extremely difficult circumstances are given facilities to develop in a healthy manner, & in condition of freedom and dignity. India has the second largest child population in the world, and it is estimated that there are over 32 million destitute children in the country258. The religion-specific nature of adoption law was a very retrograde step. It reinforced practices that were unjust to children

256 *Shabnam Hashmi vs Union of India,* (2014) 4 SCC 1
257 (1984) SCC 284
258Deepak Kumar, *Hindu Adoption Laws and Interpretations of different High Courts,* http://www.nja.nic.in/2.%20Hindu%20Adoption%20Law%20and%20Judicial%20interpretation-%20Deepak%20KR.Verma.pdf, visited on March 22, 2016

and hindered the formation of Uniform Civil Code. The Supreme Court has however, held in the case of Shabnam Hashmi v. Union of India,259 that personal laws cannot dictate the operations of provisions of an enabling statute, like Juvenile Justice (Care and Protection) Act 2015, which is a secular law and the act would prevail over all personal and religious codes in the country. A major step has been taken by the apex court towards the achievement of Uniform Civil Code, by nullifying all the provisions of all the acts, inconsistent with the Juvenile Justice (Care and Protection) Act 2015. The court also said that the personal laws could continue to govern any person, who chooses to be governed by them until a uniform civil code is achieved.

SUCCESSION

There is no concept of Joint family as a legal entity260 among Muslims, like it is in Hindus, and there is no distinction made between movable and immovable property. When the members of a Mohammedan Family live in commensality, they do not form a joint family, in the sense in which the expression is used in the Hindu law261. Also, in Mohammedan family, the right of husband over cash and household furniture is presumed.262Also, when daughters are excluded from inheritance either by custom or by a statute, they should be treated as non-existent, while determining the shares.263 Another astounding provision, as per the Holy Quran, is given in IV: 11 which states as follows "Allah directs you concerning your children (their inheritance), to the male a portion equal to that of two females". How can this discrimination be justified in the eyes of law? Those who back this provision, are of the view that since the girl gets dower from her husband after marriage, she doesn't require much of the property. It's the husband who has to use the property that he has got in inheritance, for

259 (2014) 4 SCC 1
260 *Sahul Hamid Vs Sulthan,* 1947 A. Mad. 287
261 Dinshaw Fardunnji Mulla, *Principles of Mahomedan Law,* 20 edn., pg 61
262 Ma Khatun vs Ma bibi, (1933) A.R. 393, 14 I.C. 654
263 Dinshaw Fardunnji Mulla, *Principles of Mahomedan Law,* 20 edn., pg 62

the welfare of the family. But, this also cannot be the ground for not giving equal share. These provisions show prima facie the dominance of males and their intent, to make the women dependent on them. This is clearly absurd and in violation of Article 14, which guarantees equality to everyone on the grounds of race, religion and sex.

The law governing the succession among Hindus, is governed by the Hindu Succession Act 1956, prior to the enactment of which, it was governed through shruti, smriti, commentaries, digests and customs. The position of women was however minimal, as they didn't have any independent rights and had to be dependent on the male counterparts of the family. The Hindu Succession Act 1955 basically, has two schools namely Dayabhaga, which is also known as Bengal School of law and is applicable in West Bengal and Mitakshara, which is applicable in the other parts with variations. While the Mitakshara school doesn't give women of the house any right to take part in the management of the business as coparceners, which also meant that she couldn't demand partition as only coparceners have that right, Dayabhaga school of Bengal allowed women to be coparceners. This came as a shock, as even after 6 years of the making of The Constitution, which recognizes equality as a fundamental right, the legislatures could come up with such biased laws, making a mockery of The Constitution. Discrimination against women is so pervasive, that it sometimes surfaces on a bare perusal of the law, made by the legislature itself, particularly in relation to inheritance and succession.264 The amendments brought in the Act in 2005 gave daughters equal status as sons. Now, daughters can be coparceners and take part in the management of the business while the same right is not available to mothers and wives and widows, as this concept has not been modified substantially. Women were however, not recognized as a Karta of a Hindu Undivided Family. The oldest male member of the family becomes the karta, who has all the powers and under his names all the business undertakings

[264] Law Commission Of India, 174th Report on Property Rights of Women: Proposed Reforms under the Hindu Law (Ma, 2000)

take place. But the Delhi HC, in the case of Sujata Sharma v. Manu Gupta265, Justice Waziri held that Sec 6 of the Hindu Succession Act, is a socially beneficial legislation, which gives equal rights of inheritance to Hindu males and females and hence, if a male can become a karta by virtue of his age, then even a female has that right.

IV. THE GOAN CIVIL CODE

If there is any region in India, which has been successful in achieving a Uniform Civil Code, it is Goa. Owing to its majority population of Christians, the law is largely based on the Portuguese Civil Code of 1867, with some modifications to suit different religions apart from Christians. Article 372(1) of The Indian Constitution, specifies, "All the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority". Article 372(3) further reads, "law in force in this article shall include a law passed or made by a legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas". Since, Goa was not a part of India at the time of independence, these provisions didn't apply to Goa, when it came under the territory of India on 19 December 1969. For divorce, there are severe provisions. The practice of triple talaq has been banned and no man can have more than one wife. During the course of marriage, all the property and wealth owned or acquired by each spouse, is commonly held by the couple. Each spouse, in case of divorce, is entitled to a half share of the property and if one dies, the ownership over half of the property is retained by the other.266 Also, if all their children (both male and female) have got married, then their parents cannot disinherit any of their

265 CS(OS) 2011/2006

266 *Uniform Civil Code in Goa,* http://www.goaholidayhomes.com/information/uniform-civil-code-in-goa.html, visited on March 22, 2016

children completely. Parents can only inherit half of their property as per their will. The other half is divided amongst all the children equally, irrespective of the sex. In the Uniform Civil Code in Goa, a citizen's juridical capacity is understood in one's identity as an individual, and not as a member of a religious community.267 Although uniform to a great extent, there are some specific provisions which exist among different religions. There is 'limited' polygamy allowed among the Hindus, when the wife is not able to give birth to a child, up to a certain age. This is however, prohibited among other religions. Also the Church has not been separated from the State. Those who opt to solemnize their marriage in Church, the Church can annul the marriage at the instance of one of the parties, as is laid down in the Church law. The difference in treatment, is also seen in the cases of adoption as Goa, like rest of the states doesn't have a uniform civil code of adoption. This means that no Muslim couple can legally adopt a child.

V. CONCLUSIONS AND RECOMMENDATIONS

Women empowerment is a much talked about reform. As Swami Vivekananda once said "All nations have achieved greatness by paying proper respect to women and a country can't progress by neglecting its womenfolk, just as a bird cannot fly only on one wing". However, our personal laws have made sure that women don't get a chance to be independent, as they have become subject to many social constraints curbing their advancement, and ultimately the nation suffers due to this. This has greatly affected the achievement of women empowerment. Articles 14 and 15 of the Constitution do not give anyone the authority to discriminate anyone, on the basis of race, caste, place of birth and sex. However, personal laws are being given the authority to have an overriding effect of the law of the land. Different laws governing people belonging to different religions has led to many differences

[267] Gurpreet Mahajan, Surinder S. Jodhka, *Religion, Community and Development: Changing Contours of Politics and Policy in India* (Routledge, New Delhi, 11 Edn. 2010)

being cropped up. Political parties have many times lured on this opportunity to take advantage by playing politics on such a sensitive issue, delivering hate speeches and targeting a particular religion. This has led to the mob getting violent, and Babri Mazjid attacks and the Gujarat riots are the consequences of these. One more thing that needs to be noticed here is that earlier, people used to stay closely attached to their religions and so it used to play a huge role in their lives. Due to industrialization and modernization and scientific advancements, religion has lost the social influence that it had on the lives of a common person and has only become a post- retirement thing. People are so busy with their lives, that they have become ignorant of religious practices. Hence, it can be rightly said that personal law boards especially the All India Muslim Personal Law Board (AIMPB) are trying to sustain the socially, ethically, and legally unjustified laws and practices under the guise of religion. God doesn't discriminate among his children. It is only the so-called religion gurus and maulvis who have manipulated the ancient scriptures as they please, so as to promote their evil intentions. Especially the Mohammedan laws, many provisions of which have been so badly misinterpreted that people who preach Islam are unaware of the actual Quranic knowledge. The hold of maulvis has been so strong on the Muslim community that there is absolutely no scope for the reform in Muslim laws. Prof. Tahir Mahmood in his book, 'Amid Gods and Lords' wrote an anecdote: A maulvi and a pandit go to God and both complain that their communities don't accept social reform. After a long argument, God counsels them to be patient with their community and that a time would come when they would accept reform. The pandit asks, "When would that time come?" God said, "Not in your lifetime." Then the maulvi asked, "When would that time come for my community?" God said, "Not in my lifetime." Every sensible Hadith is declared false, every sensible verse of the Quran has been abrogated. Bad customs need to be done and over with. It is only sheer ignorance, obstinacy and blind belief that have sustained the existence of personal laws. Even the Muslim majority countries like Tunisia, Israel and Turkey have banned polygamy and other unjustified laws. The word 'Secular' was

included in the preamble of the Constitution by way of the 42nd Amendment Act 1976. Unlike the typical meaning where the state doesn't recognize any religion, secularism in the Indian context means that every religion is given equal respect. However, it only seems that no measures have been taken by the parliament for the betterment of the women among Muslims. The Muslim Protection Act was apparently enacted by the Rajiv Gandhi government for providing protection to the Muslim women, worsened the situation by making the wrong interpretation, so as to negate the breakthrough judgment of Shah Bano case. Uniform Civil Code being just a DPSP cannot be enforced by the courts. It is only the duty of parliament to achieve this object. However, our legislators have turned a blind eye on the issue. No concrete steps have ever been taken. Perhaps, it seems that they don't want to annoy their voters as this might take a toll on their vote bank. A huge population in India, being uneducated are often deceived into false beliefs. It is a bitter truth to swallow, but the voters see the religion of their leaders before voting. What is more shocking to see is that, apart from the legally established courts, there are private courts functioning, which are run by imams, which have time and again delivered horrific and terrifying judgments, such as issuing absurd fatwas and allowing honor killing, which shakes the conscience to core. Though their decisions are not at all binding, but their functioning however, cannot be justified. The Constitution doesn't provide with anything for the protection of personal laws. Contrary to this, it provides for amending any personal law, as per Entry V of the Concurrent list. The unity of the nation is threatened, and if, appropriate and timely measures are not taken to give equal treatment to every person irrespective of his religion, the day is not far when this religious segregation will break the country. India, being a vast country, cannot accommodate each and every religion's views while enacting the laws. To start off with, reforms can be made within the community e.g. same laws for Shias and Sunnis and same laws of succession among the Hindus. This internal uniformity can later be expanded by bringing uniformity among all the religions in the civil domain. This however, should not prescribe the way, a ritual should be performed which should be

left to the customary practices. Attention should also be given while amending laws for the North-eastern regions, as it has been provided by the Constitution, that any amendment in their personal laws shall be made by their Parliament only. A Uniform Civil Code is the need of the hour for unifying the nation. With no measures being taken by the Legislature, Judiciary seems to be the only hope. Judiciary though, is taking steps towards the goal of Uniform Civil Code and has sent many reminders to the government regarding the issue, but of no avail. It is high time for our leaders to stop playing dirty politics and take steps for the betterment of the nation.

9. RELIGIOUS CONVERSION AS GROUND OF DIVORCE IN INDIA: A CRITIQUE

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I. INTRODUCTION

Perspectives regarding the institution of marriage have progressively evolved from conservatism in viewing marriage as a 'sacrament' to contemporary societal laws providing for dissolution of marriage. Provisions being carved out under each personal law permitting divorce as a remedy to escape from matrimonial ties have struck at the very root of the notion of marriage as an 'indissoluble/inviolable union'. Since ancient personal laws regarded adultery on the part of a woman as a sin of the highest order,[268] it formed the sole ground for obtaining divorce to renounce the marriage with the unchaste woman. However, the stability of marriages has been mutated by providing a range of divorce grounds owing to socio-legal changes.

Universally, religion has strongly influenced individual and collective societal behavior by imposing restrictions and regulating the conduct of its followers. Nevertheless, the waves of westernization, liberal outlook and rational thought since the advent of industrial revolution (and social reform movements in India) have enabled mankind to question before associating oneself with a religious identity. Consequentially, rigidity regarding one's religious faith, as determined by birth, has been gradually undergoing relaxations. A testimony to this is witnessed through the scope available in certain personal laws for one to renounce his/her birth-religion and acquire the beliefs and ideals of the other religion. In India, this accommodation in personal law statutes might, perhaps, be attributed

[268] Paras Diwan, *Law Of Marriage And Divorce*, Preface To The 6th Edn., Universal Law Publishing Co., New Delhi, 2011.

to the constitutional recognition of the right of religious freedom *per* Article 25 of the Constitution. Often deemed as the reservoir of family/personal laws, Article 25 has proven to be a champion of religious conscience enabling citizens to freely convert to the religious faith of their choices.

It becomes pertinent for one to analyze the effects produced by the change of one's religious faith to adopt another especially on the ambit of his personal ties and obligations thereof. Aspects of personal laws, specifically marriage, succession and inheritance[269] are impacted greatly subsequent to conversion from one faith to another. Marriage, as permissible under various personal laws, would be deemed as validly solemnized provided both parties to marriage belong to the same religion (excepting Christian personal laws). Once an individual converts his religion, the applicability of family laws also changes. Whilst certain things are permissible under one family law, the same might not be necessarily permitted in the converted faith. Thus, conversion has the potential of entitling the spouse of the converted party to question the very validity of their marital relationship and providing him/her with a ground for divorce.

This paper shall seek to trace how conversion, as a matrimonial cause, could be a ground for dissolution of matrimony under various personal laws recognized in India. It will first examine why, how and to what extent conversion affects family laws. Then, it will discuss the legal consequences of conversion under Hindu, Muslim, Christian and Parsi personal laws. Lastly, the paper will question whether conversion is an advocate of gender equality by analyzing the upshots of male and female conversions.

[269] Change Of Religion And Loss Of Caste Were Grounds Of Forfeiture Of Coparcenary Property And Of Exclusion From Inheritance Prior To The Enactment Of The Caste Disabilities Act, 1886. The Fear Of Loss Of Ancestral Property Was Viewed As A Bar To Free And Fearless Conversions Into Christianity. The Enactment Of This Act By The British Proved As A Panacea For Conversions To Christianity, And Other Religions Alike Without Depriving Converts Of Rights Of Inheritance.

II. CONVERSION AND FAMILY LAWS

RELIGION AND MARRIAGE

Religion, in India, is a very sensitive and personal aspect of an individual's life. All personal laws, excepting Christianity (subject to conditions thereunder), require that both parties to marriage belong to the same religion.[270] In the event the parties of different religions marry under Hindu, Muslim or Islamic laws, their marriages shall be construed as *void ab initio*. Not only religious scriptures prescribe same-religion marriages, but studies,[271] too, highlight the importance of same-religion marriages keeping in view the lifestyle-choices influenced by religion. Thus, without meeting the religious pre-requisites, marriages solemnized under personal laws, have no legal status.

CONVERSION AND FAMILY LAW

Personal laws and the individuals' religious tenets govern his/her conduct as to matters pertaining to marriage and divorce. When an individual, exercising his right as under Article 25 of the Constitution, adopts the faith of another religion,[272] the application and operation of the personal law over the individual also changes.[273] The problem, then, mainly arises by reason of the facts that –

a. While some systems of personal law enjoin monogamy, others sanction polygamy.[274]

[270] Lakshy Iyengar, *Salient Features Of The Hindu Marriage Act, 1955*, Legal Services India [Available At: Http://Www.Legalservicesindia.Com/Article/Article/Salient-Features-Of-The-Hindu-Marriage-Act-1955-558-1.Html]
[271] Herb Scribner, *Religion Carries Weight In Decisions About Marriage And Kids*, Deseret News, October 2, 2013 [Available At: Http://National.Deseretnews.Com/Article/421/Religion-Carries-Weight-In-Decisions-About-Marriage-And-Kids.Html].
[272] Conversion Would Be Recognized By Law When The Same Is In Accordance With The Duly Prescribed Formalities Of The Religion To Which The Conversion Is Sought. *B. Chandra Manikyamma* V. *B. Sudarsana Rao Alias Saleem Mohammed* On 9 September, 1988[Andhra High Court].
[273] *Rakeya Bibi* V. *Anil Kumar Mukherji* (1948) Ilr 2 Cal 119; *Faheem Ahmed* V. *Maviya @ Luxmi* 178 (2011) Dlt 671; *Ajit Datt* V. *Mrs. Ethel Walters* Air 2001 All 109.
[274] Law Commission Report, *Eighteenth Report On Converts' Marriage Dissolution Act, 1866*, Government Of India, Ministry Of Law (1961).

b. Secondly, the point of view of the institution of marriage as under different personal l aws – as a sacrament under Hindu law,[275] a solemn pact under Muslim law[276] and as a union for life of a man and a woman under Christianity, Judaism and Zoroastrianism. [277]

Thus, what may be legal under one's prior religious faith may not be a valid conduct under the faith to which conversion is sought. The classic example of this is in the case of monogamy in most personal laws as opposed to polygamy permissible under Mohammedan Law. Thus, the law recognizes this change in religious faith directly affects the applicable personal laws of the converted individual.

