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RAJIV GANDHI NATIONAL UNIVERSITY OF LAW, PUNJAB
SIDHUWAL BHADSON ROAD, PATIALA - 147 006
TEL.: 0175 – 2391600, 2391601, 2391602, 2391603,
TELEFAX: 0175 – 2391690, 2391692
E-MAIL: info@rgnul.ac.in WEBSITE: www.rgnul.ac.in

EDITORIAL

The academic landscape is a privileged space, providing opportunity and platform to voice and ventilate our concern and also to offer alternate perspectives to the reality of the contemporary world. The digital landscape has facilitated the reach and ambit of the academia but has brought to fore some of the serious concerns regarding personal space and privacy. With government leaving no stone unturned for a country to join this revolution, some of the common fears, apprehensions and confusions are being brushed under the carpet. It's imperative for academia to expound the varied dimension of the new legislation and to comment, criticize and analyse accordingly.

Economics and Law are the most crucial cornerstones of contemporary world; each affecting an individual's life, beyond measure. Research must focus on the exact impact and its assessment on individual as well as an community. RGNUL Law Review appreciates the contribution for this issue, each explaining newer and different fields of law and its related disciplines; Liability of Police Officials, Wildfires, Third Gender, Life Imprisonment and Digital India Mission. As always we seek contributions those explore expand and offer analyses of significant contemporary ideas, which get cemented into legislations and policies.

Tanya Mander

RGNUL Law Review (RLR)

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TORTIOUS LIABILITY OF POLICE OFFICIALS: EMERGING TRENDS

Dr. Sanjay Gupta*
Kamya Singh**

The State or sovereign emerged in the society to check the exploitation of weak and to remove chaos from the society, by providing security to life, person and property[1], be it may an Indian or Foreign country. The purpose of creation of the office of the king was to establish an orderly society.

1. Theory of Divinity

Initially, the sovereign was attributed divinity and was working under the auspices of religious commands, which meant nothing else, but the omnipotent natural law[2]. The king was to perform maternal or paternal functions caring always for his subjects, providing them with food, clothing, lodging and protection in the times of distress[3]. Gradually the office became all powerful seeking obedience strictly from the subjects. Thus he enjoyed immunity from punishments and was considered absolute, irresistible authority[4].

This trend led to the evolution of the maxim, "King can do no wrong", especially in Britain, and any injury at the hands of Sovereign or his delegates was considered non-redressible. The only remedy was by way of writ of trespass which was granted as a matter of grace. Action can be maintained against the violators in their personal capacity and king used to compensate them[5]. However this led the people to believe that the King is trampling upon the rights of the people with ease with the help of the subordinates and no more the office is working for the benefit of people[6].

The radical transformation brought about in the 19th and 20th century checked the abuses of powers and the state was forced to recognise the vicarious liability for

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* Associate Professor, Department of Law, University of Jammu
** Research Scholar, Department of Law, University of Jammu

1 Ravindra Sharma, *Kingship in India*, 33-34, (1988).
2 Garath Jones, *The Sovereignty of Law*, 36, (1973)
3 Aparna Srivastava, *Role of Police in Changing Society*, Vol. 1, 3, (1997); see also, Rajindra Prashar, *Police Administration*, (1986).
4 *Canterbury* v. *Attorney General*, (1842) 1 Ph. 306
5 P. Ishwara Bhat, *Administrative Liability of the Government and Public Servants*, 18-20, (1983); see also, H. S. Street, *Government Liability: A Comparative Study*
6 *Supra* note 2.

the acts of its servants. In England the passing of the Crown Proceeding Act, 1947 was an attempt in this direction.

In India, the Welfare concept and the purpose theory surrendered to the dictatorial regime and the concept of the sovereign immunity was exploited to the utmost extend by the East India Company. The company became a ruling authority in India shifting from its commercial locales of activity. During the company's rule, this concept of sovereign function emerged in India. The liability of company was pleaded by the sufferers and company pleaded 'the doctrine of Immunity' on the basis of being a delegate of Crown.

2. Classification of Sovereign and Non-Sovereign Functions

The classification of the concept of sovereign and non-sovereign functions owes its origin to *Peacock, C. J.* in *Peninsular and Oriental Steam Navigation Company case*[7]. The obiter of this case was followed in justifying the non-liability of company or the State and it held that "Sovereign Functions" are those which are carried on by the sovereign himself or through officers or soldiers subordinate in exercise of powers given by sovereign, but restricted it to circumstances when they are on military duty and that too in relation of enemy or under judicial functions and moreover, which can't be carried on by private individuals in the absence of such powers acquired from the Sovereign; whereas the functions which can be carried on by the private individual without the aid of the powers given by the sovereign are the non-sovereign functions. This judgment changed the course of decisions in succeeding years and is followed or was followed by various Courts in India in coming years.

In India the liability of the State for the tortuous acts of the servants is provided by the Indian Constitution which provides that the Govt. of India may sue or be sued by the name of Union of India and the Govt. of a state and may, subject to any provisions which may be made by an Act of Parliament or of the legislature of such state enacted by virtue of powers conferred by this constitution, sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian states might have sued or been sued if this Constitution had not been enacted[8].

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7 (1868-69) 5 Bom. HCR App 1, 1.

8 Article 300

3. Pre Constitutional Position

Act of 1935 provided that the federation may sue or be sued by the name of Federation of India and a provincial Government may sue or be sued by the name of the Province, and without prejudice to the subsequent provisions of this chapter, may subject to any provisions which may be made by Act of the Federal or a provincial legislative enacted by virtue of powers conferred on that legislative by this Act, sue or be sued in relation to their respective affairs in the like cases as the secretary of State in council might have sued or been sued if this Act had not been passed[9].

Moreover, it excluded the personal liability of the officers for the acts done in their capacity subject to the personal judgment of Governor-General or Governor and provided that where a civil suit is instituted against a public officer in respect of any act purporting to be done by him in his official capacity, the whole or any part of the costs incurred by him and of any damages or costs ordered to be paid by him shall, if the Governor-General exercising his individual judgment so directs in the case of a person employed in connection with the affairs of the Federation, or if the Governor exercising his individual judgment so directs in the case of a person employed in connection with the affairs of a province, be defrayed out of and charged on the revenues of the Federation or of the province as the case may be[10].

Furthermore the preceding Act of 1915 provided that the Secretary of State in council may sue and be sued in the name of the Secretary of State in council as a body corporate. Every person shall have the same remedies against the Secretary of State in council or he might have had against the East India Company, if the Government of India Act, 1858 and this Act had not been passed. The property for the time being vested in His Majesty for the purposes of the Government of India shall be liable to the same judgments and executions as it would have been liable to in respect of liabilities, lawfully incurred by the East India Company if the Government of India Act, 1858 and this Act had not been passed. Neither the Secretary of State nor any member of the council of India shall be personally liable in respect of any assurance of contract made by or on behalf of the Secretary of State in council, or any other liability incurred by the Secretary of State in council or any member of the council or his or their official capacity but

9 S. 176
10 S. 271 (3)

all such liabilities and all costs and damages in respect thereof shall be borne by revenues of India[11].

Prior to it the position was similar under the Act of 1858 which provided that the Secretary of State in Council shall and may sue and be sued as well in India as in England, by the name of the Secretary of State in Council as a Body corporate ; and all Persons and Bodies Politic shall and may have and take the same Suits, remedies and Proceedings, Legal and Equitable, against the Secretary of State in council of India as they could have done against the said company ; and the Property and effects hereby vested in Her Majesty for the purposes of the Government of India or acquired for the said purposes, shall and liable to the same Judgments and executions as they would, while vested in the said company have been liable to in respect of Debts and Liabilities, Lawfully contracted and incurred by the said company[12]. Prior to it the company was ruling India and the sovereign immunity concept was prevailing in India.

An attempt was made in the year 1967, when a bill was prepared as to the Government liability in tort to put an end to judicial dilemma but which never saw the light of the day.

4. Judicial Approach

The Supreme Court in *Kasturilal* v. *State of U.P.*[13], where the question of liability of the state was to be determined, *Gajendra Gadkar*, C.J., fully approved the decision of *Peacock*, C. J., in the case of *Peninsular and Oriental Steam Navigation Co.*[14], stating per incuriam that it "enumerated a principle which has been consistently followed in all subsequent decisions" & observed: "It must be borne in mind that when the State pleads immunity against claims for damages resulting from injury caused by negligent acts of its servants, the area of employment referable to sovereign powers must be strictly determined. Before such a plea is upheld, the court of an undertaking or employment which is referable to the exercise of delegated 'sovereign power'."

In upholding the defense of immunity pleaded by the State of U. P., *Gajendragadkar,* C. J., further said, "The act of negligence was committed by

11 S. 32
12 S. 65
13 AIR 1969 SC 1039
14 1868-1869) 5 Bom HCR App 1, 1

police officers while dealing with the property of Ralia Ram, which they had seized in the exercise of their statutory powers. Now, the power to arrest a person, to search him and to seize property found with him, are powers conferred on the specified officers by the statute and in the last analysis, they are powers which can be properly characterized as sovereign powers, and so, there is no difficulty in holding that the act which gave rise to the present claim for damages has been committed by the employees of the respondent during the course of their employment; but the employment in question being of the category which can claim the special characteristic of sovereign power, the claim cannot be sustained."

In *State of M.P.* v. *Chironji Lal*[15] , the High Court held that the function of the State to regulate procession is delegated to the police by sec. 30 of the Police Act 1861 and the function to maintain law and order including quelling a riot is delegated to the authorities specified by section 144 CrPC is undisputedly the police. These function cannot performed by private individuals.... In view of the above discussion, this case falls within the dictum of *Kasturilal* case.

On the basis of this decision, the courts in India held taxing power of the government[16], power of the police to arrest, detention and confiscation[17], supplying meals to Army[18], road maintenance[19], Power of Armed Forces[20], etc., to be Sovereign functions; and the coal supply to Army[21], carrying team of Army[22], carrying away of wood[23], transporting army men from railway station[24], etc., to be non-sovereign functions.

5. Fundamental Rights

In cases of violations of Human Rights or Fundamental Rights[25], a liberal approach was followed in interpreting the Sovereign Function theory, thereby,

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15 AIR 1981 M.P. 65.
16 *Secretary of State for India* v. *Hari Bhanji*, ILR 5 Mad.27.
17 *Kasturilal* v. *State of UP,* AIR 1969 SC 1039; *State of M.P. v Chironji Lal,* AIR 1981 M.P. 65.
18 *Union of India* v. *Harbans Singh*, AIR 1959 Punj. 39.
19 *Secretary of State* v. *A. Cockraft*, AIR 1915 Mad 993.
20 *Supra* note 18.
21 *Union of India* v. *Smt. Jasso*, AIR 1962 Punj. 315
22 *Satyawati Devi* v. *Union of India*, AIR 1967 Del 98
23 *Roop Lal* v. *Union of India*, AIR1972 J&K 22
24 *Union of India* v. *Savita Sharma*, AIR 1979 J&K 6.
25 *PUDR* v. *State of Bihar*, AIR 1987 SC 355; see also, *Challa Ram Konda Reddy* v. *AP*, AIR 1989 AP 235; *Saheli* v. *Police Commissioner*, AIR 1990 SC 513.

bringing every such violation of Fundamental Rights within the arena of State's Liability. In some cases, the dictum was altogether discarded along with the immunity of the Crown concept. Latest developments signify the trend of eradicating this maxim of gone days in order to breed accountability[26]. Even the steps are taken to shift from vicarious liability to direct liability of the State. Even if, the negligence of the servants can't be ascertained, still the State is made liable.

In, *Rudul Shah* v. *State of Bihar*[27], the petitioner was acquitted by the Court of Sessions on June 3rd, 1968 but was kept in jail for 14 years even after his acquittal and was finally released on October 16, 1982. *Chandrachud*, C.J., held, "Under Article 32, the Supreme Court can pass on order for the payment of money in the nature of compensation consequential upon the deprivation of a fundamental right to the life and liberty of a petitioner.. Respect for the rights of individuals in the true bastion of democracy Therefore, the State must repair the damage done by its officers to the petitioner's rights". Taking into consideration by the Government of Bihar, the Supreme Court ordered the State to pay to the petitioner a further sum of Rs. 30,000% as an interim measure in addition to the sum of Rs. 5,000% already paid by it.

In, *Bhim Singh* v. *State of J&K* [28]facts were that on August 17, 1985, the opening day of the Budget session of the legislative Assembly, Shri Bhim Singh was suspended from the Assembly. He questioned the suspension in the High Court of Jammu and Kashmir. The order of suspension was stayed by the High Court on 9th September, 1985. On the intervening night of 9th &10th September, 1985, when he was proceeding from Jammu to Srinagar, en route, at about 3.00 a.m., he was arrested at Qazi Kund, a place at about 70 kilometers from Srinagar, and was taken away by the police. As it was not known where he had been taken away and as the efforts to trace him proved futile, his wife Smt. Jayamala, acting on his behalf, filed the application for the issue of a writ to direct the respondents to produce Bhim Singh before the Court, and to declare his detention illegal and to set him at liberty. On Sept. 16, 1985, Shri Bhim Singh was released on bail by the learned Additional session Judge of Jammu before whom he was produced. Shri Bhim Singh filed a supplementary affidavit on 20th September,

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26 *N. Nagendra Rao* v. *State of AP*, AIR 1994 SC 2663.
27 AIR 1983 SC 1086.
28 AIR 1986 SC 494.

1985 stating more facts in addition to what had already been stated by Smt. Jayamala in the petition. He categorically asserted that he was kept in police look up from 10th to 14th and that he was produced before a Magistrate for the first time only on the 14th.

Chinnappa Reddy, J., held,

> When a person comes to the Supreme Court with the complaint that he has been arrested and imprisoned with mischievous or malicious intent and that his constitutional and legal rights were invaded, the mischief or malice may not be washed away or wished away by his being set free. In appropriate cases the Court has the Jurisdiction to compensate the victim awarding suitable monetary compensation.
>
> Where a member of the legislative Assembly was arrested while en route to Assembly and in consequence, the member was deprived of his constitutional rights to attend the Assembly session. The responsibility for arrest lay with higher echelons of the Govt., it was a fit case for compensating the victim by awarding compensation.
>
> Police officers who are the custodian of Law and order should have the greatest respect for the personal liberty of citizens and should not flout the Laws by stooping to bizaric acts of lawlessness.

Another case concerning the misuse of powers by the police came before the Supreme Court of India where People Union of Democratic Rights filed an application. In the case, i.e., *People Union for Democratic Rights* v. *State of Bihar*[29], the facts were that on 19th April, 1986, 600 to 700 poor peasant and landless people, mostly belonging to the backward classes had assembled for holding a peaceful meeting within the compound of Gandhi Library in Arwal, a place within the District of Gaya in the State of Bihar. Without any previous warning by the police or any provocation on the part of the people who had so assembled, the superintendent of police reached the spot with police force; surrounded the gathering and opened fire as a result of which several people were injured and at least 21 persons including children died.

The Supreme Court attributed the vicarious liability on the state for such ghastly act on the part of the police and provided compensation to the relatives of victims.

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[29] AIR 1987 SC 355

In *Challa Ram Konda Reddy* v. *State of A.P*[30], High Court of Andhra Pradesh openly followed the trend of upholding the concept of fundamental rights in cases of tortious act committed by the servant of the State.

In this case, a person was arrested and was remanded to judicial custody. He complained to the police as to the imminent danger to his life. But the police did not take cognizance of it. Some person threw a bomb inside the jail and killed the person.

The High Court held,

> The theory of sovereign function does not clothe the State with the right to violate the fundamental right to life and liberty guaranteed by Art 21 and no such exception can be read into it by reference to Art. 300(1). An under- trial prisoner though deprived of liberty by virtue of sovereign function is still entitled to the protection of life. The prisoner brought to the notice of the authorities that he apprehended danger to life while in Jail and requested to arrange for extra guards. But they did not pay heed to it and on the contrary because of the negligence of the guards on duty, bomb was hurled at the prisoner and he died. A suit for compensation against the State would be maintainable for the default of its officers. It is necessary to ensure that the State officials do not act with gross negligence and do not abuse their powers to the detriment of life and liberty of citizens. Concept of sovereign powers is not an exception to the right to freedom of life. The fundamental right to life guaranteed by Art 21 cannot be deflated by pleading the archaic defence of sovereign functions. The said theory of sovereign function does not clothe the State with the right to violate the fundamental right to life and liberty, guaranteed by Art. 21... It is true that the arrest in the course of investigation and detaining them in Jail was referable to sovereign power or function of the State. But the prisoner lost life not by due process of law but due to failure or negligence of police to perform their duty. In view of the negligence on the part of the police officials in failing to provide adequate guard to protect the life of the deceased, more so when the deceased apprehended danger to his life and also expressed the need, the invocation of the doctrine of sovereign immunity by the State was not permissible.

In, *Saheli, a women's Resources Centre through Ms. Nalini Bhanot,* v. *Commissioner of Police, Delhi*[31], a writ petition was filed by the organisation on behalf of Kamlesh Kumari and Maya Devi who were residing is a building on rent. Their land-lords wanted them to vacate the premises and tried all ways to get them evicted in collusion with S.H.O of Anand Parbhat police station. The S.H.O. used to threaten Kamlesh Kumari and on one day took away the child of

30 AIR 1989 AP 235
31 AIR 1990 SC 513

the lady. Later on, they were rescued from S.H.O by the lawyer of the lady, but her son succumbed to the injuries suffered at the hands of illegal and brutal beating of the police.

Ray, J., held,

> It is well settled now that the State is responsible for the tortuous acts of its employees. The respondent no.2, Delhi administration is liable for payment of compensation to Smt. Kamlesh Kumari for the death of her son due to beating by the police. The Delhi Administration can take appropriate or part thereof from the officers who will be found responsible, if they are so advised.

The Supreme Court of India, keeping pace with the new trend evolved, rejected the defense of sovereign immunity in case of violation of a Public Right, i.e, Fundamental Right. In *Nilabati Behara* case[32] the petitioner's son was taken into custody by the police in connection with the investigation of an offence of theft. The next day, his dead body was found near a railway track with fatal injuries. An inquiry was conducted in this case to ascertain the cause of death and it was proved that death resulted from injuries which were result of police atrocity.

Verma, J., held,

> A claim in public law for compensation for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution, is an acknowledged remedy for enforcement and protection of such rights, and such a case based on strict liability made by resorting to Constitutional remedy provided for the enforcement of a fundamental right is distinct from and in addition to the remedy in private law for damages for the tort, resulting from the contravention of the fundamental right. The defense of sovereign immunity being inapplicable, and alien to the concept of guarantee of fundamental rights, there can be no question of such a defense being available in the Constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution, when that is the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of their powers. The enforcement of the fundamental right is claimed by Court to provide the remedy in public law under the Constitution by recourse to Arts. 32 and 226 of the Constitution.

- Negligence

Sovereign immunity has been the shield behind which government official errs and escapes penalty or punishment. What this notion means is that the

[32] *Smt. Nilabati Behara* v. *State of Orissa*, AIR 1993 SC 1960

government being a sovereign entity, always acts bonafidely and hence cannot be treated at par with individuals. In other words the officials who act on behalf of the government or State in its all inclusive sense, are covered by immunity clause. Now the Supreme Court has stripped the State of this age old privilege, on the well taken argument that in a democracy sovereignty lies with the common man and any attack on him or his dignity violates the basic cannons of society and, therefore, invites action under ordinary law. The Supreme Court decision in *N. Nagendra Rao & Co.* v. *State of Andhra Pradesh*[33] through a two judge bench has endorsed this stand and laid down principle that the State is "not above law" and has no power to deprive the common man of his property. The state or the official concerned if found negligent are guilty of "abuse of power". The Bench felt that the distinction between the government (the public sector) and private undertaking is withering away and so what applies to the latter should also apply to the former.

The S.C. has ruled in *Nagendra Rao's* case that the vicarious liability of the State is linked with the negligence of its officers, if the officer can be sued personally, there is no reason or rationale for the proposition that the State cannot be sued. The determination of vicarious liability of the State being linked with negligence of its officers, if they can be sued personally for which there is no dearth of authority and the law of misfeasance in discharge of public duty having marched ahead. There is no rationale for the proposition that if the officer is liable, the State cannot be sued. The doctrine has become outdated and sovereignty now vests in the people. Therefore there is no rationality in conferring immunity on the State.

- The Welfare State

In 1962, the S.C. for the first time since the Constitution came into force, was called upon to consider the question of state liability for the tortious acts of its servants in the *State of Rajasthan* v. *Vidyavati*[34].

Referring to the P&O case, the court derived the proportion that the govt. would be liable for damages occasioned by negligence of its servants if the negligence was such as would render an ordinary employer liable. At another place, the

33 AIR 1994 SC 2663
34 AIR 1962 SC 933

court observed that to uphold the vicarious liability of the State would be only to recognize the old established rule of more than 100 years .

Along with this, the court also made certain general observations underlying the need to hold the State liable vicariously. "Viewing the case from the point of view of first principle", observed the court, "there should be no difficulty in holding that the state should be as much liable for tort in respect of a tortious act committed by its servants within the scope of his employment and functioning as such, as any other employer." At another place, the court stated, "Now that we have, by our constitution established a Republic form of government, and one of the objectives is to establish a socialistic state with its varied industrial and other activities, employing a large army of servants, there is no justification in principle, or in public interest that the State should not be held liable vicariously for the tortious acts of its servants."

- Act of State

In *Secretary of State for India* v. *Hari Bhanji*[35],the respondents, after having purchased a quantity of salt at Bombay and paid excise on it at the rate leviable under the law, dispatched it by sea to certain parts in the Presidency of Madras. While the salt was in transit, Act XVIII of 1878 raised the duty on the salt. On landing of the salt in the Presidency, the collector required the respondents to pay the difference between the excise already paid and the raised duty. The respondents paid the difference for having the salt, but instituted the suit to recover the additional sums, they had been compelled to pay. Among other pleas the appellant pleaded that the court had no jurisdiction to entertain the suit.

Turner, C.J., held that two principal rules regulated the maintenance of proceedings of law by a subject against a State, the one having relation to the personal status of the defendant, the other to the character of the act in respect of which the relief is sought. It is an acknowledged attribute of sovereignity and has been described as a rule of universal law that a sovereign is not liable to suit is his own courts without his consent.

Hon'ble Judge held, "The East India Company was not a sovereign and the personal exemption from suit, which is the attribute of sovereignty, did not attach to it as the act complained of is professedly done under the sanction of

[35] ILR 5 Mad 273 (1882)

municipal law and in the exercise of powers conferred by that law, the fact that it is done by the sovereign power and does not oust the jurisdiction of the civil court. Acts done in the exercise of sovereign powers, but which do not profess to be justified by the municipal law are what we understood to be the acts of State of which municipal courts are not authorised to take cognizance".

In *State of Rajasthan* v. *Smt. Vidyawati*[36], the Supreme court held that the injuries resulting in death of Jagdish Lal were not caused while the jeep was being used in connection with the sovereign power of the State, so the state is liable to Mrs. Vidyawati. The important points which emerge out of the judgment are:

1. Doctrine of state immunity was never applicable to India in the form as it applied in England. The East India Company could not have claimed any such immunity as was available to sovereign.
2. There is similarity of the nature, functions and obligations of the present day government to that of the East India Company.
3. The principle of sovereign immunity is now a discarded doctrine. When the rule of immunity in favour of the Crown, based on common law in the United Kingdom has disappeared from the land of its birth, there is no legal warrant for holding that it has any validity in this country particularly after the coming in to operation of the Constitution.

- Compensatory Jurisprudence

In Rudul Shah v. *State of Bihar*[37], a three judge bench of the Supreme Court under writ jurisdiction, passed an order of compensation for the violation of Article 21 and Article 22 of the Indian Constitution. In this case, the petitioner was unlawfully detained in prison for 14 years even after his acquittal. On finding that his detention was wholly unjustified, he demanded compensation for the illegal detention. Although an ordinary remedy through a civil suit was available to the petitioner for claiming compensation, the Supreme Court held that it wouldn't be doing justice merely by passing an order of release from illegal detention and in fact had the power to direct the State Government to pay compensation. It ordered a sum of Rs 30,000 to be paid by the State within two

36 AIR 1962 SC 933; *Bakshi Amrik Singh* v. *Union of India,* (1973) 75 Punj. L.R. 1 (I.B.)
37 AIR 1983 SC 1086

weeks of the order. In *Sebastian Hongray* v. *Union of India*[38], the Supreme Court awarded compensation for torture, agony and harassment of two ladies whose husbands had been missing after they were taken to an army camp by army officials in Manipur, and for the failure of the detaining authority to produce the missing persons. Exemplary costs were awarded for the same and the single judge bench did so following *Rudul Shah* but without indicating any further reasons.

In *Saheli* v. *Commissioner of Police, Delhi*[39], a nine year old child was severely beaten up by the police and who later died. The court held that the Delhi Administration is liable to pay compensation of Rs. 75,000 to the mother of the deceased child.

In *PUDR* v. *Delhi Police Headquarters*[40], a labourer doing some work in the police station was severely beaten to death, and the court in that case directed the Delhi administration to pay Rs 50,000 as compensation.

In *State of Maharashtra* v. *Ravi Kant Patil*[41], an under-trial prisoner was handcuffed, tied with a rope and paraded through the streets, and was subjected to humiliation and indignity. The Supreme Court relying on *Rudul Shah* agreed with the decision of the High Court that a compensation of Rs 10,000 be paid by the State Government. The court however deliberated over the question of who is to pay the compensation- whether the individual police officer is to be held liable or the State. Making an argument of vicarious liability, the court stated that "the police officer has acted only as an official and even assuming that he has exceeded his limits and thus erred in taking the under-trial prisoners handcuffed, still we do not think that he can be made personally liable."

In Nilabati Behara v. *State of Orissa*[42] is a case of custodial death where the mother reported the death of her son as a result of multiple injuries inflicted on him while he was in police custody. A three judge bench of the Supreme Court concluded that the cause of death was police brutality which was a violation of fundamental rights and hence awarded compensation under Article 32 of the Constitution.

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38 AIR 1984 SC 571 and AIR 1984 SC 1026
39 AIR 1990 SC 513
40 (1989) 4 SCC 730
41 AIR 1991 SC 871
42 AIR 1993 SC 1960

In *PUCL* v. *Union of India*[43] the issue before the Supreme Court was whether it is open to the State to deprive a citizen of his life and liberty otherwise than in accordance with the procedure prescribed by law and yet claim an immunity on the ground that the said deprivation of life occurred while the officers of the State were exercising the sovereign power of the State. The Court concluded in the negative. The court ruled that monetary compensation is an appropriate and indeed an effective remedy in case of infringement of the fundamental right of life of a citizen by a public servant of the State who is vicariously liable for their acts. The claim of the citizen is based on the principle of strict liability to which the defence of sovereign immunity is not available and the citizen must receive the amount of compensation from the State.

Exercising its epistolary jurisdiction, in *Sube Singh* v. *State of Haryana*[44], a writ under Article 32 was instituted in the Supreme Court, based on a letter it received from the petitioner alleging illegal detention, custodial torture and harassment to family members of the petitioner. The three judge bench of the Supreme Court furthered the principle laid down in *Nilabati Behra*[45] by asserting that compensation as a remedy will be available only if the violation of Article 21 involving custodial death or torture is established as opposed to cases where the violation is doubtful . It suggested that courts must although zealously protect fundamental rights of those illegally detained or subject to custodial violence, but should also stand guard against false, motivated and frivolous claims and to enable the police to discharge their duties fearlessly and effectively.

P.P. Unnikrishnan v. *Puttiyottil Alikutty*[46] is a case where two police officers were accused of having kept a complainant illegally in lock-up for several days and torturing him. The division bench of the Supreme Court had to deal with a defense raised by the police officers under section 64 of the Kerala Police Act wherein there are procedural safeguards against initiation of legal proceedings against police officers acting in good faith in pursuance of any duty imposed or authority conferred by the State. The Supreme Court considered the provision to be based on the rationale of section 197 of the CrPC. Therefore, the Supreme Court discussing the scope of section 197(1) held that "there must be a

43 AIR 1997 SC 1203
44 (2006) 3 SCC 178
45 AIR 1993 SC 1960
46 AIR 2000 SC 2952

reasonable connection between the act and the discharge of official duty; the act must bear such relation to the duty that the accused could lay a reasonable, but not a pretended or fanciful claim, that he did it in the course of the performance of his duty."

Uttarakhand Sangharsh Samiti v. *State of U.P.*[47] where a division bench of the High Court of Allahabad was faced with a case of mass human rights violations including firing by the police and paramilitary forces on an assembly of protestors, resulting in the loss of twenty four lives, mass scale molestation and rape, illegal detentions and incarceration of large number of persons. It was stated that acts of wrongful restraint and detention, planting weapons to show fake recoveries, deliberate shooting of unarmed agitators, tampering with or framing incorrect records, commission of rape and molestation, etc., are neither acts done, nor purported to be done in the discharge of official duties. No sanction of the Government is required in ordering prosecution of such public officials. It granted exemplary damages of Rs 10 lakhs to the 24 persons killed, Rs 10 lakhs to each of the women raped and Rs 5 lakhs to each of the women molested.

The following points are clear from a perusal of the aforementioned precedents. *Firstly,* It is clear that a violation of fundamental rights due to police misconduct, can give rise to a liability under public law, apart from criminal and tort law. *Secondly*, that compensatory jurisprudence can be an effective tool for violation of fundamental rights. *Thirdly,* it is the State that is held liable and therefore the compensation is borne by the State and not by the individual police officers found guilty of misconduct. *Fourthly*, the Supreme Court has held that the standard of proof required for proving police misconduct such as brutality, torture and custodial violence and for holding the State accountable for the same, is high. It is only for patent and incontrovertible violation of fundamental rights that such remedy can be made available; and not for the doubtful cases. *Fifthly,* the doctrine of sovereign immunity does not apply to cases of fundamental rights violation and hence cannot be used as a defence in public law, and *lastly*, the State can recover the amount from the erring officer if it desires so.

Apex court while examining the matter in *D.K. Basu* v. *State of West Bengal*[48] expressed similarly sentiments and observed:

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47 (1996) 1 All WC 469

48 AIR 1997 SC 610

> Custodial violence, including torture and death in the lockups, strikes a blow at the Rule of law, which demands that the powers of the executive should not only be derived from law but also that the same should be limited by law Custodial violence is a matter of concern. It is aggravated by the fact that it is committed by persons who are supposed to be protector of the citizen. It is committed under the shield of uniform and authority in the four walls of a police station or lockup, the victim being totally helpless...

- Personal Liability

In the case of *Mohd. Zahid* v. *Govt. of NCT of Delhi*,[49] the TADA Court held the appellant guilty and hence an appeal was filed in the Apex Court pleading that he was not guilty of the charges leveled against him. In his specific defense he pleaded that the police apprehended him, and after detaining him for three days in the police post, foisted a false case against him. He asserted that no country made firearms or cartridges were recovered from him. The Apex Court, setting aside the conviction held that appellant has been a victim of prolonged illegal incarceration due to machination of police personnel. Therefore, it directed the Delhi Government to pay compensation to the sum of Rs. 50,000/- to appellant which could be recovered from the erring police officers.

In *State of Maharashtra* v. *Christian Community Welfare Association*,[50] the Court also directed the State to pay a sum of Rs. 1,50,000/- to the widow of the deceased as compensation. The Court also observed that the amount of Rs. 1,50,000/- directed to be paid as compensation to the second petitioner may ultimately be recovered from the police officers concerned pro-rata depending upon their involvement in the death of deceased.

In *Common Cause, A Registered Society* v. *Union of India*[51], the apex court held that it is high time that the public servants should be held personally responsible for their malafide acts in the discharge of their functions as public servants. With the change in socio-economic outlook, the public servants are being entrusted with more and more discretionary powers even in the field of distribution of Government wealth in various forms. If a public servant abuses his office either by an act of omission or commission, and the consequence of that is injury to an individual or loss of public property, an action may be maintained against such

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49 (1198) 5 SCC 419
50 2004 Cri. L.J. 14
51 AIR 1996 SC 3538

public servant. However the position was reversed in *Common Cause, a Registered Society,* v. *Union of India.*[52]

In *Shiv Sagar Tiwari* v. *Union of India* [53], the court directed, after examining all the facts and circumstances of the case, Smt. Shiela Kaul to pay a sum of Rs. 60 lacs (on all counts) as exemplary damages to the Government Exchequer. Since the property with which Smt. Shiela Kaul was dealing was public property, the Government which is "by the people" has to be compensated.

The Present State of the Sovereign immunity was explained the *Hazur Singh Case*[54] in following words:

India is constitutional democratic state governed by Rules of law and the state cannot, claim any exemption from payment of compensation for illegal and wrongful deed of its officials on the so called principle of sovereign immunity. Time has come to give good bye to the doctrine of sovereign immunity. And to sweep of this archaic rule, which has become outdated in the notion of modern development. In Indian democratic republic, the sovereignty lies on the people and the government, which is run by the people, elected by the people, cannot seek immunity against themselves.

6. Conclusion

The trend to set free the Indian legal system from the paralyzing effects of the Sovereign Function theory can be seen from the preceded analysis but yet due to over-ruling trends and recourse to the penumbral areas, this concept is resurrecting time and again. The total shift demands a clear panoramic vista firstly as to the purpose and emergence of Sovereign or State.