CONVERSION AS A GROUND FOR DIVORCE

Conversion, under most personal laws is recognized as a ground for divorce by entitling the unconverted spouse to file for a decree of divorce. The reason why conversion is construed as a valid ground can be seen at 2 levels[278] –

a. Application of different personal laws upon conversion of religious faith of an indivi dual;
b. Conversion could mean a radical change in the personality of the convert.

The event of conversion is often very much akin to a breakdown of marriage, and goes to the root of conjugal life of the spouses. Thus, most personal laws (with the exception of Mohammedan Law)

[275] *Rajneesh Rajpurohit (Dr.)* V. *Savita*, Air 2008 Raj 119.
[276] *Divorce Under Various Personal Laws: A Comparative Study*, Chapter-V, Shodhganga, [Available At: Http://Shodhganga.Inflibnet.Ac.In:8080/Jspui/Bitstream/10603/39005/14/14_Chapter%206.Pdf]
[277] *Marriage And Divorce Under Parsi Law*, Lex Warrior [Available At: Http://Lex-Warrier.In/2013/11/Marriage-Divorce-Parsi-Law/]
[278] Kusum, *Family Law Lectures – I,* Student Series, At Pp.65-72, Lexisnexis Butterworths Wadhwa.

recognize conversion as one of the grounds for vitiating a marital contract entitling the unconverted spouse with a right to obtain divorce.

III. CONVERSION AS A GROUND OF DIVORCE: PERSPECTIVES FROM PERSONAL LAWS

HINDU LAWS

Traditionally, Hindu personal laws viewed marriage as a 'sacrosanct', absolutely indissoluble, eternal union.[279] Conversion was no bar to dissolution of marriages as a simple change of faith could not *ipso facto* dissolve the sacred relation of marriage without notice to the spouse or through the intervention of the court.[280] Thus, a Hindu wife converting to Islam to marry a Mohammedan made her liable to be charged and convicted of bigamy under Section 494 of the Penal Code as her first marriage with a Hindu husband was not dissolved by her conversion.[281] However, conversion from Hinduism was treated as a degradation of Hindu laws and customs; hence, the convert was treated as an outcaste.[282] Thus, the unconverted spouse had a justifiable cause to abandon the marriage or refuse to cohabit with the converted spouse. Yet, this action would not be construed by law as divorce.[283]

Presently, the Hindu Marriage Act, 1955, which spells out various common grounds for divorce under Section 13(1), empowers either party to marriage to present a petition for his/her marriage to be

[279] Manu's *Smriti*, Vol. V, 156-158; Ix, 46.
[280] *Gul Mohammed* V. *Emperor* Air 1947 Nagpur 121.
[281] *Re: Ram Kumari* (1891) Ilr 18 Cal 264.
[282] P.K. Virdi, *The Grounds For Divorce In Hindu And English Law: A Study In Comparative Law*
[283] *Smt. Sarla Mudgal*, V. *Union Of India* Air 1995 Sc 1531.

dissolved by a decree of divorce by reason that the spouse has ceased to be a Hindu by conversion to another faith.[284] Two conditions must be satisfied before the invoking divorce[285] –

- Respondent has ceased to be a Hindu – a person does not cease to be a Hindu by me re abandonment of practices of Hinduism. Failure to comply with the tenets of his re ligion alone would not suffice.[286] A person does not cease to be a Hindu by merely ob serving or believing in the other religious faiths.
- Respondent has converted to another religion – what is pertinent is the formal conve rsion of one's religion along with ceasing to be a Hindu. The convert, who was a Hin du by religion at the time of marriage, has willfully converted, with all procedural for malities, into either religions of Christianity, Islam or Zoroastrianism.[287] It is immateri al whether the convert reposes faith in or practices the new religion.

Once these two requisites are duly fulfilled, the unconverted Hindu spouse can successfully obtain a decree for divorce on the ground of conversion.[288] The Act, too, ensures, similar to the traditional perspective on conversion that change of religious faith does not amount to immediate dissolution of marriage; thus, the unconverted spouse may choose to either continue the marital tie with the converted spouse or obtain a decree of divorce.[289] A marriage performed under the Act cannot be dissolved except on the grounds available under S.13. Thus, parties who have solemnized their

[284] Section 13(1)(Ii), Hindu Marriage Act, 1955.
[285] *Lily Thomas* V. *Union Of India* (2000) 6 Scc 224.
[286] *Chandrashekhara* V. *Kulndaivelu* Air 1963 Sc 185.
[287] *Perumal Nadar (Dead)* V.*Ponnuswami*1971 Air 2352.
[288] *Virender Narang* V. *Smt. Beena* 1976 Wln (Uc) 413; *Suresh Babu* V. *V.P. Leela* Ilr 2006 (4) Kerala 66.
[289] *Jethabhai Ratanshi Lodaya* V. *Manabai Jethabhai Lodaya* Air 1975 Bom 88.

marriage under the Act remain married even when the husband embraces Islam in pursuit of other wife.[290]

CHRISTIAN LAWS

Conversion amounting to divorce under the prism of Christian personal laws can be viewed with 2 perspectives –

a. **Conversion, renouncing Christianity** – The Indian Divorce Act, 1869 is the prede cessor statute governing the dissolution of Christian marriages. Previously, the positio n of law as per the Act was wives could file for divorce-decrees on the basis of conve rsion and subsequent bigamy on part of the husbands. Thus, the criterion for convers ion amounting to divorce was conversion plus marriage.[291] However, the husbands of converted wives had no right to dissolve the marriage.[292]

   Subsequent the amendment of the Act in 2001, the position of Christian law on conversion has undergone a sea of change. The Act now provides certain common grounds for divorce to both parties under Section 10 whereby, either party to marriage can present a petition before the District Court for his/her marriage to be dissolved by a decree of divorce by reason that the spouse has ceased to be a Christian by conversion to another faith.[293]

10. **Conversion, adopting Christianity** – The British enacted the Native Converts' Mar riage Dissolution Act, 1866 to legalize under certain circumstances, the dissolution of

[290] *Supra*. At Note 16.
[291] *Dunbai* V *Sorabji* Air 1938 Bom 68.
[292] Section 10, Indian Divorce Act, 1869 (Prior To The Amendment Of The Act In 2001).
[293] Section 10(1)(Ii), Indian Divorce Act, 1869.

marriages of converts to Christianity.[294] Hereunder, if the spouse of the converted Ch ristian, for a continuous period of 6 months, deserts him/her or repudiates the marri age, the convert can approach the courts for restitution of conjugal rights (hereafter ' RCR'). Upon failure to comply with the decree of RCR for a period of one year from the date of decree, then the convert spouse may sue for divorce. However, the statute does not empower the convert to dissolve the marriage if the unconverted spouse ch ooses to continue the marital bond.

MUSLIM LAWS

Conversion from Islam to another faith, under Mohammedan Law, is recognized under the banner of apostasy, i.e., the formal disaffiliation from, abandonment/renouncement of religion by a person.[295] Even mere renunciation of Islam by not believing in Islam amounts to apostasy as the same is construed as grossly disrespectful towards Prophet Mohammed and Quran.[296] However, adoption of a different sect within Islam does not tantamount to conversion.[297]

In classic Islam, apostasy was viewed as a criminal offence whereby a male apostate was liable for death penalty and a female apostate was liable for imprisonment.[298] Apostasy from Islam of either party to marriage operated as a complete bar and lead to the immediate dissolution of marriage.[299]

[294] Preamble, Native Converts' Marriage Dissolution Act, 1866.
[295] B. J. Oropeza, *Paul And Apostasy: Eschatology, Perseverance, And Falling Away In The Corinthian Congregation,* Mohr Siebeck, 2000 [Isbn: 3161473078].
[296] *Supra*. At Note 1.
[297] *Jiwan Khan* V. *Habib* (1933) 14 Lah 518.
[298] Abdul Rashied Omar, *The Right To Religious Conversion: Between Apostasy And Proselytization*, At Pp. 179-194, Peace-Building By, Between, And Beyond Muslim And Evangelical Christians, Lexington (2009).
[299] Amir Ali, *Mohammedan Law*, Ii, 388.

The enactment of the Dissolution of Muslim Marriages Act, 1939 considerable changed this classical position of law. The law on conversion as under Islam now stands as follows –

a. The apostasy of the husband still results in an instant dissolution of marriage.[300] Thus , where on apostasy of the husband, the wife married another man, even before the e xpiry of her *iddat*, it was not held to be an act of bigamy.[301]
b. If a Muslim woman who belonged to another faith before her marriage, reconverts to her original faith, or to some other religion, it would amount to instant dissolution of her marriage.[302]
c. The apostasy of a Muslim wife does not result in the dissolution of marriage, instant or otherwise. (Section 4). Apostasy of wife does not bar her from the right to sue for divorce on any ground mentioned in section 2 of the Act.[303]

However, under section 4 of, conversion by a married Muslim woman or her conversion to a faith other than Islam shall not by itself operate to dissolve her marriage. According to the *Shias,* in the event of apostasy of husband before the consummation of marriage, the wife is entitled to half of the dower, but if she apostates, then no claim on dower can be advanced.[304]However, if the marriage is consummated, then she is entitled to full dower. The *Hanafis* take the view that dissolution on the grounds of apostasy are the same as *talaq*. Amir Ali views that when both parties apostate to adopt another faith, the marriage remains

[300] *Bibi Shahnaz Alias Munni* V. *State Of Bihar* 1998 (3) Bljr 2230.
[301] *Abdul Gani V. Azizul* (1912) 39 Cal 409.
[302] *Karam Singh* V. *Emperor* Air 1933 All 433.
[303] First Proviso To Section 4.
[304] Amir Ali, Mohammedan Law, 390-1.

intact by consent.[305] The courts have categorically invalidated those marriages wherein conversion takes place for the purposes of polygamy as permissible under Islam.[306]

PARSI LAWS

The Parsi Marriage and Divorce Act, 1936 contains ten-fault grounds of divorce on which either spouse may seek divorce. Section 32(j) provides the plaintiff may file for a decree of divorce before the Parsi Special Marriage Courts by reason of conversion of the Parsi-defendant to another religion. However, this right of the unconverted spouse to dissolve the marriage is subject to the condition that divorce shall not be granted if the suit has been filed more than two years after *he/she came to know of the conversion-in-question*.[307] Thus, the period of 2 years needs to be adjudged from the date of plaintiff's knowledge of that fact and from the time the converted spouse has ceased to be a Parsi.[308]

CONVERSION – STATUTORY PROVISIONS AT A GLANCE

ACT	PROVISION	RELIEF
Hindu Marriage Act Sections 10(1) & 13(1)(ii)	Both spouses are entitled. Relief available to wife and husband on respondent's ceasing to be a Hindu by conversion to another religion.	Judicial Separation or Divorce.

[305] *Id.* At 394.
[306] *Smt. Sarla Mudgal*, V. *Union Of India* Air 1995 Sc 1531.
[307] Proviso To Section 32(J), The Parsi Marriage And Divorce Act, 1936.
[308] *Ms. Jorden Diengdeh* V. *S.S. Chopra* (1985) 3 Scc 62.

Hindu Adoption and Maintenance Act Sections 10(1) & 13(1)(ii)	Hindu ceasing to be Hindu by conversion to another religion.	Wife entitled to separate residence and maintenance.
Indian Divorce Act, 1869 Sections 10(1)(ii)	Relief available to both parties on ground of respondent's conversion	Dissolution of marriage.
Converts' Marriage and Dissolution Act, 1866 Sections 4 and 5	Husband or wife converting to Christianity can dissolve on failure of RCR subsequent to 6 months desertion by unconverted spouse	Dissolution of marriage
Parsi Marriage and Divorce Act Sections 32(j) and 34	a) Both parties entitled to relief on respondent's ceasing to b e a Parsi. b) Suit to be filed within 2 year s of knowledge of fact.	Judicial Separation or Divorce.
Special Marriage Act, 1954	Secular legislation – no divorce ground for conversion	No relief
Dissolution of Muslim Marriage Act, 1939 Section 4	Wife a) If a wife who is a non-conve rt before marriage converts b ack to her earlier faith b) If a Muslim married woman renounces Islam and embrac	Instant dissolution of marriage

	es another faith Husband On husband's apostasy by converting to another religion	No automatic divorce, but wife entitled to obtain dissolution on grounds specified under Section 2. Automatic dissolution of marriage.

IV. A CRITIQUE ON THE POSITION OF CONVERSION-DIVORCE LAWS IN INDIA

RELIGIOUS CONVERSION IN INDIA

A basic understanding of the socio-religious setup in India highlights the co-existence of several religions since time immemorial. With the invasion of several dynasties and the sustenance of the British rule for almost two centuries, India grew to be a melting-pot of cultural and religious diversity. While increasing orthodoxy and dogmatism inherent to each of these religions lead to suppression/subjugation of certain sects or caste groups, introduction of new, liberal religious ideals incentivized change of religious faith, mostly to escape from the disabilities meted out thereunder. It is not disputed that religious conversion has sparked a lot of attention and has caused hostilities in Indian families. Though conversion resolved the pre-conversion crisis, it resulted in more troubles in

the convert's life – different kinds of hostilities, killing, social ostracism, and uncertainty as to marriage status.[309]

As stated earlier, religion casts paramount influence upon an individual's societal conduct, inclusive of governing his marital relations and succession issues. Upon conversion of one's religious faith, it is but natural for the application of personal laws of the newly acquired faith over the individual. However, conversion cannot be stated as affecting only a convert's life; his/her religious choices also affect his/her immediate relations with his/her spouse and his/her family. Thus, both traditionally and presently, the law has recognized this effect by permitting the unconverted spouse to obtain a decree of divorce with the intervention of the courts. The march of law, as witnessed through the judicial precedents, highlights the sea of change from the traditional notions of conversion to the modern day perspectives on the same.

SECULARISM: A PEARL IN THE OCEAN

In India, conversion has been recognized as a ground for divorce by all those statutes having a religious fervor, namely, the Parsi Marriage and Divorce Act, 1936, Indian Divorce Act, 1869, The Dissolution of Muslim Marriage Act, 1939 and the Hindu Marriage Act 1955.

However, interestingly, the Special Marriage Act, 1954, being a secular law stipulating the regulation of inter-religious marriages, is completely silent on the aspect of conversion and rightly so.[310] As an Act legalizing and recognizing the validity of trans-religious marriages, the silence to delve into an individual's religious space only strengthens the idea of marriage as exclusive of religious clutches.

[309] Joshua Iyadurai, *The Step Model Of Transformative Religious Experiences: A Phenomenological Understanding Of Religious Conversions In India*, Vol. 4, Pastoral Psychology, Springer Publications (28 May 2010).
[310] Shiv Sahai Singh, *Unification Of Divorce Laws In India*, At Pp. 374-376, Deep And Deep Publications, 1993 [Issn 8171005926].

India, for upholding the ideals of secularism, has militated against the retention of penal provisions under any law for conversion. Home to almost 9 major religions of the world,[311] laying stress or strain on the religious diversities of the nation would not favorably serve the objectives of maintenance of peace and harmony within the nation.

CONVERSION: WHETHER A PROPONENT OF GENDER EQUALITY?

This paper has observed/described the existing standards/requisites that are to be met prior for one to be entitled for a decree of divorce on the ground of conversion. It is nothing but apparent that almost all personal laws are *prima facie* discriminatory towards women. While Muslim law views divorce as a privilege for males, the same is a statutory right for females. Whereas apostasy by Muslim husbands amounts to automatic dissolution of marriage, apostasy by married females does not cast a similar effect upon her marriage and the marriage remains intact unless dissolved through the Court's intervention. Classical position of the Indian Divorce Act, too, prescribed double standards for women to obtain divorce on account of husband's conversion.

In fact, the 90th Law Commission Report on the *Grounds of Divorce Amongst Christians in India: Section 10 of the Indian Divorce Act, 1869* delved into the question of whether there was an urgent need of revision of the Act on the ground of equality of the sexes.[312] The only permissible ground for divorce to the husband, under the previous Act, was for adultery. The wife on the other hand, along with grounds of incestuous adultery, bigamy, cruelty, bestiality, sodomy, had the right to file for divorce on account of her husband's conversion coupled with another marriage. This placed both women and men in an

[311] Office Of The Registrar General & Census Commissioner, *Population By Religious Community – 2011*, 2011 Census Of India [Available At: Http://Censusindia.Gov.In/Ad_Campaign/Drop_In_Articles/04-Distribution_By_Religion.Pdf]
[312] Ninetieth Law Commission Report On The *Grounds Of Divorce Amongst Christians In India: Section 10 Of The Indian Divorce Act, 1869,* Government Of India, Ministry Of Law (1983).

unfavorable position – by demanding additional proof from the former to get a divorce, and by not carving out a provision for men to get divorce on account of their wives' conversion. Thus, reform in the Divorce Act, 1869 was much needed to bridge the gender disparity being enforced by the statute. The position now stands that both parties can, on account of conversion, file for divorce under Section 10(ii) of the Act.

V. CONCLUSION

Owing to India's religious diversity, one cannot dispute the need for citizens to be governed by their respective personal laws. Balancing the constitutional right of religious freedom and conscience with the application of personal laws is a perfect example of a quandary for conversion affects not just the converting individual but also his kith and kin. The balance of convenience rests in favor of making conversion a ground for divorce as secularism cannot dictate/force one's intention to stay married irrespective of the religious choice of his/her spouse. If one's personal religious space stands violated due to spousal conversion, then it may account for a valid ground for divorce. However, as witnessed in the past, religious disparities in the nation heavily incentivize conversions accounting for more than half the number of religious conversions.[313] Thus, if conversion is preserved as a ground for divorce by various personal laws, the law and courts must ensure the significant distinction between willful conversion and conversion under duress.[314] More importantly, laws should place precedence to equality of all, despite religious perspectives on gender, and reform laws to meet this constitutional mandate.

[313] Joanna Sugden, *Where Are India's 2011 Census Figures On Religion?* The Wall Street Journal, January 9, 2015 [Available At: Http://Blogs.Wsj.Com/Indiarealtime/2015/01/09/Where-Are-Indias-Census-Figures-On-Religion/].
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Joanna Sugden, *Where Are India's 2011 Census Figures on Religion?* The Wall Street Journal, January 9, 2015 [available at: http://blogs.wsj.com/indiarealtime/2015/01/09/where-are-indias-census-figures-on-religion/].....18

Joshua Iyadurai, *The Step Model of Transformative Religious Experiences: A Phenomenological Understanding of Religious Conversions in India*, Vol. 4, Pastoral Psychology, Springer Publications (28 May 2010).....16

Lakshy Iyengar, *Salient features of the Hindu Marriage Act, 1955*, Legal Services India [available at: http://www.legalservicesindia.com/article/article/salient-features-of-the-hindu-marriage-act-1955-558-1.html] 8

10. EVOLUTION OF CRIMINAL PRINCIPLES: PRE & POST INDEPENDENCE

Author(s): Amulya Chinmaye

I. INTRODUCTION

> *"That society prepares crime and the criminal commits it and law at a given time is the reflection of the society and the social conditions in which it operates was, is and will be a truth beyond dispute."*[315]

In ancient India, the genesis of criminal jurisprudence can be traced back to the Smritis which came into existence, particularly from the time of 'Manu'.[316] He categorized assault, theft, robbery, false evidence, slander, criminal breach of trust, cheating, rape and adultery into 'crimes'.

In British India, the whole of the criminal law was codified for administrative needs in a diverse society such as India in accordance with the English laws. The Indian Penal Code, 1860 which came as the first codification of criminal law in the British Empire, is a monumental compilation of Lord Macaulay which came into force on 1st January 1862 in British India. Having incorporated various theories and principles of the common-law of England with some modifications to suit the Indian conditions, it is the longest serving code in the common law world.[317] India retained the penal code enacted in the

[315] Bm Gandhi, *Indian Penal Code*, 3rd Edn., At P. 3 (Eastern Book Company, 2010)
[316] Law Commission Report, One Hundred And Fifty-Sixth Report On Indian Penal Code, Ch. I, At P. 12, (August 1997)
[317] Siyuan Chen, *Codification, Macaulay And The Indian Penal Code: The Legacies And Modern Challenges Of Criminal Law Reform,* 581 (Wing-Cheong Chan, Barry Wright And Stanley Yeo, Eds., Singapore Journal Of Legal Studies) 2011.

British colonial era, even after she attained independence in 1947 from the British by virtue of Article 372 of the Constitution.[318]

The 42nd Report of the Law Commission had made several recommendations for the revision of the IPC which failed to find place on the statute book as the then Lok Sabha dissolved the Bill. The 156th report of the Law Commission too focused on the Indian Penal Code, making several recommendations for the reformation of archaic criminal law. With human civilizations undergoing rampant changes, and the inter-State influence of lifestyle patterns has engendered in every society, both positive and perverse fluctuations that call for consistent changes in the criminal law to keep abreast and curb crimes.[319]

The Indian Parliament having recognized this need of timely amendment of criminal laws has retained certain penal laws in their archaic form, while certain other criminal principles have been metamorphosed drastically. The code completes its cataclysmic journey in spite of the social and political upheavals in the country. To meet with the social demands, necessary additions – as much as 49 new sections were affixed into its provisions to combat the new crimes which crop up with the march of time.

This article seeks to examine the evolutions and reformations of certain controversial criminal principles which have thrown the Indian criminal justice system into limelight the world over.

II. CAPITAL PUNISHMENT

[318] David Skuy (1998). Macaulay And The Indian Penal Code Of 1862: The Myth Of The Inherent Superiority And Modernity Of The English Legal System Compared To India's Legal System In The Nineteenth Century. Modern Asian Studies, 32, Pp 513-557.
[319] Syed Shamsul Huda, Principles Of The Law Of Crimes, P. Xix (Lucknow: Eastern Book Company, 2011)

"But secondly you say 'society must exact vengeance, and society must punish'. Wrong on both counts. Vengeance comes from the individual and punishment from God." [320]

The crusade against capital punishment as one of the major human concerns is surely archaic and yet there has been no consensus that is reached on the finality of its abolition or inclusion in the penal laws. In India too, the government and the public have both been exceedingly concerned over the years with the matter of death penalty.

The evolution of sentencing structure in India relating to death penalty has come a long way and has culminated in the concept of mitigating circumstances. Before any attempt by the European countries to abolish death penalty, the State of Punjab under the Sikh ruler – Maharajah Ranjit Singh had removed capital punishment in as early as 1830. However, British colonialism restored the death penalty. In fact, long before capital punishment became a global concern, the Indian National Congress had called for its abolition, in 1931.[321]

During the colonial days the worth and dignity of human life was not the central point in criminal jurisprudence.[322] §376(5) of the Code of Criminal Procedure, 1898 required a judge to record the reasons in the judgment for awarding any other sentence to an accused if his criminal liability for the offence fit into the gambit of an award of punishment with death. Even with the coming of Indian Constitution, the aforesaid provision continued for some time. The Criminal Code with its Amendment Act of 1955 deleted the provision of the 1898 Code thereby not making it necessary for a Court to record the reason in its judgment for not penalizing the accused with death. The Royal Commission in its Report on Capital Punishment 1949-1953 dealing with the modes of execution

[320] Victor Hugo, *The Last Day Of A Condemned Man* (1829)
[321] Bikram Jeet Batra, *Knot To Be?*, The Times Of India, November 24, 2012 (Available At Http://Www.Timescrest.Com/Coverstory/Knot-To-Be-9261)
[322] *Rajesh Kumar* V. *State Through Govt. Of Nct Of Delhi* (2011) (13 Scc 706).

stated three requisites to be fulfilled in executing the death sentence (a) it should be as less painful as possible; (b) it should be as quick as possible; and (c) there should be least mutilation of the body.[323]

With the Supreme Court priding itself for 'judicial activism and a champion of human rights', the present situation of capital punishment is such that exists in the statute and is meted out in the 'rarest of rare cases'[324]. There is a tendency to restrict its use to grave offenses committed under aggravating circumstances[325] with the Penal Code suggesting its reservation to only six principle offences – treason (§121 and §132), perjury resulting in the conviction or death of an innocent person (§194), murder (§302 and §303), abetment of suicide of a minor or innocent person (§305), dacoity with murder (§396) and kidnapping for Ransom (§364-A).

The principle of death sentencing has fallen out to the effect that the Court should not confine its consideration principally or merely to the circumstances connected with the particular crime but also give due consideration to the circumstances of the criminal.[326] Only in the event the accused was beyond all reformative possibilities and there was substantial evidence to demonstrate that he would revert to such crimes, could there be an imposition of death penalty.[327] This relies on the primary tenets of criminal jurisprudence wherein it is the nature and gravity of the crime but not the criminal which are germane for consideration of appropriate punishment in a criminal trial.[328] While some judges expressed themselves in favor of abolition of capital sentence in order to 'achieve a milestone in the long road of barbarism',[329] some others dissenting have held that the matter is essentially political

[323] Law Commission Of India, 187th Report Consultation Paper On Mode Of Execution Of Death Sentence And Incidental Matter, Ch. Ii, At P. 93, October 2003.
[324] *Bachan Singh* V. *State Of Punjab* (1980) 2 Scc 684.
[325] *Machhi Singh* V. *State Of Punjab (*1983) 3 Scc 470
[326] *Ravji Alias Ram Chandra* V. *State Of Rajasthan* 1996 (2) Scc 175
[327] Supra., N.10
[328] *Dilip Tiwari* V. *State Of Maharashtra* (2010) (1 Scc 775)
[329] *Rajendra Prasad* V. *State Of Uttar Pradesh* Air 1979 Sc 916

and properly the domain of the legislature, not the judiciary.[330] Regardless of the highly-prolonged debates on its abolition, the law retains the capital punishment guided by the precedential rule of 'rarest of rare' prescribed in *Bachan Singh.*[331]

The perspective has metamorphosed into such an award only for 'exceptional reasons' entrenching the policy that life imprisonment is the rule and death punishment is an exception after the legislative reforms of criminal laws in 1955.[332] The exceptionally grave circumstances relating to the crime as well as the criminal are of importance wherein the criminal's circumstances are to include his mindset and consideration as to whether he was under the grip of social factors such as caste. The rarest of rare dictum places an extraordinary burden on the court to carry out an objective assessment of facts to satisfy the exceptions ingrained in the rarest of rare dictum.[333]

The ambit of death penalty, however, has widened to cover within it a number of offenses with the rising atrocities of crimes in the society. The archaic principle of limitation of death penalty to murder and its associates has now been extended to mete out punishment to terrorism-related offenses, heinous rapes, espionage, drug trafficking, honor killings[334] and the like. The recent upsurge of sexual offenses has come to see an ordinance promulgated by President Mukherjee in 2013 whereby a person who in the course of a sexual assault inflicts injury that causes the victim to die or to be left in a 'persistent vegetative state' is punishable by death. So is the case with repeated offenders of gang rape.

[330] *Santosh Kumar Satishbhushan Bariyar* V. *State Of Maharashtra* (2009) 6 Scc 498.
[331] Supra N.10
[332] Sujato Bhadra, *Indian Judiciary And The Issue Of Capital Punishment,* Café Dissensus, 1st January 2014 (Available At Http://Cafedissensus.Com/2014/01/01/Indian-Judiciary-And-The-Issue-Of-Capital-Punishment/)
[333] *Supra*., N 16
[334] *Bhagwan Das* V. *State* (2011)

In the adoption of a humanistic approach, certain categories of offenders are excluded of liability of capital punishment. Such persons include offenders who are minors, pregnant women, insane or mentally ill at the time of commission of crime. [335]

In conclusion, the stance on death penalty in India is quite clear with the Apex Court opining in *Mithu* v. *State of Punjab*[336] and *India Harm Reduction Network* v. *Union of India*[337] that the mandatory death penalty is unconstitutional. India, being party to the International Covenant on Civil & Political Rights and other human rights treaties, is also guided by the principles of non-execution of death sentences except only at times of inevitable need and prohibition on execution of insane persons. Additionally, a line of cases since *Bachan Singh* laying that it should only be applied for the most heinous offenses illustrates the application of the death penalty is still highly restricted.[338]

In last three years, India saw during November 2012-February 2013, two executions of terrorists being carried out in close succession nearly after 8 years without executions.[339] Unusually so, both of them were carried out in secrecy to be revealed only the execution had been carried out.[340] This action was strongly criticized to being counter to prior government practice and the Right to Information Act, which requires all public authorities to inform citizens of their important decisions, including upcoming executions.[341]

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[335] In Accordance With The Provisions Of The Juvenile Justice (Care And Protection Of Children) Act 2000, Indian Penal Code (§84),
[336] *Mithu* V. *State Of Punjab* 1983 Scr (2) 690
[337] *India Harm Reduction Network* V. *Union Of India* 2008
[338] Amnesty Intl., The Death Penalty In India: A Lethal Lottery: A Study Of Supreme Court Judgments In Death Penalty Cases 1950-2006, P. 72-90 (Summary Report), May 2008.
[339] Bbc, Mumbai Attack Gunman Ajmal Qasab Executed, Nov. 21, 2013 (Available At Http://Www.Bbc.Co.Uk/News/World-Asia-India-20422265)
[340] Hindustan Times, No Rubber Stamp, Pranab Acts Fast On Mercy Petitions, Feb. 10, 2013 (Available At Http://Www.Hindustantimes.Com/India-News/Newdelhi/No-Rubber-Stamp-Pranab-Acts-Fast-On-Mercy-Please/Article1-1009366.Aspx)
[341] Yug Mohit Chaundhry, Breach Of Procedure, Frontline, Dec. 1, 2012 (Available At Http://Www.Frontline.In/Stories/20121214292413200.Htm)

III. RAPE LAWS

The Victorian era belief "that rape is indeed a fate worse than death", is to be revived. [342]

Rape being a combination of illegal sex and violence, has been condemned in almost all societies as the most 'ultimate violation of self'.[343] Despite the colonial promise of a more modern and humane criminal law, the gradual displacement of Islamic law did little to widen rape victims' path to legal remedy.[344]

Broadly, there have been two attitudes in criminal law towards sex offenders –

(i) Application of quite severe penal sanctions keeping view the rehabilitative ideal in special cases.

(ii) Sexual offenders are different from other offenders, mentally or constitutionally and hence, they must be treated differently.[345]

India has found favor in the first attitude with its reflection in the Penal Code which defines rape under §375 whereby a man is guilty of rape when he commits sexual intercourse with any woman under the five situations set out by it. These include intercourse against the will and consent or forcible consent of the woman under threat. The fourth and fifth situations provide that a man husband exercising his conjugal rights over his wife who is at least of 15 years of age is not to be stereotyped as a rapist.

[342] Corey Rayburn, "Better Dead Than R(Ap)Ed?: The Patriarchal Rhetoric Driving Capital Rape Statutes," St. Johns Law Review, Vol. 78, No. 4, Page 1119, Fall 2004.
[343] Law Commission Of India, *One Hundred And Fifty-Sixth Report On The Indian Penal Code*, Chapter V, Vol I, At P. 139, August 1997.
[344] Elizabeth Kolsky, *The Rule Of Colonial Indifference: Rape On Trial In Early Colonial India, 1805–57*, The Journal Of Asian Studies, 69, P. 109, Issue 04, November 2010,
[345] Ahmad Siddiqui, *Criminology & Penology,* 6th Edn., At P.146 Eastern Book Company (2009)

Strenuous efforts have been made to expand the scope of rape laws by the 42nd Law Commission Report with its recommendation to amend §375(3) to include even those offenses committed with forcible consent by posing threat to the victim herself or her relatives or anyone present in the place. It further recommended the removal of marital rape altogether under the ambit of §375 and making of a separate provision for it. It also wished to correct the notion that intercourse by a man with his wife without her consent should be treated as rape in the marital sense.

The 42nd Report's signal contribution was the introduction of the concept of custodial rape. It also provided for an additional 376C-E to incorporate custodial rape by public servants and hospital authorities. However, these changes were not implemented by the legislature dissolution of the IPC (Amendment) Bill in 1979. Consequently, the SC in the *Mathura case*[346] held in favor of the accused, wrongly considering consensual intercourse and lack of reasonable circumstantial evidence to prove guilt.

The 84th Report converged attention towards the definition of consent and rape of girls below the age of 18 years. It also contributed to the reduction of age to 12 years from 15 years in clause 3 of §375. The Criminal Law (Amendment) Act, 1983 increased the punishment to rapists and distinguished between gang rape and custodial rape, and also between rape on women of unsound mind, intoxicated persons and stiffer penalties for the same. Offenses against children are to be prescribed heavy punishment under §376 in light of the alarming increase in offences on children.[347] Consequently, the Supreme Court has seriously viewed the quantum of punishment meted out to offenders where lower courts awarded lenient punishments, and has held reduction of sentences in cases of gruesome rapes cannot be acceptable. The courts cannot forget their duty to the society and the victim. [348] The measure

[346] *Tuka Ram* V. *State Of Maharashtra* Air 1979 Sc 185
[347] *Sat Pal* V. *State Of Haryana* (1992) 4 Scc 172.
[348] *State Of Mp* V. *Bala* (2005) Scc (Cri) 1947.

of punishment for rape should depend on the conduct of the accused, the state and condition of the victim and the gravity of the criminal act. To show mercy in such a heinous crime would be a travesty of justice and the plea of leniency is wholly misplaced.[349] The plight of the victim and the social stigma that may follow the victim in all probability may have ruinous effects on almost all prospects of life.[350] The public abhorrence of the crime needs reflections through imposition of appropriate sentence by the court and a deterrent theory of punishment.[351]

The Court has also witnessed severely controversial arguments that when the victim is a girl of easy virtue, the accused should be entitled to acquittal and a less harsh punishment. This view, confounded on an illogical base of reasoning, was upheld by the Supreme Court in *Brij Lal Sud* v. *State of Punjab,*[352] wherein it was opined that no severe punishment was called in for in view of the fact that the sexual offence was committed on a minor girl who appeared to be sexually active for a certain period. This illogical reasoning was corrected in *State of Haryana* v. *Prem Chand*,[353] wherein it was observed that –

> "*All that said and done, even a girl of easy virtue is entitled to protection of her body by law and cannot be compelled to sexual intercourse against her will or consent. Offenses of rape and other allied offenses were created for the protection of fallible, earthly mortals and not goddesses and meting out less punishment for the reason the girl was of easy virtue is wholly unfounded and untenable.*"

The Court further held that factors like the character for reputation of the victim are wholly alien to the very scope and object of Section 376 and they cannot never serve as mitigating or extenuating circumstances to award a sentence below the prescribed punishment.