The Concept of Sovereign Functions is a gift of the British Justice System, but the concept emerged just because *Peacock*, C.J, wanted to distinguish and justify the imposition of liability on the company. Even if, one agrees to that, the adherence to it, is unwarranted. Moreover, even in the country, where this immunity concept was conceived and delivered has long back given a death blow to it. But due to the refer-back approaches owing to Article 300, it is ruling Indians from the grave.

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52 AIR 1999 SC 2979

53 AIR 1997 SC 1483.

54 *Hazur Singh* v. *Behari Lal,* AIR 1993 SC 51.

Moreover, Article 300 was incorporated to persist with the scenario at that time and was subjected to any law made by Parliament or State Legislature, but which was not made barring some areas of tortious liability. A futile attempt was, no doubt, made; but was centralised to safeguard the use of power by Army and Police. Any legislation in this regard is a felt necessity but immunity to any department will largely nullify the remedy it will provide. The purpose of legislation should be to balance the conflicting interests and firstly, the area of conflict should be properly analysed.

The people want a government of rule of Law and not of men. And whenever power is given to men, it is supposed to corrupt the best of the minds. So power should be properly checked in order to check the corruption of mind. The balance is needed between despotism and anarchy.

The power should not be misused in any way and whenever these is misuse of power, the State can be held liable because it is duty of the State to safeguard and check from misuse of power. Whenever people surrender, they surrender to reasonable and just use of power and not to misuse or abuse of power; so power should be used hesitatingly and not at will.

Thus, in order to meet growing needs of the rapidly changing society the doctrine of tortious liability of the state requires to be made adaptable to the present socio-economic conditions of the society. On account of these reasons, the First Law Commission after making exhaustive surveys of case law, made the following suggestions in 1957[55]:

1. The old distinctions should no longer be invoked to determine the liability of the state. The law laid down by *Sir Charles Turner* in *Hari Bhanji* case is correct.

   (a) Recognition of liability of the state for the torts committed by its employees during the course of their employment, for the torts arising under the common law duty of ownership and possession; for breach of duty by its employees, for the wrongful exercise of power by its employees causing damage, but not for the acts authorized by statute, which in themselves, are injurious.

[55] Law Commission of India (First Report), p. 32 as quoted by Ishwara Bhat *op. cit.*, p. 39.

(b) In its rights and duties, the state should be equivalent to a private employer, the state should be entitled to indemnity from the errant employee.
(c) Recognition of immunity of the state from any liability should be limited for the acts of state, acts done under judicial power, acts done in pursuance of external affairs and defense.

After a close scrutiny of the judicial pronouncements of various High Courts and the Supreme Court some suggestions are emerging as under:

i) Need for an Enactment on Tortious Liability of State

In order to meet the growing needs of people in changing socio-economic scenario there must be a legislation which prescribes the state's accountability for infringement of legal rights a citizen by State's employees.

ii) The touchstone of distribution between Sovereign and Non-Sovereign Function must be discarded:

The distinction between sovereign and non-sovereign function causes a lot of confusion and ambiguities not only among various courts but almost always within each court. Therefore, such distinction is not just and has not been able to correlate the liability of the state with its present role in a welfare state. In some exceptional circumstances it is just to recognize instances of sovereign activities of the State; that is war, defense and diplomatic ties with another Country.

iii) Need for More Liberal Approach by Judiciary

Mere legislation would not be enough to lay principles of state responsibility if judiciary does not take liberal approach towards law of state accountability. Since the doctrine of state immunity has emanated from the judiciary, so the responsibility to change it according to changing socio-economic circumstances also lies primarily on judiciary.

iv) Need for Compensating the Aggrieved Person

In present complex society infringement of legal right of person either by police atrocities or by negligence on the part of state government officers is very common. So in order to check or prevent these violations, the judiciary should adopt sympathetic attitude and award compensation to aggrieved party and the burden of proof to prove innocence must lie on the tort-feasors.

v) Need for a Departmental Reconciliation Machinery for Tortious Liability

The establishment of an unbiased and independent departmental reconciliation settlement tribunal would be a right step in the proper direction to scrutinize all the cases of tortious liability arising out of the actions and inactions of that department before defending or contesting the claim in the higher courts. For its proper functioning it is expedient that such a tribunal should be independent of political and executive control of the state.

vi) The State should be held Liable for Wrongful Acts of Its Employee

The existing tortious liability of state in India is not sufficient to provide justice, therefore, the rigid distinction between sovereign and non-sovereign function should be discarded except in certain exceptional cases. The ambit of tortious liability of State for the wrongful acts of its employees should be expanded.

vii) Personal liability

The police officials as well as other officials should be made personally liable for compensation and in situations where the State pays the amount; norms should be devised for the recovery of the amount. As the State is only a juristic person and the tort is committed by the natural person who has the capacity to understand the nature of his act and the following consequences.

LEGAL ASPECTS OF CROSS BORDER MERGERS UNDER NEW REGULATORY REGIME IN INDIA: A STUDY OF INDIA, USA AND UK JURISDICTIONS

Priyanka Dhar *
Anindhya Tiwari **

1. Introduction

Crises that threaten the very existence of a company can hit them all: medium sized companies, or multinationals, corporations with or without a big name or famous brands, businesses of any size and in every industry. It becomes very essential for companies to survive the market pressure. Merger and acquisitions is a restructuring tool available to companies aiming to expand and diversify[1] their businesses for various reasons whether it is to gain competitive advantage, reduce costs or unlock values. In commercial parlance, merger and acquisitions essentially means an arrangement whereby one or more existing companies merge their identity into another existing company or form a distinct new entity.

Mergers and acquisitions (hereinafter referred as "M&A") are used as a means to achieve crucial growth and are becoming more and more accepted as a tool for implementing business strategy, whether they involve Indian companies wanting to expand or foreign companies wishing to acquire market share in India. Some of the other motivating factors behind mergers and acquisitions are the desire to acquire a competency or capability, to enter into new markets or product segments, to enter into the Indian market generally, to gain access to funding resources, and to obtain tax benefits[2]. Every merger or acquisition involves one or more methods of obtaining control of a public or private company, and the legal aspects of these transactions include issues relating to due-diligence review, defining the parties' contractual obligations, structuring exit options, and the like.

M&A is driven by many factors like strength of the currency and stock market, tax, regulatory and technological changes, and level of interest rates. The influence of emerging-market targets and buyers on M&A market is not confined

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* Assistant Professor, School of Law, Galgotias University, Greater Noida, Uttar Pradesh
** Assistant Professor, School of Law, Galgotias University, Greater Noida, Uttar Pradesh

1 Michael Blatz et al., *Corporate Restructuring Finance in Times of Crisis* (2006)

2 Ottorino Morresi and Alberto Pezzi, *Cross-Border Mergers and Acquisitions Theory and Empirical Evidence* (2014)

to any particular industry but represents a new, recent, and global phenomenon involving almost all sectors. M&A activity in India is booming. In particular, the percentage of cross-border transactions has risen significantly. Businesses now operate in a global economy where national borders mean little to multinationals employing worldwide personnel and financial strategies to suit their strategic objectives. The past decade has witnessed the phenomenal growth of the Indian software industry and is responsible for putting India back on the world economic map. Mergers and acquisitions are necessary for the survival of the Indian industry if they wish to become global players and have a worldwide presence. It is evident that the appetite of Indian companies for making global acquisitions has grown bigger with time. Vodafone's acquisition of a controlling interest in Hutchison Essar and Tata Steel's acquisition of the European steelmaker, Corus headlined a frenzy of acquisitions of foreign companies by Indian corporate enterprises in the past year.

For years, M&As between developed countries dominated the deal market because governments of many emerging countries had long imposed restrictions[3] and barriers to inward and outward capital flows, limits on capacity extension, stringent licensing requirements to enter new businesses, etc., which inhibited the rise of deals between developed and emerging economies as a result of poor or absent growth avenues. In addition, until recently, technological innovation, transportation, and communication, that advanced at astonishing rates only in the last decades, did not allow easy, fast, and cheap combination, integration, and communication between business firms located in geographically and culturally distant countries. The few deals involving developed and emerging economies were also initiated almost exclusively by developed-market buyers that acquired either minority or majority stakes in emerging-market targets. There has recently been a steady transition in a number of emerging economies as local governments tried to liberalize their closed economies. This has not only spurred deals originated by developed-market acquirers but also, and especially, the acquisition of developed-market firms by emerging market companies.

3 In India, cross border mergers specifically came under the scanner of the *Companies Act*, 1956 which only allowed one- way cross border mergers i.e., only a foreign company was allowed to merge with an Indian company. Further strict compliance of the *Foreign Exchange Management Act*, 1999 with respect to cross border mergers was required.

Company law in India has undergone a complete overhaul and a new law was finally passed in 2013. However, only 98 sections of the new *Companies Act*, 2013 ("2013 Act") have been brought into force and the provisions relating to mergers covered in Sections 230 to 240 are yet to be notified[4]. Until then, this court driven process will continue to be governed by Section 391-396A of the *Companies Act*, 1956 and the Companies (Court) Rules, 1959 (collectively referred to as "1956 Act"). In India, the relevant laws that may be implicated in a cross border merger or acquisition also include the income tax law, the stamp duty act, the foreign exchange laws, competition laws, and securities regulations, among others.

2. Mergers and Acquisitions: A Conceptual Analysis of Key Terms

Mergers and acquisitions are an important part of corporate restructuring. The basic concept behind mergers and acquisitions is that two companies together are of more value than those two companies when they are separate entities. It is basically a consolidation of two companies. Therefore, the understanding of mergers and acquisitions is of great importance in today's world where newspapers almost every day tell stories of such taking place around the globe. Some business sectors where mergers and acquisitions take place are finance, pharmaceuticals, chemicals, oil, telecommunications, IT etc. It becomes essential to analyse certain key concepts relating to mergers and acquisition.

2.1 Definition of "Mergers and Acquisitions"

Mergers and acquisitions (M&A) can conventionally be defined as the purchase of entire companies or their specific assets by another company. M&A transactions therefore imply that existing assets are combined in a new shape. In a frictionless world, asset recombination occurs whenever corporate assets are not used in the best possible way. The new asset combination should therefore be more productive than the old one. This means that corporate assets should be channelled toward those combinations that assure their highest productivity. Put differently, the combination of two or more assets should be more valuable than the sum of its parts.

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4 A. Rammaiya , *Commentary on the Companies Act*, 2013. Vol. III (2014)

Mergers have also been defined as a strategy of joining two businesses. Basically a merger occurs when two companies join or merge to form one single company but with a new name. 'M&As represent a marriage.'[5] This is because a merger often takes place between two companies that are equal in size and stature and with their cooperation, thus the term 'merger of equals'. This may not be true always or for all the companies that merge. Sometimes a merger is not a marriage between two equals. Hence: 'When two companies differ significantly in size, they usually merge.'[6]

Acquisition refers to a situation where one firm acquires another and the latter ceases to exist.[7]Simply put in what happens in an acquisition is that one business buys another usually smaller business that might be absorbed within the parent organization or run as a subsidiary. A company/organization that attempts to merge/acquire with some other company/organization is generally referred to as the acquiring firm[8]. On the other hand the company/organization that is being acquired is known as the target company/organization.

The legal dictionary defines the term as:

> *A combination of two companies where one corporation is completely absorbed by anothercorporation. The less important company loses its identity and beco mes part of the more important corporation, whichretains its identity. A merger extinguishes the merged corporation, and the surviving corporation assumes all the rights,privileges, and liabilities of the merged corporation. A merger is not the same as a consolidation, in which two corporationslose their separate identi ties and unite to form a completely new corporation.*[9]

2.2 *Definition under the Income Tax Act, 1961*

The Income Tax Act defines the term amalgamation rather than the terms M&A as:

> "amalgamation", in relation to companies, means the merger of one or more companies with another company or the merger of two or more companies to form one company (the company or companies which so merge being referred to as the amalgamating company or companies and the company with which

5 Valerie Garrow et al., *Reaping the Benefits of Mergers and Acquisitions* (2002).
6 H. R. Machiraju, *Mergers, Acquisitions and Takeovers*, (2007).
7 *Ibid.*
8 Harjit Singh, *Corporate Restructuring through Disinvestment [An Indian Perspective]* (2007)
9 *http://legal-dictionary.thefreedictionary.com/Mergers+and+Acquisitions*

they merge or which is formed as a result of the merger, as the amalgamated company) in such a manner that—

(*i*) all the property of the amalgamating company or companies immediately before the amalgamation becomes the property of the amalgamated company by virtue of the amalgamation ;

(*ii*) all the liabilities of the amalgamating company or companies immediately before the amalgamation become the liabilities of the amalgamated company by virtue of the amalgamation ;

(*iii*) shareholders holding not less than [three-fourths] in value of the shares in the amalgamating company or companies (other than shares already held therein immediately before the amalgamation by, or by a nominee for, the amalgamated company or its subsidiary) become shareholders of the amalgamated company by virtue of the amalgamation, otherwise than as a result of the acquisition of the property of one company by another company pursuant to the purchase of such property by the other company or as a result of the distribution of such property to the other company after the winding up of the first-mentioned company ;][10]

2.3 Provisions applicable under Companies Act, 1956

The *Companies Act*, 1956 (the "*Companies Act*"), sets forth provisions relating to mergers and acquisitions. It also covers related issues, such as reorganizations, compromises and arrangements with creditors, and also becomes relevant while structuring an investment in a private-equity transaction (including matters relating to the type of shares and return available).Procedures under the *Companies Act* are far from simple. Under the *Companies Act*, a merger (referred to in the *Companies Act* as an "amalgamation") is considered to be a scheme of arrangement[11] made with members[12] of a company. In any such scheme, both the amalgamating (i.e., merging) company or companies and the amalgamated (i.e., survivor) company are required to comply with the requirements specified in Sections 391 through 394 of the *Companies Act*, which, inter alia, require the approval of a "high court" and of the Central Government. Sections 394 and 394A of the *Companies Act* set forth the powers of the high court and provide for the court to give notice to the Central Government in connection with an amalgamation of companies. It is not enough

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10 the *Income Tax Act*, 1961, S. 2 (1B)

11 An "arrangement" includes a reorganization of the share capital of the company by the consolidation of shares of different classes, or by the division of shares into shares of different classes, or by both those methods. [S. 390 (b), the *Companies Act*, 1956].

12 "Members" include every person holding share capital of a company and whose name is entered as beneficial owner of record.

for only one of the companies alone to comply with the necessary statutory formalities. While hearing the petitions of the companies in connection with the scheme of amalgamation, the court will give the petitioning company an opportunity to meet all the objections that may be raised by shareholders, creditors, the government and others. It is, therefore, necessary for the company to be prepared to face the various arguments and challenges that may be raised. Then, by court order, the relevant properties and liabilities of the amalgamating (i.e., transferor) company are transferred to the amalgamated (i.e., transferee) company and the amalgamating company is dissolved without undergoing the process of winding up.[13] The *Companies Act*'s provisions governing amalgamation may be applicable to a cross border amalgamation in a limited manner. Pursuant to Section 394(4) (b) of the *Companies Act*, the "transferee company" must be a company within the meaning of the *Companies Act* (i.e., an Indian company); however, a "transferor company" may be anybody corporate, whether a company within the meaning of the *Companies Act* or not. A "body corporate"[14] includes a company incorporated outside India. In the case of *Moschip Semiconductor Technology Limited*,[15] the High Court of the State of Andhra Pradesh, dealing with the amalgamation of an Indian company (as the transferee) and a foreign company governed by the laws of California (as the transferor), held that, under section 1108 of the California Corporation Code and in contrast to the provisions of Indian law, the surviving company could be either a domestic company or a foreign company.[16] In the above matter, the court observed that "in these days of liberal globalization, a liberal view is expected to be taken enabling such a scheme of arrangement for amalgamation between a domestic company and a foreign company and there is every need, in my considered view, for suitable modification of the law in that direction." The court also stated that a scheme involving a foreign and an Indian company would be subject to the laws of both countries. Notwithstanding the high court's dicta, currently in a merger or amalgamation of an Indian company and a foreign company, the transferee company (i.e., the surviving entity) must be an Indian company[17]. Under the present provisions of Sections 391-394 of the *Companies*

13 the *Companies Act*, 1956, S. 394 (1) b

14 the *Companies Act*, 1956, S. 2 (7)

15 1 Company L. J. 307 (2005)

16 the *Companies Act*, S. 394 (4) specifically states that the transferee company shall be a company as defined under the *Companies Act* and the transferor company can be a body corporate, which includes a foreign company.

17 V.K. Bhalla, *Financial Management and Policy-Text and Cases* 1016, (5th Ed.)

Act, 1956 it is possible for a foreign company to merge with an Indian company, but an Indian company cannot be merged with a foreign company. This is intended to ensure that the company that continues after the merger is an Indian company over which the Indian regulatory authorities continue to exercise control.[18]

2.4 Cross Border Mergers Provisions under the Companies Act, 2013

> *There are some pragmatic reforms such as: fast-track schemes, which being cost and time effective will encourage corporate restructurings for small and group companies; merger of an Indian company into a foreign company should give impetus to cross-border M&A activity; introducing the threshold for raising objections to a scheme would deter frivolous objections and postal ballot approval would ensure a wider participation of the stakeholders. However, multi-authority appraisal of the restructuring scheme in the 2013 Act may be a dampener, considering that the present framework envisages a single-window clearance.*
>
> -Pallavi J Bakjru (Partner & Practice Leader, Wlker, Chandiok & Co.)

The initial euphoria regarding the recent Indian *Companies Act*, 2013 will mellow down with passage of time. The pragmatic implications both, long term and short term of any newly enacted legislation is actually felt and understood by the stakeholders and the regulators on basis of the problems which emerge post enactment with which they have to be grapple. However, this does not undermine the significance of analysing its provisions at this juncture to offer timely insights as to their strengths and weaknesses[19]. It might also provide an opportunity to the legislators to again contemplate on some of the provisions of the *Companies Act* so as to suggest some suitable amendments. The merger provisions are contained in Chapter XV, containing Sections 230 to 240, which deals with 'Compromises, Arrangements and Amalgamations.' Section 234 specifically deals with the cross-border mergers concerning merger or amalgamation of an Indian company with foreign company.[20]

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18 *Cross Border Mergers,* available at *www.indiancorplaw.com*

19 C. Verma, *Corporate Mergers Amalgamations and Takeovers,* 59 4th ed. (2002)

20 *Mergers and Acquisitions in the new era of* the *Companies Act, 2013,* Published by ASSOCHAM Feb 2014, available at *www.ey.com/Publication/vwLUAssets/Assocham_ White_paper _Companies_Act*

2.5 *An insight into certain general provisions of chapter XV of the Companies Act, 2013*

2.5.1 *Section 234: Progressive or Regressive*

The *Companies Act*, 1956 due to Section 394(4)(b) restricts cross-border mergers to the Indian transferee companies. This legislative policy was a unusually restrictive and parochial, and ostensibly existed to protect Indian companies. This neo-colonisation mindset viewing business with foreign entities with suspicion should have been long sacrificed in this era of economic liberalisation, where the Indian government is slowly and cautiously moving towards an open door policy for inbound foreign investment, with progressive relaxation on capital account transactions (in a rather flip-flop manner); and the benefits of comparative advantage are quite well established for trade and commerce. Indian Government is arguably moving towards a freer capital account convertibility. In such an environment the restriction on cross-border mergers imposed by the Section 394(4)(b) should not be countenanced. It should also be appreciated, that such restrictive protectionist condition is not there in many advanced jurisdictions like, the U.K. and the U.S., otherwise previous cross-border mergers with U.K. Companies e.g., in the 1976 E.I.D. Parry Ltd. Case and the U.S. companies e.g.,[21] the year 2003 amalgamation of Verasity Technologies Inc. with Moschip Semiconductor Technology Ltd. would not have been possible. No adverse effects have been demonstrated on the U.S. and U.K[22] companies due to permissive regime in their jurisdictions.[23]

Thus, the introduction of Section 234 in the 2013 Act is a welcome step. However, a regressive restriction of allowing such cross-border mergers only with the foreign companies incorporated in the Central Government notified jurisdictions nullifies the progressiveness which was apparent in Section 234. It is just anybody's guess that which jurisdictions will be notified in due course, and on what basis. Will this policy be formed on basis of reciprocity or, on some other criterion, like restricting mergers from tax and treaty havens? Notably, the *Companies Act*, 1956 provisions do not restrict cross border mergers on basis of the nationality of the transferor foreign company. Thus, there is a need to further

21 *Supra* note 3.

22 *Ibid.*

23 J. Sagar Associates, JSA Analysis on Companies Bill, August 2013, *Available at, http://www.jsalaw.com/Admin/uplodedfiles/PublicationFiles/JSA%20Analysis%20on%20Companies%20Bill.pdf*

examine two issues pertaining to this restriction. Will this restriction in the 2013 Act actually make it even more regressive than the 1956 Act? This question can only be addressed after the relevant notification is issued, which will enable examination of its scope and contents; and its impact on cross-border M&As is seen with passage of time. The second concern relates to the (in) appropriateness of addressing issues concerning other areas like, international taxation and its avoidance through the instrument of companies legislation.[24] This complicates these existing problems further, without effectively addressing them, and has unnecessary adverse implications on the company's law regime.[25]

2.5.2 More comprehensive reporting

Sub-section (2) of Section 230 at the onset makes the reporting to the tribunal for purpose[26] of calling a members or creditors meeting more comprehensive than prescribed by Rule 67 of the Companies Court Rules,[27] 1959, by filing an affidavit in Form No. 34, as required on an application made under Section 391(1) of the *Companies Act*, 1956. Most notable changes are the disclosure regarding the Corporate Debt Restructuring (CDR) Scheme to the tribunal; and filing of a share and property valuation report before the tribunal.[28]

2.5.3 Role of Reserve Bank in approval: Onerous condition

Sub-section (2) of Section 234 requires a prior Reserve Bank approval in the cross-border mergers. This is unusual and should be left to the wisdom of the authorities managing Foreign Exchange Management Act, 1999 and its Regulations, prescribing the exchange control laws in India. It should be noticed, that even under the current framework, Regulation 7 of the FEM (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000 ('FEMA 20') mere reporting to the Reserve Bank by the transferee or the new company within the 30 days period in the manner prescribed is the general norm to be

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24 *Ibid.*

25 *Supra* note 2.

26 Abhay nayak *"Companies Act 2013- mergers and acquisitions 2014", March 25 2013, available at <http://indiamicrofinance.com/companies-act-2013-mergers-acquisitions-2014.html>*

27 *Ibid.*

28 Yogesh Malhan *"Merger and Acquisition- transformed rules of the game"*, 1 March, 2014, *available at <http://www.lexology.com/library/detail.aspx?g=e55e05ba-1363-4300-a981-64c6fafe186a>*

followed.[29] Only respite is, that sub-section (2) is 'subject to any other law for time being in force'.[30] Thus, Regulation 7 of FEMA 20 should override the prior approval requirements. A corresponding overriding provision will have to be introduced in the FEM (Transfer or Issue of any Foreign Security) Regulations, 2004 ('FEMA 120') for the benefit of cross border mergers involving a foreign transferee company.

2.5.4 Central Government framing rules in consultations with the Reserve Bank

Proviso to sub-section (1) of Section 234 provides, 'that the Central Government may make rules, in consultation with the Reserve Bank of India, in connection with mergers and amalgamations provided under this section.' The coverage, consistency (both within and with other existing laws), and clarity of such rules will be important criteria. The Companies (Cross-Border Mergers) Regulations, 2007 (U.K.) may be instructional in this regard, as it exhibits considerable foresight in dealing with even (traditionally) offshoot issues like, protection of employees.[31] The consultations with other stakeholders and experts are suggested before formulating such rules.

2.5.5 Notice to the regulators and examining the role of CCI

Sub-section (5) of Section 230 provides for sending sub-section (3) notice and other prescribed documents to the sectoral regulators and other authorities who are likely to be affected by the compromise or arrangement, to enable these regulators and authorities to make any representations on the proposals within the prescribed 30 days period. Competition Commission of India (CCI), which is arguably the Indian super-regulator, is expressly to be provided with the said notice and documents, *if necessary*. The circumstances amounting to the 'necessity' of the notice to CCI are nowhere delineated in the Act. Perhaps, the asset and turnover thresholds prescribed under Section 5 of the Competition Act, 2002 will be looked into to determine such a necessity, in absence of an express provision in the *Companies Act* in this regard.

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29 Ajay Kumar Sharma, *Cross Border Mergers Provisions under the Companies Act, India Law Journal*, available at *www.indialawjournal.com/volume7/issue-1/article2.html*

30 Ashutosh Chaturvedi, *Cross Border Mergers & Acquisitions, available at http://www.bcic.org.in*

31 Hortense Trendelenburg, *"Cross-Border Mergers: Problems and Solutions"*, 30 *Int'l. Bus. Law.* 69 (2002).

As far as providing notice to the CCI is concerned, we should not forget that the Competition Act, 2002 provisions, along-with the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ('Merger Control Regulations') already prescribes for obtaining mandatory approval of certain combinations, where prescribed thresholds are met.[32] Even the Company (High) Courts are taking note of these Competition Law provisions in their orders approving schemes of mergers. This entails substantial costs including, high filing fee with attendant delay. This dual requirement of allowing CCI to make representations before the tribunal, and under the Competition Act to seek mandatory sanction is unnecessary, and cumbersome for the companies concerned. Further an anomalous situation may be created,[33] if the CCI does not object or make any representation before the tribunal and later on declines to grant sanction, as required under Section 31(1) of the Competition Act. Instead, representations by CCI should be omitted in the sub-section (5) of Section 230, as it will have authority to block the merger when the 'combination' proposal comes for its approval.[34]

2.5.6 Depository receipts as payment of consideration to the shareholders of the merging company

One radical feature of sub-section (2) of Section 234 is allowing Depository Receipts (DRs) as payment of consideration to the shareholders of the merging company. Thus, there can be a case of issuance of Indian Depository Receipts (IDRs) by the foreign company as payment of consideration to the shareholders of the Indian merging company.[35] IDRs have been an unpopular and problematic security, which seems to have fell into disfavor after the Standard Chartered Bank's IDR issue. The RBI and SEBI as regulators have created unnecessary restrictions, and have been sceptical in crucial areas like redemption, which has only been slowly yet not fully relaxed, to the inconvenience of the foreign

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32 Dhinal Shah, *Provisions relating to cross border M & A, Demergers & class action suits, available at <http://icaiahmedabad.com/Companies-Act-2013-Presentation-25-01-14-CA-DHINAL-SHAH.pdf>*

33 *Supra* note 3.

34 Nisthih Desai, *"Mergers & Acquisitions in India"*, available at, *<http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Mergers%20%26%20Acquisitions%20in%20India.pdf >*

35 Jignesh Shah & Shankar Ganesh, the *Companies Act 2011: M & A goodies abound, but curbs a killjoy*, DNA, 17 December, 2011.

companies issuing such IDRs through depositories. We should not also forget the Central Government's intervention in form of Companies (Issue of Indian Depository Receipts) Rules, 2004. This makes the whole IDR Regime unnecessarily complex and unattractive. If the IDRs are to be made an attractive security, like ADRs and GDRs, then simplification and unification of the IDR legal regime needs to be done with an open mind by the regulators concerned. Otherwise, such enabling provisions permitting issuance of IDRs carry little meaning. .

2.5.7 *Restricting the scope of objections to mergers by shareholders and creditors*

There been instances in past of unscrupulous shareholders who bought just a few shares solely with a view to object to the mergers and attempt to block and delay the process. Proviso to sub-section (4) to Section 230 appears to rule out such frivolous and vested objections to the compromises or arrangements by prescribing, that 'the objection to the compromise or arrangement shall be made only by persons holding not less than ten per cent of the shareholding or having outstanding debt amounting to not less than five per cent of the total outstanding debt.' Such a positive change can have negative implications for protecting the rights of the genuine minority shareholders and small creditors. Instead, a summary procedure could be prescribed for such objections, a time frame could be laid down for dealing with such objections, and tribunal should be permitted to impose heavy penalty on such unscrupulous objectors.

2.5.8 Provisions and procedure

It can be noticed, that the 2013 Act has much elaborate provisions and procedure to deal with several issues related to forming a more objective view of the scheme and deal with the stakeholders interests when compared to the provisions under the *Companies Act*, 1956. One such provisions is Section 236, which prescribes for 'purchase of minority shareholding'. This provision should be distinguished from the preceding section dealing with the acquisition of shares of dissenting shareholders.[36] Though, inadvertently in Section 236 the Explanation which follows sub-section (8) erroneously refers to Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 [SEBI (SAST) Regulations, 1997] when SEBI (SAST) Regulations, 2011

[36] *Supra* note 3.

are already in force. This drafting error could have been detected and removed in the Parliament itself.[37]

2.5.9 Simplified procedure in certain cases

One salient provisions of the 2013 Act is Section 233, which prescribes for bypassing the tribunal in case of merger or amalgamation of two or more small companies or between a holding company and its wholly-owned subsidiary, apart from other prescribed companies. Section 233 involves the Registrar (RoC) and Official Liquidators (OLs) in such mergers and amalgamations. This simplification of the process should expedite such mergers apart from reducing the transaction costs.[38]

3. Legal Consequences and Enforceability of A Cross-Border Merger

As a result of a cross-border merger all assets and liabilities of the disappearing companies will be considered transferred without the liquidation of the disappearing company to the receiving company upon the entry into force of the cross-border merger,[39] i.e. with the following legal effects:

(i) the merging company will cease to exist;
(ii) the assets and liabilities, including all the rights and obligations, will be transferred to the surviving company;
(iii) the shareholders of the merging companies will become shareholders of the surviving company;
(iv) at the moment of registration of the implementation of the merger, the shareholders of the merging company and the holders of option rights and other special rights entitling to shares will become entitled to the merger consideration in accordance with the draft terms of merger. The new shares to be issued as merger consideration will carry shareholder rights as of the moment of registration; and
(v) the final settlement of accounts takes place in the merging company

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37 Ashish Jejurkar "Impact of the *Companies Act* on Merger and Acquisition", 24 Jan., 2014, available at *<http://www.events.iceindia.in/threadingtheneedle/presentation/ Ashish%20Jejurkar.pdf>*

38 Corporate Finance Team Valserve Advisor, the *Companies Act, 2013, "Impact on M & A Transactions and Corporate Restructuring"* , available at *<http://www.valserve.in/images/research/4401651_ValServe_Companies_Act_2013_M&A_Provisions.pdf>*

39 Ottorino Morresi and Alberto Pezzi, *Cross-Border Mergers and Acquisitions Theory and Empirical Evidence* (2014).

The transfer of all rights and obligations shall be applied also to contractual relationships in force, including but not limited to the employment contracts and employment relations existing on the date of the enforcement of the cross border merger.

4. Cross Border Merger Issues Between India & UK

The English[40] legal system is based on common law as against civil law system which exists in most of continental Europe. United Kingdom (UK) is one of the biggest global economies, with a GDP of almost USD 2.4 trillion.23 India shares strong linkages with the UK, as India was an English colony until 1947. India and UK have traditionally shared strong trade linkages, and bilateral trade between the two countries recently crossed GBP 13 billion24 (~USD 20.5 billion). Indian companies have been fairly active in making acquisitions in the UK. Some examples of Indian companies acquiring companies in the UK include [41]Tata group's acquisition of Tetley, Corus, Jaguar and Land Rover, and HCL Technology's acquisition of Axon. Deal size and mix range across the spectrum.[42] The attractiveness of UK as an investment destination for Indian companies as compared to rest of Europe is further reflected in the fact that Indian companies invested about USD 1.3 billion in UK alone in 2011, as compared to USD 770 million in rest of Europe.

UK has a freely floating currency and it generally does not impose restriction on movement of capital. This in-effect means that foreign companies investing in the UK may be able to freely repatriate their income in form of dividend or otherwise. This is an important consideration for companies investing in a foreign jurisdiction; as such a free economy, allows the flexibility to repatriate the income earned in one country to their home jurisdiction or the jurisdiction of their upstream holding entity without any restrictions.

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40 Office of National Statistics, *United Kingdom.*

41 UK-India relations blossom in 2011; bilateral trade crossed the 13 billion-pound mark, *The Economic Times* available at: *http://articles.economictimes.indiatimes.com/2011-12-22/news/30546950_1_bilateral-trade-financial-dialogue-british-secretary. (visited on 8 April, 2016).*

42 UK business taps Indian potential, *Financial Times* available at: *http://www.ft.com/intl/cms/s/0/df08ac3a-138b-11e1-9562-00144feabdc0.html (visited on 8 April, 2016).*

Since, the[43] UK is a constituent of the EU, the EU regulatory framework might be applicable in certain merger situations. It should be noted that the European Union Merger Regulation ("EUMR") may apply to transactions which may result in concentrations with a community dimension, in which case the European Commission shall have the exclusive jurisdiction to investigate and recommend action under the EUMR. A 'community dimension' here is a broad criterion which is generally understood to mean if such a transaction may raise competition concern which may have an impact on the European community.

An acquisition of a public company in the UK is to be made in accordance with the Takeover Code ("Takeover Code"), which traces its legal authority to the *Companies Act*, 2006. The Takeover Code applicability comes in case of acquisition of companies who have their registered office in the UK, Channel Islands and the Isle of Man and is registered for trading in a regulated market in the UK, the Channel Islands and the Isle of Man. The Takeover Code is further applicable on companies whose shares are traded on unregulated markets such as the Alternate Investment Market (AIM) and which are considered by the Takeover Panel (a body constituted under the Takeover Code) residents of UK.