[349] *Dinesh* V. *State Of Rajasthan* (2006) 3 Scc 771.
[350] *State Of Up* V. *Satish* (2005) 3 Scc 114.
[351] *State Of Karnataka* V. *Krishnappa* (2000) 4 Scc (Cri) 755.
[352] *Brij Lal Sud* V. *State Of Punjab* (1970) 3 Scc 808.
[353] *State Of Haryana* V. *Prem Chand* (1990) 1 Scc 249

In lieu of Modern Penology, the Courts have taken a reformative and therapeutic approach where a headmaster's punishment for raping a young girl of 10 years was reduced from life term imprisonment to 10 years' sentence reasoning that harsher punishments should be inflicted only in 'extreme rarest of rare cases'[354] There has been a recent trend of reduction in sentencing of accused than the prescribed limit. This is due to the lenient belief of the Courts that there was lack of efficacy of long term imprisonments in cases of "lust-loaded criminality"[355]. The same judge within a short span of time prescribed harsh punishment holding that *a course of anti-aphrodisiac treatment or willing castration is a better recipe for this hyper-sexed human than outright death sentence.* The Court were also to merit the hope in meditational therapy as a form of correctional courses by way of which the erotic aberration of the accused could with away.[356]

[354] *Ramroop Das* V. *State* 1993 Cri Lf 1000 (Ori).
[355] *Phul Singh* V. *State Of Haryana* (1979) 4 Scc 413.
[356] Verma Commission On Rape Law Reforms, At P.62-63

IV. HOMOSEXUALITY

Laws in India have been particularly influenced a great deal by religious injunctions and morals in sexual relationships and have restricted sexual activity within certain well-defined areas for the supposed 'well-being' of the society. In the recent times, more so with increasing western influence on lifestyle patterns, the traditional requirement of sexual acts between a man and woman has been tarnished. Homosexuality has had a hoary past with major religious systems condemning it to no certain ends. It was observed in *Khanu* v. *Emperor*[357] that –

"*. . .by making this vice punishable, the State has not only protected good morals but has also struck at the enemies and prevented ultimately the conception of demons.*"

It is believed that traditionally, India was almost free of homosexual practices and only saw introduction in the medieval times of Persian and Turkish culture.[358] The ancient Indian code was very strict and rigid on 'perverse' homosexual behavior and prescribed stringent punishments for the same. It has been said that India's homophobia is rooted in the pre-colonial customs wherein laws criminalizing homosexuality was a mainstay of sexual offences.[359] The British's proscription of homosexuality in the lands of their Empire reflected even in its colonies thereby having India to not outlaw homosexuality even today because of 'Victorian morality and colonial laws'.[360] Britain,

[357] *Khanu* V. *Emperor* Air 1925 Sind 286
[358] Vanita, Ruth Kidwai, *Same-Sex Love In India: Readings From Literature And History* (1st Ed.) New York: Palgrave Macmillan, 2001.
[359] Peter Moskowitz, *Anti-Gay Ruling In India Sparks Fears Of Historical Rewind*, Aljazeera America, 14th December 2013 (Available At Http://America.Aljazeera.Com/Articles/2013/12/14/Anti-Gay-Ruling-Inindiasparksfeelingsofhistoricalrewind.Html)
[360] James Kirchick, *The Curious Case Of Countries Where Being Gay Is A Crime*, The Daily Beast, 1st February 2014 (Available At Http://Www.Thedailybeast.Com/Articles/2014/01/02/The-Curious-Case-Of-Countries-Where-Being-Gay-Is-A-Crime.Html)

however, decriminalized consensual gay sex in 1967. Yet the ban persists in its colonies that inherited the British legal system.[361] The complex entanglement of the British Empire's values, pre and post British Indian history has made any discussion of LGBT sex a hard one to have in the country.

Suggesting reforms in sexual offenses in light of the changing society, the 84th Law Commission Report, suggested amendment to §377 to include Explanation 2 whereby the proposed section was to read – '*Consensual carnal intercourse, between a man and man or between a man and a woman, shall not constitute the offence under this section*'.[362] The irony is that Government of India's bulletin *Crime in India*, makes no reference of homosexuality as an offense.[363]

There has been an uproar in relation to LGBT rights in India with the Supreme Court verdict on the *Naz Foundation Case*[364] in December 2013. A PIL was filed in 2001 by an NGO challenging the constitutional validity of the extremely controversial §377 of the IPC and it was requested subsequently that the provision be struck down. The main arguments rendered to uphold their request was the section affects the HIV/AIDS prevention efforts whereby homosexuals are precluded from seeking help in open. Further, criminalizing homosexual acts in fact provided fertile ground for moral and legal sanctions for continued social discrimination against sexual minorities and that the private consensual relation lie at the heart of the privacy zone guaranteed under right to liberty under Article 21. It was countered by the government which contended that deletion of the said provision would '*open floodgates of delinquent behavior and be misconstrued as provided unbridled license for the same.*' The High

[361] Joshua Keating, *Gay Sex Is Still Banned In India: Thanks To A Victorian-Era British Law*, The Slate, 12th December 2013 (Available At Http://Www.Slate.Com/Blogs/The_World_/2013/12/12/It_S_Been_A_Bad_Week_For_Global_Gay_Rights.Html)
[362] §377, Indian Penal Code, 1860.
[363] Supra., N31 At P. 320
[364] Suresh Kumar Koushal V. *Naz Foundation And Ors* 2013 (15) Scale 55

Court dismissed the petition but the Supreme Court reversed the verdict and held that 'gay-sexual relationships' constitute unethical and unnatural offenses.

Inspired by gay rights efforts elsewhere, activists in India have set in motion, a legal battle to assert their rights, holding gay rights marches and pushing for greater legal rights and recognition.[365]

[365] Gardiner Harris, *India's Supreme Court Restores An 1861 Law Banning Gay Sex*, The New York Times, 11th December 2013 (Available At < Http://Www.Nytimes.Com/2013/12/12/World/Asia/Court-Restores-Indias-Ban-On-Gay-Sex.Html)

V. OTHER REFORMATIONS

1. The framers of the Indian Penal Code were Benthamites who strongly favored fines. According to him, punishment by way of imposition of fine had the advantage of being capable of regulation according to the means of the offender, implied no disgrace and was remissible in case of unjust convictions as discovered subsequently.
2. Forfeiture and confiscation of property which is the subject-matter of the offence, is possible mode of punishment under the IPC in certain circumstances.[366] However forfeiture of the entire property of the criminal is not possible according to the present law. Such a punishment was possible under the original Penal Code repealed in 1921. Recently the Law Commission considering the introduction of confiscation into the penal code reached consensus that "this harsh punishment which will fall not only on the criminal but on his dependent family, is not to be commended.[367]
3. Banishment in India has been one of the ancient modes of punishments by exiling the offenders to far-away places. Deportation meant dispatch of dangerous criminals to '*Kala Pani*' i.e., to the Andaman and Nicobar Islands. In the Indian context, banishment had an additional dimension for Hindus as travelling beyond the seas involved the forfeiture of one's caste in the ancient times.[368] With the acquisition of the island by the Japanese, the practice came to an end with a formal abolition meted out in the amending Act of 1955 and was substituted by life-term imprisonment or shorter exiles. The Law Commission opined that banishment does not appear to have any appreciable advantage but leads to emergence of problems in administration and was not to be recommended.[369]

[366] Note A, Reprint At P. 97 Of The Commissioner's Report, Quoted By Rc Nigam, *Law Of Crimes*.
[367] Forty-Second Report, Ipc, Law Commission Of India, At P. 58.
[368] Hs Gaur, *Penal Law Of India*, Vol. 1 At P. 380, 11th Edn., Law Publisher (India) Private Ltd., 2003.
[369] Id.

VI. ATTITUDINAL TRANSFORMATION OF PENAL LAWS

Reactions to crime have been different at different stages of human civilization and also in various societies at the same point in time.[370] Such reactions reflect the attitude towards crime along with the basic societal values. Along with the changing times, so do these reactions to crime. The rationalizations of punishment meted out to criminals may very broadly be classified into two classes – retributive and utilitarian theories.[371]

Retributive theory, in its purest form, provides that a penal system should be designed to ensure that offenders atone my suffering for their offences and their sufferings should equalize in magnitude the suffering of their victim. Retribution aims at restoring the social balance disturbed by the offender by avenging for suffering inflicted upon the victim by offering a chance to assuage the angry sentiments of himself and the community.[372] Further, it held that infliction of punishment by law gives definitive expression and a solemn ratification and justification to the hatred excited by the commission of the crime. It endorsed the view that it is morally right to hate criminals and upheld the close alliance between moral sentiments and criminal law.[373]

Utilitarian rationalists endorse the consequential deterrence of punishments where an assumption is made that it would proscribe certain undesired behavior in society. It is often said that the deterrent-approach is veiled out of the retributive spirit. They provide no clarity on whether the deterrence is aimed at the offender or the other members of the society. Another perspective for justification of

[370] *Crime, Correction And Society,* At P. 3.
[371] Supra., N31, At P 129.
[372] Heinrich Oppenheimer, *The Rationale Of Punishment* (1913).
[373] Sir James Stephen, *A History Of The Criminal Law Of England,* At P. 81 (1883).

punitive reaction is the ground of incapacitation, wherein it is perceived that the 'danger' to the society is removed by placing the offender under imprisonment in accordance with the gravity of the crime.

However, modern society has rejected the idea of revenge in punishment and revolutionized the concept of 'hate the sin and not the sinner'.[374] It has come to realize that there exist several other means to achieve solidarity along with ensuring the prevention of crimes. The 'modern outlook' is that with social sciences on the forefront, the social structure and functioning of the social system are more responsible for the crime than the criminal himself. These scholars emphasize the need to mitigate these causal factors in furtherance of prevention of such socially devious acts.

Modern law makers in India have assumed roles of reformists and repealed several inhuman punishments that prevailed in the British colonial era. The corporal punishment by whipping, which was regulated by the Whipping Act of 1864 (repealed and replaced by its Amendment Act of 1909) was abolished in 1955[375] The ultimate justification of any punishment is not that it is a deterrent, but that it is the emphatic denunciation by the community of a crime.[376] Modern criminology emphasizes the importance to protect the interest of the criminal in the same way as one has to defend the social interest. Also, the idea of incapacitation has been replaced by possible reformation of the offender. This attitudinal shift from punitive to preventive approach in dealing with criminal offences needs much appreciation.

VII. CONCLUSION

[374] Supra., N31., Chapter V, At P. 132.
[375] Quoted In Gordon Rose, The Struggle For Penal Reform (1961).
[376] *Lord Denning At The Royal Commission On Capital Punishment,* At P. 53 (1949).

With the march of civilization, the modes of death punishment have witnessed significant humanized changes in every society. India, like other British colonies, has retained the criminal principles and has affixed new sections into its provisions to combat the new crimes which crop up with the march of time. The continuing usage of legislation of such pedigree, however, brings about several problems. Any legislative inertia to update the statute from time to time will put the judiciary in a dilemma with different judges having different conceptions judicial activism thereby lacking a democratic mandate.

Though the Indian Penal Code, 1860, has incorporated certain amendments, the primary jurisprudence of penal laws have root in the archaic British criminal laws. For instance, the courts and the government have made certain changes in rape laws so that the victim is not humiliated during the trial. Yet, much more needs to be done to ensure the protection of the victim's honor. Lack of effective enforcement and implementation of criminal law dealing with offences like homosexuality, abortion, capital punishment and gambling creates problems for both law and the person who conducts the crime within the prescribed category. It results in contempt and cynicism towards law in general because the condemnation of prohibited conduct is only in word and not in deed.

The transfiguration of British-rooted principles of the criminal justice system to the modern lines of penology has indeed generated highly controversial debates with some principles having shaken the basic fundamental rights of persons while others questioning morality and ethics.

11. PAYMENTS IN INTERNATIONAL SALES TRANSACTIONS

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ABSTRACT

Surge in transnational commerce has fostered greater market access while allowing expansion of economies. Cross-border trade houses, along with its economic incentives, a wide spectrum of risks that both parties need to bear owing to the anonymity of parties to transaction, as seen in most cases. Such adversities in the nature of global business have necessitated the evolution of a new system of payments to best-serve international commercial transactional interests of the parties. The instrumentality of electronic commerce in smooth facilitation of intercontinental exchange needs to be much appreciated in this regard. The question each consumer and retailer is confronted with before engaging in e-commerce is the degree of security and reliability in the system. Each party becomes precautious in his/her capacity to do away with uncertain modalities of export/payment. Multiplicity of options for both parties coupled with their time constraints to deal in the subject-matter makes involvement in the transaction a rather tough decision. To engender a win-win solution to this stalemate, secure institutional enablement of transactions comes into picture. Despite existence of services to further international payment-methods, most businesses accrue losses. Yet others remain naïve or oblivious and are hoodwinked. This article objectifies to identify the different modes of payments in international sales transactions and briefly outline safety-concerns thereto. Its primary focus shall be to inquire into the nature of payments made by letters of credit to carry out international trade and the rights and obligations of parties thereof as under the Uniform Customs and Practices 600; it shall also attempt to identify the distinction that subsists between Letters of Credit and Bank Guarantees.

I. INTRODUCTION

Secure trade financing forms the core aspect in any international commercial transaction. There subsists a need in such transactions for the advent of new financing models which are flexible and provide versatility to alleviate the tone of risk, such as non-performance or fraud. Ever-growing

technological changes are bringing in dynamic changes for which regulations are required. The monstrous growth of e-commerce has flooded the payment system and given a huge blow to the traditional systems of payment. Yet, these modern mechanisms are continued to be influenced by those legal and economic principles that govern those mechanisms continue to influence the current payment schemes. There exists an entire gamut of risks in international commercial sales, filled with speculation as regards to the *bona fide* delivery of the contracted goods and services and the payment thereof.

In most of the international commercial sales transactions, on one hand, the exporter expects his payment at the earliest, ideally upon placement of the order or before the dispatch of the goods while on the other hand, the importer awaits the delivery before making payment for the same. To the exporter, any sale is a gift until the payment is received and to the importer, any payment is a donation until the goods are received.[377] The exporters are faced with concerns of offering the most lucrative bargain to the buyers who usually have a spectrum of choices in the global marketplace. Thus, the seller has to ensure in doing so, there is remission of the payments due to him on part of the buyer who is to be assured of the delivery of the consignment. Risk management and mitigation on both sides is sought to be achieved to the fullest. The dubiety between the contracting parties is what the modalities on payments with respect to such transactions seek to achieve a balance upon.

The various payment methods in such international transactions are primarily of five kinds[378] – Cash-in-advance, Letters of Credit, Documentary Collections, Open Account, and Consignment. Of these, to the exporter, the prior two form the most secure payment-methods and the latter two, the

[377] U.S. Department Of Commerce, International Trade Administration, *Trade Finance Guide: A Quick Reference For U.S. Exporters,* Chapter 1 Methods Of Payment In International Trade (2007) Http://Trade.Gov/Media/Publications/Pdf/Trade_Finance_Guide2007ch1.Pdf

[378] *Ibid.*

least. To the importer, the situation of such payment is converse. Documentary Collections seem to form a middle ground for both the parties. In addition to these, there exist few supplemental methods to the traditional forms of financing trade.

Cash-in-advance is usually the most favored payment method of the seller whose main objective is to secure the pre-payment, i.e., payment even before the export of the goods. However, the buyers with a view of risk reduction usually do not prefer such remission for there exist possibilities of cash-flow problems and fear of non-delivery.[379] Documentary Collections entail payment and subsequent delivery or vice-versa, with the involvement of the banks of both parties. Here, the banks facilitate the process of payments thereby bringing in an element of certainty to the transactions. However, this method provides no verification process and limited recourse in the event of nonpayment.[380]

Open Account Transactions, the popular payment mode in intra-EU trade,[381] forms the usual norm between parties, who engage in mutual trade for a considerable time period, transact with an implicit sense of trust between them. This is amongst the cheaper methods of payment as the involvement of the bank constricted to a bare minimum, the bank charges will be low.

The most famous **services** offered by various banks and financial institutions in trade finance segment are in the forms of *Letters of Credit* and *Bank Guarantee* whose functions are similar to those of escrow arrangements.

[379] *Ibid.*
[380] *Ibid.*
[381] Jason C.T. Chuah, *Law Of International Trade: Cross-Border Commercial Transactions*, At P.500, 4th Edn., (Sweet & Maxwell, South Asian Edition, 2011)

II. LETTERS OF CREDIT

The impasse between the parties to proceed further with the transaction can be broken by the introduction of a stable financial institution to facilitate a smoother transaction between them which offers a definitive undertaking to that effect.[382] The certainty of payment is the most important aspect of a Letters of Credit (LC) transaction, and this certainty encourages hesitant parties to enter into transactions, by providing them with a secure source of credit.[383]

Credit[384] is a signed writing or other authenticated record in which the issuer engages that it will honor a documentary presentation, which usually means paying or accepting drafts or other demands for payments that comply with the terms of the credit.[385] A credit that intends to facilitate trade is called a commercial letter of credit.[386] LC, also called documentary credits or banker's commercial credits, are the most common method of payment for the goods in export trade and have been described by English Judges as "*the life blood of international commerce.*"[387] They are usually preferred over the other forms as they provide the most security to the international traders.