As in India, an acquirer is required to make a mandatory public offer to the shareholders of the target, if it reaches a certain threshold. The threshold for making such an open offer under the Takeover Code is at 30% of voting rights of a UK public company[44]. Such open offer has to be made in cash at a price which cannot be less than the highest price paid by the acquirer during the preceding 12 month period. The acquirer may however place a 50% acceptance requirement for the offer and usually no other conditions may be attached to the offer. The open offer is undertaken in terms of the Takeover Code. Foreign companies will be taxed on trading income attributable to a permanent establishment in the UK.

Ordinarily, dividends received from UK sources are not subject to any withholding tax. However, interest and royalties from UK sources will be subject to withholding tax at the rate of 20%. This is subject to any exemption that may be available under the EU interest and royalties directive applicable to entities located within the European Union. Other exemptions may be available with respect to interest on bank deposits or quoted Eurobonds.

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43 *http://www.nishithdesaiassociatesOutbound Acquisitions by India Inc.- (visited on 9 April, 2016).*

44 *Supra* note 39.

Non-residents are normally not subject to capital gains tax in the UK unless the assets transferred form part of a permanent establishment in the UK.[45]

Anti-avoidance rule:

UK Courts have evolved a number of anti-avoidance rules. While the fundamental principle is that a taxpayer[46] is free to organize his affairs and mitigate taxes within the framework of the law, certain arrangements in the nature of colorable devices and shams may be disregarded for tax purposes. A number of anti-avoidance doctrines including the step transaction doctrine may be applied by the tax authorities to disregard a composite series of transactions with no business purpose other than tax avoidance.

Recently, UK[47] has proposed a statutory general anti avoidance rule that target abnormal arrangements which seek to avoid application of tax provisions, or exploit the application, inconsistencies and shortcomings in the provisions.

UK also enforces a number of specific anti avoidance rules including rules to limit group or consortium relief, counter tax arbitrage, etc. Transfer pricing provisions allow UK tax authorities to adjust income and expenses in cases of non-arm's length transactions between related enterprises. The arm's length principle also applies in the context of thin capitalization.

For long, [48]the Indian corporate world has been longing for a single window clearance agency for any industry to seek approvals for the commencement of business operations. With the ever increasing bureaucracy and political instability within the country, seeking approvals for green field projects sometimes become economically unviable and hence the Indian companies look for inorganic growth by way of acquisition of companies in countries where the regulatory systems are much more developed.

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45 *Supra* note 36.

46 Donald M. *Depamphilis, Mergers, Acquisitions, and other Restructuring Activities*, (VII th ed., 214)

47 Herbert Smith: *A Legal Guide to Investing in the UK for Foreign Investors*, Fourth Edition (July 2012) (p. 25) available at: *http://www.herbertsmithfreehills.com/-/media/HS/L05071215457891217141621 9.pdf* (visited on 9 April ,2016)

48 Outward Indian FDI – Recent Trends & Emerging Issues, Address delivered by Shri. Harun R Khan, Deputy Governor, Reserve Bank of India at the *Bombay Chamber of Commerce & Industry, Mumbai* available at: *http://www.rbi.org.in/scripts/BSSpeechesView.aspx?id=674#T1* (visited on 7 April, 2016).

India [49]wherein the investment regulations for cross-border acquisitions have been considerably relaxed over the years. This regulatory evolution in developing countries coupled with easy availability of finance has resulted in increased cross-border investment activity from developing economies into developed economies.

Indian companies have been galloping in making cross-border investments, especially in the last decade, however, as compared to other emerging economies, particularly the other members of the BRIC economies, it still has a lot of catching up to do since the total foreign investments made by companies from these economies[50] is much more than companies from India. The following figure6 shows a comparison of total cross-border deals executed by companies, in percentage terms, from BRIC economies.

5. Legal Aspects of Merger in USA

Every country follows their own set of rules and regulations regarding Mergers and Acquisitions. Mergers and Acquisitions Law exist in every country of the world. But, the laws and regulations regarding Mergers and Acquisitions differ from country to country. In US the Mergers and Acquisitions Law are different from that of any other country. In USA, there are both state laws and federal laws to administer[51] Mergers and Acquisitions. The State Laws determine the process through which any merger or acquisition can be approved in the country[52]. These laws also ensure that, the shareholders of the target firm receive fair value for their shares. In USA, state laws have also been generated keeping in mind the issue of Hostile Takeover. These laws protect any target company from Hostile Takeover by providing financial and legal support.

The Federal Laws keeps a check on the size of the joint firm after a Merger or Acquisition, so that the merged firm cannot develop monopolistic power[53]. The Federal Laws of USA ensures that, no big merged firm involves in any business activity which is unlawful.

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49 Indian Takeovers abroad: Running with the bulls - Are Indian firms really going to take over the world, *The Economist*, available at: *http://www.economist.com/node/21548965 (visited on 9 April, 2016).*

50 Michael Blatz et al., *Corporate Restructuring Finance In Times Of Crisis* (2006).

51 *Supra* note 43.

52 *http://finance.mapsofworld.com/merger-acquisition/law.html* <*visited* on 7 April, 2016 at 7:35 pm>

53 Patrick A. Gaughan, *Mergers, Acquisitions and Corporate Restructurings*, 3rd Ed., 2002.

In the United States, regulations can be divided into three categories: State Laws, Federal Anti-Trust Laws, and Federal Security Laws. Since discussion of state law is beyond the scope of this course, we will focus on federal related laws. The Federal Trade Commission (FTC) and the U.S. Justice Department (USJD) administer federal anti-trust laws. The Securities and Exchange Commission (SEC) administers federal security laws for companies registered with the SEC.

5.1 Anti-Trust Laws

One of the most important federal laws is Section 7 of the Clayton Act which stipulates that a merger cannot substantially lessen competition or result in a monopoly. In determining if a merger is anti-competitive, federal agencies will look at the markets served and the type of commerce involved. Several factors are considered, such as size of market, number of competing companies, financial condition of companies, etc.

5.2 Notifying the FTC and USJD

The FTC (Federal Trade Commission) and the USJD (United States Justice Department) become involved within the merger and acquisition process by way of form with the FTC and USJD whenever a merger involves one company with $ 100 million or more in assets or sales and the other company has $ 10 million or more in assets or sales and the transaction involves an offer of $ 15 million or more in assets or stock or the transaction involves more than 50% ownership of a company with $ 15 million or more in assets or sales.[54]

5.3 Security Laws

Companies registered with the Securities and Exchange Commission (SEC) must deal with several schedules whenever a merger takes place. Whenever a company acquires in excess of 10% of book values of a registered company, the SEC must be notified within 15 days. Whenever someone acquires 5% or more of the outstanding stock of a public company, the acquisition is required to be disclosed.

6. Conclusion

Indian companies are increasingly becoming open to the idea of global expansion and making outbound acquisitions, more so in the wake of moderating

[54] *http://www.latinolawblog.com/2009/12/articles/commerce/key-united-states-laws-regarding-mergers-and-acquisitions* <visited on 04.04.2016 at 1:30pm>.

domestic economic growth. This evolution of Indian companies oriented towards making overseas acquisitions is a trend which will become more prominent in the near future. Accordingly, the trend and outlook of outbound investments remains increasingly promising. There has been an extensive research on cross border merger and acquisition. Most of the studies have focused on the share market reaction to the cross border merger and acquisition. Wealth maximization, financial impact and synergy gains have also been subjected for study by numerous researchers. Most of the studies were conducted in countries which have highly developed capital markets like USA and UK. Few studies are dedicated to find out the impact of cross border mergers and acquisitions in emerging countries.

I. Thus, in anticipation this article seeks to examine some salient aspects of *Companies Act*, 2013 pertaining to the cross-border mergers either, generally or specifically. The merits of some provisions in the new Act are noticeable at the onset. For example, as discussed, Section 230(2) provides for a more comprehensive reporting relatively than the one under the 1956 Act regime. The simplification of procedure of mergers, in certain cases, under Section 233 is also laudatory. However, many of the enactments are criticisable. Notice requirement to the CCI under Section 230(5) should not be provided for due to the current competition law sufficiently addressing that issue. Involvement of too many regulators in the proceedings before the tribunal may unnecessarily complicate and delay the process of a cross border merger. In fact, it is surprising to find the inclusion of CCI in this provision considering the government's efforts on the other hand to simplify the regulatory process by initiating measures like the constitution of the financial sector legislative reforms commission (FSLRC) under the chairmanship of Justice Srikrishna. Furthermore, the restriction contained in Section 234 restricting cross border mergers (both ways) of Indian companies with companies of only notified countries is not only regressive but speaks of the parochial and protectionist mindset of the government in these matters. This restriction in practice may turn out to be more regressive than the corresponding one under the 1956 Act having only one-way prohibition. Thus, this jurisdiction notification requirement should certainly be done away with when the government and parliament seek to liberalise the cross border mergers. If issues like tax avoidance are a problem in cross border deals, the solution should be sought under international tax laws regime not through the *Companies*

Act. The mention in Section 234(2) about seeking RBI approval in cross border mergers, subject to any extant law, is also superfluous in view of the FEMA and the gamut of regulations under it which are meant to act as the foreign exchange control laws.[55] The instance of a drafting mistake in the explanation to Section 236(8) while referring erroneously to the previous SEBI (SAST) Regulations could have been obviated either at the drafting stage or at the time of passage of the bill by the legislature. Hopefully, the Government will take timely note of the critique advanced in this article to initiate suitable legislative and executive measures. The other stakeholders are also likely to have more clarity on the issues discussed here enabling them to more objectively assess the provisions pertaining to cross border mergers in the *Companies Act*, 2013.

[55] *Report of the Expert Committee on Company Law, Ministry of Corporate Affairs* (2005).

TDS ON TRANSFER OF CERTAIN IMMOVABLE PROPERTIES- SECTION 194-IA OF INCOME TAX ACT- A CRITICAL ANALYSIS

Dr. Sonika Bhardwaj *

Section 194-IA[1] was introduced in the Income Tax Act, 1961 (ITA) w.e.f. 01.06.2013. The memorandum explaining the provisions of Finance Bill, 2013 specifies that the purpose of the section is "Widening of Tax Base and Anti Tax Avoidance Measure". The section provides for Tax Deduction at Source (TDS) on transfer of certain immovable properties (other than agricultural land). So far , under the existing provisions of the Income - tax Act, tax is required to be deducted at source on certain specified payments made to residents by way of salary, interest, commission, brokerage, professional services, etc. Further, on transfer of immovable property by a non - resident, tax is required to be deducted at source by the transferee. However, there was no such requirement on transfer of immovable property by a resident except in the case of compulsory acquisition of certain immovable properties. So in order to have a reporting mechanism of transactions in the real estate sector and also to collect tax at the earliest point of time, Finance Bill, 2013 proposed to insert a new section 194-IA to provide that every transferee, at the time of making payment or crediting of any sum as consideration for transfer of immovable property (other than agricultural land) to a resident transferor, shall deduct tax, at the rate of 1 % of such sum.

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* Assistant Professor, School of Law, Christ University, Banglore.

1 Section 194-IA:

(1) Any person, being a transferee, responsible for paying (other than the person referred to in section 194 LA) to a resident transferor any sum by way of consideration for transfer of any immovable property (other than agricultural land), shall, at the time of credit of such sum to the account of the transferor or at the time of payment of such sum in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to one per cent of such sum as income-tax thereon.

(2) No deduction under sub-section (1) shall be made where the consideration for the transfer of an immovable property is less than fifty lakh rupees.

(3) The provisions of section 203 A shall not apply to a person required to deduct tax in accordance with the provisions of this section.

Explanation — For the purposes of this section,—

(a) "agricultural land" means agricultural land in India, not being a land situate in any area referred to in items (a) and (b) of sub-clause (iii) of clause (14) of section 2;

(b) "immovable property" means any land (other than agricultural land) or any building or part of a building.

Thus the objective of the section is very clear viz (i) to have a reporting mechanism of transactions in the real estate sector; and (ii) to collect tax at the earliest point of time. However, to reduce the compliance burden on the small taxpayers, it is provided in the section that no deduction of tax under this provision shall be made where the total amount of consideration for the transfer of an immovable property is less than fifty lakh rupees. Further, the transferee is not required to obtain TAN as required by section 203 A. He is just required to pay the tax deducted at source, within 7 days from the end of the month in which the deduction is made, to the Government. A careful reading of the section shows:

- Section 194-IA has been introduced w.e.f. 01.06. 2013.
- It is applicable when there is transfer of an immovable property other than agricultural land.
- The obligation to deduct tax at source is on the transferee i.e. the purchaser of the immovable property.
- The transferee /purchaser can be any person i.e. he can be an individual or it can be an HUF, Partnership Firm, Company, AOP, BOI, Society, Trust, etc. Further it won't matter whether the purchaser is Resident or Non-resident. It is also immaterial whether the purchaser is having any taxable income or not. Only exception is that purchaser should not be a person referred to in Section 194 LA of ITA, as such a person is not required to deduct tax under the provisions of this section.
- The section becomes applicable only if the transferor/seller is a resident.
- The transferee/purchaser should be responsible for paying to the transferor/seller any sum by way of consideration for transfer of immovable property (other than agricultural land).
- The tax is to be deducted at the time of credit of such sum to the account of the transferor or at the time of payment of such sum in cash or by issue of a cheque or draft or by any other mode, whichever is earlier.
- The consideration for transfer of the property should be Rs 50 lacs or more.
- The tax is to be deducted at a rate of one per cent of such sum credited or paid.

- The words "agricultural land" has been defined in the explanation to the section as agricultural land in India, not being a land situate in any area referred to in items (a) and (b) of sub-clause (iii) of clause (14) of section 2;
- The words "immovable property" has also been defined in the explanation to the section as any land (other than agricultural land) or any building or part of a building.

This article critically examines the provisions of this section in detail and the practical issues which are likely to crop up during the implementation of this section. On several issues the income tax authorities need to issue a circular to avoid inconvenience to the persons who are required to carry out the mandate of this section.

A detailed analysis of the above referred aspects of this provision of ITA is as follows:

1. Applicability of Section 194-IA

Since this section has been introduced w.e.f. 01.06.2013, so its provisions are attracted only if the transaction has taken place on or after 1st of June 2013. Thus this section should not be attracted if sale agreement is made before 1st June, 2013 and the amount has already been credited to the account of the transferor before this date. This should not matter if actual payment has not been made before this date as the tax is required to be deducted at the source at the earlier event i.e. credit or payment and in the present situation the event of credit has already happened before the date of applicability of the section. Similarly in a case where some advance payment or even entire payment has been made by the transferee to the transferor before the date of applicability of this section but sale agreement is made after this cut-off date the provisions of this section cannot be applied retrospectively to such amount already paid. However in cases where the immovable property is being purchased say from a builder by opting for "construction linked installment plan" and part payment has already been made before cut-off date, the provisions of the section would be attracted for all future payments on or after the cut-off date as the amount was not due and thus not already credited before this date but becomes due or is paid only after this date. The facts and circumstances of a particular case, although, will decide the issue as to whether and when an amount can be considered to have been credited to the transferor or not.

2. Nature of Property Covered

This section has its applicability only in those cases where there is "transfer" of an "immovable property" other than "agricultural land". While the definition of two words "immovable property" and "agricultural land" is given in the section itself by way of an explanation the meaning of word "transfer" needs to be adopted from the definition given in section 2 (47)[2] of the ITA. The words "agricultural land" has been defined in the explanation to the section as agricultural land in India, not being a land situate in any area referred to in items (a) and (b) of sub-clause (iii) of clause (14) of section 2[3],

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2 Section 2
(47)"transfer", in relation to a capital asset, includes,—
(i) the sale , exchange or relinquishment of the asset ; or
(ii) the extinguishment of any rights therein; or
(iii) the compulsory acquisition thereof under any law ; or
(iv) in a case where the asset is converted by the owner thereof into, or is treated by him as, stock-in-trade of a business carried on by him, such conversion or treatment ;or
(iva) the maturity or redemption of a zero coupon bond; or
(v) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53 A of the *Transfer of Property Act*, 1882 (4 of 1882) ; or
(vi) any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immovable property.
Explanation 1.—For the purposes of sub-clauses (v) and (vi), "immovable property" shall have the same meaning as in clause (d) of section 269 UA.
Explanation 2.—For the removal of doubts, it is hereby clarified that "transfer" includes and shall be deemed to have always included disposing of or parting with an asset or any interest therein, or creating any interest in any asset in any manner whatsoever, directly or indirectly, absolutely or conditionally, voluntarily or involuntarily, by way of an agreement (whether entered into in India or outside India) or otherwise, notwithstanding that such transfer of rights has been characterised as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India;

3 Section 2. In this Act, unless the context otherwise requires,—
(14) "capital asset" means property of any kind held by an assessee, whether or not connected with his business or profession, but does not include—
(iii) agricultural land in India, not being land situate—
(a) in any area which is comprised within the jurisdiction of a municipality (whether known as a municipality, municipal corporation, notified area committee, town area committee, town committee, or by any other name) or a cantonment board and which has a population of not less than ten thousand ; or
(b) in any area within the distance, measured aerially,—
(I) not being more than two kilometres, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of more than ten thousand but not exceeding one lakh; or

the words "immovable property" has been defined in the explanation to the section as any land (other than agricultural land) or any building or part of a building.

Thus for the purpose of this section a land shall not be treated as Agriculture Land if:

(i) It is situated within jurisdiction of a municipality (whether known as a municipality, municipal corporation, notified area committee, town area committee, town committee, or by any other name) or cantonment board which has a population of 10,000 or more; or

(ii) It is situated in any area within a specified distance (measured aerially) from municipal limit or cantonment board, which is as follows:

   (a) Within 2 kilometers, if population of the municipality is more than 10,000 but does not exceed 1,00,000

   (b) Within 6 kilometers, if population of the municipality is more than 1,00,000 but does not exceed 10,00,000

   (c) Within 8 kilometers, if population of the municipality is more than 10,00,000

The above definition of "Agricultural Land" is not complete in itself. The definition only prohibits certain types of lands from being treated as agricultural land e.g. agricultural land situated outside India or in urban areas or within certain distance from municipalities etc but this does not means that all other lands would be "agricultural land". Whether a land is an agricultural land or not is essentially a question of fact[4]. Thus in deciding the question

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(II) not being more than six kilometres, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of more than one lakh but not exceeding ten lakh; or
(III) not being more than eight kilometres, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of more than ten lakh.
Explanation.—For the purposes of this sub-clause, "population" means the population according to the last preceding census of which the relevant figures have been published before the first day of the previous year

4 *Smt. Sarifabibi Mohmed Ibrahim & Others* v. *Commissioner of Income Tax* (1993) 204 ITR 631 (SC).

whether a particular property is agricultural land, it would be necessary to take note of the definition of "agricultural income" in the Act. It would follow that the use to which a particular property is put would be a very relevant factor to be considered for the purpose of determining whether it is agricultural land.

Looking at the above definition of immovable property and agricultural land, a dispute may sometimes arise as to whether the land to be transferred falls within the definition of agricultural land or not. Transferee may not always be in position to independently determine the correct facts related to distance of the land from municipality or population of the municipality or the nature of land and may depend on third party certification. In such a case, who will be responsible, if later on assessing officer holds that the third party had certified incorrectly but the transferee had not deducted tax at source on basis of such certification. So this issue needs to be clarified by the tax authorities.

3. Who is Required to Deduct the Tax at Source?

As per the provisions of this section the transferee/purchaser is required to deduct tax at source. The transferee can be any person other than the person referred to in section 194-LA[5]. Thus the responsibility to deduct tax at source is not cast on those persons who are making payment in the nature of compensation or the enhanced compensation or the consideration or the enhanced consideration on account of compulsory acquisition, under any law for the time being in force, of any immovable property (other than agricultural land) and are already covered by the provisions of section 194-LA of ITA. The transferee /purchaser can be any person i.e. he can be an individual or it can be

[5] Payment of compensation on acquisition of certain immovable property.
S. 194 LA. Any person responsible for paying to a resident any sum, being in the nature of compensation or the enhanced compensation or the consideration or the enhanced consideration on account of compulsory acquisition, under any law for the time being in force, of any immovable property (other than agricultural land), shall, at the time of payment of such sum in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to ten per cent of such sum as income-tax thereon:
Provided that no deduction shall be made under this section where the amount of such payment or, as the case may be, the aggregate amount of such payments to a resident during the financial year does not exceed [two] hundred thousand rupees.
Explanation.—For the purposes of this section,—
(i) "agricultural land" means agricultural land in India including land situate in any area referred to in items (a) and (b) of sub-clause (iii) of clause (14) of section 2;
(ii) "immovable property" means any land (other than agricultural land) or any building or part of a building.

an HUF, Partnership Firm, Company, AOP, BOI, Society, Trust, etc. Further it won't matter whether the purchaser is Resident or Non-resident. It is also immaterial whether the purchaser is having any taxable income or not. Although, if property of a resident is located outside India the transferee resident will be bound to comply with the provisions of this section, however an issue can arise when the transferee/purchaser is a non resident and he purchases a property situated outside India from a resident. In such a case how the provisions of this section can be enforced on a non-resident especially if that person is not likely to ever come to India. Even if such a non resident ever happens to visit India the applicability of the provisions of this section on such a non resident may be challenged. So this issue needs to be clarified by the tax authorities.

4. For which Transferor/Seller Section is Applicable?

The section becomes applicable only if the transferor/seller is a resident i.e. if the payment of any sum by way of consideration for transfer of any immovable property (other than agricultural land) is being made to a person whose status for income tax purposes is that of a resident. In case the transferor is non-resident, this section will not be applicable although in such a case provisions of section 195[6] of ITA may come into play.

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[6] Other sums.
195. (1) Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest (not being interest referred to in section 194 LB or section 194 LC)or section 194 LD or any other sum chargeable under the provisions of this Act (not being income chargeable under the head "Salaries" shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force :

Provided that in the case of interest payable by the Government or a public sector bank within the meaning of clause (23 D) of section 10 or a public financial institution within the meaning of that clause, deduction of tax shall be made only at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode :

Provided further that no such deduction shall be made in respect of any dividends referred to in section 115-O.

Explanation 1—For the purposes of this section, where any interest or other sum as aforesaid is credited to any account, whether called "Interest payable account" or "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.

Explanation 2.—For the removal of doubts, it is hereby clarified that the obligation to comply with sub-section (1) and to make deduction thereunder applies and shall be deemed to

5. Meaning of Words "any sum"

As per provisions of this section the transferee/purchaser responsible for paying to the transferor/seller "any sum" by way of consideration for transfer of immovable property (other than agricultural land) shall at the time of credit of such sum to the account of the transferor or at the time of payment of such sum in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to one per cent of such sum as income-tax thereon. Thus book entries are covered by the provisions of this section and tax at source needs to be deducted even if only such book entries are made and no

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have always applied and extends and shall be deemed to have always extended to all persons, resident or non-resident, whether or not the non-resident person has—

(i) a residence or place of business or business connection in India; or

(ii) any other presence in any manner whatsoever in India.]

(2) Where the person responsible for paying any such sum chargeable under this Act (other than salary) to a non-resident considers that the whole of such sum would not be income chargeable in the case of the recipient, he may make an application to the Assessing Officer to determine, by general or special order, the appropriate proportion of such sum so chargeable, and upon such determination, tax shall be deducted under sub-section (1) only on that proportion of the sum which is so chargeable.

(3) Subject to rules made under sub-section (5), any person entitled to receive any interest or other sum on which income-tax has to be deducted under sub-section (1) may make an application in the prescribed form to the Assessing Officer for the grant of a certificate authorising him to receive such interest or other sum without deduction of tax under that sub-section, and where any such certificate is granted, every person responsible for paying such interest or other sum to the person to whom such certificate is granted shall, so long as the certificate is in force, make payment of such interest or other sum without deducting tax thereon under sub-section (1).

(4) A certificate granted under sub-section (3) shall remain in force till the expiry of the period specified therein or, if it is cancelled by the Assessing Officer before the expiry of such period, till such cancellation.

(5) The Board may, having regard to the convenience of assessees and the interests of revenue, by notification in the Official Gazette, make rules specifying the cases in which, and the circumstances under which, an application may be made for the grant of a certificate under sub-section (3) and the conditions subject to which such certificate may be granted and providing for all other matters connected therewith.

(6) The person referred to in sub-section (1) shall furnish the information relating to payment of any sum in such form and manner as may be prescribed by the Board.

(7) Notwithstanding anything contained in sub-section (1) and sub-section (2), the Board may, by notification in the Official Gazette, specify a class of persons or cases, where the person responsible for paying to a non-resident, not being a company, or to a foreign company, any sum, whether or not chargeable under the provisions of this Act, shall make an application to the Assessing Officer to determine, by general or special order, the appropriate proportion of sum chargeable, and upon such determination, tax shall be deducted under sub-section (1) on that proportion of the sum which is so chargeable.

actual payment is made. Even in case of exchange of assets, the transaction will be covered by words "any other mode" and will attract the provisions of this section and in fact in such a case both parties need to deduct tax at source on the consideration amount. An issue can arise in such exchange cases as what will be the value of consideration. The same can be adopted as the value adopted for the purposes of the stamp duty. Cases relating to family arrangement and gifts would probably not attract the provisions of this section as these transactions cannot be considered as involving "any sum by way of consideration". However, it would be better if income tax authorities issue specific instructions on these issues.

6. Rate at which Tax is to be Deducted?

As per the provisions of the section, the tax is to be deducted at a rate of one per cent of such sum credited or paid. However as per provisions of section 206 AA of ITA if PAN is not available then tax needs to be deducted at a rate of 20 percent. But the form of payment of TDS (Form 27 QB) as prescribed in the rules provides that quoting of PAN of transferor and transferee is mandatory and without that it will not be possible to upload the challan. So the issue will arise as what to do in case where seller is not having any PAN. What is the option available to the purchaser in such circumstances? Is transferor required to obtain PAN before entering into the transaction? So these issues need to be suitably addressed by income tax authorities. Further the transferee should check the correctness of PAN well in advance as while uploading the challan wrong PAN cases will not be accepted.

7. Issue of Multiple Buyers or Sellers

There can be a case where the number of transferee is more than one. On this issue two interpretations can be there. This can be argued that section will apply to only those transferees for whom consideration amount is individually Rs 50 lacs or more. Another argument can be that all transferees need to deduct tax at source irrespective of their share if the total consideration for transfer of immovable property is not less than fifty lakh rupees. Although second interpretation appears to be more logical if we look at subsection 2 of section 194-IA, however the income tax authorities should provide clear instructions for the benefit of transferees so that they do not face any problems later on for interpreting the section in other possible way. Similar can be the case when there are multiple sellers or multiple sellers and buyers both. Here too if the

total consideration for transfer of immovable property is not less than fifty lakh rupees then second interpretation as supra needs to be adopted by the transferees even if each transferee individually pays less than fifty lakh rupees or each transferor transferee individually receives less than fifty lakh rupees. Thus number of TDS transactions will be multiple of number of transferees and number of transferors. So a guideline for such cases must be released by the income tax authorities.

8. Consequences for Failure to Deduct Tax at Source

Failure to comply with the provisions of this section would attract the provisions of section 201[7] of ITA and the transferee would be deemed to be

[7] Consequences of failure to deduct or pay.
S. 201. (1) Where any person, including the principal officer of a company,—
(a) who is required to deduct any sum in accordance with the provisions of this Act; or
(b) referred to in sub-section (1A) of section 192, being an employer, does not deduct, or does not pay, or after so deducting fails to pay, the whole or any part of the tax, as required by or under this Act, then, such person, shall, without prejudice to any other consequences which he may incur, be deemed to be an assessee in default in respect of such tax:
Provided that any person, including the principal officer of a company, who fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a resident or on the sum credited to the account of a resident shall not be deemed to be an assessee in default in respect of such tax if such resident—
(i) has furnished his return of income under section 139;
(ii) has taken into account such sum for computing income in such return of income; and
(iii) has paid the tax due on the income declared by him in such return of income, and the person furnishes a certificate to this effect from an accountant in such form as may be prescribed:
Provided further that no penalty shall be charged under section 221 from such person, unless the Assessing Officer is satisfied that such person, without good and sufficient reasons, has failed to deduct and pay such tax.
(1A) Without prejudice to the provisions of sub-section (1), if any such person, principal officer or company as is referred to in that sub-section does not deduct the whole or any part of the tax or after deducting fails to pay the tax as required by or under this Act, he or it shall be liable to pay simple interest,—
(i) at one per cent for every month or part of a month on the amount of such tax from the date on which such tax was deductible to the date on which such tax is deducted; and
(ii) at one and one-half per cent for every month or part of a month on the amount of such tax from the date on which such tax was deducted to the date on which such tax is actually paid, and such interest shall be paid before furnishing the statement in accordance with the provisions of sub-section (3) of section 200:
Provided that in case any person, including the principal officer of a company fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a resident or on the sum credited to the account of a resident but is not deemed to be an assessee in default under the first proviso to sub-section (1), the interest under clause (i) shall be payable from the date on which such tax was deductible to the date of furnishing of return of income by such resident.

assessee in default in respect of such tax. The transferee can however escape from the rigor of these provisions if the transferor

(*i*) has furnished his return of income under section 139;

(*ii*) has taken into account such sum for computing income in such return of income; and

(*iii*) has paid the tax due on the income declared by him in such return of income, and the transferee furnishes a certificate to this effect from an accountant in form no 26 A to the assessing officer. However, the transferee will still be liable to pay interest as per provisions of sub section 1 A of section 201 of ITA. In addition to above the transferee can be made liable to pay penalty under section 221 of ITA if he does not show to the assessing officer that his failure was due to good and sufficient reasons.

9. Other Responsibilities of Transferee

The transferee is required to upload challan in Form no 26 QB electronically on the website (Traces) of the department within 7 days from the end of the month in which the tax is deducted at source. Further the transferee is required to online generate a certificate of TDS in Form no 16 B and provide the same to transferor within 15 days from the due date for furnishing the Challan in Form No. 26 QB.

From the discussion as above, it is evident that the section imposes a heavy burden on the transferee to comply with its provisions. However, it is

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(2) Where the tax has not been paid as aforesaid after it is deducted, the amount of the tax together with the amount of simple interest thereon referred to in sub-section (1A) shall be a charge upon all the assets of the person, or the company, as the case may be, referred to in sub-section (1).

(3) No order shall be made under sub-section (1) deeming a person to be an assessee in default for failure to deduct the whole or any part of the tax from a person resident in India, at any time after the expiry of seven years from the end of the financial year in which payment is made or credit is given.

(4) The provisions of sub-clause (ii) of sub-section (3) of section 153 and of Explanation 1 to section 153 shall, so far as may, apply to the time limit prescribed in sub-section (3).

Explanation.—For the purposes of this section, the expression "accountant" shall have the meaning assigned to it in the Explanation to sub-section (2) of section 288.

necessary that the income tax authorities issue circular for the guidance of the transferees so that they can comply with the provisions of this section without any ambiguity in their mind and as such do not face any problems at any later stage for not deducting the tax at source by adopting some other reasonable interpretation of the section.

hence the Liberal foreign Investment policies should be accompanied by a stable domestic environment so as to attract the foreign investors. This proposition of mine is not a question to self sufficiency of India but just a proposal that foreign investments will help us, better achieve the digital India dream better.

I shall demystify my statements in the upcoming sections.

2. Indian FDI Policy in Telecom Sector

India has witnessed a massive change in the area of telecommunication in last decade. The development is so massive that the Indian telecom network has acquired second position in the world telecom industry after China[4]. The country has been trying its level best through improved telecom industries to maintain the pace with the latest technologies provided in the mobile phones and the service providers. The government has invested in the plans like Digital India to make each and every part of the country access the telecom facilities and make them developed digitally[5].

Apart from the government's consistent efforts there is a need of Foreign Direct investment in the Telecom sector and to ease this process there arise the requirement of liberalization of the FDI policies within the country.

In light of above the Government of India introduced the liberalization policies in 1991 which also bothered the telecom industries as it attracted foreign investors to invest in the country[6]. But the government provided license to these foreign investors with a condition to start investing in partnership venture with the Indian companies with 49% cap for foreign ownership. Therefore many a time the investors, their partners as well as the international organizations resisted this condition imposed by the government and requested to remove the cap[7]. Therefore in 2005 Government liberalized

4 Department of Telecommunications, Ministry of Communication and Information Technology, Government of India, 'Annual Report (2012 – 2013).'

5 *Supra* note 2.

6 Rashmi Banga and Abhijit Das (Eds.), *Twenty Years of India's Liberalization: Experiences and Lesson*, United Nations Publication, Geneva, 2012

7 Dr. G.G. Gopika, "Foreign Direct Investment Policies in the Liberalized telecom Sector of India: A Review", *International Journal of Business and Management Invention*, Vol. 3, No. 3, March 2014.

the FDI cap from 49% to 74% and further in the year 2013 the cap was liberalized from 74% to 100%, in which up to 49% is through Automatic route and beyond that shall be with the permission of the Government[8]. The automatic route for that purpose means that the Investment by the Foreign Enterprises under this route does not need prior permission of the government or the Reserve Bank of India. Through this route, the Investors need to inform and file the required documents to the RBI prior to the issue of shares to the foreign investors[9]. Therefore the foreign investors can invest up to 49% without the prior permission of the Government but requires an approval of Foreign Investment Promotion Board (FIPB) beyond that.