Credits that require the presentation of only a draft is commonly called a *clean credit;* that which requires a draft and presentation of documents is called a *documentary credit*. The latter is a method whereby an undertaking is given by a stable financial institution or source, usually a bank, to the exporter, promising the payments due to him by the buyer, upon the satisfaction of all the

[382] § 5-102(A) (10), Ucc.
[383] *Southtrust Bank* V. *Webb-Stiles Co., Inc* 931 So.2d 706 (Ala. 2005)
[384] Article 2, Ucp.
[385] §5-102(A) (8) And (10), §5-104.
[386] Halsbury' s Laws Of England, *Financial Services And Institutions*, 49, Para 949 At P.348, 5th Edn, Lexisnexis 2008.
[387] *Per* Kerr L.J. In *Rd Harbottle (Mercantile) Ltd* V. *National Westminister Bank Ltd* [1978] Q.B 146 At 155.

requirements as per the contractual agreement, with documentary evidence to that effect. Hence, it is a substituted promise for the promise of a credit applicant in favor of the beneficiary.[388]

NATURE OF LETTERS OF CREDIT

The essence of an LC transaction lies in its documentary character, i.e., the evidential proof that those specified documents are used as a means of financing the transaction. Thus, upon the presentation of the full set of original bills of lading which authenticates the shipment of the consignment, the bank advances the payment due to the exporter.[389] In the words of Lord Wright in *TD Bailey,*[390] –

"*…the general course of international commerce involves the practice of raising money on the documents so as to bridge the period between the shipment and the time of obtaining payment against documents.*"

An LC transaction embodies *three separate contracts*–

1. Underlying contract for sale between the applicant/buyer and the beneficiary/seller;
2. Contract for the payment against documents between the issuer bank and the beneficiary;
3. The contract for reimbursement between the applicant and the issuer/bank (also called as the *reimbursement agreement*).[391]

[388] *Paramount Export Co.* V. *Asia Trust Bank, Ltd.* (1987) 238 Cal.Rptr.920
[389] *Per* Ackner L.J. In *United City Merchants (Investments) Ltd* V. *Royal Bank Of Canada* [1982] Q.B. 208.
[390] *Td Bailey, Son & Co* V. *Ross T Symth & Co Ltd* (1940) 56 T.L.R 825
[391] *United City Merchants (Investments) Ltd* V. *Royal Bank Of Canada [1983] 1 Ac 168.*

The primary objective of an LC is to protect the buyers by ensuring that no payment obligations arise until the goods have been duly shipped or delivered as promised by the exporter.[392] The bank charges a small amount for providing the service to the parties. Such a service is most appreciable when the credit-reliability of unknown importer is difficult to gauge but the exporter is content with the creditworthiness of the buyer's foreign bank and vice-versa.

The arrangement of payment in an international sale of goods transaction to be financed by means of a confirmed irrevocable documentary letter of credit undergoes a formal procedure of **four autonomous, though interconnected contractual transactions**.[393] They involve –

i. The importer instructs a bank at his place of business – the issuing bank – to open a letter of credit for the exporter who is the beneficiary, upon the terms specified by the importer in his directions to the issuing bank.

ii. The issuing bank arranges with a bank at the locality of the exporter – the advising bank – to negotiate, accept, or pay the exporter's draft upon the delivery of the transport documents by the seller. However, this step can be combined with the previous wherein issuing bank advises directly or through its own branch at the exporter's country eliminating the need of another intermediary bank.

iii. The advising bank informs the exporter that it will negotiate, accept or pay his draft upon delivery of the transport documents. The advising bank may do so with or *without its own engagement* or it may *confirm* the credit opened by the issuing bank. This

[392] *Ibid.*

[393] Smithoff' s Export Trade: The Law And Practice Of International Trade, 11th Edn., (Carole Murray, David Hooloway, Daren Timson-Hunt, Ed. 1st South Asian Edition, Sweet & Maxwell, London, 2007)

confirmation of credit by the advising bank shall not be done if the issuing bank does not deem it irrevocable.[394]

The due observance of these procedures obliges the contractual payment to the goods and services tendered by the exporter. Any instruction to the issuing bank to the contrary by the buyer for the revocation of credit, even after observation of the prescribed norms for payment shall not be accommodated but rejected.[395]

As codified in the UCC,[396] the distinctive feature or cornerstone of LCs is that the *rights and obligations of an issuer towards a beneficiary independent of the existence, performance, or nonperformance of the underlying contract of sale* between the exporter and the importer and the banks are bound to honor their obligations.[397] In accordance with Articles 4 and 5 of UCP 600, LC in itself *reflects another separate contract*[398] to credit the exporter, upon the due discharge of his obligations as per the contractual terms and the buyer's instructions[399] and no regard is had to the commercial transaction between them.[400] Only in ***exceptional cases such as fraud***, wherein the documents produced by the exporter (beneficiary of credit) are fraudulent, the banks shall refuse payment.[401] No set-off and counterclaim is allowed to detract an LC but a set-off[402] has been allowed exceptionally for liquidated damages directly arising from the banking transaction which accrued against the credit liability to the

[394] In Accordance With Article 9(B), Ucp 500.
[395] *Hamzeh Malas & Sons* V. *British Imex Industries Ltd* [1958] 2 Q.B. 127.
[396] § 5-103(D), Ucc.
[397] *Power Curber International Ltd.* V. *National Bank Of Kuwait* [1981] 2 W.L.R 1233.
[398] *Sirius International Insurance Corpn (Publ)* V. *Fai General Insurance Co Ltd* [2004] 1 Wlr 3251.
[399] *Spiersbridge Property Developments Ltd.* V. *Muir Construction Ltd* [2008] Csoh 44
[400] *Bolivinter Oil Sa* V. *Chase Manhattan Bank Na* [1984] 1 Lloyd' s Rep. 251
[401] *Montrod Ltd.* V. *Grundkotter Fleischvertreibs Gmbh* [2002] 1 W.L.R 1975
[402] § 5-114, Official Comment 1, Ucc

beneficiary.[403] Thus, the default on one of the contracts does not provide the person adversely affected by that default with an excuse to default on its obligations in one of the other contracts.

DUTY TO HONOR

Once the credit is issued, the issuer is burdened with a statutory *duty to honor* owed directly to the beneficiary,[404] which is the heart and soul of Article 5 and the statute's most important provision. The bank is bound to apply the funds to the purpose for which they were appropriated.[405] This duty is virtually absolute and applies, with some limited exceptions, whether or not the goods/documents actually conform to the underlying contract for sale between the applicant and the beneficiary. An issuer who violates his duty to honor is guilty of wrongful dishonor and is liable for the amount that is the subject of dishonor.[406] The issuer is also liable to the applicant for compensatory and incidental damages the wrongful dishonor causes him, "less any amount saved as a result of dishonor."[407]

The issuer's duty to honor depends exclusively on whether the beneficiary has presented the kinds of documents and other papers called for in the credit, not on whether the beneficiary has otherwise satisfied the underlying contract with the beneficiary. A match between the documents presented and called for triggers the issuers duty to honor regardless of whether the goods or documents conform to the underlying contract of sale between the exporter and the importer.[408] If the underlying contract

[403] *Hong Kong And Shanghai Banking Corporation* V. *Kloeckner & Co Ag* [1989] 2 Lloyd' s Rep. 342.
[404] § 5-108, Ucc
[405] *Re Barned' s Banking Co Ltd., Massey' s Case* (1870) 39 Lj Ch 635
[406] § 5-111(A), Ucc
[407] § 5-111(B), Ucc
[408] Steve H. Nickles & Mary Beth Matthews, *Payments Law And Commercial Paper: Learning And Teaching Materials*, At P.564-590, American Case Book Series, Thomson West, 2009

provides for payment by credit, the credit, in the absence of express stipulation, the issuer must make available to the seller at the beginning of the shipment period.[409]

OPENING AND EXPIRY OF CREDIT

Often the contract of sale will make an express provision as regards to the date on which the credit shall be opened. It can be made open on a certain date or sometimes immediately[410] or sometimes the opening is made dependent on the seller providing a performance guarantee.[411] Normally wherein the contract is unqualified, the stipulation to open a letter of credit is only a condition precedent to the *performance* of that contract and by implication, has to be opened within a 'reasonable time'.[412] The failure to open the credit by the buyer may be treated by the seller as a breach of condition of a contract and shall be entitled to repudiation.[413]

The credit includes an expiration date upon which the issuer's duty to honor terminates. In the absence of an expiry date or any other provision determining its duration, the LC shall expire one year after its stated date of issuance, and if it is stated to be perpetual, it shall expire five years after its stated date of issuance[414] or if none is stated, after the date on which it is issued.[415] In *Banker's Trust Co* v. *State Bank of India*[416] the Court of Appeal examined whether there was a reasonable timeframe within which the banks were to examine the documents tendered by the exporter. In light of this case, the absence of any stipulation as regards to the same in UCP 400, Article 13(b) of UCP 500 was amended

[409] *Pavia & Co. Spa* V. *Thurmann-Nielson* [1952] 2 Qb 84 At 88.
[410] *Garcia* V. *Page & Co* [1936] 55 Lloyd's Rep 391.
[411] *Cf. State Trading Corporation Of India* V. *M Golodetz Ltd; The Sara D* [1989] 2 Lloyd's Rep. 277.
[412] *Diamond Cutting Works Federation* V. *Triefus & Co. Ltd* [1956] 1 Lloyd's Rep. 216
[413] *Nichimen Corporation* V. *Gatoil Overseas Inc* [1987] 2 Lloyd's Rep. 46
[414] § 106-(D), Ucc.
[415] § 5-106(C) And (D), Ucc.
[416] *Banker's Trust Co* V. *State Bank Of India* [1991] 2 Lloyd's Rep. 443, Ca.

to include a seven day time limit for the examination of documents following the day of their receipt.[417] Yet again, this provision stood amended under Article 14(b) of UCP 600 to allow only five banking days to verify the compliance of the presentation "*without unreasonable delay*".[418] On the other hand, the UCC provides seven days, excluding non-working days, to the issuer within receipt of documents from the beneficiary to honor or reject the same.[419]

DOCUMENTARY EVIDENCE & STRICT COMPLIANCE

LCs *operate under the doctrine of strict compliance* where the advising bank is construed as a special agent of the issuing bank, which is again an agent of the buyer[420] and any action of these agents beyond or outside their permissible limits, shall not bind the principal for the same.[421] It is this doctrine that explicitly rejects the lesser, riskier standard of substantial compliance that some courts and commentators have occasionally advocated.[422]

As the banks function for financing trade[423] and are absolved of any liability for the lack of background knowledge of any usage of any commercial transaction,[424] they are obliged to conform to the UCP or the terms of credit given by the principal.[425] Whilst the bank is permitted to reasonably construct upon any ambiguity in the mandate with the assistance of the UCP, if the mandate is clear then there must be strict compliance to it.[426] Any non-conformity to the same would result in bearing

[417] Carole Murray & David Holloway, *Smithoff's Export Trade: The Law And Practise Of International Trade*, At P. 189, 11th Edn. (London: Sweet & Maxwell, 2007)
[418] *Bayerische Vereinsbanke* V. *Bank Of Pakistan* [1997] 1 Lloyd's Rep. 59
[419] § 5-108(B), Ucc.
[420] Jack Malek And Quest, Para.6.4.
[421] *Equitable Trust Co Of New York* V. *Dawson Partners Ltd* [1927] 27 L.I.R 49.
[422] *Gian Singh & Co. Ltd* V. *Banque De L'indochine* [1974] 2 All E 754.
[423] *Mahonia Ltd* V. *West Lb Ag* [2004] Ewch 1938 (Comm)
[424] §5-108(F), Ucc.
[425] *J.H. Rayner & Co* V. *Hambros Bank Ltd.* [1942] 2 All E.R. 694 (C.A.).
[426] *Per* Sir John Donaldson M.R., In *Commercial Banking Co Of Sydney Ltd* V. *Jalsard Pty Ltd* [1973] A.C. 279.

the risks of the transaction.[427] The bank is entitled to refuse accreditation of seller, in view of strict compliance, upon lack or improper presentation of the required documentary evidence.[428]

Articles 19-25, UCP 600 enlists the traditionally required documents by the importers – *invoice*, *an inspection certificate* attesting to the conformity of the goods, an *insurance document*, *bill of lading* or a combined *multimodal transport document* evidencing that the goods under the credit have been shipped to the buyer/applicant.[429] The general rule is that the buyer is entitled to receive original documents[430] as per **Article 20(b) and (c) of UCP 500**, unless the contrary in mentioned in credit requirements.[431]

The obligation, with respect to the transaction, of the issuing or advising banks does not extend beyond the supply of credit to the seller on verifying whether or not a documentary presentation strictly complies with the mandate[432] and accordingly honoring its commitment.[433] All they are required to do is satisfy themselves that the documents are in consonance with its requirements and that it bears no indorsement by the carriers as regards to certification of material defects in the quality of the goods shipped.[434] In the event that multiple documents are in a set, it is sufficient that, when taken together collectively, the set contains all the particulars required by the mandate, even if every document does not contain them. The banks are not under a duty to concern themselves with the clauses of the documents in the absence of instructions to the effect.[435]

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[427]Clayton P. Gillete, Robert E.Scott, Alan Schwartz, *Payment Systems And Credit Instruments*, 2nd Edn., Foundation Press 2007, Thomson West

[428] *Kredietbank Antwerp* V. *Midland Bank Plc* [1998] 2 Loyd' s Rep 173.; *Seaconsar Far East Ltd* V. *Bank Marzaki Jomhouri Islami Iran* [1993] 1 Lloyd' s Rep. 236.

[429] *Re Barned' s Banking Co, Barner And Young* V. *Johnston* (1871) Lr 5 Hl 157.

[430] *Glencore International Ag* V. *Bank Of China* [1996] 1 Lloyd' s Rep. 135.

[431] Article 17(B) Of Ucp 600 Now Reflects The Guidance Provided By The Icc Commission And Now Attempts To Set Out What Constitutes 'Original Documents'.

[432] Art.14(A), Ucp 600.

[433] Ucp 600, Art. 15.

[434] *British Imex Industries Ltd.* V. *Midland Bank Ltd.* [1958] 1 Q.B. 542

[435] Supra., N.41.

In case of rejection or dishonor of documents, the banks are to intimate the presenter by following the directions as laid down in Article 16 of UCP 600. The referral made by the bank to the applicant/presenter for remedying the defects and subsequently presenting conforming documents, all have to be done within the period of validity of credit.

FORM & NOTIFICATION OF CREDITS

The ICC has attempted to standardize documentation relating to letters of credit, and has published the *ICC Standard Documentary Credit Forms*. There exists an array of credits, of which four types are distinctive and most extensively used in international transactions. Until the recent revision of the UCP in 2007, commercial credits could have been of two types, namely revocable and irrevocable, and all credits were required to clearly indicate whether they are revocable or not.[436] Furthermore, there could a classification of irrevocable credits, namely confirmed or unconfirmed credits.[437] The distinctions between these various types of credit are often confused. While revocability of credits refers to obligations of the issuing bank towards the beneficiary, confirm-ability refers to the obligations of the corresponding bank towards the seller.[438] Discussed below are the prominent types of credit –

a. Revocable LC – A credit that has been issued cannot be modified or revoked unless the credit is a revocable credit. As provided under Article 8(a) of the 1993 Revision of the UCP,[439] a credit could be amended or cancelled by the issuing bank at any moment and without prior notice to the beneficiary. However, the issuing bank had several duties in regard to

[436] Ucp (1993 Revision) Article 6(A) And (B).
[437] Halsbury' s Laws Of England, *Financial Services And Institutions*, 49, Para 933 At P.348, 5th Edn, Lexisnexis 2008.
[438] Paul Todd, *Cases And Materials On International Trade Law*, At P. 235, Sweet And Maxwell (2007).
[439] Now, Revised In In 2007 In The Form Of Ucp 600 Which Does Not Accommodate Any Provision Regarding Revocability Of Credit.

reimbursement.[440] Where revocable credit is intended, it should be expressly stated in the body of the credit - "*A LC is revocable only if it so provides*'.[441] Practically speaking, a revocable credit is not a LC because it has no legal significance. In UCP 600, the references made to revocable credits have been removed on the basis that revocable letters of credit are rarely encountered in practice.[442] Parties wishing to open revocable credits may do so by making appropriate modification to UCP 600 or by incorporating the terms of UCP 500.