Due to this policy, now the foreign investors can invest in the Indian market without entering into partnership with a local Investor, which they used to do in order to adhere to the regulatory requirement[10]. Now they can have the complete ownership over their ventures.

In spite of rapid growth of FDI in the telecom sector and liberalization of FDI caps there are few grievances, loopholes and difficulties in increasing the FDI in this sector as Ericsson, a leading telecom company, has said that India needs to invest more in the improvisation of in-building coverage in order to enable the customers in using the 4G services. The company has predicted an immense and sudden increase in the traffic due to the introduction of 4G network which would require underlying layers of small cells.[11] Further the current regulatory framework of Indian market has been challenging for the development of the telecom sector and that needs to be reviewed.[12]

Therefore apart from the loosening of FDI caps there is an emergent need of pondering over other issues on regarding the FDI. Some of the issues

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8 *Supra* note 3.

9 Reserve Bank of India, Foreign Investments in India (FAQs), at *https://www.rbi.org.in/scripts/FAQView.aspx?Id=26* (last accessed 11 October 2015)

10 Press Trust of India, "Cabinet approves 100% FDI in telecom", *Economic Times*, 1 August 2013.

11 Danish Khan, "Indian telecom operators need to in in-building coverage as 4G grows: Erricson", *Economics Times*, 9 October 2014

12 Press Trust of India, "Tektronix Communications works on Big data Analytics for Indian Telecom Operators", *Economic Times*, 9 July 2014

highlighted by Harsha Vardhana Singh et al. in their article[13] such as Interconnection Issue, Tariff issue have been discussed by me in upcoming paragraphs in a way relevant to my study.

Firstly, The foreign telecom operator needs to develop an interconnection with the incumbent operator and the service providers within the territory. Such an arrangement creates a structure similar to that where the 49% of foreign investment was allowed[14] and the foreign investment was dependent on the indigenous operator for performing its functions. This issue can be termed as Interconnection issue.

The investor shall always adhere to the standard tariff packages provided by the TRAI. That package shall always be made available to the customers. Further the service provider can introduce any 'alternative tariff package' in addition to that and this can be introduced in order to attract the customers. Such a regulation on tariff in a country where the spectrum auction process are 25 times[15] the price in other countries affects the profit expectations of the foreign investor in a highly negative fashion. This can be termed as the Tariff issue affecting the foreign investments.

To summarize, India has a liberalized its FDI policy in telecom sector after 2013 but there is no such stable development in this sector when it comes to foreign investment. India has a tremendous possibility of gaining more foreign investment. It has liberalized the caps to the great extent but liberalizing the FDI caps would not solve the purpose alone. The telecom industry gained the massive hike in the years 2000-2010 but after that the rate has lowered[16] even after the rapid liberalization of the FDI policies.

To conclude we may say that liberal FDI policies will not be enough to attract foreign investments in the country. Other factors such as internal regulatory policies are also to be taken care of in order to make India an

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13 Harsha Vardhana Singh *et. al*, 'Telecom Policy reform in India', at *http://siteresources.worldbank.org/INTRANETTRADE/Resources/Singh.pdf* (last accessed 11 October 2015).

14 *Supra* note 7.

15 Shamika Ravi and Darrell M. West, 'Spectrum Policy in India'(2015), at *https://www.brookings.edu/wp-content/uploads/2016/06/Spectrum-Policy-in-India8515.pdf* (last accessed 25 August 2016).

16 Department of Telecommunications, at *http://www.dot.gov.in* (last accessed 9 October 2015).

attractive destination for telecom investment (in turn to realize the dream of Digital India in true sense.). I shall focus upon, in the upcoming sections, the major flaws in the spectrum policy of India and its possible impact on Digital India Dream.

3. Spectrum Issues in India

The word spectrum reminds us of the phenomenon in physics where a ray of white light passing through the glass prism gets dispersed into 7 different colours and thus giving us a spectrum of colours (VIBGYOR). But remember, the seven colours of white light and the light itself forms a part of a larger spectrum which we term as Electromagnetic Spectrum. The electromagnetic spectrum consists of various other electromagnetic waves apart from white light and these are Ultraviolet rays, X-Rays, Infrared Rays, Radio Waves, Microwaves etc. The relevant for our purpose here are Radio Waves. The radio waves, as mentioned above, are a type of electromagnetic radiations having frequencies ranging from 3KHz to 300GHz. The radio waves are artificially created for convenient transfer of voice data through fixed and mobile radio broadcasting stations, RADARS, communications satellites, computer networks and innumerable other applications. Currently the 2100 MHz, 1800 MHz and 900 MHz band is allocated by the Government of India to the telecom operators in the country[17].

The license to operate in a particular area is given to any telecom service provider through a bid. The bid is made for the spectrum whose frequency is pre-determined by the government. The bidder who shall bid the highest shall be allotted with the license to operate in a particular area. In a standard form of spectrum auction in India, the bid is made by the various service providers for a particular frequency area wise. The government sets a reserve price for the bid for each area. The highest bidder after the completion of the auction is required to submit a certain amount at that very moment and the remaining amount is to be submitted with the authority within a stipulated time. No bidder is allowed to reduce the bid once he has made it and an attempt of reduction in the bid is generally made punishable under the bid document. In case of equal bids of two or more bidders the service provider who has

[17] Department of Telecommunications, Spectrum Management, at *http://www.dot.gov.in/content/spectrum-management* (last accessed 9 October 2015).

already been providing service in the area is given preference and in case where both the highest bidders are providing the service in the concerned telecom circle the one with the higher consumer base is given preference. Once the highest bidder is granted the license he is allowed to operate on a particular pre-defined frequency in the particular telecom circle for which he has won the auction. The license so given is time bound and the hoarding of spectrum beyond the license term is considered to be punishable[18].

Though we have understood the general procedure and terms of auction of the spectrum, the question remains that why should the government go for the auction to grant the license? Why can't the licence to telecom operator to operate in a particular area at a particular frequency be granted by checking into the credentials of the operator and his capacity to serve the concerned telecom circle?

The answer to the question lies in the fact that just like minerals, oil, gas, water, air etc., the radio waves are also considered to be the property of the government. The availability of the radio waves is scarce, but they are required to be used for various purposes such as defence, navigation, mobile phones etc. in such a situation, auction of mobile spectrum by the government is a strategy to manage the scarce resource of radio waves[19]. Through the auction a particular frequency of the radio waves is allocated to limited number of operators throughout the country and therefore the overuse of the radio wave frequencies by all the telecom operators in the country is managed. Further through auctions and the spectrum charges that are charged by the government, the government is able to recover the expenses it has incurred in production of the radio waves and further the government is able to recover the license fee which it seems to be entitled to.

As we have discussed the process through which the spectrum is allocated and why is the auction necessary to grant licence we are ready to unfold the second dimension of the telecom spectrum in India. The Spectrum Auction and allocation procedure India have various flaws. We shall discuss three major flaws important to be discussed from the foreign investment point of view.

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18 *Guidelines for auction and allotment for 3G spectrum services*, Department of Telecom, Ministry of Communications and IT, Government of India, August 1, 2008.

19 Shishir Asthana, "What is Spectrum Auction all About", *Business Standard*, 7 February, 2014.

3.1 Lack of Spectrum Availability

The first major flaw in the telecom spectrum in India is the lack of spectrum availability. The government and the telecom operators have been sparring over the call drops for some time. The telecom operators on the one hand allege that there is no proper spectrum availability whereas the government alleges that there is plenty of spectrum available. The government supports its contention with a fact that the 11.19 % of the spectrum inventory had no takers in the Auction made in March, 2015. The question remains that if the telecom operators find the scarcity of the spectrum why 11.19% of inventory remained untaken? There were basically two reasons for why the 11.19 % of the inventory remained untaken. Firstly, the GSM operators did not wish to buy the spectrum in 800 MHz frequency which is a CDMA frequency. Secondly, the other band which remained unsold was the frequency of 2100 MHz. The reason for the band remaining unclaimed was that the investing companies did not have enough money to invest in the band as they had exhausted their allocated budget in the other frequencies which were essential for their business[20].

The telecom companies in such a situation are trapped in a dead lock. If they do not invest in the untaken frequencies the government makes a claim that how can the telecom operator complain of lack of spectrum when 11.19% of auction inventory was left untaken? On the other hand if the telecom industry invests in such non profitable frequencies they will be trapped by the government through the Ministry of Corporate Affairs as to why did the company invest in a venture which it knew was detrimental to its financial status and in turn was expected to affect the shareholders in a bad fashion.

As per recent statistics India has 0.2 Hz of frequency per telecom subscriber which is much less than the other countries like USA, Australia, Brazil where the frequency per subscriber is 2.1 Hz, 22.8 Hz, 2.0 Hz[21].

3.2 Highly Fragmented Spectrum

The Second and somewhat related to the first problem in India is the problem of **highly fragmented spectrum.** The radio wave spectrum in India is highly fragmented as compared to other countries and a very less percentage of the

[20] Malini Bhupta, "The truth about spectrum shortage in India", *Business Standard*, 17 September 2015.

[21] *Supra* note 15.

entire radiowave spectrum is allocated to the mobile phone operators. The allocation of the spectrum to mobile services in India is less than half of the spectrum provided to the telecom sector in other countries. Most of the countries further have initiated their policy to allot even greater spectrum to the telecom services whereas in India the chances of allotment of greater spectrum seem to be feeble. Moreover due to extreme fragmentation of the spectrum a very small portion of spectrum is allocated to each telecom operator in India as compared to other countries and thereby making India a less attractive destination to invest in. The following figure depicts the comparison of spectrum allocated in India to that of the allocation in other countries[22].

Amount of licensed spectrum allocated for mobile services in different countries
(in MHz, including both downlink and uplink frequencies)

BAND	US		EUROPE		AUSTRALIA		BRAZIL		CHINA		INDIA	
	Currently assigned	Pipeline	Currently assigned	Pipeline	Currently assigned	Pipeline	Currently assigned	Pipeline	Currently assigned	Pipeline	Currently assigned	Pipeline
700 MHz	70					90						
800 MHz	64		60	0-60	40		65		20		23	
900 MHz			70		50		20		52		36	
1800 MHz		15	120-150	0-20	150		150		90	60	86	
1900 MHz	130	10	15-35		20		20		35	20		
2100 MHz	130	30	120		120		110		30	90	40	30
2300 MHz	20				98						40	
2600 MHz	194		150-190	0-50		140	175			190	40	
Total	608	55	540-615	0-60	478	230	554	0	227	360	265	30

3.3 Extremely high cost of Spectrum Allocation

The third and one of the most striking problem with the spectrum from the foreign investment point of view is the **High Cost of spectrum procurement.** The analysts have documented that the auction cost for the spectrum in the highest in India. The cost of spectrum allocation in India is 25 times the cost in US, Germany, France, Singapore, Sweden, Spain etc. Further a license to operate for a span of 20 years does not give a promising deal to the investors so that they may invest in Indian Market[23].

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22 V. Sridhar, "Bridging India's Spectrum Deficit", *Financial Express*, 9 October, 2014.

23 *Supra* note 15.

In the above two sections we have discussed the Foreign Direct Investment Policy and the spectrum allocation policy of India. Apart from all the other telecom policies of the country, the policy of Spectrum allocation is emphasized by me because it is the inception point for any telecom service provider in the Indian Market and therefore plays a great role in the FDI decision of the Foreign Investors. Now in the upcoming section I shall evaluate the chances of foreign investment in India, which seems to be important for the success of the digital India mission, in light of the above troubles in spectrum allocation.

4. Digital India Mission and Telecom Investments

The digital India mission is the flagship programme of the Government of India which aims at the transformation of India into a digitally empowered economy[24].The vision of the programme lies in the three core values: (1) Digital Infrastructure as utility to every citizen, (2) Governance and Services on Demand, (3) Digital empowerment of citizens[25]. Centric to all these three vision values is the need for high speed internet access to every citizen of the country.

In order to accomplish the above mentioned aims, the programme seeks to connect 2,50,000 village panchayats to the internet facility by December 2016[26]. The programme further seeks to cover, with special attention to the North Eastern Region of the country, 55,619 villages in the country where the mobile phone/ internet facility is not available by 2018[27]. Apart from granting the internet facility to the remote areas, the government also seeks to achieve 'Information for All' objective. As a part of Information for all scheme the government shall proactively engage itself social media and online messaging.

The government has rightly pointed out that in order achieve the aims under the programme the access to Internet and mobile phone facility is a pre requisite. But the pre requisite to grant internet and mobile connection is the availability of

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24 Digital India, About the Programme, at *http://www.digitalindia.gov.in/content/about-programme* (last accessed October 9, 2015).

25 Digital India, Vision and Vision areas, at *http://www.digitalindia.gov.in/content/vision-and-vision-areas* (last accessed 9 October 2015).

26 Digital India, Broadband Highways, at *http://www.digitalindia.gov.in/content/broadband-highways* (last accessed 9 October 2015).

27 Digital India, Universal Access to mobile Connectivity, at *http://www.digitalindia.gov.in/content/universal-access-mobile-connectivity* (last accessed 9 October, 2015).

service providers who could invest in the spectrum. Further in a country where an allocation of 0.2Hz per mobile user is estimated[28] at a stage when the tele density of the country is 79.38%[29], How can we without increasing the spectrum allocation to telecom sector assume an increase of tele density to approximately 100% under the digital Indian scheme? As per the opinion of experts, to achieve the vision of digital India programme industry needs to get over 50MHz spectrum per operator from 15 to 18 MHz of allocation at present[30]. In order to grant a greater portion of radio wave spectrum to the telecom sector more infrastructure, centric to telecom sector, is required to be installed (because any how the allocation of spectrum to essential services like defence cannot be curtailed). More installation of infrastructure means more addition to government cost, greater the cost incurred to the government more expensive shall be the spectrum auction and when already we have a spectrum allocation which takes place at a price 25 times to that in other countries[31] a further addition to allocation price shall be detrimental and discouraging for the operators willing to invest in the sector. Such a fiery situation that I have assumed here, I term it as 'Telecom Nightmare of India'

India for the success of its digital India mission essentially requires foreign telecom operators to invest more in India. A similar massage is conveyed through the recent visit of Hon'ble Prime Minister Mr. Narendra Modi to the Silicon Valley[32]. But the question which lies here is, Whether the relaxation in FDI policies for telecom sectors suffice or should the internal policy environment in the telecom sector should be such so as to promote the investment ? Essentially the answer lies in improvement of telecom policies especially the spectrum allocation policies so that any foreign investor who invests in the country can see returns.

The foreign investor would essentially not invest in a country having the nightmare situation as I have already discussed. Another point of extreme concern is that the Debt to Equity ratio of the telecom industry is increasing

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28 *Supra* note 15.

29 *Supra* note 1.

30 Anandita Singh Mankotia, "Telecom companies financial, spectrum problems may hurt Digital India plan", *Economic Times*, 25 May 2015.

31 *Supra* note 15.

32 Press Trust of India, "PM Narendra Modi leaves for home after concluding US, Ireland visit", *The Economic Times*, 29 September, 2015.

constantly because of the extremely high spectrum rates and lower tariff rates (as compared to other countries). The cumulative debt burden of the telecom industry as a whole has increased from 82,726 Crores in Financial Year 2008-2009 to 3,00,000 Crores in Financial Year 2014 – 2015[33].

I have discussed various policy flaws (especially spectrum related flaws have been largely dealt by me in the paper) which have the potential to disrupt the telecom sector in India and in turn the Digital India Dream. In the upcoming section I shall devise certain suggestions which may help us in staying away from the 'Indian Telecom Nightmare'

5. Conclusion

To summarize the argument, The Digital India vision of our Prime Minister is a very beautiful vision which can make India reach a higher level of development. But to realize the vision the country needs reforms in certain sectors, especially in telecommunication and information technology sectors, whose development, stability and self sufficiency are the pre requisites of the realization of the digital India dream. The self sufficiency and development of the telecom and IT sector depends largely on the foreign investment (which shall with them bring capital, new technology and more efficient digital methods). Though our country has an edge of a liberalized investment policy in telecom sector, a liberal FDI policy, alone, is not sufficient to attract the foreign investments. The polices of our country should be such so that the foreign investor not only finds the investment in our country attractive but more attractive and promising than other countries.

India, in order to attract the foreign investments, apart from liberalized FDI policy, needs to ensure easier tax regimes, lower spectrum allocation rates, higher profit expectancy to the investors, lower fragmentation in the spectrum, allotment of greater spectrum to telecom sector etc.

[33] *Supra* note 30.

SOCIAL AUDITING IN CORPORATE SECTOR IN INDIA

Dinesh Kumar *

1. Introduction

> If the [multinational enterprise] poses a threat to human freedom it is because of its peculiar effectiveness. Its capacity to pursue a centralized and coordinated strategy removes decision-making power far from the people affected by it.
>
> D.F. Vagts[1]

Sklair believed that globalization was moving 'transnational corporations'[2] (TNC) into broader international roles, whereby corporations' states of origin became less important than international agreements developed through the World Trade Organization and other international institutions. Emerging from these multinational corporations was a transnational capitalist class, whose loyalties and interests, while still rooted in their corporations, was increasingly international in scope.[3] TNCs are responsible for one fourth of the gross world product; the annual flow of foreign direct investment (FDI) they activate is, depending on the ups and downs of global economy, between 1300 and 2000 billion dollars. The United States is the greatest FDI source in the world - about 20% - and it is its largest recipient as well. However, the European Union as a whole has a lead over the US. In 2012, with assets worth almost 700000 million dollars across the world - almost half invested in the US -, the largest TNC was General Electric; GE was followed by Volkswagen (409000 millions). Shell, with 467000, was first in sales; followed by Exxon, with 420000 millions. Wal-Mart had the largest amount of employees: 2200

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* Assistant Professor, Department of Laws, Panjab University, Chandigarh.

1 D. F. Vagts, "The Multinational Enterprise: A New Challenge for Transnational Law", *Harvard Law Review*, Vol. 83, 761 (1970).

2 The legal literature is divided between two terms: Transnational Corporations and Multinational Corporations. Even though both the terms convey same meaning and used interchangeably by common man still various thinkers as well as organisations used these terms in a very restricted meaning. Transnational Corporations means corporations having business operations in countries other than their country of incorporation, either directly or through subsidiaries or affiliates. Whereas a multinational corporation is an enterprise which owns or controls production or service facilities outside the country in which it is based. The UN Economic and Social Council have embraced the term 'transnational corporation'. The OECD and the ILO on the other hand, continue to employ the term 'multinational enterprise'. In this work, the researcher would like to use the term 'Transnational Corporations' while analyzing the various codes of conduct on corporations.

3 Leslie Sklair, *The Transnational Capitalist Class*, (2001).

millions all over the world; followed by the Taiwanese company Hon Hai with over 1200 million. If we combine TNCs annual sales with Gross Domestic Products (GDP) in a single ranking, Shell - with sales almost equivalent to Argentina's or Norway's GDP and larger than Austria's, South Africa's, Thailand's or Colombia's GDP (just as Exxon's or Walmart's sales) - would be holding the 25th position.[4]

TNCs are active in most of the dynamic sectors of national economies. They bring new jobs, technology, and capital, and are capable of exerting a positive influence in fostering development, by improving living and working conditions. At the same time, however, companies may violate human rights by employing child labourers, discriminating against certain groups of employees, such as union members and women, attempting to repress independent trade unions and discourage the right to bargain collectively, failing to provide safe and healthy working conditions, and limiting the broad dissemination of appropriate technology and intellectual property. Corporations also dump toxic waste and their production processes may have consequences for the lives and livelihoods of neighbouring communities.[5]

To handle the situation, the Western institutions have taken a step ahead to control the abuses of TNCs by developing an independent monitoring mechanism known as "Social Audits". The term 'social audit' is often used to encompass a wide range of approaches to measuring, assessing, and reporting on corporate social, environmental, and ethical performance. Social auditing is not only about adding to what is already on our plates, it's about taking a more organized and high impact approach to meet the business objectives that we already have. The Social Auditor will work on the components of a company's Social Policy (Ethics, Labor, Environmental, Community, Human Rights, etc.), and for each subject, he/she will analyze the expectations of all stakeholders.

Several major international projects, such as the Global Reporting Initiative (GRI) and (Account Ability) AA1000 standards, are underway to develop generally accepted principles, standards, and reporting formats for all companies, as well as professional standards for social auditors.

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4 "Global Technology Flows". *<http://www.unsam.edu.ar/tss-eng/global-technology-flows/>* Accessed on 01 May, 2016.

5 David Weissbrodt, "UN Human Rights Norms for Business", *International Law FORUM du droit international*, Vol. 7, No. 4, 290-297 at 290 (2005).

However, most innovative models for corporate social reporting are developing in Europe, some of them have taken a lead at international level like the U.K. based Institute for Social and Ethical Accountability (ISEA) which promotes the practice of SEAAR (social and ethical accounting, auditing and reporting). ISEA has created AA 1000 Framework in 1999, an international membership organization, which provides a comprehensive management framework for social and ethical accounting, auditing and reporting. The framework provides both a set of guiding principles and processes that corporation and other organizations can follow to measure, manage and communicate performance.

During the past two decades the idea of transparency, accountability in environmental and sustainability performance, human rights in general and labour rights in particular have taken root in the discourse on corporate social responsibility.[6] The inter-governmental organization like the UN, ILO, and regional organizations like EU while addressing this discourse drafted and issued various voluntary guidelines for TNCs. At the same time, various independent institution or organisation emerged as part of this trend and offered various tools for compliance of human rights by TNCs. Most of these different techniques focused on several specific issues, which gives the liberty to the TNCs to choose the techniques of their own choice or more suitable to their needs, but in general, all the techniques touched upon the issues relating to human rights and labour rights.

2. Meaning and Concept of Social Auditing

In the era of Corporate Social Responsibility (CSR), where corporations are often expected not just to deliver value to consumers and shareholders but also to meet environmental and social standards deemed desirable by some vocal members of the general public, social audits can help companies create, improve and maintain a positive public relations image.[7] The social audit is a natural evolutionary step in the concern for operationalizing CSR and, its essence, represents a managerial effort to develop a calculus for gauging the

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6 Halina Szejnwald Brown, Martin de Jong and Teodorina Lessidrenska, "The Rise of the Global Reporting Initiative (GRI) as a Case of Institutional Entrepreneurship", *Corporate Social Responsibility Initiative,* Working Paper No. 36, at 1 (2007).

7 *<http://www.investopedia.com/terms/s/social-audit.asp#ixzz2KydgffzG>* Accessed on 31 March, 2016.

firm's socially oriented contributions.[8] The goal is to identify what, if any, actions of the corporation have impacted the society in some way. A social audit may be initiated by the corporation that is seeking to improve its cohesiveness or improve its image within the society.[9]

The social audit today is a vehicle or device by which individual businesses can monitor, measure, and appraise their social performance. It is a document published annually with information on the activities developed by a company in the area of human and social promotion, directed towards its employees and the community to which it belongs.[10] It is a systematic study and evaluation of an organization's social performance, as distinguished from its economic performance. It is concerned with possible influences on the social quality of life instead of the economic quality of life.[11]Alen Couret and Jacque Igalense defines Social Audit[12] as an aims at analyzing each risk factor and provides recommendations on the possible means for their limitation. On the other hand

Raymond Vatier, founder of the social audit in France, considers social audit as "a managerial tool for managing and monitoring the company's ability to manage human or social issues related to the professional activity".[13] Bauer and Fenn, pioneers in the development of modern forms of social auditing, take it to mean: "A commitment to systematic assessment of and reporting on some meaningful, definable domain of a company's activities that have social impact".[14]

Pierre Candou defines social audit as an independent activity for monitoring, analysis, assessment and presentation of recommendations for the activity based on methodologies and applied methods that which permit, upon comparison with the reference books, to determine first the strengths and problems in the field of using staff in relation to costs and risks. This allows the diagnosing and clarifying the problem causes, assessing their significance and

8 Archie B. Carroll and George W. Beiler, "Landmarks in the Evolution of the Social Audit", *The Academy of Management Journal*, Vol. 18, No. 3, at 589 (Sep. 1975).

9 *<http://www.businessdictionary.com/definition/social-audit.html#ixzz2KyalMKvy>* Accessed on 31 March, 2016.

10 *<http://www.balancosocial.org.br/media/textofisuc2.pdf>* Accessed on March 31, 2016.

11 Keith Davis and Robert L. Bromstrom, "Implementing the Social Audit in an Organization", *Business and Society*, Vol. 16, at 13 (1975).

12 *<http://archive.nbuv.gov.ua/portal/SocfiGum/Mimi/2011fi3fi2/1fi8.pdf>* Accessed on 31 March, 2016.

13 *Ibid.*

14 *Supra* note 8, at 595.

last but not least making recommendations for the implementation of specific activities which are not performed by the auditor himself.[15]

S. Prakash Sethi captures the essence of the social audit[16] At the risk of oversimplification, we might say that the purpose of the social audit is to help break down the broad term "social responsibility of business" into identifiable components and to develop scales that can measure these components.

A social audit takes into consideration the factors such as a company's record of charitable giving, volunteer activity, energy use, transparency, work environment and worker pay and benefits to evaluate what kind of social and environmental impact a company is having in the locations where it operates. Social audits are optional - companies can choose whether to perform them and whether to release the results publicly or only use them internally.[17] The key difference between development and social audit is that a social audit focuses on the neglected issue of social impacts, while a development audit has a broader focus including environment and economic issues, such as the efficiency of a project or programme.

3. Objectives of the Social Auditing

The scope of the social audit includes all the activities of a corporation, which have significant social impact. To be more precise, to know the social impact of the corporation one has to work on the components of a corporation Social Policy. Generally, a good social policy includes provisions relating to Ethics, Labour, Environment, Human Rights, Community, Society, and Compliance. Normally, a social audit can determine only what an organisation is doing in social areas, not the amount of social good that results from these activities. It is a process of audit rather than an audit of results.

The functions of the Social auditor is to see whether the ethical policy of the corporation include the pledge not to participate in a series of activities that are deemed offensive like exploitation of children, unethical treatment of animals, damage to the environment and dealing with undemocratic regimes. Social

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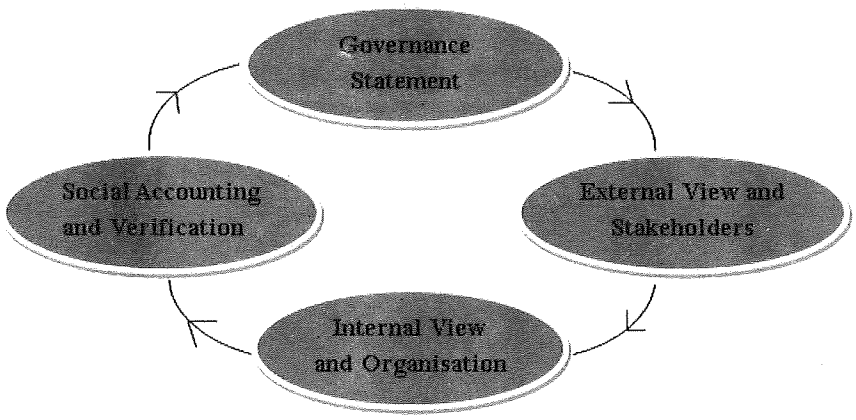
15 *Supra* note 12.

16 S. Prakash Sethi, "Getting a Handle on the Social Audit", *Business and Society Review / Innovation*, No. 4, 31-38 at 32 (Winter 1972-73).

17 *<http://www.investopedia.com/terms/s/social-audit.asp#ixzz2KydXQdYV>* Accessed on 30 March, 2016.

5. The Social Audit Process

The Social Audit process is cyclical, it is made up of four accumulative elements each one following on from the previous one and informing the next element until the audit cycle is completed. The process itself creates a learning culture which grows and strengthens year on year. The four elements of the Social Audit cycle are as follows: governance statement; external view and stakeholders; internal view and organisation; and social accounting and verification.[25]



(i) Governance Statement: This element is used to establish clarity about the organisation: the principles and values, its objectives and commercial operations. The element includes a review of the constitutional aims and objectives, a review of the rule book and clarification of the main values that guide the operational management. Current practices and new areas for development are identified, objectives are set for the following audit period and the measurement of objectives set in the previous audit period takes place.[26]

(ii) External View and Stakeholders: This element is used to examine the organisation's relations with a broad set of stakeholders and its social, environmental and commercial environment. The element includes stakeholder mapping, profiling and analysis, and an assessment of consistency between the Governance Statement and current practice. Strengths and weaknesses in

[25] *Id.* at 8.
[26] *Ibid.*

current practices and new areas for development are identified, and objectives are set for the following audit period.[27]

(iii) Internal View and Organisation: This element is used to examine the organisation's structure and relations with its staff, board members and volunteers, and how it delivers its operations. The element includes an analysis of Roles and Tasks and a comparison with job descriptions and terms of reference for consistency. Consistency with the Governance Statement is assessed. Strengths and weaknesses in current practice and new areas for development are identified and objectives set for the following audit period.[28]

(iv) Social Accounting and Verification: This element is where the Outline Objectives set in the other elements are brought together, prioritised and planned for the following audit period. The previous year's achievements are analysed for their consistency with the Governance Statement to determine the organisation's degree of integrity. Objectives that have not been achieved are analysed, the Quality Assurance checks are assessed and the process and results are reported formally to stakeholders in the Social Audit Report.[29]

6. Social Auditing in Corporate Sector in India

The social audit movement was a precursor to corporate social monitoring. When the concept of social responsibility has been gaining momentum, the Indian corporations have also started initiating the process of social audit to retain their customers' value and contribute positively towards their social goal. In 1970, Tata Steel, which happens to be the largest Private Sector Steel Company or TNCs in India, was the first company which took initiatives to start the process of social audit. It formally incorporated its commitment to the stakeholder concerns, including those of the nation, and environment, in its Articles of Association.[30]

The Company shall have among its objectives the promotion and growth of the national economy through increased productivity, effective utilisation of materials and manpower resources and continued application of modern scientific and managerial techniques in keeping with the national aspirations,

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27 *Ibid.*
28 *Id.*, at 9.
29 *Ibid.*
30 Pheroza Godrej and Justice S.K. Mohanty, *3rd Social Audit 1991-2001*, 2 (2005).

and the Company shall be mindful of its social and moral responsibilities to the consumers, employees, shareholders, society and the local community.[31]

In order to objectively and effectively assess its corporate social responsibility in terms of the impact of its activities on stakeholders, Tata Steel conducts a Social Audit of the organisation every ten years, carried out by an Audit Panel consisting of members, independent of, and unconnected with, the Company, selected by the Board. The exercise is guided by the following 'Terms of Reference' (TOR), based on the 'Articles of Association':

> To examine and report whether, and the extent to which, the Company has fulfilled the objectives contained in Clause 4A of its Articles of Association regarding its social and moral responsibilities to the consumers, employees, shareholders, society and the local community.

As is evident from the TOR, the scope of the Social Audit is quite vast and broad, touching every aspect of organisational activities and performances, and leaves little for interpretation. TOR engages assessment of the organisation's social and moral responsibilities to the consumers, employees, shareholders, society and the local community. Besides, the environment or 'Mother Nature' is also an implicit stakeholder of an organisation, though common to other stakeholders, as social accounting without including environmental aspects means little to stakeholders. Accordingly, the scope of audit is integral to 'Corporate Sustainability', addressing all three key organisational aspects, i.e. economic, societal and environmental, and, therefore, involves recording, consulting, analysing and reporting of its findings vis-à-vis consumers, employees, shareholders, society, local community and 'Mother Nature'.[32]

The 1st Social Audit, for the period prior to 1980, was conducted in the year 1980 based on the 'Articles of Association'. The Audit Panel interacted with stakeholders, visited the organisation's premises and other places of relevance to the audit, as per a mutually agreed schedule, and submitted its views and recommendations to the Board on 9th July 1980. This report covered social and moral responsibilities to consumers, society, employees, shareholders and the local community. In order to formalise the audit process, a 'Terms of

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31 Clause 4A: Social Responsibility of Company, Articles of Association, Tata Motors Limited, 7. *<http://www.sec.gov/Archives/edgar/data/926042/000119312504156777/ dex12.htm>* Accessed on July 01, 2016.

32 *Supra* note 30, at 6.

Reference' for the Social Audit was laid down, as mentioned above. Accordingly, the 2nd Social Audit, for the period 1981 - 1991, was conducted in the year 1991, as per the given 'Terms of Reference'. The 3rd Social Audit being reported, for the period 1991 - 2001, was conducted during the period 2002- 03 within the framework of the same 'Terms of Reference' as that of the 2nd Social Audit.[33]

Subsequently, Indian Tobacco Company (ITC) published its social report in 1978 that discussed the company's social responsibilities in three different aspects: nation orientation and economy; nation and people; and nation and the society. From 1970-80 many public sector units like Cement Corporation of India (CCI) Limited, Bharat Heavy Electrical Limited (BHEL), Bharti Airtel Ltd., Oil and Natural Gas Commission (ONGC), Mineral and Metal Trading Corporation (MMTC), Steel Authority of India Limited (SAIL) and Oil and Natural Gas Corp Ltd., Tata Consultancy Services, Suzlon Energy Ltd., Reliance Communications Ltd. India Limited has prepared 'social income statement' and 'social balance sheet' along with their financial statements depicting their social performance and corporate growth together in their annual report.[34]

In 2012 annual report, Tata Steel reaffirmed its policy towards social responsibility and social auditing. Tata respects and protects human rights both within and outside the workplace through the application of frameworks such as SA 8000 and the United Nations Global Compact based on the Universal Declaration of Human Rights and ILO conventions. Tata Steel's commitment to human rights is reflected in its Human Resource Policy, Procurement systems, Affirmative Action Policy and Social Strategy, all of which are aimed at fostering socio-economic empowerment through inclusive growth. Tata Steel's CSR and Accountability Policy uphold applicable laws while dealing with stakeholders, avoiding any direct or indirect complicity in the Infringement of fundamental rights.[35]

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33 *Id.*, at 3.

34 Deepa P, "Social Audit - Indian Experiences," in B. Sujatha (Ed.) *Social Audit: Concept and Practices*, 157-169 at 159 (2006).

35 105th Annual Report 2011-2012: The Cornerstones of Sustainability, at 50. *<http://www.tatasteeleurope.com/file_source/Functions/Finance/Documents/annual-report-2011-12.pdf>* Accessed on July 02, 2016.

By 1990-2000, Tata's social audit reports proved itself to be a usher for the most of the domestic TNCs as well as companies. Tata's audit reports were made public which helped the corporation in earning the trust and profits of the customers, employee, contractors and society at large not only at national level but also at international level. As a result most of the domestic TNCs to name few Reliance Industries, Birla, Bajaj Automobiles, BHEL, SAIL, BAHART, Dr Reddy's Foundation, BPCL, Hero, Maruti Udyog, IOC, Ranbaxy etc. opted for social audit of their social performance. Today, one can find social audit reports of most of the corporations on their website. Moreover, the process of social auditing become very easy as there are number of organization to do social audit on standard parameters.[36]

7. Conclusion

Since 1990s, the era of globalization, not only a good number social auditing systems/tools were in force even though on voluntary basis but the States also recognised the needs to fix the responsibility of the corporations keeping in view the economic influence these TNCs have. However, the States were seems to be helpless in front of them, because most of the TNCs shifted their subsidiaries in the least developed countries to earn more profit at a lesser cost i.e., by not paying the minimum wages, lenient labour legislations and weak governments. The steps taken up by the United Nations like the Global Compact, UN Norms on the Responsibility for the Businesses also highlighted the significance of the social auditing techniques. Due to the efforts of the international organisations like UN, Council of Europe, ILO, the states also took initiatives in drafting norms or guidelines for the corporations on the similar lines. The *Companies Act*, 2013 contains mandatory provision for CSR for the companies in India. Social auditing has become need of the hour and mostly companies recognised the same.

[36] C. V. Baxi and Rupamanjari Sinha Ray, "Corporate Social &Environmental Disclosures & Reporting", *Indian Journal of Industrial Relations*, Vol. 44, No. 3, 355-375 at 361 (January, 2009).

CORPORATE SOCIAL RESPONSIBILITY: 'SPORADIC' TO 'SYSTEMATIC' LAW

*Dr. Bharat**

A lesser-known event of the epic, the *Ramayana*, relates to the common squirrel's contribution to making of the 'sethu' (bridge) across the sea for reaching Lanka. Being inspired by the noble purpose, the squirrel got wet in the sea-water, rolled over the sand and then shook the sand off on the *sethu*. Impressed by this sincere, committed though small effort of the squirrel, *Lord Rama* patted on its back and touched it fondly with his fingers, which, according to the epic, gave squirrel its stripes. On similar lines, in case of the Corporate Social Responsibility (CSR) interventions, the spirit of involvement and sharing the prevailing concerns of the society are of greater importance than the amount spent. It calls for the mass participation of each and every corporate operating in the society. Agenda for future of CSR in India to a great extent will lie in recognizing, understanding and appreciating the CSR efforts by the media, civil society and the Government, which will in turn promote it further in solving the national issues relating to unemployment & poverty and making the growth socially inclusive.[1]

1. Introduction

In India, the CSR has paralleled India's historical development.[2] In the pre-industrial period, prior to the 1850s, CSR was heavily influenced by cultural and religious tenets. As per the Vedic philosophy, the principal role of money was to serve the needs of society, and the best use of money was donation for the welfare of others. This thinking influenced merchants and business owners of that time period who committed themselves to charitable works such as building temples, schools, and hospitals, and providing relief in times of famine and epidemic for their personal satisfaction. Later, the British brought western industrialization to India, and under its influence, a few families from traditional merchant communities such as the Tata, Birla, Bajaj, Godrej, Shriram, Singhania, Modi, Mahindra, "who were strongly devoted to philanthropically motivated CSR," pioneered indigenous industrialization.[3] These corporate philanthropists participated not only in the struggle for freedom, but also in the

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* Assistant Professor of Law, University Institute of Legal Studies, Panjab University, Chandigarh.

1 Nikita Singh, "Corporate Social Responsibility: The Mahindra Way", *Indian Journal of Industrial Relations*, Vol. 44, No. 3, (Jan.), 396-401 (2009).

2 Tatjana Chahoud et al., *Corporate Social and Environmental Responsibility in India - Assessing the UN Global Compac's Role*, 24-26 (2007).

3 *Ibid.*

nation-building process thereafter. However, their charity was not purely altruistic: they had a commercial interest in supporting efforts to further the country's industrial and social development.[4] Business operations and CSR engagement in this period were based primarily on corporate self regulation, though the charitable and philanthropic actions of corporations were mostly sporadic and were not followed consistently as part of a well thought-out, long-term business strategy.[5] Additionally, these CSR practices focused on the external stakeholders only, such as communities and general social welfare bodies.[6] This narrow focus obviously could not deliver the desired results, as the welfare of internal stakeholders, such as employees, were completely ignored.

India was a British colony for about 200 years, and the country's struggle for independence dominated the second phase of Indian CSR (1914-1960). This phase was influenced fundamentally by "Gandhi's theory of trusteeship, the aim of which was to consolidate and amplify social development."[7] In fact, many Indian academicians believe that the concept of CSR has its origin in Gandhi's concept of trusteeship:

Gandhi felt that the capitalist(s) [should] be treated as trustees of the assets vested with them – provided they conduct themselves in a socially responsible way. This demanded that they manage the assets in the best possible way, take a part of the profit to sustain them and dedicate the remaining profit for the uplift of the society. Here 'asset' has a broader connotation: it can also include knowledge or skills.[8]

"Gandhi's influence prompted various Indian companies to play active roles in nation building and promoting socio-economic development during the twentieth century" by committing themselves to his reform programs, which included abolition of "untouchability," the caste system, development of rural areas, and promotion of indigenous cottage industry.[9] CSR practices until this time were heavily influenced by the ethical model[10] of CSR, the origins of which "lie in the

4 *Ibid.*
5 *Ibid.*
6 *Ibid.*
7 *Ibid.*
8 T. Karunakaran, *Corporate Social Responsibility*, 1 (2008).
9 Ritu Kumar et al., "*Altered Images: The 2001 State of Corporate Responsibility in India Poll*" 1, 1-2 (2001).
10 A model heavily influenced by moral values.

pioneering efforts 19th century corporate philanthropists such as the Cadbury brothers in England and the Tata family in India."[11]

Post-independence India followed the "mixed economy" model, which incorporated aspects of capitalism and socialism, and under which both the public and private sectors co-exist successfully.[12] The mixed economy model was expected to be the solution to the economic and social challenges that the country faced immediately following independence, when a majority of the population was living in abject poverty. The government's efforts were directed towards providing socially just economic growth, which led to the emergence of Public Sector Undertakings (PSUs) and extensive legislation on labour and environmental standards.[13] Jawaharlal Nehru propounded the "Statist" model of CSR in post-independent India, under which sustainability practices and policies of State owned Enterprises were featured prominently.[14] In this context, CSR was mainly characterized by legal regulation of business activities and/or promotion of PSUs. Under this model, "elements of corporate responsibility, especially those relating to community and worker relationships, were enshrined in labor law and management principles."[15]

2 Corporate Social Responsibility and the Law

Corporate responsibility is defined by the Business Dictionary as 'a company's sense of responsibility towards the community and environment (both ecological and social) in which it operates. Companies express this citizenship (1) through their waste and pollution reduction processes, (2) by contributing educational and social programs, and (3) by earning adequate returns on the employed resources.'[16]

The Companies (Corporate Social Responsibility Policy) Rules, 2014 defines the concept of CSR as under:[17]

Corporate Social Responsibility means and includes but is not limited to:

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11 *Supra* note 9.
12 *Supra* note 2, at 27.
13 *Id.*
14 *Supra* note 9.
15 *Id.*
16 *<http://www.businessdictionary.com/definition/corporate-social-responsibility.html#ixzz48hvnv4XS>* Accessed on February 26, 2016.
17 The Companies (Corporate Social Responsibility Policy) Rules, 2014, 2(c).

(i) Projects or programs relating to activities specified in the Schedule VII of the Act; or

(ii) Projects or programs relating to activities undertaken by the board of directors of a company (Board) in pursuance of recommendations of the CSR Committee of the Board as per declared CSR policy of the company subject to the condition that such policy will cover subjects enumerated in Schedule VII of the Act.

In India, the biggest companies have practiced philanthropy for decades but giving has been 'sporadic', and has not aided development. To begin with, the Government did not make it compulsory for every company to have a policy for CSR. However, various guiding principles on CSR were formulated by different authorities' viz. Reserve Bank of India, Ministry of Heavy Industries & Public Enterprises (Department of Public Enterprises) and the Ministry of Corporate Affairs. To quote, the Department of Public Enterprises issued comprehensive CSR guidelines for Central Public Sector Enterprises in April, 2010 wherein these enterprises, except those making a loss, have to create mandatorily, through a board resolution, a CSR budget as a specified percentage of net profit of the previous year.[18]

The business can generate value and long term sustainability for itself while making positive contribution for the betterment of the society by exhibiting socially, environmentally and ethically responsible behaviour in governance of its operations. And to carry forward this agenda, in July 2011, Ministry of Corporate Affairs presented a guideline which was a refinement over it earlier issued "Corporate Social Responsibility Voluntary Guidelines – 2009".[19] The refined guidelines of 2011 were named as "National Voluntary Guidelines on Social, Environmental & Economic Responsibilities of Business".[20] Besides this,

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18 *<http://taxguru.in/company-law/government-compulsory-company-policy-corporate-social-responsibility.html>* Accessed on April 12, 2016.

19 To provide companies with guidance in dealing with the abovementioned expectations, while working closely within the framework of national aspirations and policies, following Voluntary Guidelines for CSR have been developed. *<http://www.mca.gov.in/Ministry/latestnews/CSR_Voluntary_Guidelines_24dec2009.pdf>* Accessed on March 28, 2016.

20 The 2011 guidelines emphasized that businesses have to endeavor to become responsible actors in society, so that their every action leads to sustainable growth and economic development. Accordingly, the Guidelines use the terms 'Responsible Business' instead of CSR as the term 'Responsible Business' encompasses the limited scope and understanding of the term CSR. These Guidelines were articulated in the form of nine Principles with the Core Elements to actualize each of the principles.

the Ministry also undertook projects, programmes and activities in collaboration with national and international organizations, chambers of business, professional institutions and others for generation of awareness on CSR related activities of Corporate Sector.

CSR has recently taken legalized getaway into corporate board rooms by virtue of the Section 135 of the *Companies Act*, 2013; which is as under:

> **135. Corporate Social Responsibility**
>
> (1) Every company 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 constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which at least one director shall be an independent director.
>
> (2) The Board's report under sub-section (3) of section 134 shall disclose the composition of the Corporate Social Responsibility Committee.
>
> (3) The Corporate Social Responsibility Committee shall, –
>
> (a) formulate and recommend to the Board, a Corporate Social Responsibility Policy which shall indicate the activities to be undertaken by the company as specified in Schedule VII;
>
> (b) recommend the amount of expenditure to be incurred on the activities referred to in clause (a); and
>
> (c) monitor the Corporate Social Responsibility Policy of the company from time to time.
>
> (4) The Board of every company referred to in sub-section (1) shall, –
>
> (a) after taking into account the recommendations made by the Corporate Social Responsibility Committee, approve the Corporate Social Responsibility Policy for the company and disclose contents of such Policy in its report and also place it on the company's website, if any, in such manner as may be prescribed; and
>
> (b) ensure that the activities as are included in Corporate Social Responsibility Policy of the company are undertaken by the company.
>
> (5) The Board of every company referred to in sub-section (1), shall ensure that the company spends, in every financial year, at least two per cent of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy:
>
> Provided that the company shall give preference to the local area and areas around it where it operates, for spending the amount earmarked for Corporate Social Responsibility activities:
>
> Provided further that if the company fails to spend such amount, the Board shall, in its report made under clause (o) of sub-section (3) of section 134, specify the reasons for not spending the amount.

Explanation – For the purposes of this section "average net profit" shall be calculated in accordance with the provisions of section 198.

Section 135 of the *Companies Act*, 2013 mandates every company above the given threshold levels to comply with CSR provisions of the Act, and to disclose contents of its CSR policy in its Board's Report. The penalty provision for non-compliance in this regard is prescribed under Section 134 (8) of the Act.

The Ministry of Corporate Affairs has vide its notification dated February 27, 2014, and in exercise of powers conferred by section 1(3) of the *Companies Act*, 2013, notified April 1, 2014 as the date on which the provisions of Section 135 and Schedule VII of the Act shall come into force. With the patronage of law for CSR compliance by companies, India has become the forerunner to command expenditure on CSR activities through a statutory provision.

3. CSR Law: Threshold limit

The threshold limit, during any financial year, for applicability of CSR to a company is:[21]

a) A net worth of Rs. 500 crore or more; *or*
b) Turnover of the company to be Rs. 1000 crore or more; *or*
c) Net profit of the company to be Rs. 5 crore or more.

With effect from April 1, 2014, every company, private limited or public limited, which either has a net worth of Rs 500 crore or a turnover of Rs 1,000 crore or net profit of Rs 5 crore, needs to spend at least 2% of its average net profit for the immediately preceding three financial years on CSR activities. If for any reason a company is unable to do so, they would be required to explain the reason for that.

Every company falling in the above stated threshold limit is bound to constitute a CSR Committee of the Board consisting of three or more directors, out of which at least one director shall be an independent director. For the CSR purposes, the net worth, turnover or net profits are to be computed in terms of Section 198 of the *Companies Act*, 2013 as per the profit and loss statement prepared by the company in terms of Section 381 (1) (a) and Section 198 of the *Companies Act*, 2013. Since the CSR spend amount is based on the average net profit of the last three years, companies can plan its CSR expenditure well in advance. Further, as per the Companies (Corporate Social Responsibility Policy) Rules, 2014; the mandate of

[21] the *Companies Act*, 2013, S. 135 (1).

the CSR is applicable not only to Indian Companies, but also applicable to branch and project offices of a foreign company in India.

4. CSR Committee and the Policy

Every qualifying company requires spending of at least 2% of its average net profit for the immediately preceding three financial years or CSR activities. The company needs to constitute a committee that will have three (or more) board of directors, which shall initiate CSR activities and policies.

The three keys to an effective CSR policy are commitment, clarity and congruence with corporate values. Clarity is all-important because social responsibility is a broad term, and it needs to be debated and hammered out to meet each company's circumstances. Congruence is about ensuring that the company's attitude to its responsibilities towards society is consistent with the way in which it runs the whole business, *i.e.* its values and culture.[22]

5. CSR and Schedule VII

Today the innermost challenge is to maintain the human progress while minimizing the use of resource and environmental decline. CSR is all set to increase availability of funds for the welfare activities to overcome both these challenges. A wide spectrum of activities are within the ambit of CSR, as per the Schedule VII of the *Companies Act*, 2013 wherein, a few of the activities permitted as per the earlier Schedule have been elaborated and widened in scope and several others altered. Listed below are permitted CSR activities in accordance with Schedule VII:

1. Eradicating hunger, poverty and malnutrition, promoting preventive health care and sanitation (including contribution to the Swach Bharat Kosh set-up by the Central Government for the promotion of sanitation)[23] and making available safe drinking water.
2. Promoting education, including special education and employment enhancing vocation skills especially among children, women, elderly, and the differently abled and livelihood enhancement projects.
3. Promoting gender equality, empowering women, setting up homes and hostels for women and orphans; setting up old age homes, day care centres

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22 *<http://taxguru.in/corporate-law/aspects-corporate-social-responsibility-quintessence-business-activity.html>* Accessed on 18 March, 2016.

23 Inserted vide notification dated 24 October, 2014 and will come to force after it has been published in the Official Gazette.

and such other facilities for senior citizens and measures for reducing inequalities faced by socially and economically backward groups.

4. Ensuring environmental sustainability, ecological balance, protection of flora and fauna, animal welfare, agroforestry, conservation of natural resources and maintaining quality of soil, air and water (including contribution to the Clean Ganga Fund set-up by the Central Government for rejuvenation of river Ganga)[24].
5. Protection of national heritage, art and culture including restoration of buildings and sites of historical importance and works of art; setting up public libraries; promotion and development of traditional arts and handicraft.
6. Measures for the benefit of armed forces veterans, war widows and their dependents.
7. Training to promote rural sports, nationally recognized sports, paraolympic sports and olympic sports.
8. Contributions or funds provided to technology incubators located within academic institutions which are approved by the Central Government.
9. Contribution to the Prime Minister's National Relief Fund or any other fund set up by the Central Government for socio-economic development and relief and welfare of the scheduled castes, the scheduled tribes, other backward classes, minorities and women.
10. Rural development projects.
11. Slum area development.[25]

The dawn of CSR law is considered as one of the most forward looking and futurist framework in recent times to help businesses become more responsible. The CSR expenditure needs to be in conformity with Schedule VII so as to be considered as eligible CSR expenditure. Therefore, companies need to draw up the policy and action plan to ensure that they spend the required 2% amount on the activities included in the Schedule. The companies can carry out these activities by collaborating either with a non-governmental organization, or through their own trusts and foundations or by pooling their resources with another company.

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[24] Inserted vide the above mentioned notification dated 24 October, 2014 and will come in to force after it has been published in the Official Gazette.

[25] Inserted vide notification dated 06 August, 2014 and will come into effect after its publication in the Official Gazette.

In the Budget 2016-17, presented in Parliament, the Government has decided to set up a Higher Education Financing Agency (HEFA) with initial capital base of Rs. 1,000 crore which will leverage funds from the market and supplement them with donations and CSR funds. The setting up of HEFA will provide companies with one more government scheme to invest their CSR funds in.[26]

6. CSR Reflections: 2014-15

Corporate initiatives must work hand in hand with a commitment toward social responsibility. Corporate responsibility may not be an aspect of a business that is always the first thing people notice about a corporation but it's extremely imperative to a business's integrity and character. The year 2014-15 was the first year of implementation of CSR by companies under the *Companies Act*, 2013.

CSR expenditure of 460 listed companies, which have placed their annual reports on their website, indicates that 51 PSUs and 409 Private Sector Companies together spent Rs. 6337.36 crore on CSR during 2014-15 as summarized below:[27]

S. No.	Company Type	No. of Companies	Actual CSR expenditure (in Rs. Crore) (2014-15)
1.	Public Sector Undertakings	51	2386.60
2.	Private Sector Companies	409	3950.76
Total		460	6337.36

The data clearly points out that, 51 PSUs spent Rs. 2386.60 crore while 409 private companies spent 3950.76 crore rupees during the first year.

The CSR data, divulge that the 2% profits of 460 companies comes to around Rs. 8,347.47 crore, of which 75.92% has been spent for CSR activity during 2014-15. Furthermore, the spending under CSR is 79% for private corporate entities

[26] The Higher Education Financing Agency (HEFA) will be a not-for-profit organization that will leverage funds from the market and. These funds will be used to finance improvement in infrastructure in our top institutions and will be serviced through internal accruals. <*http://pib.nic.in/newsite/printrelease.aspx?relid=136981*> Accessed on 25 March, 2016.

[27] As stated by Shri Arun Jaitley, Union Minister of Corporate Affairs in written reply to a question in the *Lok Sabha* on 26 February, 2016.

and 71% for PSUs. The unspent amount is to be carried forward to the next year.[28] Ah, that's good beginning for the first year!

Of these 460 companies, company-wise CSR outflow of top twenty companies during financial year 2014-15 is as under:[29]

S. No.	Name of the Company	Actual CSR Expenditure (In Rs. Crore)
1	Reliance Industries Limited	760.58
2	Oil and Natural Gas Corporation Limited	495.23
3	Infosys Limited	239.54
4	Tata Consultancy Services Limited	219.00
5	ITC Limited	214.06
6	NTPC Limited	205.18
7	NMDC Limited	188.65
8	Tata Steel Limited	171.46
9	Oil India Limited	133.31
10	Wipro Limited	132.70
11	Indian Oil Corporation Limited	113.79
12	Bharat Heavy Electricals Limited	102.06
13	Mahindra and Mahindra Limited	83.24
14	Hindustan Unilever Limited	82.35
15	Larsen and Toubro Limited	76.54
16	Gail (India) Limited	71.69
17	Cairn India Limited	70.36
18	Northern Coalfields Limited	61.77
19	Mahanadi Coalfields Limited	61.30
20	Hindustan Zinc Limited	59.28
GRAND TOTAL		**3542.09**

Out of the above top twenty CSR spenders, nine are PSUs and rest private companies. Reliance Industries spent the most with almost 760.6 crore rupees

28 *<http://pib.nic.in/newsite/PrintRelease.aspx?relid=137987>* Accessed on 28 March, 2016.
29 *Ibid.*

much more than the prescribed 2% limit[30] followed by ONGC with 495.2 crore rupees.

The State /UT wise number of CSR projects undertaken during the year 2014-15 is as under:[31]

S. No.	States/U.T.s	No. of Projects	S. No.	States/U.T.s	No. of Projects
1	Maharashtra	202	*19*	Jharkhand	41
2	Gujarat	111	*20*	Bihar	38
3	Tamil Nadu	97	*21*	Kerela	37
4	Karnataka	95	*22*	Himachal Pradesh	34
5	Rajasthan	89	*23*	Goa	23
6	Uttar Pradesh	80	*24*	Manipur	23
7	Andhra Pradesh	79	*25*	Arunachal Pradesh	22
8	West Bengal	79	*26*	Chandigarh	21
9	Madhya Pradesh	71	*27*	Meghalaya	20
10	Delhi	66	*28*	Sikkim	20
11	Haryana	66	*29*	Tripura	20
12	Orissa	54	*30*	Nagaland	19
13	Jammu & Kashmir	52	*31*	Pondicherry	19
14	Chattisgarh	48	*32*	Andaman & Nicobar Islands	18

[30] Around 95% of expenditure has been made through Reliance Foundation. The list of NGOs partnered with the foundation has not been published. While contributions have been made to Reliance University, Schools and hospitals, 72% of contribution has been made to a single entity, H N Reliance Foundation Hospital and Research Centre. Incidentally, Sir H.N. Reliance Foundation Hospital and Research Centre in Mumbai was rebuilt in the same financial year with state-of-the-art facilities to provide tertiary care. Promoting preventive health care is a permissible CSR activity under Schedule VII of the *Companies Act*. *<https://factly.in/how-are-various-companies-spending-csr-money/>* Accessed on 30 March, 2016.

[31] *Ibid.*

15	Telangana	47	*33*	Dadar & Nagar Haveli	18
16	Uttarakhand	47	*34*	Daman & Diu	17
17	Punjab	43	*35*	Lakshadweep	17
18	Assam	42	*36*	Mizoram	15
Total					1790

As per Section 135(3) & (4) of the *Companies Act*, 2013, the Board of the company is empowered to select programs/projects/activities to be undertaken and to prioritize the CSR obligation as per the Schedule VII besides monitoring the same without any role on the part of the Ministry of Corporate Affairs in this regard. Development-sector wise CSR expenditure for 2014-15 is as under:[32]

S. No.	Subjects in Schedule VII	CSR Expenditure (in Rs. Crore)
1	Eradicating Hunger, Poverty & Health Care	1421.66
2	Education/ Vocational skills / livelihood enhancement	1462.6
3	Women / Old Age / Children	219.27
4	Environment sustainability	1188.69
5	Art & Culture	539.83
6	Sports promotion	454.91
7	PMNRF etc.	125.32
8	Rural Development	724.32
9	Slum Development	114.14
10	Swatch Bharat Kosh	42.64
11	Clean Ganga Fund	15.49
12	Others	28.5
	Grand Total	**6337.36**

[32] *Ibid.*

Attracting more than 23% of the CSR spending, 1462.6 crore rupees were spent on promoting education, vocational skills and livelihood enhancement. To deal with issues such as hunger, poverty and health care a total of 1421.66 crore rupees were spent. Rural development projects saw a spending of 724.32 crore rupees.

After the *Swachh Bharat Abhiyaan* was launched on October 2, 2014, the Government set up a *Swachh Bharat Kosh* (fund) in 2015, to attract contributions from corporate entities.[33] Having the budgetary allocation of 9,000 crore rupees for the cleanliness and sanitation drive; during the year, the *Kosh* garnered Rs. 42.64 crore from companies.

The figures reveal that the contribution towards technology incubators provided by Central government received the least focus. Regardless of the teething troubles which corporate faced on account of lack of clarity in laws and taxes, delay in getting permission from competent authority, conflicts among local stakeholders, etc. the CSR law has activated an urge among the companies to project them as 'socially responsible'. The above reflections of the 2014-15 are self-speaking that the concept of CSR has the potential to bring a revolution in the development of the economy.

7. Conclusion

Involvement of business in welfare and development of society has been a tradition in India and its evolution from individual's munificence to CSR can be seen in the business sector over the years. The concept of parting with a portion of one's surplus wealth for the good of society is *neither* modern *nor* a Western import into India. From around 600 BC, the merchant was considered an asset to society and as treated with respect and civility as is recorded in the *Mahabharata* and also the *Arthashastra*. Over the centuries, this strong tradition of charity in almost all the business communities of India has acquired a secular character. Also, many of India's leading businessmen were influenced by Mahatma Gandhi and his theory of trusteeship of wealth which contributed liberally to his valued programs including that of abolition of untouchability, women's emancipation, rural reconstruction etc.

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[33] *<http://pib.nic.in/newsite/PrintRelease.aspx?relid=113643>* Accessed on 24 April, 2016.

To thrive, or even just to survive, businesses increasingly need to understand the root causes of what affects their operations, not just the symptoms.

In order to streamline the benevolent activities by the corporate entities and ensure greater degree of accountability and transparency, the *Companies Act*, 2013 has made it mandatory for companies to undertake CSR activities. The advent of the CSR law at this juncture is very significant, as on one hand, India is at the threshold of demographic dividend; and on the other hand, there is an imperative need for the creation of human and physical capital to harvest its rewards. Pandering to CSR activities not only helps the company to develop a conscientious and concerned brand image but also as develop community acceptance. The CSR law will not only strengthen the Indian tradition but also shore up the Indian corporate sector into a global leader in responsible business.

Though this is only the first year of mandatory CSR expenditure, the activities undertaken by various large companies does give a fair idea of which way this might go in the future. The government needs to review these activities and issue further guidelines on what could be taken up and what cannot be. CSR activities in 2014-15 saw grandeur expenditure with a whopping 6337.36 crore rupees spent by 460 companies in implementing a total of 1790 projects.

CSR law in India has given a pioneering way to look at the relationship amid business and society that does not treat 'corporate growth' and 'societal welfare' as a zero-sum game. The 'sporadic' to 'systematic' law on CSR in India bolsters the notion that lasting corporate subsistence is possible with respect for the environment and social responsibility.

TECHNIQUES OF DNA FINGERPRINTING

Deepti Singla*
Anjan Nanda**

1. Introduction

Among many new tools that science has provided for the analysis of forensic evidence is the powerful and controversial analysis of DNA fingerprint. Today, the use of DNA fingerprint technology has gained acceptance in the courts in *the US, the UK, and Canada* and now even in *India* this technique of DNA fingerprint have been availed of in various civil and criminal cases. The DNA analysis on blood, semen, saliva, urine, hair roots, etc. is not only used to apprehend the guilty but also to exonerate the innocent. As time passed technology has improved the techniques of analyzing DNA. Depending on the quantity of sample and extent of degradation, several techniques can be applied to narrow the likelihood that a particular individual was present at a crime scene. There are many techniques used by various laboratories in analyzing DNA. However, the two most popular techniques used are Restriction fragment length polymorphism (RFLP), and Polymerase chain reaction (PCR) using Short tandem repeats (STRs).

2. What is DNA?

DNA is an abbreviation for "deoxyribonucleic acid". It is the chemical name for a gene which is found in every cell in the body and which carries genetic information from one generation to the next. A human being is made up of millions of cells, and DNA is present in all cells. Human cells have 23 pairs of chromosomes. An individual inherits half of his/her chromosomes/DNA from each parent.

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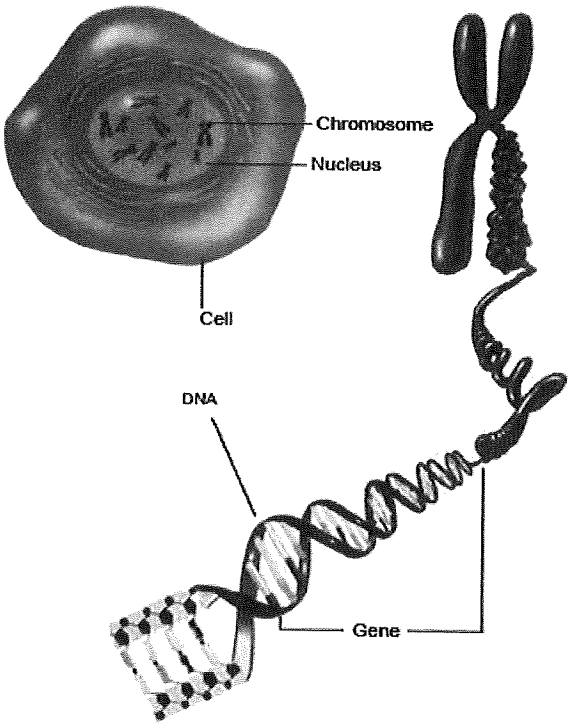
* Doctoral Research Scholar (SRF-UGC Sponsored), Rajiv Gandhi National University of Law, Punjab.
** Advocate, District Courts, Patiala.



DNA in Human Cell

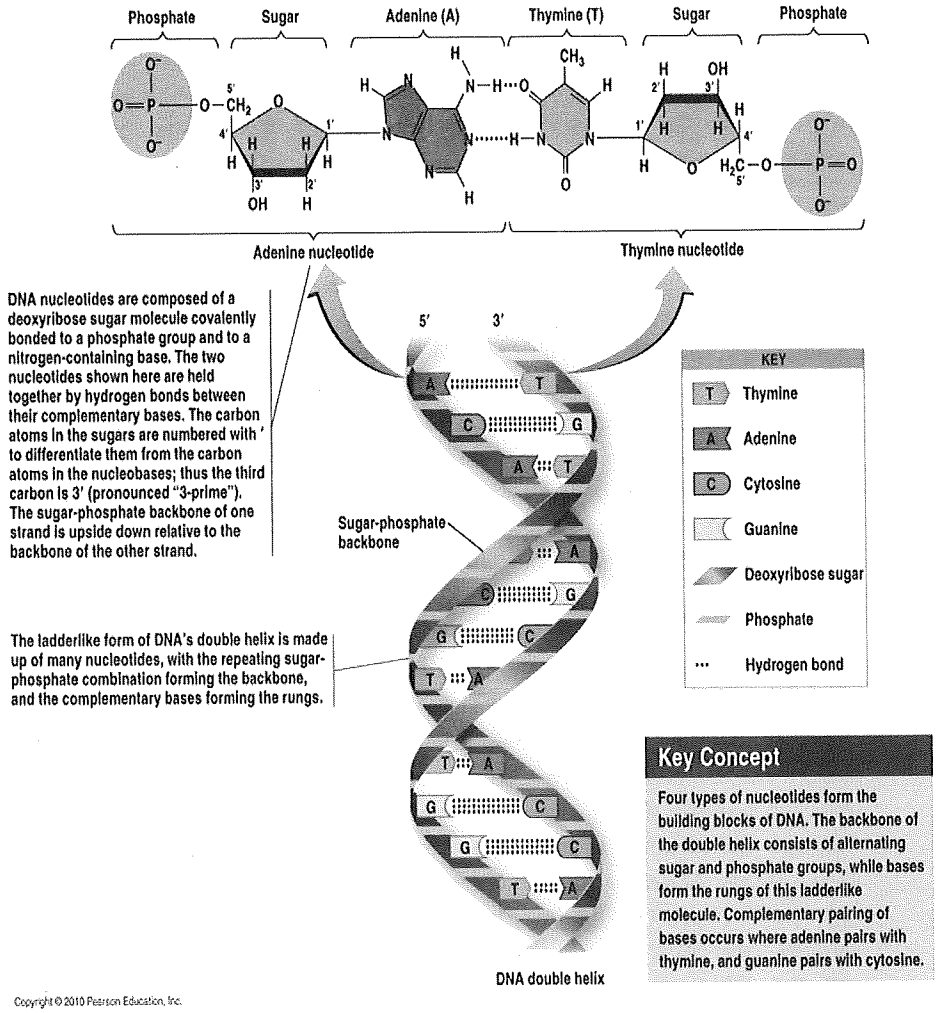
Source:http://publications.nigms.nih.gov/biobeat/12-07-19/12-07-19-5.jp

3. Chemical Structure of DNA

The chemical structure of everyone's DNA is same. The only difference between people is the order of the base pairs. DNA looks like an incredibly long twisted ladder. This shape is called a double helix. DNA consists of two parallel spiral strands that form a double-helix. Each strand is actually a linked chain in which the links consist of a very large number of units called nucleotides. Every nucleotide is composed of three smaller chemical compounds: a phosphate group, a sugar molecule (deoxyribose), and a nitrogen-containing base i.e. a base (A, T, G, or C). The DNA double helix is composed of four different nucleotide bases: Adenine (A), Thymine (T), Cytosine (C) and Guanine (G). Due to their chemical makeup Adenine (A) is always paired with Thymine (T), and Cytosine (C) is always paired with Guanine (G). The base pairs (for example, T-A, A-T, C-G, and G-C) are held together by hydrogen bonds. The order of the bases in one strand of the DNA ladder determines the order of the bases in the other

strand; for example, if the bases in one strand of the ladder are: TGATCA, the bases in opposite strand would be ACTAGT.