A revocable credit is an unsatisfactory method of finance from a seller's point of view but the buyer can gain from the same. The seller might prefer it only due to its relative cheap or cost-effectiveness when the buyer's trustworthiness is not in doubt, because such a type of credit offers no security at all. Not only can the issuing bank revoke it at any time on the buyer's instructions but it can also not inform the seller. The bank may cancel a revocable credit at any time and is under no duty to inform the seller that the revocable credit has been cancelled.[443]

b. Irrevocable LC – It is often made a condition of a mercantile contract that the buyer is to pay for the goods by means of an irrevocable credit,[444] and it is then the buyer's duty to procure that his issuing bank issues an irrevocable credit in favor of the seller either directly or through the advisor. The different methods of payment under irrevocable credit have been provided for under Article 9(a) of the UCP. According to Article 7 of the UCP, i*rrevocable credits can neither be amended nor revoked* as regards the customer or the beneficiary without the consent of the issuing and advising banks and if necessary, even the beneficiary.[445] An issuing bank

[440] Article 8(B), Ucp (1993 Revision); Gelpcke V. Quentell 74 Ny 599 (1878), Ca.
[441] § 5-106(A) And (B), Ucc.
[442] Supra., At N.61, Para 928 At P.354.
[443] Cape' s Asbestos Co Ltd. V. Lloyd' s Bank Ltd Kb (1921) W.N. 274.
[444] Supra., At N.61, Para P.928.
[445] *Ed & F Man Ltd* V. *Nigerian Sweets & Confectionery Co Ltd.* [1977] 1 Lloyd' s Rep. 50

generally puts itself into a risk if it consents to making amendments without the notice to and consent of the applicant[446]. Under the irrevocable credit the seller knows that he will be eventually be paid by a reliable and solvent paymaster, thus the seller doesn't insist for immediate payment against presentation of documents.[447] A credit is irrevocable despite the absence of any indication to that effect.[448] It constitutes a definitive undertaking of the bank to credit the beneficiary, provided the stipulated documents are tendered.[449] The issuing bank is bound irrevocably to honor as of the time it issues the credit.[450]

c. Confirmed Credits – If the correspondent bank confirms the credit, it adds its own undertaking to that of the issuing bank, effectively taking on towards the seller all the obligations taken on by the issuing bank.[451]

d. Unconfirmed Credits – Where this type of credit is used, the issuing bank cannot revoke its undertaking to the beneficiary, but the advising bank does not enter into its own obligations to make payments under credit. The disadvantage of this type of credit is that they do not localize the performance of the contract of sale in the seller's country. Hence, if the advising bank refuses to pay, then the beneficiary may be compelled to institute proceedings overseas – a situation which largely defeats the purpose of commercial credits.[452]

e. Transferable Credits- These are those which are 'transferable' either in whole, or in part, to another beneficiary (the second beneficiary) at the request of the primary beneficiary.[453] The transferring bank is under no obligation to effect such transfer except to the extent and

[446] Supra., At N.61, Para 930.
[447] Supra. At N. 62.
[448] Article 3, Ucp 600.
[449] Ian Stach Ltd. V. Baker Bosley Ltd [1958] 2 Q.B. 130
[450] Ucp 600, Article 7(B).
[451] Supra. At N. 71.
[452] C. M. Smithoff, *Confirmation In Export Transactions*, [1957] J.B.L 17.
[453] Article 38, Ucp 600

in the manner consented to by the bank.[454] The first beneficiary has the right to substitute his own invoices, and drafts for those of the second beneficiary, for amounts not in excess of the original amount stipulated in the credit.

III. HOW PAYMENTS ARE MADE?

The seller should be able to contemplate in what manner the payment shall be made to him. All credits must specify clearly whether they are available by sight payment, by deferred payment, by acceptance or by negotiation; and they must nominate a bank authorized to accept drafts or negotiate.[455] These four are the most prominent forms of payment methods.[456] –

1. If the parties have arranged *a payment at sight credit*, the advising bank is instructed to pay, or arrange for payment, to the seller the money due on the presentation of the documents. This is a case of payment against documents.

2. If the parties have arranged for *a deferred payment credit*, the advising bank is instructed to pay, or arrange for payment, at some future date determinable in accordance with the terms of the credit. If the seller requires the money before the deferred payment credit matures, he can only do so by negotiating in the letter of credit.[457] This negotiation of a deferred payment is usually done at a discount, which reduces the amount of credit diegiven to the seller. To negotiate a letter of credit, the consent of the issuing bank must be obtained and in the absence of it, there may be a risk of discovery of fraud by the seller or the advisor-bank.[458]

[454] Bank Negara Indonesia 1946 V. Lariza (Singapore) Pte Ltd [1988] Ac 583, Pc.
[455] Art. 6(A) And (B), Ucp 600.
[456] Supra. At N. 41.
[457] European Asian Bank Ag V. Punjab & Sind Bank (No. 2) [1983] 1 W.L.R. 642.
[458] Banco Santander Sa V. Bayern Ltd. [2001] 1 All Er (Comm) 776.

3. If the credit is an *acceptance credit*, the seller draws the bill of exchange on the advising bank in a specified manner. The bill will normally be a time draft and its acceptance by the bank signifies its commitment to pay the face value on maturity to the party presenting it. This accepted bill provides a sense of security to the seller. If he does not want to hold the bill until it matures, he may turn it into money by negotiating (amounting to discounting) or selling it to his own bank.

4. Under *negotiable credits*, the advising bank is only authorized to negotiate a bill of exchange drawn by the buyer or the issuing bank. The advising bank may indorse the bill and negotiate it, subject to deduction of discount or interest and commission. This kind of credit is subject to recourse against the seller and the drawer of the bill because the bank has become the endorser of the bill.[459]

IV. REGULATION OF LOC

Customary law forms the most important source of law on LC in the international sales arena. The issuance and use of letters of credit are usually on the lines of the ***Uniform Customs and Practice for Documentary Credits*** **(UCP)**, which is a set of rules unified by the International Chamber of Commerce by standardizing much of the practice of the international trading community. Developed in 1933, it forms one of the most successful attempts made by the ICC to promote a healthy and secure trading ground and environment for investment and ensures free flow of capital by unifying rules providing for the determination of rights and duties under the LC.

With regular revisions, **the latest segment – UCP 600 was brought out in 2007** with the approval of the Banking Commission. These rules are to only serve as guiding principles in the

[459] Maran Road V. Austin Taylors Co Ltd [1975] 1 Lloyds Rep. 156.

individual commercial transactions and their application is up to the discretion of the contracting parties requiring them to expressly state their incorporation in the transaction.[460] Hence, these rules form a flexible as well as a stable base for international review, including judicial scrutiny. However, even in the explicit non-incorporation, commercial LCs invariably incorporates the UCP. The relevant practices may apply requiring the issuers to "observe standard practice of financial institutions that regularly apply to LC,"[461] by determining whether the presentation "appears on its face strictly to comply with the terms and conditions of the LC"[462] The ICC has also issued the *International Standard Banking Practice* (ISBP)[463] in order to supplement the UCP and provide guidance on examining the documents presented under LC.

In the Uniform Commercial Code of the United States, the principle source of law on commercial credits is prescribed extensively under Section 5.[464] By its own terms, the UCC constricts or limits its applicability by explicitly recognizing that the liability of the parties to the LC may be governed by the UCP rather than by section 5 of the UCC.[465] Although §5 of the UCC and the UCP are consistent in most regards, in the event of clash between them, in practice, the latter shall prevail if it has been incorporated by the parties in their LC and the issue does not involve a non-variable provision of §5.

REIMBURSEMENT & SUBROGATION

The application or any other agreement between the issuer and applicant invariably provides not only for a fee for the supply of credit but also some form of *reimbursement* or other insurance if and

[460] Article 1, Ucp 600.
[461] §5-108(E), Ucc.
[462] § 5-108(A), Ucc.
[463] Icc Brochure 681 (2007) Was Issued To Supplement Ucp 600.
[464] Detlev F. Vagts, William S. Dodge, Harold Hongju Koh, *Transnational Business Problems,* 4th Edn., At 128,Foundation Press, Thomson West, 2008.
[465] Supra., At N. 41 At P.172.

when the issuer honors a presentation under the credit.[466] By default, upon honoring presentation, the issuer becomes eligible for reimbursement of credit in immediate available funds.[467]. Also the law provides that upon honor under credit, the issuer is *subrogated to the rights of a beneficiary* as against the applicant and also the applicant against the beneficiary with respect to the underlying transaction between them.[468] However, it does not create a new or distinct right of subrogation. Rather it recognizes and adopts subrogation to the extent that other law would subrogate the issuer if the issuer were a secondary obligor of the obligations of the buyer and seller owe each other.

V. STANDBY LETTERS OF CREDIT AND BANK GUARANTEE

In commercial transactions, letters of credit have certain common alternative uses, of which the most common is *as a form of guarantee for the performance of one who is primarily responsible* for that performance. Such guarantees tendered by the financial institutions are regarded as Standby Letters of Credit. The United Nations Commission on International Trade Law (UNCITRAL) has also promulgated a ***Convention on Independent Guarantee and Standby Letters of Credit*** which has been entered into force only amongst eight nations. The extent to which the UCP (1993 Revision) applies to the SLC is left undefined.[469]

A standby credit is one which insures payment to the beneficiary not for his due performance in the credit or sale but for the customer's default in the transaction.[470] The beneficiary under 'standby letters of credit' (SLC) expects that the performance will be forthcoming by the applicant. ***Payment is made by the issuer only in the event of default by the applicant.*** Hence, such credits are

[466] Supra., At N. 32.
[467] §5-108(I) (1) And (2), Ucc.
[468] §5-117(A), Official Comment 1, Ucc
[469] Supra. At N. 61, At Para 925, P 351.
[470] Supra., At N. 32.

intended at protecting the beneficiary. Usually the issuer does not expect the beneficiary to call on the credit because in the typical case, performance by the applicant will be forthcoming. Finally, the issuer of SLC does not expect reimbursement from its customer; again because the credit is anticipated to remain unused. These arrangements, which essentially serve as surety contracts, are frequently used in construction contracts. The **standby letter of credit is thus often functionally similar in effect to a bank guarantee or performance bond.**[471]

A standby credit is ***essentially equivalent to a loan made by the issuing bank*** to the applicant.[472] Like a surety contract, the standby credit operates to ensure the applicants nonperformance of an obligation. Unlike a surety contract, however, the beneficiary of the standby credit *may receive its money* first, regardless of pending litigation with the applicant. The seller may then sue the applicant for the breach of contract/warranty, or may sue in tort, but without the money. Parties of the standby credit have bargained for a distinct and less expensive kind of credit transaction.

Chief Justice Nabers, in *Southern Energy*,[473] clearly set forth the international principles governing standby letters of credit. He opined —

"*Shifting cost of litigation is one of the important functions of a standby credit. In this situation, the parties negotiate their relationship while bearing in mind that litigation might occur. This cost-shifting function gives one party the benefit of money in hand pending the outcome of litigation.* ***A demand for payment made upon a standby credit usually indicates that something has gone wrong in the contract.*** *Indeed, this is the nature of standby letter of credit. In contrast to the commercial letter of credit,* ***nonperformance that triggers payment in standby credit*** *usually indicates some form of financial weakness by the applicant. For this reason, the parties choose*

[471] Supra. N. 62 At P.224.
[472] Southern Energy Homes, Inc. V. Amsouth Bank Of Alabama 709, So.2d 1180 (Ala. 1998)

this security arrangement over another so that they may have the ***benefit of prompt payment before any litigation*** *occurs."*

DISTINCTION BETWEEN DOCUMENTARY AND STANDBY CREDITS

The main parties and the basic rights and duties of the issuer are the same in both commercial and standby credits. Yet, a standby credit differs fundamentally from a commercial credit.[474] The basic difference between a standby letter of credit and other documentary credits is that the standby letter of credit is issued to *protect the beneficiary against non-performance* or default, usually that of the applicant, whereas traditional commercial credits direct a bank to pay the beneficiary upon the shipment of goods or other *performance in favor of the customer-applicant.*[475]

The standby credit 'directs the bank to pay the beneficiary not for his own performance but upon the customer's default, thereby ***serving as a guarantee device***".[476] For this reason, standby letters of credit are often referred to as a guarantee letter of credit. A standby letter of credit differs from a common-law guarantee, however, in that the former is a *direct obligation* to pay upon '***specified documents showing a default***' while the latter is a *secondary obligation* requiring '***proof of the fact of default***'.[477]

PERFORMANCE BONDS

The whole commercial purpose of a performance bond is to provide security which is to be readily, promptly and assuredly available when the prescribed event occurs.[478] By issuing a performance bond

[474] Supra., At N.61.
[475] Supra. N. 32.
[476] *Fraud In The Transaction*: Enjoining Letters Of Credit During The Iranian Revolution, 93 Harv. L. Rev. 992, 993 (1980).
[477] *American National Bank & Trust Co.* V. *Hamilton Industries International, Inc.*, 583 F.Supp. 164, 169 (N. D. Ill. 1984)
[478] Howe Richardson Scale Co Ltd. V. Polimex Cekop And National Westminster Bank [1978] 1 Lloyd' s Rep. 161, Ca.

or performance guarantee, a bank assumes obligations to a buyer or other beneficiary analogous to those assumed by a confirming bank to the seller under a documentary credit.[479] Whether a performance bond is payable on demand upon the occurrence of a specified event, the beneficiary's demand must state that the event has occurred.[480] A bank which gives a performance guarantee must honor that guarantee according to its terms; it is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contractual obligations or not; nor with the question whether the supplier is in default or not; and, subject to the fraud exception,[481] the bank must pay according to the guarantee, on demand, if stipulated, without proof or conditions.[482] A *performance bind is virtually a promissory note* payable on demand[483], and certainly has more of the characteristics of a promissory note than of a guarantee.[484]

GUARANTEE

In common law the guarantee or suretyship, is an arrangement involving three parties – the creditor, who has a claim against the principal debtor, and a third party, the guarantor (the surety), who undertakes to be liable to the creditor if the principal debtor fails to discharge his obligation.[485] The arrangement between the creditor and the guarantor is the contract of guarantee. The guarantor has a secondary obligation, subsidiary to the contract between the creditor and the principal debtor.

[479] Supra. N. 84.
[480] Esal (Commodities) Ltd And Realtor Ltd. V. Oriental Credit Ltd And Wells Fargo Bank Na [1985] 2 Lloyd' s Rep 161 Ca Per Roskill Lj.
[481] Turkiye Is Bankasi As V. Bank Of Canada [1996] 2 Lloyd' s Rep 611- In Challenging A Demand Made On A Performance Bond, The Challenging Party Must Show That The Only Inference The Bank Could Draw Was That The Demand Was Fraudulent; In Doing So, It Must Put Before The Bank An Irrefutable Evidence Because It Is Not For The Bank To Verify Mere Allegations.
[482] Edward Owen Engineering Ltd. V. Barclays Bank International Ltd. [1978] Qb 159 At 171.
[483] Ibid, Per Lord Denning Mr Approving *Rd Harbottle*
.[484] Ibid.
[485] O' donovan, The Modern Law Of Guarantee (3rd Edition, 2003)

Bank guarantees are absolute undertakings by the bank to pay if certain conditions are fulfilled.[486] They may be procured by the seller or by the buyer. If they are procured by the buyer, their aim is to secure the payment of the price to the seller by substituting a *reliable paymaster* for the buyer.[487] If procured by the seller, then its purpose is to secure the buyer if he has a claim for damages against the seller for non-delivery of the goods, for defective delivery or other cases of non-performance. Such guarantees are known as ***performance guarantees***.

In practice, demand guarantees, performance bonds, performance guarantees, and standby letters of credit have a similar legal character and resemble documentary credits in that they are primary in form, and generally conditional only upon the presentation of a written demand for payment together with any other stipulated documents. The issuing bank is not concerned as to whether there has been any actual default by the principal.

Many considerations which apply to documentary credits apply, likewise, apply to the bank guarantee. In particular, the principles of autonomy of the bank's undertaking[488] and of strict compliance with the conditions stated in the bank's instructions (mandate) apply, *mutatis mutandis,* to bank guarantees as well.[489] The application of the doctrine of strict compliance to demand notices was considered by Legatt J.,[490] who stated that the *demand must conform strictly to the terms of the bond in the same way that the documents tendered under a letter of credit must conform strictly to the terms of the credit.* Even in the case of guarantees, the obligation of the bank to honor its undertaking is subject to the fraud exception. But if the guarantee is a demand performance guarantee given by the seller, the question is whether

[486] Ph Grace Pte Ltd V. Amercian Express International Banking Corporation [1987] 1 Mlj 437.
[487] *Per* Mcnair J. In Soproma Spa V. Marine And Animal By-Products Corporation [1966] 1 Lloyd' s Rep. 367
[488] Ermis Skai Radio And Television V. Banque Indosuez Sa, February 26, 1997, Unreported.
[489] Potton Homes Ltd V. Colman Contractors (Overseas) Ltd [1984] 28 Build. L.R. 19.
[490] In Ie Contractors Ltd V. Lloyds Bank Plc [1989] 2 Lloyd' s Rep. 205.

the buyer (and not the seller, as under letter of credit) has acted fraudulently, when making a demand under guarantee.[491]

VI. CONCLUSION

In the contemporary commercial world, the expansion and growth of trade transactions in the international sales arena has called for the incessant need to finance such trades with greater security in light of almost complete anonymity of the parties to the transactions. The assistance of a neutral financial institutions and organizations to by providing payment devices has almost become indispensable. The services of financial intermediaries through the form of services such as letters of credit and bank guarantee to facilitate smoother and secure trade transactions is highly commendable.