The double helix structure of DNA was first described by *James Watson and Francis Crick* in 1953, who were awarded jointly the Noble Prize in 1962 for discovery of the structure of DNA.



DNA Double Helix Structure

Source: Copyright © 2010 Pearson Education, Inc.

4. What is DNA Fingerprinting?

DNA fingerprinting is a method to identify and evaluate genetic information in a person's cells. The complete analysis of DNA in a human cell is known as 'DNA fingerprinting'. DNA fingerprinting was used for the first time in 1984 by *Dr. Alec Jeffreys (a geneticist in Leicester)* when he discovered that repetitive patterns of DNA known as VNTRs (variable number of tandem repeats) were present in all human beings but varied in length for each individual. Each individual has a VNTR pattern which is inherited by his or her parent. The pattern in each individual is different, but is similar enough to reconstruct the parents VNTR. DNA profiling is a technique by which an individual can be identified at molecular level.

A human being is made up of millions of cells, and DNA is present in every cell of human body packaged in chromosomes within the nucleus. DNA is a powerful investigative tool because no two individuals have the same DNA since every person's DNA sequence is unique. DNA fingerprint is prepared to identify criminal from hair, blood, semen or other biological materials found at the scene of a crime. The DNA samples of the culprit can be obtained from the scene of crime itself. For example blood samples from a scene of murder or samples of seminal fluids deposited on the clothes or on the surface or in the body of victim of rape can be used to acquire DNA fingerprint of the culprit. This is compared with those taken and prepared from the possible suspect in the case.[1]

5. Techniques of DNA Fingerprinting

DNA fingerprinting is a laboratory process that determines with near certainty whether two samples of DNA are from the same person. There are different methods used by laboratories till date for the analysis of DNA fingerprint. Each testing protocol has its own positive and negative points and each protocol differs slightly from each other. Circumstances, such as the age, size and handling of the sample, determines what type of testing is to be used. When DNA testing is done, several basic steps are performed regardless of the type of test. In the process of analysis, first of all it is isolated from cells. Generally, RFLP analysis requires large amounts of DNA and the DNA must be un-degraded. PCR testing amplifies the DNA

[1] Singh Pradeep and Dershowitz Allan, 'DNA Fingerprinting and Criminal Justice'; *Chicago Sun Times*, 12 August, 1987.

molecules using a smaller sample and often requires less DNA than RFLP testing. However, PCR tests are extremely sensitive to contamination at the crime scene and within the laboratory. STR is one of the newer and more flexible DNA techniques. It has the advantage of being able to analyze degraded and broken pieces of DNA. STR analyses how many times base pairs repeat themselves on a particular location on a strand of DNA, This method is used most widely. The other test, naming MtDNA, is used to examine samples which cannot be analyzed by other methods by looking at the DNA in a cell's mitochondrion.[2] When DNA testing is done, several basic steps are performed regardless of the type of test. In the process of analysis, first of all it is the extraction and purification of the DNA sample.

Some of these techniques have been discussed in detail as follows:

I. RFLP (Restriction Fragment Length Polymorphism);

II. PCR (Polymorphism Chain Reaction);

III. STR (Short Tandem Repeat);

IV. MtDNA (Mitochondrial DNA Analysis); and

V. Y-Chromosome Analysis.

I. Restriction Fragment Length Polymorphism ("RFLP") Method

The first technique for the analysis of DNA is known as RFLP. The use of RFLP testing for human identification was pioneered by Prof. Alec Jeffrey and first reported in *Andrews* v. *State*[3]. Since then, RFLP testing has been widely used by laboratories throughout the world for the determination of paternity and other biological relationships and for the exclusion or inclusion of individuals as the source of a DNA sample. It has been used in post conviction relief cases and has resulted in a number of exonerations.

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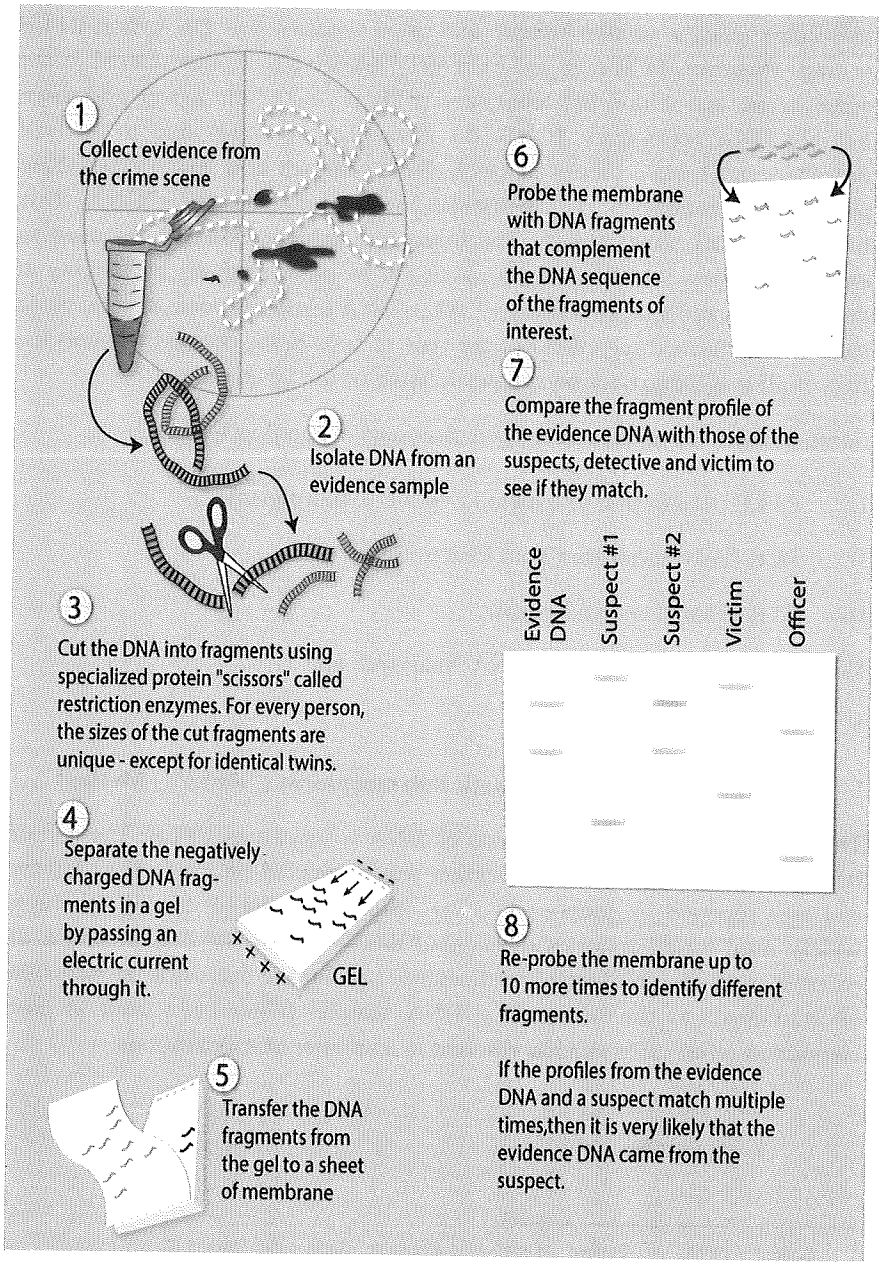
2 Source: DNA & Typing (Unit 11) Brennon Sapp and Bsapp.Com, available at *http://www.bsapp.com/forensics_illustrated/texthtml/unit_11_bodies_autopsies.htm* (last visited 28 February 2016).

3 Fla. Dist. Ct. App. 1988.



http://learn.genetics.utah.edu/content/science/forensics/

i. Basic steps involved in the analysis of DNA Fingerprinting:

The general process of DNA fingerprinting analysis includes:

a. *Collection of DNA samples* - The samples including the blood, semen, saliva, hair and may be an extremely small sample. The root from a single strand of hair is enough for researchers to work with.

b. *Isolation of DNA from an evidence sample* (cells are broken down to release DNA) - This sample contains WBCs which are broken open using detergent. The entire useable DNA is separated from the extra cellular material.

c. *DNA cutting* – Then the extracted DNA is cut into smaller fragments using a restriction enzymes or molecular scissors. It results in many fragments of different lengths. The fragments are called RFLPs.

d. *Gel Electrophoresis* - RFPLs are then put into an agarose gel. Using gel electrophoresis, the fragments are sorted according to size. DNA has a negative charge and when the current of the electric field is turned on, the negative RFLPs will start to move across the gel towards the positive end. The smaller fragments move farther across the gel than the larger ones.

e. *Transfer of DNA to Nylon Membrane* - The double helix DNA split into single strands using alkaline solution. The DNA band pattern is transferred from gel to nylon by placing the sheet on the gel and soaking them overnight so that all liquid is evaporated and only DNA is left. This process is called Southern blotting.

f. *DNA probe* - Radioactive or colored probes are then added to the nylon sheet so that DNA fingerprint can be seen. Adding probes to the nylon sheet produces some pattern of bands.

g. *Hybridization* - Nylon membrane is bathed in a solution containing labelled probe. The probe will recognise and hybridize to the target portion of single stranded DNA molecule. The blot is then mixed-up in the concentration of detergent salt and urea with DNA which determines the DNA sequence or locus. Excess probe material, if any, is washed off.

h. *Autoradiography* - X-ray film is placed next to the membrane to detect the radioactive pattern. The X-ray film is developed to make visible

the pattern of bands which is known as DNA fingerprint. The results are generally visualised as a series of bands on film. This photographic process (X-ray film) is known as 'autoradiography.'

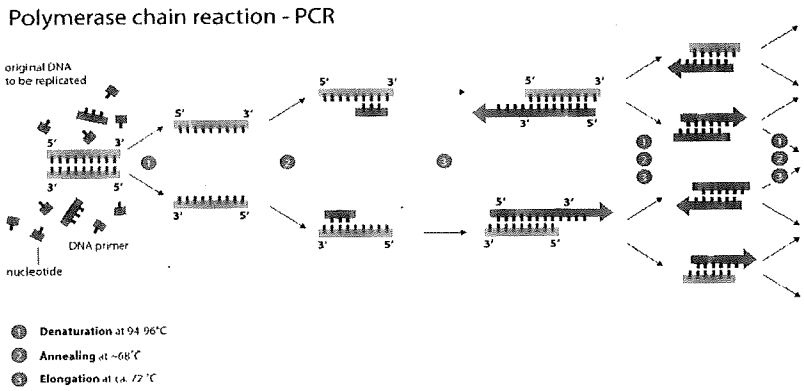
i. *Interpretation of the test results*- The DNA fingerprint obtained from the crime scene is then compared with the DNA of the suspect to determine whether the suspect is excluded as the source of the DNA or is included as a possible source of the DNA and if band patterns match then it can be determined that the suspect is possibly the source of the DNA.

RFLP was one of the first applications of DNA analysis to forensic investigation. The RFLP is considered to be more accurate than the PCR, mainly because the size of the sample used more, use of a fresh DNA sample, and no amplification contamination. The RFLP, however, require longer time period to complete the analysis and is costly. In RFLP relatively large amounts of DNA is required. This method usually requires a sample that has 100,000 or more cells. In addition, samples degraded by environmental factors such as dirt or mold, do not work well with RFLP. Therefore this method is not usually used now-a-days. The PCR-STR based method that came to replace RFLP offered significant improvements over all of these shortcomings.

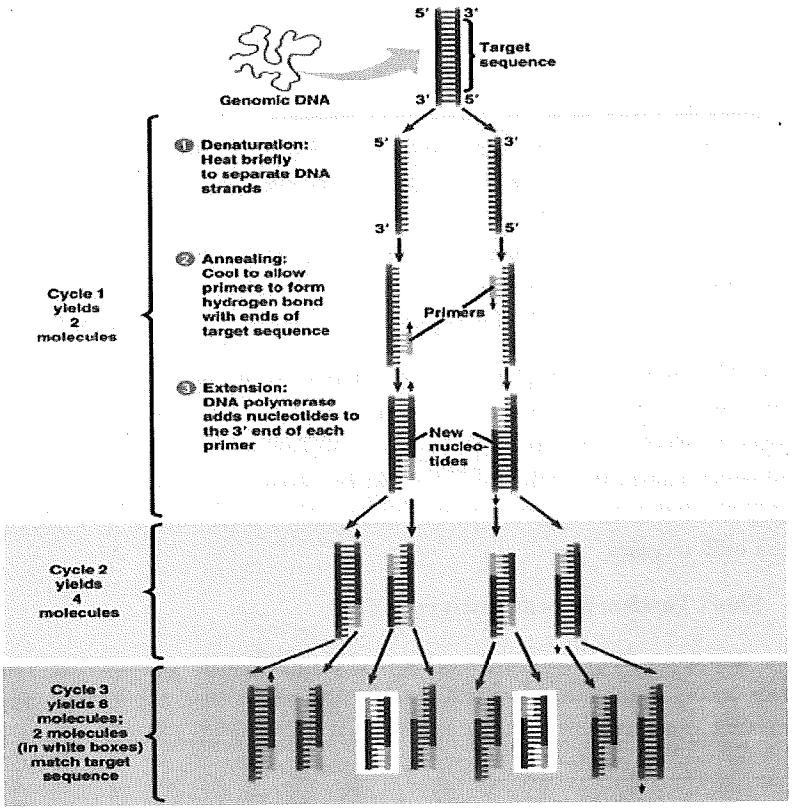
II. The Polymerase Chain Reaction ("PCR") Method

The technique of Polymerase Chain Reaction has rapidly become the most widely used and accepted technique for DNA analysis. This technique has an advantage over RFLP as it takes less time to process and give result. PCR is used to make millions of exact copies of DNA from a biological sample without affecting the original sample. The ability of PCR to amplify such tiny quantities of DNA enables even highly degraded samples to be analysed or samples that have been stored improperly or samples become aged. Great care, however, is needed to be taken to prevent contamination with other biological materials during identification, collection and preservation of a sample.[4] Accuracy, precision and rapidness are the hallmarks of PCR based technology, rendering it the most informative status. It is also indispensable in situations where the specimen is very little or the DNA is degraded.

[4] *Id,* 1.



Source: http://en.wikipedia.org/wiki/Polymerase_chain_reaction.



Source: http://openwetware.org/wiki/BME103:T930_Group_16

III. The PCR process is comprised of three steps:

a. Denaturation;
b. Annealing; and
c. Extension.

a. *Denaturation* - The first step requires a high temperature to denature the double strand DNA. DNA molecules are melted by raising the temperature to 95 degrees Celsius (or about 20–30 seconds) where the weak hydrogen bonds are broken and the double strand DNA separates into two single strands.

b. *Annealing*- The second step requires lowering the temperature to allow annealing of the primers to the single strand DNA. The optimal annealing temperature depends upon the melting temperature of the primer-template hybrid. If the temperature is too low, the primer could bind imprecisely. If it is too high, the primer might not bind effectively. The mixture is cooled to anywhere from 45-72° C. The annealing reaction occurs very quickly once the proper temperature has been reached.

c. *Extension* - The third step requires DNA mixture by DNA polymerase. The reaction is then heated to 72° C, the optimal temperature for DNA polymerase to act. Nucleotides in the solution are added to the annealed primers by the DNA polymerase to create a new strand of DNA complementary to each of the single template strands. After completing the third step, two identical copies of the original DNA have been made.

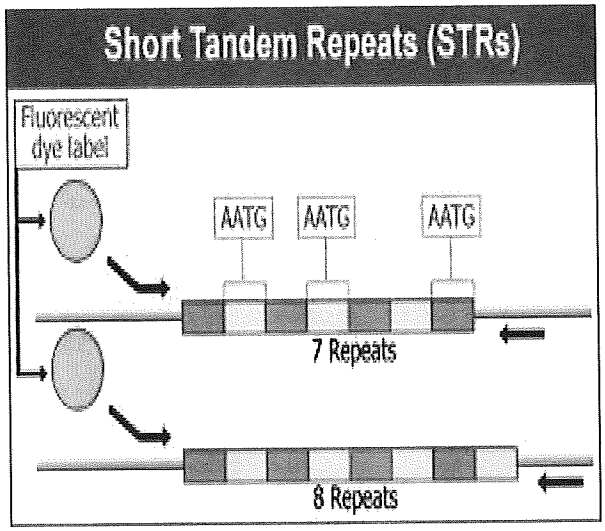
This system targets specific genetic information in the cell and amplifies it a billion times so it can be analysed. Synthetic primers are made which seek out the pattern which occurs once the DNA is separated. A DNA polymerase is added which causes the DNA to make a perfect copy of it. The matter is heated causing the strands to separate a further time making more copies. 30 cycles will make a billion copies.[5]

IV. Short Tandem Repeat Analysis (STR):

Every strand of DNA has a piece that contains genetic information which informs an organism's development (exons) and pieces that, apparently, supply no relevant genetic information at all (introns). Although the introns may seem

[5] A. Bennett and Robert S. Anderson, "DNA Profiling", *The Advocate*, Vol. 49, Part 1, January 1991, p. 63.

useless, it has been found that they contain repeated sequence of base pairs. These sequences are called Variable Number Tandem Repeats (VNTRs). A given person's VNTRs come from the genetic information donated by his parents. Because VNTRs patterns are inherited generally, a given person's VNTR pattern is unique. For precise and clear identification by DNA fingerprinting base sequence is studied in specific regions of DNA strand. This technology is called short Tandem Repeat technology. The STR technique is the most common PCR-based DNA analysis technique. This technique is used to evaluate specific regions within nuclear DNA. Variability in STR regions can be used to distinguish one DNA profile from another.[6]



Source:http://zon.trilinkbiotech.com/wp-content/uploads/2013/05/STR.jpg

For Example:

TTCCATTTGGAATGAATGAATGAATGAATGAATGATGAGTTTCAA

We can see in above example that the sequence ATGA is repeated six times within this particular location. These are what we refer to as short tandem repeats.[7]

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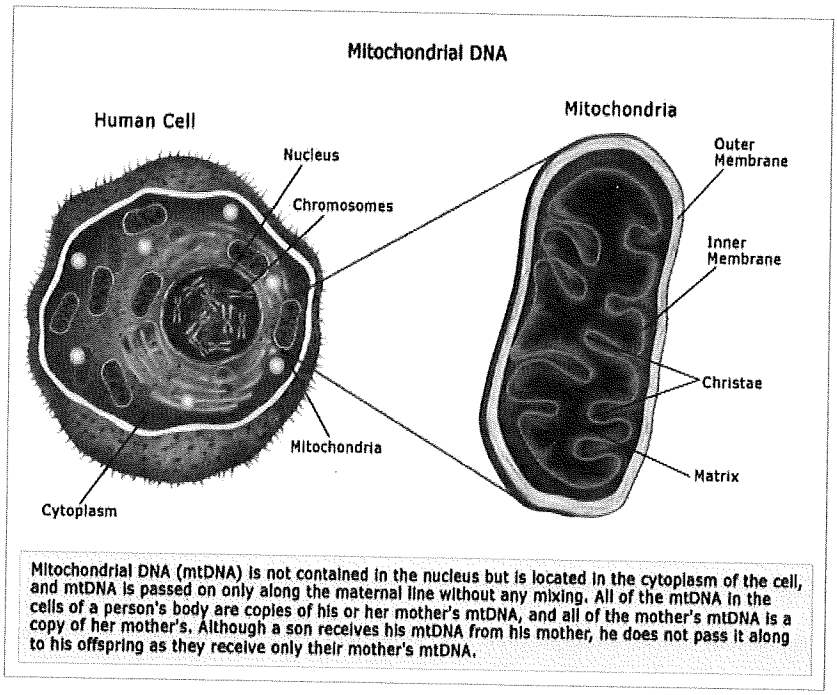
6 *Ibid.*

7 *http://www.assl.net/forensic/dnatestingpdf.pdf* (last accessed 25 February, 2016).

STR has been extremely successful in the *identification of criminal suspects, paternity issues, as well as in identification of the diseases.* The use of PCR in STR analysis permits very tiny amounts of DNA to be amplified to produce large amounts of DNA sufficient for analysis.[8]

V. Mitochondrial DNA Analysis (MtDNA):

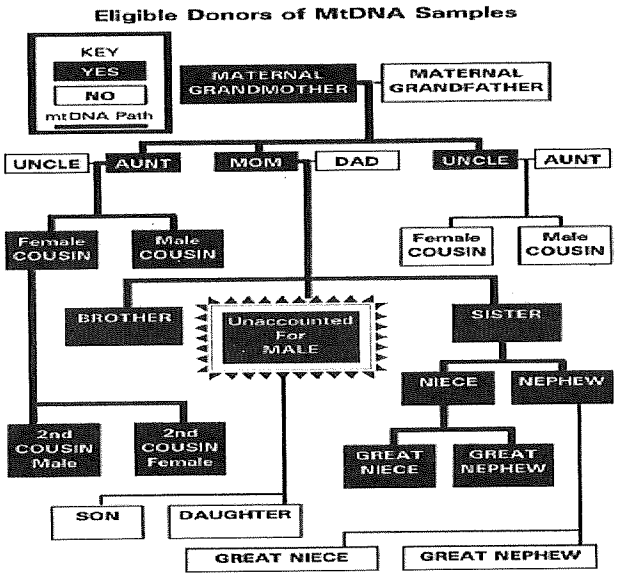
A number of techniques are available for sex determination and one is MtDNA and the other is Y-Chromosome testing. Mitochondrial based tests differ somewhat from the standard STR method, but are similar in principle. Typically, for MtDNA testing, the PCR is used to copy specific sequences in the hyper variable regions of the MtDNA i.e. in general, PCR is used to amplify two regions of the mitochondrial DNA that are highly variable between people. Samples are then matched by comparing the sequence in these two regions.



Source: http://dragonflyissuesinevolution13.wikia.com/wiki/Mitochondrial_DNA

[8] Kashyap, et al., 'DNA Profiling Technologies in Forensic Analysis'.

A novel approach in DNA analysis is the application of mitochondrial DNA (mtDNA) sequencing. Mitochondrial DNA is the female version of Y-STR. This is not nucleic DNA and is inherited maternally.[9] MtDNA is inherited uniparentally i.e. it is passed from mother to her offspring.. Because a mother passes her mtDNA to all of her children, all siblings and maternal relatives have the same mtDNA sequence, and unlike nuclear DNA, mtDNA is not unique to an individual. MtDNA is inherited exclusively from the mother, whereas nuclear DNA (except for X and Y chromosomes) is inherited equally from both parents. The advantage of mitochondrial DNA is that it typically lasts longer than nuclear DNA. Most cells have hundreds or even thousands of copies of mitochondrial DNA (and only two copies of nuclear DNA), so the chance that some of the mitochondrial DNA will survive degradation is much higher.[10] This testing can be used to link a sample to a particular family. This technique is useful in identification of missing or unidentified persons, where there is a maternal relative present who can provide the reference sample.



How MtDNA is inherited within a family tree

Source: http:// www.assl.net/forensic/dnatestingpdf.pdf

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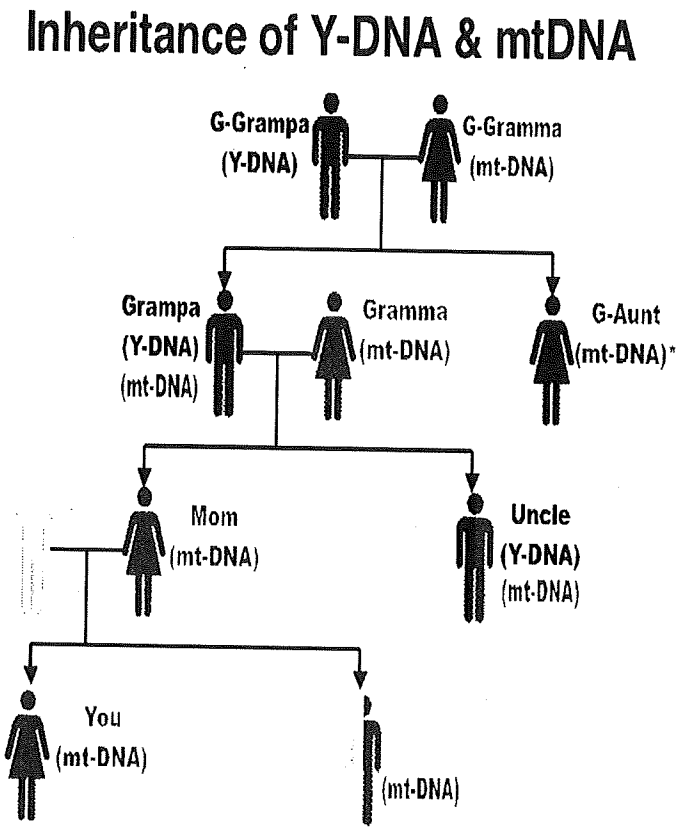
9 *Ibid.*

10 *http://www.newenglandinnocence.org/knowledge-center/resources/dna/* (last accessed 04 March, 2016).

Mitochondrial DNA testing is generally performed on samples that are not amenable to either RFLP or PCR testing. It is often used on samples which lacks nucleated cells or any other sample containing very little DNA or highly degraded DNA samples.

VI. Y-Chromosome Analysis



Source: http://www.mx-world.org/Dna/DnaPrimer.aspx

Y-Chromosome analysis is one of the most recent types of DNA testing. It is usually used when DNA cannot be recovered using either RFLP or PCR testing methods. While the traditional STR based methodology is still the most common technique in use today, there are situations when specialized techniques are needed. One such technique is Y-Chromosome testing. Y-Chromosomes can

only be detected in males. As it is inherited from your father, only male fraction of a biological sample is targeted in it. The Y-Chromosome is nuclear DNA, present in one copy per cell and only in males. It displays paternal inheritance.

In forensics, the most common use of this method is in *rape cases*. The biological samples recovered after a rape is a complex mix of cells from both the victim and the rapist. In order to get a clean DNA profile from the perpetrator alone, it is necessary to separate this mix. A standard technique in these situations is to use a chemical that digests most cells but has no effect on sperm cells. However, in some cases, such as when the rapist has had a vasectomy, or when very little sperm can be recovered, this isn't possible. In the case of a female rape victim, a Y-Chromosome test can then be used. Because women lack the Y-Chromosome, the results of the test will only reflect the male DNA in the sample.[11] Therefore, Y-Chromosome tests are usually only used when DNA cannot be recovered using traditional STR methods.

The analysis of Y-Chromosomal short tandem repeats (Y STRs) is a powerful tool for analyzing mixed forensic stains and for paternity testing. Paternity cases involving the common trio constellation of mother, offspring and alleged father can usually be solved with STR's alone, and do not seem to require any additional or alternative markers. If a father/son relationship is to be tested, Y STR markers are useful .The Y-Chromosome is found only in males, and therefore genetic markers along the Y-Chromosome can be specific to the male portion of a male–female DNA mixture such as is common in sexual assault cases.

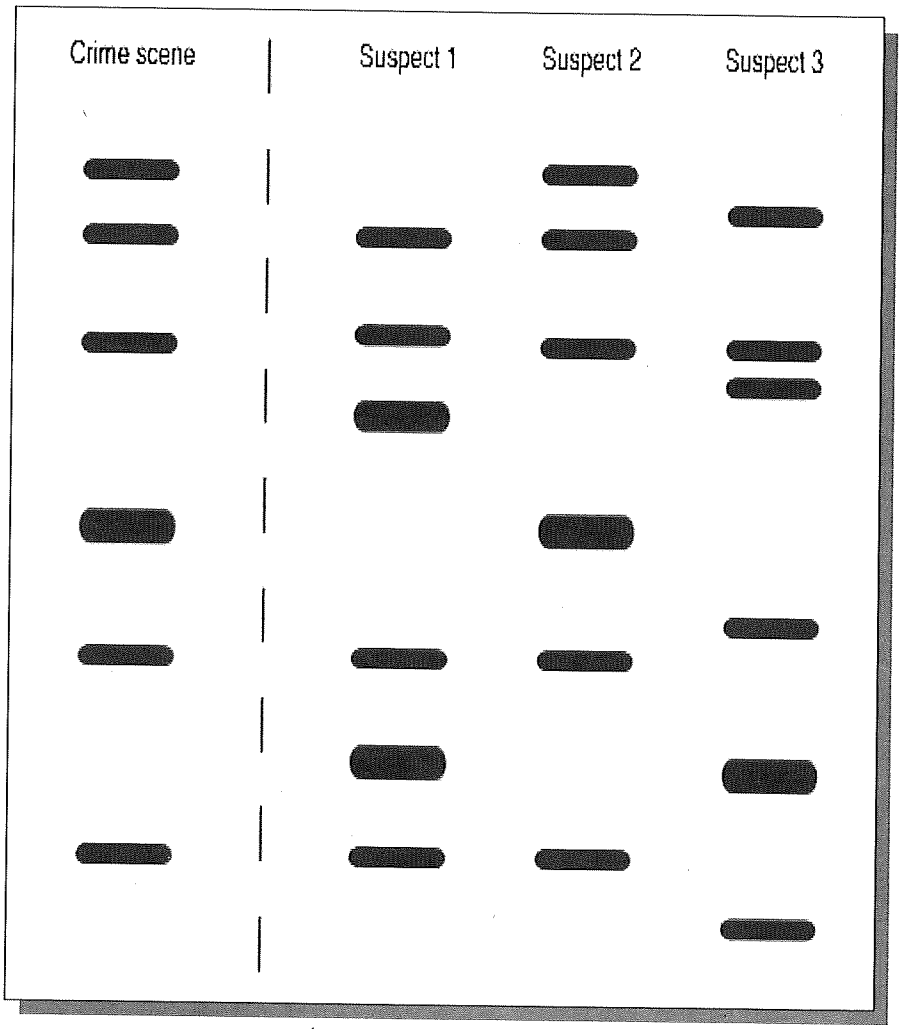
POSSIBLE OUTCOME OF DNA TEST RESULTS

Outcome	Description	Explanation/interpretation
Null result	Profile comparison is not possible	This will occur when one or both samples are of insufficient quantity or quality (for example, because of contamination by DNA from microbes) to yield an adequate DNA profile.
Negative result (exclusion)	The profiles are different—no DNA match	This is probative evidence that the individual cannot be a potential source of crime scene evidence.

[11] *Ibid.*

Positive result (inclusion)	The profiles are the same—DNA match	This is evidence that the individual can be a potential source of crime scene evidence.

It is important to note that this DNA match in itself is not enough to secure a conviction. It may prove beyond reasonable doubt that the suspect was present at the crime scene, but it cannot prove what he or she was doing there.



Source: http://geneed.nlm.nih.gov/topic_subtopic.php?tid=37&sid=38

In this Figure, the samples were collected from the scene of the crime, suspect 1, suspect 2 and suspect 3. So, there were three suspects in the crime and their DNA was analysed. Now, if you compare the band pattern of DNA between these four samples, we can see that the pattern of suspect 2 matches those of the crime scene.

6. Appropriate use of DNA Fingerprint Technology

The success of DNA fingerprinting in the courtroom depends upon many factors, including:

I. Proper handling of evidence;
II. Careful examination by an impartial forensic laboratory; or
III. Fair and appropriate interpretation of the results and without bias.

DNA evidence is generally accepted as admissible in the courtroom[12] where proper procedures have been adopted and all necessary precautions have been taken to satisfy the court that the evidence put before it is reliable and on the other hand in case of any doubt arising out of laboratories errors or procedural irregularities or malpractices in the DNA Fingerprinting process, the benefit of doubt ought to go to the accused.

The most glaring Indian example in favour of the aforesaid argument is *Priyadarshini Mattoo rape and murder case (Santosh Kumar Singh* v. *State through CBI)*[13]

Priyadarshini matto was a 25-year-old law student who was found raped and murdered at her house in 1996. In this case the defence argued and challenged the scientific procedure adopted in DNA probe. The court held that any benefit of doubt arising from malpractices or irregularities in the scientific process involved ought to go to the accused and hence the accused was acquitted because of irregularities or malpractices involved in the scientific process. However, in 2010, the Supreme Court of India commuted the death sentence to life

[12] In Indian context, Section 45 of the *Indian Evidence Act*, 1872 provides for expert evidence in the interpretation of the DNA evidence. Such opinion of the expert may be admissible in evidence if it is given by persons with specialized knowledge based on training, study and experience.

[13] (2010) 9 SCC 747.

imprisonment amongst other grounds on the basis of the DNA Test conducted in the case which had clearly established the fact of rape.

O. Simpson murder case[14]

This case also highlighted the laboratory difficulties. The former professional football star and actor O. J. Simpson was tried for murder of his ex-wife, Nicole Brown Simpson, and waiter Ronald Lyle Goldman. DNA forensic evidence was collected in form of blood, skin, and semen samples taken from the scene of the crime and was analyzed and compared to O.J. Simpson's DNA taken from a cheek swab sample. Although the blood sample and the swab sample matched, this evidence was not used in court due to it nature. In this case, there was reasonable doubt about the DNA evidence (a relatively new form of evidence in trials at the time) – including that the blood sample evidence had allegedly been contaminated and mishandled by laboratory scientists. Therefore, he was cleared of a double murder charge in 1994, which relied heavily on DNA evidence.

DNA fingerprinting is a valuable tool to be used for establishing the presence or absence of someone at a crime scene but is not prima facie evidence of guilt for a criminal offence. Therefore, it is necessary to keep in mind that any procedure adopted in the scientific DNA process should have no scope left to benefit the accused giving him the benefit of doubt at all. Any benefit of doubt arising from malpractices or irregularities in the scientific process involved ought to go to the accused.

7. Conclusion

DNA fingerprint technology is in a stage of rapid discovery and change. Progress is being made in both expansion of existing techniques and development of new techniques for DNA testing. Techniques discussed in this research paper are some of the forensic techniques used to analyse DNA fingerprint and several other new techniques although still in the experimental stage, are becoming available. Improvements are likely to continue in the recovery of trace and degraded evidence and other new techniques will be developed that will be even more rapid, successful and cost-effective and it is hoped that it will continue to become even more powerful than it is now.

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[14] Available at *http://en.wikipedia.org/wiki/O._J._Simpson_murder_case* (last assessed 30 March 2015).

WILDFIRES IN INDIA: A COMPARATIVE STUDY OF THE NEED FOR EFFECTIVE PREVENTION STRATEGIES

(Dr.) Vijender Kumar*
Vidhi Singh**

1. Introduction

Forests are nature's greatest bounty to mankind and play a very important role in its life. The *Agni Purana* (Hindu Scripture) discusses about the role of forests in human life by emphasizing that *"Man who plant trees for the welfare of the public obtains obsolete bliss."*[1] Further, the contributions of forests to the well-being of humankind are far-reaching.[2] Forests have been defined in various ways; however, an ideal definition of forest may be that *"Forests constitute the largest, complex and most important natural resource mostly dominated by the trees or continuous forest with trees usually growing to more than about seven meters in height and able to produce wood. This includes both closed forest formations where trees of various stores and undergrowth cover a high proportion of the ground and open forest formations with a continuous grass layer.*[3]

India is 12th mega bio-diversity hot spot in the world.[4] India has forest cover of 7,01,673 square kilometre, comprising 21.34 percent of the total geographic area (GA) of the country.[5] This forested area has increased by 9,646 sq. km over four years that is between 2011 and 2015.[6] Our country shows much variation in its forest vegetation due to its diversified climatic and physiographic conditions. The forest vegetation in India varies from tropical evergreen forests in the Andaman and Nicobar Islands to dry Alpine forests high up in Himalayas.

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* Vice-Chancellor, Maharashtra National Law University (MNLU), Nagpur.
** Student, B.A.LLB., Symbiosis Law School (Symbiosis International University), Hyderabad.

1 http://shodhganga.inflibnet.ac.in/bitstream/10603/24803/7/07_chapter%201.pdf visited on 10 May, 2016.

2 Forests provide vital wood supplies and help to combat rural poverty, ensure food security and provide decent livelihoods. They also offer promising mid-term green growth opportunities and deliver vital long-term environmental services, such as clean air and water, biodiversity, and mitigation of climate change.

3 *Supra* note 1.

4 R.K. Sahoo, *"Mega-Biodiversity of India"*, p. 1, available at www.vigyanprasar.gov.in/RadioSerial/Mega%20 BD%20H.P%20San%20Zoo.pdf.

5 Survey of India, Indian State of Forest Report (ISFR) 2015, Forest Survey of India. Available at http://fsi.nic.in/isfr-2015/isfr-2015-tree-cover.pdf, visited on 22 March, 2017.

6 *Ibid.*

2. Forest Fires: Delineate

The word '*fire*' is evolved from the Greek word '*pyra*' meaning growing embers. Fire has been used as a tool for a long time. Fire actually is '*the heat and the light that results when three elements that is fuel, oxygen and the source are combined*'. These are the basic fundamental component of fire which produce the '*fire triangle*'. The other elements, which determine the behavior of the fire, are weather, the landscape and the presence of the fuel.[7] Subsequently, small and limited forest fires are integral part of the forest eco system and are very essential for healthy, proper growth and development of forests. However, the large uncontrolled fire gravely damages the forest in many ways because of its increased intensity and frequency and also its uncontrollable nature. Each year millions of hectares of the world's forests are consumed by fire, which results in enormous economic losses because of burnt timber, degraded real estate, high costs of suppression, damage to environmental, recreational and amnesty values, and loss of life.

Forest fire is a major cause of injury and loss to the forests. Forest fire in India has become intense and more frequent in the last few decades. Forest fires are not always same but they may differ, depending upon their nature, size, spreading speed, behavior etc. Basically forest fires can be sub grouped depending upon their nature and size into four types-surface fire, underground fire, ground fire and crown fire. Surface fire is the most common forest fires that burn undergrowth and dead material along the floor of the forest. Other types of forest fires includes 'spotting' and further 'conflagration' which is a large fire with a character of aggravation, usually enhanced with wind action and firebrands.[8]

3. Forest Fire: Genesis

Forests cover almost one third of the earth's total land area, excluding Antarctica and Greenland, and are our richest terrestrial ecosystems in both a biodiversity and an economic sense.[9] Forest fires essentially are '*quasi-natural*', which means that they are not entirely caused by natural reasons like

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7 *https://www.osha.gov/dte/grant_materials/fy09/sh-18796-09/fireprotection.pdf* visited on 11 May, 2016.

8 *http://himachal.gov.in/WriteReadData/l892s/172_l892s/5-54447247.pdf* visited on 11 May, 2016.

9 Nanda P. Ved, George Pring 2nd ed. (2013), *International Environmental Law and Policy for The 21ST Century*, Hotei Publishing Imprint of Brill Publication. The Netherlands, p. 295.

volcanoes, earthquakes and tropical storms, but are also caused by human activities primarily through the uncontrolled use of fire for clearing forest and woodland for agriculture or arson, cigarette smoking, campfires, and carelessness. But, the causes vary around the world. For example, in countries like Canada, the United States and Australia, lightning strike is a major source of fires, while in Mexico, South America, Africa, Southeast Asia, Fiji and New Zealand, these fires can be attributed to the activities such as animal husbandry, agriculture, etc.[10]

4. Forest Fire: Impact on Environment

The earth's atmosphere-the 'delicate membrane'[11] of gases that makes life on earth possible- is undergoing dramatic change due to human activities. Because life on earth's surface has evolved to survive at very specific atmospheric conditions, these anthropogenic (human-caused) atmospheric alterations directly affect nearly every ecosystem on the planet. Human life and health and many populations may be threatened due to the damage currently being inflicted on the atmosphere.[12] Airsheds, winds, and chemical transport are no respecters of national borders.[13]

Forest fire is one of the major degenerating factors which extensively damage the growing stock and its generations and making area vulnerable to erosion. The impact of the uncontrollable forest fire includes damage to growing stock of forests, loss of biodiversity, increase in soil erosion, scorching of soil and reduction in its permeability and water retaining capacity and volatization of the nutrients like Nitrogen. Not only for forest vegetation and environment, the forest fire causes direct loss to the human being also in the form of damage to life and property.[14]

Forest fire also contributes to global warming and has resulted in health problems, due to fire generated smoke. Skin irritation, breathing problems, loss of visibility

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10 *http://www.financialexpress.com/article/fe-columnist/uttarakhand-forest-fires-climate-change/263939/* visited 12 May, 2016.

11 Lester R. Brown et al., State of the World 2000 32 (2000).

12 See UN Framework Convention on Climate Change Secretariat, Feeling the Heat: Climate Science and the Basis of the Convention, *http://unfccc.int/essential_background/the_science/items/6064.php*

13 Nanda P. Ved, George Pring 2nd edition (2013), *International Environmental Law and Policy For the 21ST Century*, Hotei Publishing imprint of Brill Publication. The Netherlands, p. 348.

14 Satendra and Ashutosh, "*Forest fire Disaster Management*" by NIDM, Chapter 3: *Forest Fire and its Impacts*, para 3.5, p. 58.

and other related problems are very common during forest fires. Researchers have also revealed that extreme forest fires may create conditions, which ultimately result into floods and landslides, causing enormous loss to life and property. The loss to timber increment, loss of soil fertility, loss of employment, drying up of water sources and loss to biodiversity are immeasurable losses by forest fire. The main adverse impact of forest fire on the environment includes destruction of timber, other properties and wild life etc. Forest fire management has become important now not only because of loss of timber and other property but also because of the environmental degradation that forest fires cause.

The pollutants most associated with trans boundary air pollution include: Sulphur Dioxide (SO_2), Nitrogen Oxides (NO_2), Particulate Matter (PM), Volatile Organic Compounds (VOCs), and Persistent Organic Pollutants (POPs).[15] The main sources of SO_2 are the burning of fossil fuels, the smelting of metals, and other industrial processes[16] in which Sulphur is oxidized (that is, combined with oxygen, typically by burning), forming SO_2. Motor vehicle emissions and industrial processes are the main anthropogenic sources of NO_2, the oxidization of nitrogen.[17] Natural processes, such as forest fires, decomposition of organic material, and volcanic eruptions, also emit SO_2 and NO_2 into the atmosphere.[18]

4.1 Impact of Forest Fire on Eco-system

The ecosystems are under severe threat due to recurrent fires, which is attributed to the forest degradation, soil erosion, reduced productivity etc. The most damaging impact of forest fire on ecosystem is very evident in the Himalayas, where hills existing between the heights of 1000 to 1800 meters are dominated by pine forests and seem to be more fire prone.

4.2 Loss of Valuable Natural Resources

Forest fires cause indispensable loss to resources like *timber, teak, sal, chir, deodar, sheesam, rosewood, oak,* etc. It also deteriorates their quality. However, the adhesive impact of forest fire varies from species to species, depending upon

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15 David Hunter, James Salzman & Durwood Zaelke, *International Environmental Law and Policy* 506-07 (4th ed. 2011).

16 Jutta Brunnée, *Acid Rain and Ozone Layer Depletion: International Law and Regulation* 11-14 (1988).

17 Mark L. Glode & Beverly Nelson Glode, *Transboundary Pollution: Acid Rain and United States-Canadian Relations*, 20 B.C. Envtl. Aff. L. Rev. 1, 3 (1993)

18 Nanda P. Ved, George Pring 2nd ed. (2013), *International Environmental Law and Policy for the 21st Century*, Hotei Publishing imprint of Brill Publication. The Netherlands, p. 348.

its susceptibility. The recent case of forest fire in Uttarakhand was an unforgettable tragedy. It was one of the last bastions of oak and rhododendron, and massive areas were destroyed in the forest fire.

4.3 Degradation of Water Catchments Areas Resulting into Loss of Water

After the forest fire, soil moisture is decreased and litter decomposition becomes almost negligible, which creates a possibility of forest fire in future. Just after fire, the chemical and physical changes in upper layer of soil make it impervious and thus, reduce water infiltration. The removal of litter also decreases water holding capacity of soil and most of the rainwater is washed away removing top fertile soil of the forest resulting into loss of soil fertility.[19]

4.4 Loss of Wildlife Habitat and Depletion of Wildlife

Forests are the habitat of many wild animals. Sometimes the local people put the fire and drum beats to keep the wild animals away, but when fire becomes uncontrolled, the problem of survival of animals and their habitat arises. Forest fire dramatically impacts the animal life. Animals are first to lose their lives due to heat generated. Eggs of birds and insects are also destroyed due to impact of forest fires. Some animals have a natural ability of threat warning system and usually migrate from the danger areas. The birds also save themselves by migration, but their eggs are usually destroyed. Such migration of birds and the animals in normal condition is not permanent and they return back when the conditions are normalized.

4.5 Loss of Natural Vegetation and Reduction of Forest Cover

As a result of forest fires, millions of hectares of the forest area turn to ashes and remains of no use. Among various degradation factors, forest fire is also one of the major factors for overall loss in forest cover. The wild fires have adverse impact on forest tree growth. Forest fires add to the deforestation process as it takes many years for the forest to grow again.

4.6 Global Warming and Forest Fire

One of the major culprits of climate change is forest fire. The immediate effect of vegetation burning is the production and release of gases including carbon dioxide, carbon monoxide, methane, non-methane hydrocarbons, nitric oxide, methyl

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[19] Satendra and Ashutosh "*Forest Fire Disaster Management*", Chapter 3, *Forest Fire and its Impacts*, National Institute of Disaster Management, para 3.5, p. 58. Available at *http://nidm.gov.in/pdf/pubs/forest%20fire.pdf*, visited on March 23, 2017.

chloride and various other gases, which are released and returned to the atmosphere in a matter of hours. The burning of forest also destroys an important sink for atmospheric carbon dioxide. Hence, burning has a significant role in the world's carbon dioxide budget. If the burned ecosystem regrows, the carbon dioxide is eventually removed from the atmosphere *via* photosynthesis and is incorporated into the new vegetative growth. Other gaseous emission, however, remain in the atmosphere. The depletion of ozone layer gets started as a result of these noxious gases. This ozone layer depletion not only results in various adverse impacts but also further increases the chances of forest fire in future.[20]

Forest fires also have an adverse impact on the ambient air of the region. The 1997 Indonesian forest fire is a case in point. It is estimated that this fire had caused the release between 0.81 and 2.57 giga tonnes of carbon dioxide into the atmosphere, which is between 13 to 40 percent of the total global carbon emissions caused by burning of fossil fuels.[21] Also, the quantity of biomass burned each year from all resources is about 9200 million tones.[22] Furthermore, forests act both as source as well as sink of carbon, depending upon the manner and purpose for which they are raised and managed. Burning of the vegetation release hundreds of years of stored carbon dioxide (CO_2) into the atmosphere, and thus results into permanent destruction of important sink of carbon dioxide. It is also to be noted that the changed microclimate caused by removal of litter and duff, opening of the canopy by killing over stores shrubs and trees and darkening of the soil surface by residual soot and charcoal can increase insolation causing temperature increase. As a result the changed area becomes unhealthy for living of both wild habitats and local people.[23]

The climate change makes an impact on boundaries of forest types and areas, primary productivity, species population and migration, occurrence of pest and diseases and forest regeneration. Climate plays a vital role in determining fire patterns and intensity and, in turn, fire influences the climate system *via* the release of carbon. The changing weather pattern is one of the major factors which contribute to current increase in instances of forest fires. The main reason for this is change in overall increase in the temperature; change in precipitation pattern and moisture content in the atmosphere. Drier soil leads to less

20 *Ibid.*

21 *https://www.washingtonpost.com/news/energy-environment/wp/2015/10/15/how-indonesias-staggering-fires-are-making-global-warming-worse/* visited on 15 May, 2016.

22 Food and Agriculture Report (FAO) - "*Fire Management- Global Assessment 2006*".

23 *Supra* note 19.

evaporation and so the heat goes into higher temperatures, including consequences such as less recycled moisture in the atmosphere, and hence less rain during summer. This results into increased heat waves and thus increased risk of wildfires. Therefore, climate change is affecting various climate related variables like soil moisture content, and vegetation density, affecting the severity of fire season. Extended periods of above normal temperatures and below normal rainfall are key factors that contribute to an active wildfire season. It is not only global warming that is affecting the forest fire, but the reverse is also true, i.e., the forest fires are also contributing to global warming. As per an assessment based on scientific research, the combination of intentional and unintentional fires by burning carbon-storing vegetation has contributed a whopping 20 percent of all anthropogenic greenhouse gas emission since the Industrial Revolution.[24]

4.7 Threat to Life and Property: Socio-Economic Impact

Forest fires affect human life and property in different ways. Human life is at risk when fire crews fight fires either at the fire front or from conflict with animals, especially elephants. A forest fire that spreads outside the forest can consume buildings or infrastructure. There are also indirect dangers to human life and property due to forest fire. Therefore, fire is a major factor of destruction of human settlement and often causes deterioration of site by subsequent increased erosion. Forest fires are also adversely affecting livelihood resources, especially for tribals, who dwell within or near the forest. In India, where approximately 104 million people are classified as tribal and directly depend upon collection of non-timber forest products from the forest areas for their livelihood are directly affected by forest fire.[25] In 2015, a rough forest fire broke in San Andreas, California which burned more than 140,000 acres and threatened to destroy some of the biggest and oldest trees in the world.[26] Further, the Valley Fire burned through 73,000 acres in Lake and Napa Counties, killed one person, destroyed 600 houses, and forced thousands of people to evacuate.[27]

5. Forest Fire in India

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24 *Ibid*, para 3.5, p. 78.

25 *Ibid*, para 3.9, p. 82.

26 *http://www.nbcbayarea.com/news/local/Wildfire-in-San-Andreas-Burns-65000-Acres--327094601.html*, visited on 15 May, 2016.

27 *http://www.nydailynews.com/news/national/northern-california-fire-destroys-400-homes-businesses-article-1.2359287*, visited on 15 May, 2016.

The Forest Survey of India in its recent data attributes that forest fire has around 50 percent of the forest areas, as fire prone. The major forest fire season in the country, varies from February to June. As of 2016, a total of 20,667 incidents of forest fire have taken place. In 2015, the number of forest fire incidents was about 15, 937. In 2016, approximately 291 forest fires have occurred in the state of Uttarakhand; 2,422 in Chhattisgarh; and 2,349 in Odisha. Further, Madhya Pradesh has been reported as 2,238 forest fires in 2016 against 294 such incidents last year. In 2014, a total of 19,054 forest fire incidents were reported, while 18,451 forest fire incidents took place in 2013.[28]

5.1 Forest Fire in Uttarakhand: An Inferno of Unconcern

Uttarakhand is one of the last bastions of oak and rhododendron, and vast tracts were destroyed in the blaze of 2016. In the summer of 2016, forest fires were noted in several places across the Indian state of Uttarakhand. The land of Uttarakhand has forest cover of about 3.47 million hectares from 53,483 square kilometer of total area, comprising 64.7 percent of the geographical area.[29] This forest cover includes mixed forest of 7,354 sq. km and dense forests of about 42 percent further, comprising of 15 percent of the state's land being protected area, 31 percent of the total forest area (10,621 sq. km) is covered by pine and lastly, 9.5 percent by oak or broadleaf tree species (3,178 sq. km).[30] These forest fires were set mainly in pine forests in the slopes of the sub-Himalayan region which produced clouds of smoke. To be more accurate, the fire was set at the edge of the Binsar wildlife sanctuary in the Kumaon hills of Uttarakhand. The fire began on February 2, 2016 and went around for 89 days long, destroying 2,552 hectares of the forest cover. For the purpose of fighting with the forest fire about 6,000 people were deployed. This incident had about 922 incidences of forest fire further affecting around 2,000 hectares (4,900 acres) of forest area since it began in February.[31] But, the state government was ill-equipped to control the fire that ravaged Uttarakhand. The government also lacked in monitoring and maintenance of the fire control lines which the British had constructed to segregate parts of the forest with barren stretches. The state government in turmoil over the political crisis which led to the imposition of president's rule in the late March 2016 did not have enough

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28 *http://www.ndtv.com/india-news/over-20-000-forest-fire-cases-witnessed-in-2016-government-1401938*, visited on 15 May, 2016.

29 Forest and Tree Resources in States and Union Territories, para 7.28 (Uttarakhand), p. 159.

30 *India Today*, 23 May, 2016, p. 61.

31 *India Today*, 23 May, 2016, p. 61.

will, and resources to fight the fire. Furthermore, the state administration was so dysfunctional that only one forest guard was posted for about 80 sq. km of the forest cover. Also there were neither enough people nor enough funds to pay the firewatchers hired during the season.

Lately, the government on April 29, 2016 deployed the 'National Disaster Response Force' (NDFR) for rescue operations in the Kumaon and Garhwal areas. They deployed 135 men in Uttarakhand to help fight the fires. On May 1, 2016 the government decided to depute two MI-17 helicopters into service as part of the operations. They made use of Indian Air Force Mi-17 helicopters fitted with 'Bambi buckets' to douse the fires with water.[32] Fighting fires is not the mandate of the NDRF. Still, they built around 500 km of fire-control lines in 49 locations across three districts - Chamoli, Almora and Pauri, in about four days. They did it all without terrain-specific shoes and rationed drinking water (a litre a day per person per day in the forest). On May 3, 2016 it began to rain, quenching the flames and bringing succour. Subsequently, the forest department estimated that 3500 hectares of forest had been burnt.[33] Later, the affected area increased to around 3,500 hectares (8,600 acres) covering 50 hectares of areas of Himachal Pradesh as well.[34] Fire also broke out in the forest area of Reasi district of Jammu and Kashmir. Other incidents of forest fires have also been seen from the Bathuni and Gambhir areas of Rajouri district in Jammu and Kashmir.[35]

This unforgettable tragedy of forest fire in Uttarakhand hill took such an alarming proportion due to the rise in the temperature and the lack of the staff. First, the major cause of the forest fire was high temperature with no atmospheric moisture and lack of rainfall.[36] As this year (2016), the temperature was at least five degrees higher than usual, so the moisture in the soil had dried up. Then the strong and dry winds added to fan the flames. *"These (fires) are not new but this time due to the heat, the moisture level has reduced, which at times leads to situation like the ones in Uttarakhand and*

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32 The Hindu (Dehradun) "*Uttarakhand Battles Fire Crisis*", visited on May 15, 2016.

33 The Indian Express, "*Uttarakhand Forest Fire: Rain Brings Relief, Death Toll Reaches Seven*", 14 May, 2016.

34 *Supra* note. 24.

35 *http://www.newsx.com/national/28583-forest-fire-breaks-in-jammu-kashmir-s-reasi*, visited on 14 May, 2016.

36 According to Ravi Chopra, a former member of the National Ganga River Basin Authority (NGRBA).

Himachal Pradesh."[37] Secondly, the lack of staff as there were only 1,600 personnel for about 2.64 million hectares of reserve forest which was 'nothing'. Thirdly, the state administration often faces challenges in time of a crisis. Every year, the state forest department and the van panchayats start preparing for the onset of forest fires by clearing up the old fire-control lines. But, no new fire-control lines have been built for years. Fourthly, due to the highly inflammable *chir pine* which covers almost 20 percent of the forests in the state and the Himalayan forests which are spread all over inaccessible terrain. In 2015, the state government submitted a proposal for seeking clearance to cut the *pine* trees where they are in large numbers. But still it is awaiting for the assent of Hon'ble the Supreme Court of India. Also under the Environment Protection Act 1986, felling *pine* trees above 1,000 m sea level have been banned. Though planting more *pine* trees was stopped in 2000, existing trees still cannot be cut. Finally, the government has been trying to implement policies for *pine* needle management for years now. But it has not worked because wages offered are lowered than even MNREGA rates. Therefore, the *pine*-needle management was unsuccessful.

The forest fire in the state of Uttarakhand demonstrate how poorly prepared the state and other agencies are to combat this recurring disaster. No concrete steps were taken to mitigate the fires. Further, it proves again the callousness of the state in time of crisis. It is a long, hard road ahead. But it is a journey that is not impossible to traverse. The state department can make an effort to enhance their research, study and adopt ways like chemical fogging that is used in some countries like USA. Also, there is a need to get the local communities involved in a spirit of collective responsibility, who were at the forefront in managing forests because they had a stake by way of getting fodder for their cattle, firewood and other useful products. But after the enactment of the Forest Conservation Act 1980, forests have come under the purview of the Ministry of Environment, Forest and Climate Change, Government of India leading to restrictions for even the locals to enter forest areas.[38] Although the fires in Uttarakhand and neighboring states have been doused by rains, it should not be a reason for complacency.

6. Legal Law on Wildfire in Indian Laws

[37] The Environment and Forest Minister, Government of India, Prakash Javadekar, 4 May, 2016.

[38] *http://www.financialexpress.com/article/fe-columnist/uttarakhand-forest-fires-climate-change/263939/*, visited on 14 May, 2016.

6.1 The Indian Forest Act,, 1927

The *Indian Forest Act,* 1927 was enacted after repealing the *Indian Forest Act,* 1878 for the purpose of consolidating the law relating to forests, the transit of forest produce and the duty livable on *timber* and other forest-produce. The *Indian Forest Act,* 1927 vests the states with the jurisdiction over the administration of forests and on the basis of degree of exercisable control on them, classifies the forests into reserved forests, village forests, protected forests and non- government (private) forests.[39] A state government by making a notification in the official gazette is empowered to declare forests land or waste lands as reserved forests and may sell the produce from these forests.[40] Upon such a notification, previously recognised individual and community rights over the forest are extinguished. The access to such forest and its produce becomes a matter of privilege, subject to permission of forest officials acting under governing laws and regulations. The Act further includes procedures for making claims against government for the loss of legal rights over the forests. Any unauthorized felling of trees, setting fire to a reserved forest, trespasses of pasture's cattle, negligent damage to timber, quarrying, clearing of land for cultivation, hunting or poisoning of water in the reserved forest is punishable with imprisonment for a term which may extend to six months or with fine which may extend to five hundred rupees or with both; in addition to such compensation for damage done to the forest as the convincing court may direct to be paid.[41]

The prime purpose of Chapter-II of the *Indian Forest Act,* 1927 is the constitution of reserved forests in which (1) all private rights within the reserved area are completely eliminated by their being bought up where these are ascertained to exist by payment of compensation; and (2) the entire area being devoted to silviculture, every tree in the forest being protected from injury and within the scope of the penal provision contained in Section 26.[42]

Section 26 (1) of the *Indian Forest Act,* 1927 prohibits and punishes any person who causes fire / sets fire to a reserved forest, kindles any fire, or leaves any fire burning, in such manner as to endanger such a forest shall be with imprisonment for a term which may extend to six months, or with fine which

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39 Verma Rajendra, Management of Natural Resources and Laws In India, 2016, p. 172.
40 *The Indian Forest Act,*, 1927, Ss. 3 and 4.
41 *Id.*, S. 26.
42 *Union of India v. Abdul Jalil* AIR 1965 SC 147 : 1964 SCR (8) 158.

may extend to five hundred rupees, or with both.[43]

The Chapter-IV of the *Indian Forest Act,* 1927 provides management of 'protected forests'. As a precaution to preserve certain species of trees, wherein Section 30 of the Act declares any trees or class of trees to be reserved, and that the rights of private person, if any, over such trees shall be suspended for a fixed period.[44] To regulate the human activities in protected forests, Section 32 provides the provision with the object to protect the forests. Whereas Section 33 includes the penalties which are imposed, if contravention of certain provision deals with the protection of forest occurred. It consists of imprisonment not exceeding six months and fine up to five hundred rupees or both.[45] Last category of forest is 'private forest' which owned by private

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[43] *The Indian Forest Act,*, 1927, S. 26, The Acts prohibited in such forests:-

(1) Any person who - 26. *Acts prohibited in such forests* - "(1) *Any person who*:-

(a) *makes any fresh clearing prohibited by Section 5, or (a) makes any fresh clearing prohibited by Section 5, or;*

(b) *sets fire to a reserved forest, or, in contravention of any rules made by the State Government in this behalf, kindles any fire, or leaves any fire burning, in such manner as to endanger such a forest; (b) sets fire to a reserved forest, or, in contravention of any rules made by the State Government in this behalf, kindles any fire, or leaves any fire burning, in such manner as to endanger such a forest; or who, in a reserved forest-or who, in a reserved forest*;

(c) *kindles, keeps or carries any fire except at such seasons as the Forest-officer may notify in this behalf; kindles, keeps or carries any fire except at such seasons as the Forest-officer may notify in this behalf;*

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shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both, in addition to such compensation for damage done to the forest as the convicting Court may direct to be paid; shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both, in addition to such compensation for damage done to the forest as the convicting Court may direct to be paid."

[44] *Supra* note 39.

[45] *The Indian Forest Act,*, 1927, S. 33, provides the penalties for acts in contravention of notification under Section 30 or of rules under Section 32 and reads as :

(1) *Any person who commits any of the following offences, namely*:-

(a) *fells, girdles, lops, taps or burns any tree reserved under section 30, or strips of the bark or leaves from, or otherwise damages, any such tree*;

(b) *contrary to any prohibition under Section 30, quarries any stone, or burns any lime or charcoal or collects, subjects to any manufacturing process, or removes any forest-produce*;

(c) *contrary to any prohibition under Section 30, breaks up or clears for cultivation or any other purpose any land in any protected forest*;

(d) *sets fire to such forest, or kindles a fire without taking all reasonable precautions to prevent its spreading to any tree reserved under Section 30, whether standing fallen or felled, or to say closed portion of such forest*;

person. But, obligation of the sustainable development is that all the natural resources must be managed properly and efficiently. Thereafter, Section 35 deals with the declaration of national park for the purpose of protecting, propagating or developing wildlife therein or its habitats. Under this section state government may regulate or prohibit in any forest or waste land for the breaking up or clearing of land for cultivation; the pasturing of cattle; or the firing or clearing of the vegetation.[46]

Under Section 79 in the *Indian Forest Act,* 1927 a person is bound to furnish

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(e) *leaves burning any fire kindled by him in the vicinity of any such tree or closed portion*;
(f) *fells any tree or drags any timber so as to damage any tree reserved as aforesaid*;
(g) *permits cattle to damage any such tree*;
(h) *infringes any rules made under Section 32 shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.*

(2) *Whenever fire is caused willfully or by gross negligence in a protected forest, the State Government may, notwithstanding that any penalty has been inflicted under this section, direct that in such forest or any portion thereof the exercise of any right of pasture or to forest-produce shall be suspended for such period as it thinks fit.*

[46] *The Indian Forest Act,*, 1927. S. 35, provides **Protection of forests for special purposes and reads as :-**

(1) *The State Government may, by notification in the Official Gazette, regulate or prohibit in any forest or waste land -*
(a) *the breaking up or clearing of land for cultivation*;
(b) *the pasturing of cattle*; or
(c) *the firing or clearing of the vegetation*; *when such regulation or prohibition appears necessary for any of the following purposes*:-
(i) *for protection against storms, winds, rolling stones, floods and avalanches*;
(ii) *for the preservation of the soil on the ridges and slopes and in the valleys of hilly tracts, the prevention of landslips or of the formation of ravines, and torrents, or the protection of land against erosion, or the deposit thereon of sand, stones or gravel*;
(iii) *for the maintenance of a water-supply in springs, rivers and tanks;*
(iv) *for the protection of roads, bridges, railways and other lines of communication*;
(v) *for the preservation of the public health.*

(2) *The State Government may, for any such purpose, construct at its own expense, in or upon any forest or waste-land, such work as it thinks fit.*

(3) *No notification shall be made under sub-section (1) nor shall any work be begun under sub-section (2), until after the issue of a notice to the owner of such forest or land calling on him to show cause, within a reasonable period to be specified in such notice, why such notification should not be made or work constructed, as the case may be, and until his objections, if any, and any evidence he may produce in support of the same, have been heard by an officer duly appointed in that behalf and have been considered by the State Government.*

without unnecessary delay to the nearest forest officer or police-officer any information he / she may possess regarding the commission of or intention to commit any forest offence. Such persons are duty-bound to take steps, whether required by any forest-officer or police-officer or not-(i) to extinguish any forest fire; and (ii) to prevent any fire in the vicinity of the forest.[47]

6.2 The Wild Life (Protection) Act, 1927

The *Wild Life (Protection) Act,* 1972 provides for protection to listed species of flora and fauna and establishes a network of ecologically-important protected areas. The Act consists of 60 Sections and VI Schedules-divided into eight Chapters. The Wildlife Protection Act 1972 empowers the central and state governments to declare any area a wildlife sanctuary, national park or closed area.[48]

The *Wild Life (Protection) Act,* 1927 was enacted for protection of plants and animal species. Wherein Section 27 (2) provides that every person who resides in the sanctuary shall be bound to extinguish any fire in such sanctuary of which he has knowledge or information and to prevent from spreading, by any lawful means in his power, any fire within the vicinity of such sanctuary of which he has knowledge or information.[49]

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47 *The Indian Forest Act, 1927*, S. 79, provides persons bound to assist Forest-officers and Police-officers and reads as :- (1) *Every person who exercises any right in a reserved or protected forest, or who is permitted to take any forest-produce from, or to cut and remove timber or to pasture cattle in, such forest, and every person who is employed by any such person in such forest, and every person in any village contiguous to such forest who is employed by the Government or who receives emoluments from the Government for services to be performed to the community, shall be bound to furnish without unnecessary delay to the nearest Forest-officer or Police officer any information he may possess respecting the commission of, or intention to commit, any forest-offence, and shall forthwith take steps, whether so required by any Forest-officer or Police officer or not,-*

(a) *to extinguish any forest fire in such forest of which he has knowledge or information*;

(b) *to prevent by any lawful means in his power any fire in the vicinity of such forest of which he has knowledge or information from spreading to such forest, and shall assist any Forest-officer or Police-officer demanding his aid....*

48 See Jofin John, *'The Wild Life (Protection) Act, 1972: An appraisal'* available at *http://www.legalserviceindia.com / articles/wlife.htm*, visited on 23 March, 2017.

49 *The Indian Forest Act, 1927*, S. 27, provides Restriction on entry in sanctuary and reads as :-

(1) *No person other than, -* .....