Letters of Credit have proved to be extensively used stable methods of payments for international trade, mainly due to the negligible risks involved in them which mitigate the cross-border problems of litigation and stagnation of capital flow. By the introduction of a trustworthy and reliable intermediary, usually a bank, the parties on both sides receive a sense of assurance to proceed further with the transaction. Reliability is the foremost essence and advantage the parties secure by opting letters of credit for financing their trade transactions. It is a mutual system of assurance whereby the seller is assured of the performance of the buyer's obligations upon presentation of shipment and other documentary evidences to the bank and the buyer can thereafter make payments for the contractual goods having knowledge of the delivery of goods.

Bank guarantees and Standby letters of credit, though conceptualized on the same lines as documentary credits, slightly differ to the extent that they make payments to the beneficiary not upon

[491] United Trading Corporation Sa V. Allied Arab Bank Ltd. [1985] 2 Lloyd' s Rep. 554.

his due performance but upon the default of the customer. However, they too function on the principles of providing protection to the beneficiary against undue fraud by either party.

12. MARINE INSURANCE CONTRACTS IN INDIA

Author: Amulya Chinmaye

I. INTRODUCTION

Surge in transnational commerce has fostered greater market access while allowing expansion of economies. Cross-border trade houses, along with its economic incentives, a wide spectrum of risks that both parties need to bear. One of main concerns herein is to ensure the safety of the commodities so-transacted in, especially during transit. Every mode of transportation of goods is tied with an inherent risk to the goods. The burden falls on the merchant to guarantee the smooth movement of goods, from the point of origin up till the destination, without any damages in the interim. An absence to adopt adequate safety measures may lead to unacceptance of goods by the buyers.

International shipment of goods over the seas poses numerous threats to the cargo. The shippers can financially secure their goods, regardless of the value of goods, by insuring them against the damages, accidents and perils of the sea. Most shipping agencies offer marine insurance contracts and cargo insurance policies. The significance of marine insurance in furthering domestic trade as well as in international trade cannot be understated. Marine insurance policies could also serve to protect the interests of the ship-owner's themselves against the perils of the sea. Marine insurance contracts, thus, seek to indemnify the insurer of the object so-insured, in a manner and to the extent agreed, against marine losses, i.e. the losses incident to marine adventure.

A contract of marine insurance has been defined as "*a contract of indemnity, in which the insurer, in consideration of the payment of a certain premium, agrees to make good to the assured all losses, not exceeding a certain*

amount, that may happen to the subject insured, from the risks enumerated or implied in the policy, during a certain voyage or period of time."[492]

BACKGROUND

Maritime insurance policies were observed as early as in 3000 B.C. amongst Chinese merchants who insured their shipments from the losses at sea.[493] Hammurabi's Code provided that if a Babylonian merchant's goods did not arrive safely at the destination, the debts incurred to finance the transaction were to be written off.[494] Seagoing merchants from Phoenicia (present-day Lebanon) practiced an insurance system known as Bottomry around 200 B.C.[495] The objects and functions of marine insurance were aptly and lucidly described in the preamble to the Elizabethan Act, 1601. The Hindu religious text - Manusmriti – also contains rules for marine contracts which were observed by traders from Broach and Surat, who sailed in Indian vessels with merchandise to Lanka, Egypt and Greece.[496] Prior to codification, people across the world pooled their contributions to compensate from that pool anyone who suffered a loss during voyage. Today marine insurance has assumed vast dimensions due to the ever expanding trade across the globe.

THE MARINE INSURANCE ACT, 1963

[492] John Duer, *The Law And Practice Of Marine Insurance,* Vol. I., P. 58., J.S. Voorhies, Harvard University, New York, 2008, Isbn-10: 1-58477-817-2 [Available At: Https://Books.Google.Co.In/Books?Id=Rgwaaaaayaaj&Printsec=Frontcover&Dq=Law+And+Practice+Marine+Insurance+John+Duer&Hl=En&Sa=X&Ved=0ccuq6aewagovchmisfdjx4vgxwivhns]
[493] Gaurangi Patil, *India: Reeling Back In History To Understanding Marine Insurance/Protection & Indemnity Clubs (P&I),* In Marine Insurance, Brus Chambers, 2012 [Available At: Http://Www.Mondaq.Com/India/X/208632/Marine+Shipping/Reeling+Back+In+History+To+Understanding+Marine+Insurance+Protection+Indemnity+Clubs+Pi]
[494] R.K.Ganatrai, Anant Kumar, *Marine Insurance*, Insurance Institute Of India, At Pp. 1, Shri Sharad Srivastva Publications, 2011.
[495] *Overview Of An Insurance Industry*, Ch. 1, Shodhganga [Available At: Http://Shodhganga.Inflibnet.Ac.In:8080/Jspui/Bitstream/10603/41714/11/11_Chaptet%201.Pdf]
[496] *Id.*,

The law concerning marine affairs was originally statutorily recognized in England through a codified law, 'The English Marine Insurance Act, 1906'. In India, the law regulating marine insurance is the 'Marine Insurance Act, 1963' which is based on and is *pari materia* to the 1906 enactment of England. Marine insurance has been in vogue in India for several centuries and is essential to overseas trade, inland trade and shipping. However, the business of marine insurance was nationalized by the General Insurance (Emergency Provisions) Act, 1971.

This article shall seek to identify the basic nature of marine insurance contracts and determine the rights and liabilities of policy holders. Thereafter, it shall examine the aspect of uberrimae fidei and warranties in such contracts. Lastly, it shall discuss recent case-laws in these matters.

II. VARIOUS KINDS OF MARITIME INSURANCE POLICIES

Marine insurance is concerned with the insurance of ships, i.e.,

i) Hull insurance which covers losses or damages to the hull (main body of the ship) and machinery of a vessel during construction; during maritime operations; and during breakage;

ii) Insurance of various other interests like ship repairers/charterers' liabilities, collision liabilities;

iii) Insurance of premium;

iv) Insurance of incidental charges and profits.[497]

Thus, the prime focus of the subject matter of marine insurance is to protect the interests of the ship-owner, owner of the cargo, the person interested in freight, for liabilities and in respect of fines imposed. Insurance Companies provide various kinds insurances which can be broadly grouped

[497] *Supra*., At Pp.1

on the basis of the insured object - Hull Insurance, Cargo Insurance, Freight Insurance, Collision Liability or Protection and Indemnity Insurance. These form the subject matter of marine insurance.

HULL INSURANCE

Insurance of the shipping vessel and its equipment's is included under hull insurance.[498] Ship owners resort to marine insurance for protection of their ocean going or coastal vessels, ships, ship repairer's liability, disbursements and other interests (subsidiary interests) against marine perils.[499] This insurance can also be provided at a time when the vessel in question is under construction. At this point, the insurance is called Construction/Builders' Risks Insurance. Hull Policies are issued either on time or voyage basis. A time policy cannot exceed a period of 12 months as the same is prohibited under the Act.[500]

CARGO INSURANCE

The insurable interest in this regard is the cargo – goods and commodities in transit – which is covered under risk or floating policies.[501] The insurance may be of any description – wares, merchandise, property, goods, etc. The insurance commences soon after loading of the stock and terminates on delivery. The cargo has insurance coverage over losses caused by civil wars, fire, sea storms, burglary, rebellions or riots, seizure or arrest, strikes, etc.[502] An insurance claim upon the cargo depends on the kind of loss that occurs, that is, where there is a total loss or a constructive total loss. It may be an open cover policy or a specific voyage policy.

[498] Editorial Board, *Pratiyogita Darpan*, Extra Issue Series – 24 Commerce, Upkar Prakshan [Available At: Https://Books.Google.Com.Pk/Books?Id=Wkn08a9tv7sc&Pg=Ra5-Pt44&Lpg=Ra5-Pt44&Dq=Vessel+And+Its+Equipments+Is+Included+Under+Hull+Insurance.&Source=Bl&Ots=7d9mdj2ion&Sig=Bopqfupbnbvcaq_7jdx6djy8nnm&Hl=En&Sa=X&Ved=0cb4q6aewagovchmivpbzpkpgxwivgtcuch1scamq#V=Onepage&Q=Vessel%20and%20its%20equipments%20is%20included%20under%20hull%20insurance.&F=False]
[499] *Supra*., At Note 3.
[500] *Id.,* At Pp.158.
[501] M.N. Mishra, *Insurance Principles And Practise,* 18th Ed., At P. 238, S.Chand & Co., 2011.
[502] Fredrick Templeman, *Marine Insurance: Its Principles And Practice,* At Pp. 45, London, 1903.

FREIGHT INSURANCE

Freight is to be payable for the carriage of goods or if the vessel is chartered, then the money is to be paid for the use of the vessel. The carriage is unable to earn the freight if the goods are not safely transported.[503] The freight which is payable on delivery imposes a risk upon the ship owner who has insurable interest in it and thus can be insured against any losses to it.

LIABILITY INSURANCE

This kind of policy seeks to protect the assured and the owners of the other ships, by way of damages owing to a collision or running down caused by the negligence of the insured vessel. It includes both ocean and inland perils. It also covers a 'sue and labor charge', which is an expense covered by the assured, their agents or servants with the intention of preventing or minimizing any loss as coverable under the policy. Here, the insurer may undertake to indemnify against legal liability from the third party for accidental loss and fatal or non-fatal injury to third parties.

In a collision of two vehicles, there may arise two kinds of liabilities – cross liability and single liability. The former is when both the vessels are to blame, and then unless the liability of one or both the vessels becomes limited by law, then indemnity shall be calculated as cross liability.

In 2015, the National Consumers Disputes Redressal Commission held in a case[504] that as per Institute Voyage Clauses, Hulls (IVCH) 1995, all these insurances cover loss/damage to the subject-matter caused by perils of the seas, rivers, lakes or other navigable waters, fire or explosion, violent theft, jettison, piracy, earthquake or lightning.[505] It also includes man-made damages to the vessel like

[503] *Id.,*
[504] *Krishnapatnam Port Company Ltd* V. *United India Insurance Company Ltd* Ii (2015) Cpj 91 (Nc)
[505] Susan Hodges, *Law Of Marine Insurance,* Routledge, *2013* [Available At:

those caused during loading, discharging of shifting of cargo, bursts or breakages and negligence by the Master or crew. However, damages through man-made causes are covered only if they occurred beyond the exercise of 'due diligence'. The onus of proving the unexercised of the required diligence lies on the insurer if he wishes to avoid a claim.[506]

A marine insurance claim form would include at least the basic details such as the names of the claimant & consignee, the name of the vessel, the name, address and date of arrival of the goods at the destination, date and place where the damage occurred, a description of the loss and its cause, estimate of loss and the probable value of salvage.[507]

The Indian Carriage of Goods by Sea Act, 1925 holds that the time limit of removal of the goods into the custody of the person entitled to delivery thereof. If the loss/damage is not apparent within 3 days of occurrence, then such removal shall be prima facie evidence of delivery by the carrier of the goods as described in the bill of lading.[508]

INSURABLE INTEREST

Sections 7, 8 and 9 to 16 of the Marine Insurance Act, 1963 provide for insurable interest. A person is said to have insurable interest in the subject matter *where he stands in any legal or equitable relation to the subject matter in such a way that he may benefit by the safety or due arrival of the insurable property or may be prejudiced by the loss or damage thereof.*[509] Insurable interest in the subject matter should exist at the time of the loss.[510] It is not necessary that it exists at the time of the formation of the marine insurance policy

Https://Books.Google.Com.Pk/Books?Id=Wygoagaaqbaj&Dq=%22caused+By+Perils+Of+The+Seas,+Rivers,+Lakes+Or+Other+Navigable%22&Source=Gbs_Navlinks_S]*;The New India Assurance Co.Ltd*. V. *Priya Blue Industries Pvt.Ltd*. (2011) 4 Scc 231.

[506] *Ibid.*, At Pp.169.

[507] M.H. Writer & S.P. Gupta, *Marine Insurance Claims*, Ic-66, Insurance Institute Of India, At P. 122, 1999.

[508] *Id.,*

[509]Section 7(2), The Marine Insurance Act, 1963.

[510] *Lucena* V. *Craufurd* (1806) 2 Bos & Pnr 269

as marine insurance is frequently affected by commercial transactions.[511] The essential feature is that there must be a physical object exposed to marine perils and that the insured person must have a legal relationship with the object.[512]

Under marine insurance, the following persons are said to have insurable interest:[513]

1. Owners – there are two kinds of ownerships. One based on the ownership of ships and other relating to the owner of the cargo.
2. A creditor who has advanced money on the security of the ship or cargo.
3. The mortgagor and mortgagee.
4. The master and crew of the ship have 'insurable interest' in respect of their wages and
5. In case of advance freight, the person advancing the freight has an 'insurable interest' if such freight is not repayable in case of loss.[514]

EXCEPTIONS TO THE RULE515

a) **Lost or not lost**: A person can purchase a policy in the subject matter in which it was known were lost or not lost. Here, the assured and the underwriter are both ignorant about the safety of the goods and complete reliance is placed on the principle of good faith.[516]

[511] Halsbury's Laws Of England, 4th Edn., Lexisnexis, United Kingdom.
[512] *Ibid.*,
[513] Kyriaki Noussia, *Insurable Interest In Marine Insurance Contracts: Modern Commercial Needs Versus Tradition*, Journal Of Maritime Law & Commerce, Jefferson Law Book Company, 2008
[514] Susan Hodges, *Cases And Materials On Marine Insurance Law*, Routledge, 2012.
[515] Kavita Singh, *8 Main Elements Of Marine Insurance Contract*, Ja Template, Preserve Articles, December 2010 [Available At: Http://Www.Preservearticles.Com/2012040730001/8-Main-Elements-Of-Marine-Insurance-Contract.Html]
[516] Filippo Lorenzon, David Sassoon, *C.I.F. And F.O.B. Contracts*, Vol. 5 Of British Shipping Laws, Sweet & Maxwell, 2012, Isbn 042191890x [Available At: Https://Books.Google.Co.In/Books?Id=Cg8fsrrb0sec&Pg=Pa335&Lpg=Pa335&Dq=Exceptions+To+The+Rule+A)+Lost+Or+Not+Lost+Policy+Proof+Of+Interest&Source=Bl&Ots=Fzevimknvs&Sig=Shtrymkidcu0qqododjlexkz].

b) **Policy Proof of Interest**: The subject matter can be insured through interest proof policies. It means that in the event of claim, insurers may dispense with all proof of insurable interest.[517] In case the underwriter does not pay the claims, it cannot be enforced in any court because PPI policies are usually void and unenforceable.

III. UBERRIMAE FIDE & WARRANTY IN MARINE INSURANCE CONTRACTS

UBERRIMAE FIDEI

Contracts dealing with marine insurance are considered to be of '*ubberrima fidei*' under the provisions of the Indian law. That is, all contracts of insurance, as is marine insurance, require utmost good faith on the part of both, the insurer and the assured. Sections 19 to 23 of the Act deal with the principle of utmost good faith.

Every circumstance which is within the knowledge of the person insuring and is likely to influence the insurer in deciding – i) whether he will accept or refuse the risk or ii) the premium, terms and conditions of insurance, must be fully disclosed to the insurer before the contract is concluded. It is also deemed that the assured ought to know every other material circumstance, which in the ordinary course of business, ought to be known by him.[518] Hence, the assured cannot try and claim insurance when he had not fully disclosed the facts.[519]

[517] *Insurable Interest In Marine Insurance,* Edunote.Info [Available At: Http://Www.Edunote.Info/2015/03/Insurable-Interest-Marine-Insurance.Html]
[518] Robert Merkin, *Marine Insurance Legislation*, Crc Press, 2014 [Available At: Https://Books.Google.Com.Pk/Books?Id=F6zwawaaqbaj&Pg=Pa26&Lpg=Pa26&Dq=%22which+In+The+Ordinary+Course+Of+Business,+Ought+To+Be+Known%22&Source=Bl&Ots=Cbadt9qua4&Sig=Qw-9vpp5bfqgyyo-Irtkejbaxxi&Hl=En&Sa=X&Ved=0cbwq6aewagovchmimzdy0a7gxwivw3coch3ica4t#V=Onepage&Q=%22which%20in%20the%20ordinary%20course%20of%20business%2c%20ought%20to%20be%20known%22&F=False]
[519] *Carter* V. *Boehm* (1766) 3 Burr 1905.

Representations are communications made during the negotiations for effecting an insurance before the contract is concluded. They can be either written or verbal and can also be made by a principal's agent. The duty of utmost good faith applies to the insurer as well. He may not urge the proposer to effect an insurance which he knows is not legal or has run off safely.[520] An agent of the assured is also expected to know every circumstance as is in the ordinary course along with what has been communicated to him by his principal.[521]

These representations can be classified into – material facts, representation of facts and expectations or beliefs. The disclosure of material facts is compulsory and whatever is so represented must be true. If, on discovery it is found that the material facts were untrue, then the contract is voidable at the option of the insurer. A representation of a fact is regarded as true if it is substantially correct, provided that the difference between the actual fact and the fact does not turn out to be the 'material fact'. Lastly, the expectations and beliefs if made in good faith bear no significant damage to the contractual duties and obligations. Thus it becomes imperative for both the consigner and consignee to disclose to each other all relevant information regarding the insured object.

There are a few exceptions where the rule of utmost good faith may not be observed – facts of common sense, facts which are or should be known to the insurer, those facts not required by the insurer, those which ought to have been reasonably inferred from the details and the facts of public knowledge.

WARRANTIES

[520] *Ibid.,* At Note 8.
[521] *United India Insurance Company Ltd.* V. *M.K.J. Corporation* 1996 (6) Scc 428.

Sections 35 to 43 of the Act house provisions for Warranties in marine insurance policies. A warranty is a promise to the underwriter that something shall or shall not be done or that a certain state does or does not exist.[522] A failure to comply literally with the terms of the warranty shall empower the insurer to completely avoid all liabilities as on the date of breach. Warranties are more vigorously insisted upon than the conditions because the contract is broken if the warranty is broken whether the warranty is broken or not.[523] It is said that a warranty is in effect a 'safety valve' by which they can ensure that the risk is exactly the one that they intended to accept.

Warranties can be express or implied. The former is just a provision explicitly incorporated in the policy. The implied warranty can arise out of seaworthiness and legality of the adventure.

(a) The former requires the ship to be seaworthy at the commencement of the voyage or if the voyage is carried out in stages, then at the commencement of each stage. This implied warranty applies to every voyage policy irrespective of the interest insured, whether it is the ship itself or the cargo in it or the freight. A ship can be termed as seaworthy when she is reasonably fit to encounter, in all respects, the perils of the sea in the course of the adventure ensured. Hence, it is an implied agreement between the consignor of goods and the carrier that the shipping vessel is seaworthy. However, this implied warranty of seaworthiness is relaxed in case of time policy ships where it is more important that the goods reach the destination.

(b) The second kind of implied warranty is the warranty of legality, which is applicable to all marine policies. This requires that the adventure which is insured should be legal and as far as

[522] Barrie Jervis, *Reeds Marine Insurance*, At P.24, A&Amp;C Black, 2013 [Available At: Https://Books.Google.Com.Pk/Books?Id=9veuaaaaqbaj&Pg=Pa24&Lpg=Pa24&Dq=%22that+Something+Shall+Or+Shall+Not+Be+Done+Or+That+A+Certain%22&Source=Bl&Ots=Edb8jugb]

[523] *Marine Insurance,* Eiilm University, Sikkim [*Http://Eiilmuniversity.Ac.In/Coursepack/Insurance/Marine_Insurance.Pdf]* .

the assured can control the matter, it shall be carried out in a lawful manner. Where the insured adventure is illegal *ab initio*, no valid contract of insurance is ever created.[524]

OTHER IMPLIED WARRANTIES

Some of the other implied warranties include:

i) No change in the voyage

ii) No delay in the voyage

iii) Non deviation

The last two have exceptions for the safety of the ship and human lives or in case of barratry.

Any breach of the above mentioned warranties permits the insurer to avoid the contract. However, the insurer may excuse the breach and continue with it. The breach may also be excused when the warranty, by way of change in circumstances, ceases to be lawful when complied with or it ceases to be applicable in the new situation.

IV. RIGHTS AND LIABILITIES OF THE POLICY HOLDERS

The basis of marine insurance law is the law of contract. Between the assured and the underwriter, there is a contractual relationship with mutual rights and obligations of both parties within the terms of the specific contract each time. Every contract of sale of freight involves mainly a seller and a buyer apart from other associated parties like carriers, banks, clearing agents, etc.

ASSURED

[524] Dr Kyriaki Noussia, *The Principle Of Indemnity In Marine Insurance Contracts: A Comparative Approach*, At Pp. 40, Springer Publications.

- It is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimizing a loss.[525]
- The right to be indemnified against the losses and damages to the insured goods. When given double-insurance, he is entitled to receive contributions from all the insurers proportionately to the amount for which he is liable under his contract.[526]
- It is his duty to disclose each and every material fact related to the insured object and make the insurer fully aware of the same by himself or through his agent or broker.[527]
- An owner of the goods must ensure that the premium is paid well in advance so that the risk can be covered. If the payment is made through cheque and it is dishonored then the coverage of risk will not exist. It is as per section 64VB of Insurance Act 1938.
- It is his duty to accept the agreed value as indemnity irrespective of the amount of loss he undergoes, whether lesser or higher than that value.[528]

INSURER

- The insurer is liable for loss occurred when the interest insured is struck by an insured peril during the insurance period.
- The insurer is entitled to the right of subrogation where he pays for a total loss, either of the whole, or in the case of goods of any apportionable part of the subject- matter insured. He then is entitled to all the rights over whatever remains of that insured property.[529]

[525] Section 78(4), The Marine Insurance Act, 1963.
[526] Section 80(1), The Marine Insurance Act, 1963.
[527] Section 20(1) & 21, The Marine Insurance Act, 1963.
[528] Section 34(2)(B), The Marine Insurance Act, 1963.
[529] Section 79, The Marine Insurance Act, 1963.

- In case of double insurance, if any insurer pays more than his proportion of the loss, then he is entitled to maintain a suit for contribution against the other insurers, and is entitled to the like remedies as a surety who has paid more than his proportion of the debt.[530]
- If goods are damaged or loss occurs during transit because of deliberate act of an owner, then that damage or loss need not be covered under the policy by the insurer.[531]
- A breach of warranty may be waived by the insurer.[532]

  The seller is responsible till the goods are placed on board the steamer. The buyer is responsible thereafter. He can get the insurance done wherever he likes. The buyer's responsibility normally attaches once the goods are placed on board. He has to take care of the insurance from that point onwards. In this case, the seller is responsible for arranging the insurance up to destination. He includes the premium charge as part of the cost of goods in the sale invoice.

MEASURE OF INDEMNITY

The purpose of any form of insurance is to replace that which has been lost. Mostly the recompense is of monetary nature and this system of reimbursement is called 'indemnifying'.[533] Indemnity forms the very fundamental feature of a marine insurance contract.[534]

The concept of indemnity, as under contracts of marine insurance, is the same as that of normal contracts of indemnity (that is to indemnify an object against loss) , except that Section 3 of

[530] Section 80, The Marine Insurance Act, 1963.
[531] Module 4, Diploma In Insurance Services, Universal Publications.
[532] Section 36(3), The Marine Insurance Act, 1963.
[533] United Nations (1982) *Un Conference On Trade & Development: Legal And Docuumentary Aspects Of Marine Insurance Contract*, Un, Ny, Pp. 1-2.
[534] Bennett H, *The Law Of Marine Insurance*, Ch. 1, Clarendon Press, Oxford, 1986.

the Act, makes it stand apart slightly.[535] The said section provides that indemnity for maritime shall be "in the manner and to the extent agreed", making it an Agreed Value Policy.[536] As the policy of indemnification in this regard would not imply replacement of lost or damaged goods, the insurers undertake to compensate for the same with an amount agreed in advance.[537]

The rationale as to requiring the indemnity value prior to putting the goods in transit is due to the problems that may arise at a later date due to market fluctuations. The goods that are mostly sent as cargo in the vessels are usually subject to market fluctuations and hence it becomes difficult to calculate the exact amount of loss or damage at a given time. Thus, the best way to deal with such a problem is to agree upon a value beforehand. However, this does not mean that every marine insurance contract has its indemnity valued beforehand. The Act in Section 18 provides for insurance of unvalued policies as well. Where the market value of the loss is paid, this doctrine of indemnity is said to have been precisely applied.

An agreed or valued policy's valuation can be changed only when a fraudulent intention is proved; otherwise such value is regarded as conclusive and binding both on the insurer and the assured. In case of a fraud, not just the valuation but the whole of the policy can be avoided. Two exceptions exist to the doctrine of indemnity in marine insurance[538] –

i) Profits are allowed – The general rule of indemnity says that the market price should be indemnified and no profits should be permitted. However, in marine insurance a certain profit margin is allowed.

[535] Lambeth Rj (1986) *Templeman On Marine Insurance: Its Principles And Practise*, 6th Edn, Pitman.
[536] *Ibid.*,. Note 3 At Pp 31.
[537] *Macaura* V. *Northern Assurance Co Ltd* (1925) Ac 619.
[538] *Ibid.*, At Note 8.

ii) Insured Value – The doctrine of indemnity is based on insurable interest, whereas marine insurance is mostly based on insured value. The purpose of valuation is to determine the worth of insured.

If a vessel is totally lost by the collision or any mishap, then the measure of damages is the value of the vessel to her owners as a going concern at the time and place of loss, and regard must be had to her pending engagements, whether profitable or unprofitable.[539] In case of an absence of market value for a vessel, the test is whether she was fairly worth to her owners at the time and place of loss.[540]

Certain types of goods may lose or gain weight mainly due to evaporation or absorption of natural moisture. This is unavoidable in most cases and hence is not admissible as a claim for indemnity.

In the 19th century, ship owners banded together in mutual underwriting clubs known as Protection and Indemnity Clubs (P&I), to insure the remaining one-quarter liability amongst themselves. These Clubs are still in existence today and have become the model for other specialized and noncommercial marine and non-marine mutual, for example in relation to oil pollution and nuclear risks. They are by far the largest and most important of mutual marine insurance associations, because vessels and freight are insured with underwriters in the open insurance market and therefore the P & I Clubs are usually ancillary to the marine insurance market. Most often insurance is primarily sought for the vessels and freight and rarely for the crew. These P & I Clubs, which are essentially non-profit associations, try to bridge that gap by providing insurance to personal injury, illness, loss

[539] *The Liesboch, Dredger* V. *Edison Steamship* [1933] Ac 449
[540] *Ibid.*,

of life of crew members and passengers, wreck removal charges, etc.[541] These policies are not issued in the open marine market.

V. RECENT CASES RELATING TO MARINE INSURANCE CONTRACTS

SILVERSONS V. ORIENTAL INSURANCE COMPANY LTD. AND ANR.542

The appellant entered into an agreement with Allchem Industries Inc., Florida, USA for the supply of Diphenyl Oxide. The goods were to be shipped from Bombay to Norfolk (USA). For this purpose, the appellant obtained Marine Cargo Policy and the goods were duly shipped. During the course of inspection at the Container Terminal in the port of Colombo, it was noticed that there was leakage of chemical from the container and the same was informed to the appellant. After about 3 months, the appellant conveyed the goods' condition to the insurer enclosing therewith letter received from the carrier about leakage of the cargo and the fact that the same was lying at Colombo Port.

The insurance company repudiated the appellant's claim on the ground that intimation regarding discharge of the cargo at Colombo Port was given after a gap of more than 60 days. Thereupon, the Appellant filed complaint under Section 15 of the Consumer protection Act for award of compensation of Rs. 10,44,621 with interest at the rate of 17%. The insurer contested the claim by relying upon Clause 9 of the Institute Cargo Clauses 'A' of the Policy and pleaded that it cannot be accused of deficiency in service because the Appellant did not promptly give intimation about the termination of the cargo at Colombo Port.

The Supreme Court held that the insured should intimate the insurer a reasonable period, but there is no strait-jacket formula to determine what would constitute a reasonable time and hence it

[541] *Feasey* V. *Sun Life Assurance Co. Of Canada* (2002) 2 All.E.(Comm) 292.
[542] *Silversons* V. *Oriental Insurance Company Ltd. And Anr* (2012) 12 Scc 522.

would depend on the facts of each case. In the present matter, the court, it was held that three months was a long time gap between the date when the appellant had been informed about discharge of the cargo and the intimation given by the appellant to the insurer was unreasonable and, by no stretch of imagination, it could be construed as a prompt notice. Thus, the appellants appeal was dismissed.

THE NEW INDIA ASSURANCE CO. LTD. V. PRIYA BLUE INDUSTRIES PVT. LTD.543

The Respondent carried on a ship breaking and scraps dealing business and for the same purposes purchased a very large bulk ore and oil carrier to import goods to Alang. There is no controversy in the fact that the Respondent had taken a marine insurance policy for hull and machinery for covering only 9 kms distance between the anchorage and the destination. The insurance cover was for a sum of Rs. 25.70 crores for which a premium of Rs. 1,14,280/- was paid. The case of the complainant is that on 9.6.1997, when vessel started its funeral voyage' on its way it was completely damaged and could not reach the specified place because of extremely rough weather resulting in total loss. The insurance company was accordingly informed, followed by several letters by the complainant requesting it to state as to what action was to be taken with regard to the stranded vessel and received no response from the insurance company.

Thereafter, the appellant claimed a much higher amount than what is was entitled to be paid along with interest, costs and expenses of litigation.

In response to the claim, the insurance company appointed two surveyors to inspect the same. Their report stated the proximate and dominant cause of the vessel becoming a total loss was the stranding on a rocky shoal prior to arriving at the destination due to heavy weather. Also the stranding

[543] *The New India Assurance Co. Ltd.* V. *Priya Blue Industries Pvt. Ltd.* (2011) 4 Scc 23.

was said to be accidental and fortuitous in nature and it was not caused by any proximate cause. Thus it was calculated that the insurance cover would be to the extent of 13.69 crores. The respondent contended before the National Commission that the vessel met its ill fate only because of sea conditions and perils and hence the repudiation of the insurance claim by the company was not justiciable. The insurance company thereafter brought out defenses on the lines non-disclosure of material facts and lack to observe utmost good faith. They contended that one of the engines of the ship was not in a working condition from the commencement of the journey and hence though they were not obliged, yet they were ready to pay a sum of Rs. 13 crores. The Supreme Court upholding the National Commission's decision rejected the plea of the insurance company and directed them to compensate the respondent to a sum of as determined by the surveyors along with an interest of 19.17%.

CONTSHIP CONTAINER LINES LTD. V. D.K. LALL AND ORS.[544]

D.K. Lall Enterprises received two orders from Spain for the export of iron furniture and iron handicraft items to Natural Selection International and for export of miniature paintings to Mr. Pindikas. All the items meant for export were packed in 122 different cartons of which only one carton was meant for export to Mr. Pindikas. These packages were, according to the Respondent-Exporter, checked and cleared by the Customs Authority at Jodhpur and transported to Bombay where it was put on board CMBT Himalaya, a vessel belonging to Contship Container Lines Ltd, the appellant.

For this cargo transit, the exporter had obtained a **Marine** Cargo/Inland transit **insurance** policy to cover risks enumerated in the policy. The exporter contended that while 121 cartons had

[544] *Contship Container Lines Ltd.* V. *D.K. Lall And Ors*. [2010] 3 Scr 460.

been duly received Natural Selection International, one carton marked for Mr. Pindikas comprising miniature paintings was not so delivered to the consignee. Thereafter, a claim was made against the insurance company for compensation to the tune of Rs. 39,23,225/-representing the value of the miniature paintings with interest. The insurance company refused to pay the said amount and alleged that the exporter had never stuffed/exported the carton containing miniature paintings and that the claim made by the exporter to that effect was false. Reference was made to the Bill of Lading according to which the particulars declared by the shipper/exporter had not been checked by the carrier. The respondents further alleged that the cartons had not been properly marked with the result that the same could not be segregated before being delivered to the consignee concerned. The **Insurance** Company also filed a separate reply, alleging that the exporter was in collusion with the buyers trying to perpetrate a fraud on them with a view to making an undeserved & unjust financial gain. The Commission noted that in the declaration of the consignment sent to the insured no details of the conditions of shipment were mentioned and the insurance company stood absolved of any liability for the failure of the insured to maintain utmost good faith.

Placing heavy reliance on the Indian Sale of Goods Act, 1930, the Supreme Court distinguished between Free on Board and CIF policies, relating it to this present case. It then relied on the ratio underlying transfer of title in goods in FOB contracts as given in *B.K. Wadeyar* v. *Daulatram Rameshwarlal*[545] and held that the National Commission was, therefore, right in holding that the seller had no insurable interest in the goods thereby absolving the insurance company of the liability to reimburse the loss, if any, arising from the mis-delivery of

[545] *B.K. Wadeyar* V. *Daulatram Rameshwarlal* Air 1961 Sc 311.

such goods. However, the shipper company was wrong to not deliver the goods to the second consignee and would have to bear the costs.

VI. CONCLUSION

The potential mishaps that may occur to a shipping vessel or the goods in transit are several. This is where the concept of marine insurance plays an important role in protecting and safeguarding the insured object against all kinds of marine or sea perils. The sellers and shippers of goods are given ample choices by many insurance companies which provide insurance to a wide range of ocean going vessels and goods.

Contracts of marine insurance are principally for the indemnification for the loss and damages to cargos or shipping vessels against maritime perils. The fundamental feature of such a contract is to protect the owner, who is required to pay the premiums duly. The indemnification can be decided at the time of effecting the policy (agreed value) or after the occurrence of loss to the goods. However, all the insurer is liable to indemnify is only in respect of losses which result from the perils insured against. These contracts are based on the most integral principle of insurance contracts – *uberrima fidei*. They require full disclosure of all the material facts relating to the insurable object and a failure to do so would result in the termination of the contract, voidable at the option of the aggrieved party.

The contracts come with implied warranties and contain provisions for adding express warranties in the warranty clause. Various clauses can be inserted into the contract depending on the convenience in each transaction. In India, the marine insurance has been ever booming and has seen a growth rate of almost 76.9% in the premium received by marine insurers in the last four decades.

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