(2) *Every person shall, so long as he resides in the sanctuary, be bound:-*

(a) *to prevent the commission, in the sanctuary, of an offence against this Act*;

(b) *where there is reason to believe that any such offence against this Act has been committed in such sanctuary, to help in discovering and arresting the offender*;

The state government under Section 30 may declare any tree or class of trees in a protected forest to be reserved, it can also declare any portion of a protected forest as closed for a term not exceeding 30 years during which the rights of private persons shall be suspended provided that alternate rights are available in the remainder of the forest. It can also prohibit specified activities within the area violation of prohibited activities in protected areas as prescribed in Section 30[50] and Section 32[51] are punishable offences liable to be punished with imprisonment for a term which may extend to two years or with a fine which may extend to five thousand rupees or with both; and on the second and every subsequent conviction for the same offence, with imprisonment for a term which may extend to two years and with fine which may extend to ten thousand rupees.[52]

7. International Framework relating to Wildfire

Indeed, appropriate fire management may significantly contribute to achieving the objectives of the international framework related to forests and to environmental protection more generally. According to the 1992 Rio Forest Principles, appropriate measures should be taken to protect forests against the harmful effects of fires, in order to maintain forests' full multiple values (Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of

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(c) *to report the death of any wild animal and to safeguard its remains until the Chief Wild Life Warden or the authorized officer takes charge thereof;*

(d) *to extinguish any fire in such sanctuary of which he has knowledge or information and to prevent from spreading, by any lawful means in his power, any fire within the vicinity of such sanctuary of which he has knowledge or information*; and

(e) *to assist any Forest Officer, Chief Wild Life Warden, Wild Life Warden or Police Officer demanding his aid for preventing the commission of any offence against this Act or in the investigation of any such offence.*

(3) *No person shall, with intent to cause damage to any boundary-mark of a sanctuary or to cause wrongful gain as defined in the Indian Penal Code 1860 alter, destroy, move or deface such boundary-mark.*

50 *The Indian Forest Act, 1927*, S. 30, provides causing fire prohibited and reads as :- "*No person shall set fire to a sanctuary, or kindle any fire, or leave any fire burning, in a sanctuary, in such manner as to endanger such sanctuary*".

51 *The Indian Forest Act,, 1927*, S. 32, provides Ban on use of injurious substances and reads as :- "*No person shall use, in a sanctuary, chemicals, explosives or any other substances which may cause injury to or endanger, any wild life in such sanctuary*".

52 *The Wild Life (Protection) Act*, 1972, S. 51.

Forests, para. 1. b). According to the Non-Legally Binding Instrument[53] on all types of forests, adopted by the UN General Assembly in early 2008, Member States should adopt national measures and policies to analyze the causes of and address threats from fire to forest health and vitality (para. 6. o).

The Convention on Biological Diversity[54] (CBD) concerns forests both as a component of biodiversity and as a habitat to terrestrial biodiversity and commits parties to biodiversity conservation, the sustainable use of its components and fair and equitable sharing of the benefits arising from the use of genetic resources (Article 1). Inappropriate use of fire at wrong frequency or intensity leads to loss of plant species, change or reduction in vegetation structure and corresponding loss of animal species. Effects of fires crossing from fire adapted to fire-sensitive ecosystems may also lead to consequent negative effects on biodiversity, especially species composition, regeneration and stand structure (FAO, 2007). Thus, forest fires may undermine countries' efforts to protect and use sustainable biological resources. On the other hand, appropriate forest fire management can ensure that fire-deteriorated ecosystems be rehabilitated or restored and that local populations and the private sector participate in resource management. Finally, forest fire management should be integrated in planning exercises related to the conservation and sustainable use of forest biodiversity.[55]

The UN Convention to Combat Desertification[56] (UNCCD) requires parties to

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53 See generally Non-Legally Binding Forest Principles, *Supra* note 16. Article 5 of the U.N. Convention on Biological Diversity notes, for instance, that "*Each Contracting Party shall, as far as possible and as appropriate, cooperate with other Contracting Parties . . . on matters of mutual interest, for the conservation and sustainable use of biological diversity.*" U.N. Convention on Biological Diversity, opened for signature 5 June, 1992, S. Treaty Doc. No. 103-20 (1993), reprinted in 31 I.L.M. 818 (1992).

54 In response, the United Nations Environment Programme (UNEP) convened the Ad Hoc Working Group of Experts on Biological Diversity in November 1988 to explore the need for an. international convention on biological diversity. Soon after, in May 1989, it established the Ad Hoc Working Group of Technical and Legal Experts to prepare an international legal instrument for the conservation and sustainable use of biological diversity. The Convention was opened for signature on 5 June 1992 at the United Nations Conference on Environment and Development (the Rio 'Earth Summit'). For details visit *https://www.cbd.int/history.*

55 *Ibid.*

56 Established in 1994, UNCCD is the sole legally binding international agreement linking environment and development to sustainable land management. The Convention addresses specifically the arid, semi-arid and dry sub-humid areas, known as the drylands, where some of the most vulnerable ecosystems and peoples can be found. In the 10-Year Strategy of the UNCCD (2008-2018) that was adopted in 2007. (See details *http://www2.unccd.int/convention/about-convention).* India became a signatory to UNCCD on 14 October, 1994 and ratified it on 17 December, 1996. The Ministry of Environment, Forest and Climate Change is the nodal Ministry in the Government of India for the UNCCD, and

draw up national plans and strategies to combat land degradation and desertification, which usually include forest-related measures. Thus, implementing the UNCCD contributes to support an ecosystem approach to sustainable forest management as part of national efforts to prevent drought and desertification. To this end, Article 5 of the Convention also calls upon parties to facilitate the participation of local populations. Secondary effects of forest fires include soil erosion, which may certainly affect the attainment of the goals of the UNCCD. Land degradation plans should, therefore, integrate forest fire management as appropriate and the involvement of local populations is called for in this regard.[57]

8. The United Nations and Forest Fires

The U.N. Food and Agricultural Organization[58] (FAO) had long worked on fires as a matter of technical assistance in forest management. The U.N. Division of Humanitarian Affairs in New York in the past has assisted in organizing relief for states engulfed in vast forest fires, along with other natural disasters.[59]

9. Southeast Asian States

The combination of rapid industrial growth, economic crises, heavy reliance on fossil fuels and leaded gasoline, disastrous forest fires, and relatively weak environmental enforcement presents Asia with nearly overwhelming national and transboundary air pollution problems, and the region is still struggling to arrive at a solution.

Desertification Cell is the nodal point within the Ministry to co-ordinate all issues pertaining to the Convention.(For detail See *http://envfor.nic.in/division/unccd-india*).

57 Elisa Morgera Maria Teresa Cirelli (2009), *"Forest Fires and the Law a Guide for National Drafters Based on the Fire Management Voluntary Guidelines"*, the Development Law Service FAO Legal Office, Food and Agriculture Organization of The United Nations Rome, Italy.

58 The Food and Agriculture Organization of the United Nations is an agency of the United Nations that leads international efforts to defeat hunger. It helps developing countries and countries in transition modernize and improve agriculture, forestry and fisheries practices and ensure good nutrition for all. FAO is also a source of knowledge and information, and helps developing countries and countries in transition modernize and improve agriculture, forestry and fisheries practices, ensuring good nutrition and food security for all. (For detail see *http://www.fao.org/about/who-we-are/en/*).

59 See Nicholas A. Robinson, *"Forest Fires as a Common International Concern: Precedents for the Progressive Development of International Environmental Law"*, *Pace Environmental Law Review*. Vol. 18, Issue 2, Summer 2001, p. 24.

The ASEAN[60] Cooperation Plan on Transboundary Pollution of 1995,[61] the air pollution component of which focused exclusively on forest fire prevention (with a 'long term strategy' of "zero burning") to the exclusion of other transboundary air pollution sources, although it does commit the state parties to cooperate in the development of an air quality index, harmonization of sampling, information exchange, etc.[62]

In 2002, the ASEAN nations, with the guiding hand of UNEP, created an Agreement on Transboundary Haze Pollution in response to the major episodes of fire and transboundary haze pollution that occurred in the region during the 1980s and 1990s.[63] Transboundary haze pollution was particularly damaging during 1997 and 1998 when forest fires raged in Indonesia, burning over one million hectares of forest, blanketing Southeast Asia with smoke, forcing businesses, schools, and airports to close.[64]

10. Legislative Framework on Wildfires across the Globe

An average of more than one million hectares of forests is burnt annually due to fires in countries like Chad, Australia, United States of America, India and Canada. Forest fires have been a seasonal phenomenon in Indonesia, caused due to the practice of slash-and-burn agriculture where more than 1,30,000 forest fires occurred in 2015. The Indonesian government estimates that 63 percent of its greenhouse gas emissions are the result of forest and peat land fires. The Ministry of Natural Resources and Forestry in Ontario recently placed much of northwestern Ontario under a restricted fire zone, because of the risk of wildfires. All open fires are prohibited and people are asked to use 'extreme caution' when they are using portable gas stoves for cooking, etc.

10.1 Fort McMurray Wildfire: A Case Study

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60 The Association of Southeast Asian Nations (ASEAN) is a regional organisation comprising ten Southeast Asian states which promotes intergovernmental cooperation and facilitates economic integration amongst its members (10 members states Including Indonesia, Malaysia, the Philippines, Singapore, Thailand Brunei, Cambodia, Laos, Myanmar (Burma), and Vietnam).

61 ASEAN Cooperation Plan on Transboundary Pollution, ASEAN, *http://www.aseansec.org/8926.htm.*

62 Nanda P. Ved, George Pring, *International Environmental Law and Policy for the 21st Century*, 2nd ed. 2013, p. 349.

63 Combating Haze in ASEAN: Frequently Asked Questions (2007), ASEAN, *http://www.aseansec.org/Fact%20Sheet/ASCC/2007-ASCC-001.pdf.*

64 *Supra* note 62.

Canada has seen a number of massive forest fires in the recent years, often resulting in significant property and environmental damages. On May 1, 2016, a wildfire began in the southwest of Fort McMurray, Alberta, Canada. On May 3, it swept through the community, destroying approximately 2,400 homes and buildings and forcing the largest wildfire evacuation in Albertan history.[65] As of end of the month of May, 2016 it continues to spread across northern Alberta, and into Saskatchewan,[66] consuming forested areas and impacting Athabasca oil sands operations.[67] It has almost become the costliest disaster in Canadian history.[68]

The Government of Alberta declared a provincial state of emergency for Fort McMurray and issued a formal request for assistance from the Canadian Armed Forces.[69] Also 1,880 firefighters, 104 helicopters, 29 air tankers and 295 pieces of heavy equipment were being used to fight wildfires across the province.[70] This wildfire has loss of about 522,894 hectares on the Alberta side, and 2,496 hectares across the border into Saskatchewan. This fire was still 30 kilometres away from the nearest village, La Loche.[71]

The Northern Alberta is the heartland of Canada's oil sands industry and the effects of the enormous wildfire on the oil sector have prompted forecasters to trim their 2016 economic growth predictions for the entire country. The emergency forced nearby oil sands facilities to shut down.[72] All the provinces

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65 "*Ocean of fire' destroys 2,400 structures but 85 percent of Fort McMurray still stands*" (Global News): "*Thousands flee from Fort McMurray wildfire in the largest fire evacuation in Alberta's history*" (Edmonton Journal, Postmedia Network) visited on 15 May, 2016.

66 "*Fort Mc Murray fire grows to 505,000 hectares as it crosses into Saskatchewan*" (Edmomton Journal), visited on 15 May, 2016. Available at *http://edmontonjournal.com/news/local-news/fort-mcmurray-fire-crosses-into-saskatchewan-and-continues-to-grow.*

67 "*Justin Trudeau taking aerial tour of Fort Mc Murray*", (The Toronto Star). Available at https://www.thestar.com/news/canada/2016/05/13/justin-trudeau-to-visit-fort-mcmurray-today.html, visited on 16 May, 2016.

68 "*Fort McMurray fire could cost insurers $9B, BMO predicts*", (CBC News). Available at http://www.cbc.ca/news/business/fort-mcmurray-insurance-cost-1.3568113, visited on 16 May, 2016.

69 "*Fort McMurray fire: State of emergency declared*" (CTV News), visited on 16 May, 2016.

70 *http://edmontonjournal.com/news/local-news/smoke-clears-over-fort-mcmurray-wildfire-and-its-bigger-than-previously-thought* visited on May 14, 2016.

71 *http://www.cbc.ca/news/canada/saskatchewan/fort-mcmurray-fire-saskatchewan-1.3589287*, visited on 14 May, 2016.

72 *http://www.telegraph.co.uk/news/2016/05/20/canada-wildfire-raging-in-alberta-has-spread-from-fort-mcmurray/*, visited on 14 May, 2016.

and territories have laws in place to protect forests and punish those whose actions result in forest fire and other forms of environmental destruction.[73]

11. Present Management plans for Controlling of Forest Fire: Indian Scenario

Fire management is the process of planning, preventing and fighting fires to protect people, property and the forest resources. It also involves fire to attain forestry, wildlife and land-use objectives. The management plans need integrated, inter-sectoral, multi-stakeholder and holistic approach. First, subject of '*forests*' was transferred from State List to the Concurrent List of the Constitution of India in 1976 to ensure uniform policy and management throughout the nation.[74] The Constitution of India provides guidelines under the forest policy for protection of forests and wildlife. According to this policy the state shall endeavour to protect and to improve the environment and to safeguard the forests and wildlife of the country and the citizens are to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures.

Furthermore, the central and the state governments both are competent to legislate or make laws relating to forest management in India. The implementation part mainly lies with the state government. Therefore, policy, planning and financing are the primary responsibilities of the government of India while prevention and suppression are the responsibilities of the state governments wherein the forest department being the very custodian of conservationist endeavors. Secondly, the Ministry of Environment and Forests (MoEF), in 2016, took an initiative by increasing the number of fire-fighting staff in the state from 3,000 to 6,000 to control the fires which caused extensive damage to flora and fauna in 60 per cent of forest land in the state of Uttarakhand. In addition to it, the Ministry provided adaptive management skills like maintenance of fire lines, construction of watch towers, procurement of fire equipment and other fire-control techniques.[75] Further, the Ministry is also implementing a plan scheme "*Modern Forest Fire Control Methods*" in India under which the state governments are provided financial assistance for fire

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73 *http://findlaw.ca/learn-about-the/criminal-law/article/what-are-the-penalties-for-setting-a-forest-fire/ Present* management plans for controlling of forest fire, visited on 15 May, 2016.

74 Item No. 17-A of List-III, Concurrent List, Seventh Schedule, The *Constitution of India*.

75 *http://timesofindia.indiatimes.com/city/dehradun/Forest-fires-MOEF-pegs-losses-at-Rs18L/articleshow/52211410.cms*, visited on 14 May, 2016.

prevention and control.[76] Thirdly, the Ministry of Environment and Forest has formulated a 'contingency plan' for forest fires which deals with the mechanism for coordination during the crisis of a major forest fire. The said plan provides for a 'Central Crisis Group' at Ministry of Environment, Forest and Climate Change.

Subsequently, the Government of India provides funds to the states and union territory (UT) governments under the centrally sponsored scheme 'Intensification of Forest Management Scheme' (IFMS) to supplement their efforts. Various measures taken by state and union territory governments for protection of forests from fires include creation and maintenance of fire lines in forest areas, engaging fire watchers, establishing forest camps, regular patrolling by forest personnel etc. The support of Joint Forest Management Committees (JFMCs) is also taken in this regard.

Fourthly, the formulation of National Forest Policy in 1998 was a milestone in the firefighting history of India. It lays down certain basic objective for the protection of the forest. The principle aim of the New National Forest Policy is to ensure environmental stability and maintenance of ecological balance. The policy discusses the steps to be taken for forest conservation, including forest fire management in more effective manner. In addition, it states "*the incidence of forest fires in the country is high. Standing trees and fodder are destroyed on a large scale and natural regeneration annihilated by such fires. Special precautions should be taken during the fire season. Improved and modern management practices should be adopted to deal with forest fires*" in case of damage caused to forest from fire.[77] The aforementioned text provided in italics clearly indicates that the legal and policy framework already exists in favour of forest fire management.

Furthermore, the Global Fire Monitoring Centre (GFMC) is the foremost pioneer organization providing individual support and relevant information useful in strengthening an international cooperation. It aims at reducing the negative impacts of vegetation fires 'wildland fires' on the environment and humanity and also to advance the knowledge and application of the ecologically and environmentally

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[76] V.K. Bahuguna, '*Forest Fire Prevention and Control Strategies in India*', IFFN No. 20, March 1999, pp. 5-9, available at *http://www.fire.uni-freiburg.de/iffn/country/in/in_1.htm*, visited on 23 March, 2017.

[77] The National Forest Policy 1988, para 4.8.2, p. 7. Available at *http://envfor.nic.in/legis/forest/forest1.html*, visited on 23 March, 2017.

benign role of natural fire in fire dependent ecosystems, and sustainable application of fire in land-use systems.[78] Subsequently, it provided the current updates of the fire situations in India from 13 April, 2016 to 3 May, 2016.[79]

Though small forest fires are reported every year in the state, this time (2016) the situation was alarming as there had been no rainfall this season and the fires spread quickly. Since 2010, the Ministry of Environment, Forest and Climate Change, Government of India, and the State Government have not submitted 'Crisis Management Plan' to deal with such disasters.[80] In the past 45 years of the recurrent forest fires, there has been no new equipment, technology or preventive measures. The fires fighters never had and still don't have any proper gear to tackle emergencies.[81] The forest areas are under grave threat and the authorities are not doing anything. Therefore, strategies of wildfire prevention, detection, and suppression have varied over the years, and the international wildfire management experts encourage further development of technology and research.[82]

12. Forest Fire Management: Australia

The substantial measures that Australia adopts in monitoring forest fire include fire suppression by volunteers, recruited by agencies, which provides them training and equipment. Further, these agencies have good mechanism and equipment to detect and suppress the fire and preventive measure like prescribed burning, disposal of debris after silviculture operation etc. are also commonly used. The public awareness and training programmes are also conducted periodically. They are also leading a hazard management agency, the *Department of Fire and Emergency Services* (DFES) (*Formerly known as the Fire and Emergency Services Authority of Western Australia*) which performs a critical role coordinating emergency services for a range of natural disasters and emergency incidents threatening life and property.[83] It is supported by an extensive network of over 29,000 volunteers and with 1100 career firefighters

78 *http://www.fire.uni-freiburg.de/intro/GFMC-Profile-January-2015.pdf*, visited on 16 May, 2016.
79 *http://www.fire.uni-freiburg.de/current/globalfire.htm#2016*, visited on 16 May, 2016.
80 *http://timesofindia.indiatimes.com/city/dehradun/Forest-fires-MOEF-pegs-losses-at-Rs18L/articleshow/52211410.cms*, visited on 16 May, 2016.
81 *http://indianexpress.com/article/india/india-news-india/forest-fires-ngt-issues-notices-to-moef-uttarakhand-himachal-govts-2784399/-*, visited on 17 May, 2016.
82 "*International Experts Study Ways to Fight Wildfires*"- Voice of America News.
83 *http://www.dfes.wa.gov.au/aboutus/corporateinformation/Pages/default.aspx*, visited on 17 May, 2016.

DFES works together with the community and government to prevent, prepare for, respond to and recover from a diverse range of emergencies.[84]

They also have incorporated '*Australia's Biodiversity Conservation Strategy 2010-2030*' (released in October 2010), which aims to ensure that the biodiversity is "*healthy and resilient to threats, and valued both in its own right and for its essential contribution to our existence.*" First, the Australian government is responsible for coordinating a national approach to both environmental and international policy related issues. The Australian government is playing an increasingly important role in supporting the states in preparing for and responding to major emergencies. Secondly, state and territory governments have primary responsibility for land and fire management, in recognition of the constitutional responsibility of the states for land use decisions, emergency management and the management of large areas of forests and rangelands. Reducing the occurrence, severity and impact of bushfires, and enhancing the resilience of our natural ecosystems by managing fire in our forest and rangelands are core objectives of this statement. Thirdly, local governments have responsibilities for land use planning which affects public and private fire management, and which also can influence the protection of life and property, particularly in the zone where urban and more natural areas meet. Local government has a critical role in managing and supporting community recovery efforts after serious fire events, and has a primary bushfire response role in their jurisdictions. Finally, Australia cannot be '*fire-proofed*' any more than it can be made flood-proof or drought-proof. As bushfires are inevitable, and in some instances can be managed to assist in achieving land management objectives. The impact of unplanned fires needs to be minimized through effective action based on learning and understanding. However, living with bushfires also requires strong self-reliance.[85]

13. Forest Fire: Prevention Methods

There are few significant preventive measures which should be incorporated for bringing effectiveness in the forest fire management. First, the impact of climate change is unequivocal and should be dealt accordingly. The increased incidences of forest fire are often interconnected with the change in the climate. This could be frequency, size, intensity, seasonality and type of fires

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84 *Ibid.*

85 *https://www.dpaw.wa.gov.au/images/documents/fire/NationalBushfireManagementPolicy_2014.pdf*, visited on 16 May, 2016.

depends on the weather, prevailing climate, forest structure, and composition. Further, in order to understand the climate change, a comparison of air temperatures during the fire season can surely be useful. Secondly, there is a need for studying the impact of repeated fires on *pine / oak* forest. The fire, as such, influences the structure and process of a natural forest ecosystem. The periodicity, spatial coverage, and severity of such fires vary temporally and these fires are generally associated with excessive accumulation of pine needles and leaf litter in pine and oak forests in Kumaon, as per Forest Fire Study by Sharma and Rekhari. Thirdly, the best solution to reduce forest fire is by making the locals stakeholders in conservation endeavors. There is also a need to give certain guidelines that will integrate the local villagers seamlessly into conservation programmes rather than alienate them, for it they, who have traditionally depended on and thus, protected their forests from being ravaged. Fourthly, there is a need for policymakers to implement stringent laws that will preserve the forest. Also to start on a long term programme which will also benefit the future generations and they would stand on good stead. Lastly, forest fires are a recurrent management problem in the Western Ghats of India. Accordingly a two-step approach is to be identified that is first, the large fire prone areas by paying special attention to the climatic conditions of the monsoon season before the fire season, which determine the fuels moisture content during the fire season; and second, the most vulnerable sites within the fire-prone areas using local models mainly based on the type of vegetation.

13.1 Prescribed Fires / Vegetation Management Program (VMP)

Prescribed fire is also called '*controlled burning*', an intentionally ignited fire designed to achieve the results that would naturally occur if wildfires were allowed to burn unsuppressed.[86] Prescribed fires are generally set to burn at low levels and are designed to remove fallen branches, kill small trees and shrubs, and scorch lower limbs to reduce the vertical continuity of the forest so that fires are prevented from reaching the top branches.[87] In brief, natural recycling is a

[86] According to guidance documents for federal wildfire officials, a "prescribed fire" or a "prescribed burn" is a fire intentionally lighted by managers to meet specific resource management objectives. *Nat'l Fire & Aviation Exec. BD., Directives Task Force Briefing Paper* #03 (2005), available at *http://www.nwcg.gov/branches/ppm/fpc/archives/fire_policy/general/3_kinds_of_wildland_fire_BP3_1 _19_05.pdf.*

[87] Paulo M. Fernandes & Herminio S. Botelho, A Review of Prescribed Burning Effectiveness in Fire Hazard Reduction, 12 *Int'l. J. Wildl and Fire* 117, 117 (2003); Richard Monastersky, Burning Questions, 138 *Sci. News* 264, 265 (1990) (reporting that most forest researchers contend that crown fires did not occur in the Sierran mixed-conifer forests until white settlers adopted a practice

very lengthy and time consuming phenomenon in forest. Fire is the best process to intensify this natural process. Faster recycling occurs during a fire and gases are released into the atmosphere in the form of smoke. Further, the prescribed fire project reduces the incidence and severity of wildfires by decreasing fuel quantity and the likelihood that the wildfire will travel through a forest.[88]

The '*Vegetation Management Program*' (VMP) is a cost-sharing program with landowners. The program focuses on the use of prescribed fire and mechanical means to address wildland fire fuel hazards and other resource management issues on State Responsibility Area (SRA) lands.[89] It aims to meet the aforementioned objectives with financial support which is provided under- Prevention: - creation of fire lines, training and demonstration publicity; Detection: - construction of watch towers, network of wireless sets, fire finders; and Suppression: - hand tools, fire resistant clothing and fire tenders.

13.2 Mechanized Treatments

Mechanical treatments consist of the harvesting of timber and the removal of trees and brush, often referred to simply as 'thinning'.[90] Such treatment may be done alone, but is much more effective when paired with prescribed fire.[91] Furthermore, removing small trees and brushes can be an effective method of reducing wildfire risk.[92] However, mechanical treatments are not always feasible in all locations. Many forested areas are not accessible by road or by the heavy equipment needed to carry out forest thinning.[93] In addition, mechanical thinning may not adequately reduce

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of extinguishing the smaller periodic "caretaker" fires that burned close to the ground, cleaning the forest floor and killing small understory firs and cedars).

88 Mark A. Finney et al., Stand- and Landscape-Level Effects of Prescribed Burning on Two Arizona Wildfires, 35, *Canadian J. Forest Res.* 1714, 1714 (2005).

89 *http://calfire.ca.gov/communications/downloads/fact_sheets/Prefire.pdf*, visited on 16 May, 2016.

90 See James K. Agee & Carl N. Skinner, Basic Principles of Forest Fuel Reduction Treatments, 211 *Forest Ecology & Mgmt.* 83, 87 (2005) (distinguishing different types of thinning).

91 Susan J. Prichard et al., Fuel Treatments Reduce the Severity of Wildfire Effects in Dry Mixed Conifer Forest, Washington, USA, 40 *Canadian J. Forest Res.*, 2010, pp. 1615, 1624, (providing strong quantitative evidence that, without reducing surface fuels, thinning alone does not reduce tree mortality during a large wildfire).

92 Jolie Pollet & Philip N. Omi, Effect of Thinning and Prescribed Burning on Crown Fire Severity in Ponderosa Pine Forests, 11 *Int'l J. Wildland Fire* 1, 2002, p. 8, (stating that fuel treatments are effective in reducing severity in short fire-return interval ecosystems but may be less effective in long fire-return interval ecosystems).

93 John A. Stanturf and Palle Madsen (eds.), *Restoration of Boreal and Temperate Forests*, 2005, pp. 571-72.

wildfire risk, but if it can be very effective when combined with prescribed fire.[94]

13.3 Unplanned Wildfire Managed for Resource Benefits

Another non preventive method of minimizing wildfire risk is to manage an unplanned wildfire to achieve many of the same resource benefits of a prescribed fire: a reduced fuel load and fire resiliency. The idea is to exploit the opportunity to reap these benefits presented by the happenstance of the ignition of an unplanned wildfire occurring in a location for which burning vegetation for resource benefits is an approved land use in the applicable land and resource management plan or fire management plan.[95] Management of unplanned wildfires for resource benefits can be a cost-effective means of obtaining some of the same resource benefits provided by prescribed burning. It can also result in less predictable impacts on air quality.[96]

13.4 Food and Agriculture Organization (FAO) Recommendation on Forest Fire Management

The Food Agriculture Organization is running a special technical cooperation programme (TCP) project program in the country under which main emphasis was given to human resource development in forest fire management. The main objective of this project was to review India's current forest fire problem, provide training in strategic fire planning to key forestry personnel at the state and national levels to enable them to develop fire plans based on ecological, economic and social conditions for their respective states and to develop at least one model 'State Forest Fire Management Plan'.

To achieve the set objectives of the project, the work plan was divided into four phases: First, to conduct comprehensive analysis of the forest fire situation in India, including the study of number of fires and area burnt; the effects of ecological, economic and social impacts, current capacity for forest fire management at the national and states levels, including review of existing laws, regulations and policies covering forest fire management; Secondly, to design a training package on

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94 *Supra* note 91.

95 *Nat'l Wildfire Coordinating GRP., Wildland Fire Use: Implementation Procedures Reference Guide*, 2005, p. 3, (referring to the use of unplanned wildfire in this manner as "the application of the appropriate management response to naturally-ignited wildland fires to accomplish specific resource management objectives in predefined designated areas outlined in fire management plans").

96 See Don McKenzie, The Effects of Climatic Change and Wildland Fires on Air Quality in National Parks and Wilderness Areas, 70 *Fire Mgmt.*, 2010, pp. 26, 27 (noting that the dispersal of wildfire smoke restricts land managers' ability to manage fires for resource benefits).

strategic forest fire management planning which would enable Indian foresters to prepare site specific fire plans for all the forest types in the country; Thirdly, to conduct training courses for the foresters and planners, who would then be capable of preparing strategic 'Forest Fire Management Plans' and providing identical training to large number of field foresters throughout the country; and Lastly, to develop minimum one model 'State Forest Fire Management Plan' to serve as an example for subsequent state plans and national plan. Plans are to be organized into a series of program components, which can be considered for development assistance by international donors and financiers.[97]

14. Conclusion

After understanding of the nuances of forest, forest produces and forest fires, and forest fire preventive mechanism in India and Australia in particular, the researchers opined that the forests are lungs of the planet earth and forestry makes several contributions, which are supporting sustained human welfare and development but fires are still annihilating millions of hectares of forest area annually causing irreparable damage to the plantations raises of a considerable cost and effort. The forest fires are consuming lots of valuable money, time and resources. There is an urgent necessity of systematic monitoring, accurate reporting and accessible information archiving. Awareness about trees plantation, forest care, forest preservation, and forest fires are to be incorporated in all educational programmes and awareness materials should be developed while providing capacity building programmes for the government, non-government and other stakeholders dealing with the forest and forest produces. The awareness should be provided at all levels, tribe, village, block, small city, district, state and nation, by introducing educational programme on ecological and fire management concepts into the syllabi from schools to the colleges and universities. The Ministry of Environment, Forest and Climate Change, Government of India should lead these programmes with appropriate financial support.

Forest fires will not be prevented unless sustainable land use systems are established in the country. These regimes cannot be imposed by a treaty system, but rather must be built from the cultures and environments of each nation, country or state. In the parlance of 'common but differentiated responsibilities', each geographic region with forest habitat has the common responsibility to prevent

[97] Satendra and Ashutosh "*Forest fire Disaster Management*", Chapter 3, *Forest Fire and its Impacts*, National Institute of Disaster Management, para 3.5, p. 58. Available at *http://nidm.gov.in/pdf/pubs/forest%20fire.pdf*, visited on 23 March, 2017.

forest fires, and each can and must implement this responsibility in different ways, according to the differentiated conditions prevailing in their area.[98]

> Forest Fire Management (FFM) in India is the mandate of the forest department, therefore it is imperative that forest department be capacitated at national, regional and local levels for making forest fire management system more effective and reduce the vulnerability of the Indian forest to fires. Finally, there is a need to acquire holistic approach for forest fire management, including fire protection, planning, prevention, and rehabilitation; for its implementation and to generate public opinion against negligence, ignorance, and indifference towards fire and its consequences. The studies are to be conducted towards environmental impact of forest in soil, water, and plants; environmental damage due to forest fire; to prepare an effective disaster management plan; and to prepare a comprehensive model of fire control. To conclude the present research, it seems pertinent here to quote from *Shrimadbhagwat Gita*, Hindu scripture, "*Living beings survive on food; food is produced by rain; rain depends on forests. Therefore, conservation of forests is necessary to keep it in a healthy state.*"[99]

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98 See Nicholas A. Robinson, *Forest Fires as a Common International Concern: Precedents for the Progressive Development of International Environmental Law*, *Pace Environmental Law Review*, Volume 18, Issue 2, Summer 2001, p. 30.

99 *http://shodhganga.inflibnet.ac.in/bitstream/10603/24803/7/07_chapter%201.pdf*, visited on 19 May, 2016.

LEGAL CONUNDRUM AS REGARDS LIFE IMPRISONMENT

Jyoti Dogra Sood *

1. Introduction

The criminal law of a country proscribes certain acts and imposes punishment on those who commit these acts. The procedure and evidence required to reach the conclusion that such acts have been committed is documented in the procedural and the evidence laws. And what acts are proscribed and are visited by punishment is the domain of substantive criminal law—the Indian Penal Code, 1860 ('IPC'). The criminal law not only reflects but also creates norms of conduct and ensures their compliance by coercive penal measures of different forms (in isolation or combination) that match with the gravity of the harm resulted from the prohibited conduct. In the days of yore, barbaric punishments were carried out but subsequently prison became the most accepted coercive penal measure.[1] Serious offences are made punishable by death or imprisonment for life as an alternative thereto. But only in the rarest of rare category of crimes may the convict be executed for his crime. The courts are to use their power of awarding capital punishment sparingly and when they prefer death sentence over imprisonment for life, they have to give special reasons for their choice.[2]

Punishment is a very important facet of criminal law. Punishments that can be given to a person guilty of a crime in India are spelt out in section 53 of the IPC. The section reads thus:

Punishments—The punishments to which offenders are liable under the provisions of this Code are,—

First	–	Death;
Secondly.	–	Imprisonment for life
Thirdly.	–	[Deleted]

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* Associate Professor, Indian Law Institute, New Delhi.

1 See, R.C. Nigam, "History of Criminal Law" in *Law of Crimes in India* Vol. 1 3-24(1965); see generally, Michael Foucault, *Discipline and Punish: The Birth of the Prison* (Penguin Books 1991).

2 The Code of Criminal Procedure, 1973, S. 354(3) reads thus: When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or for a term of years, the judgment shall state the reasons for the sentence awarded and, in case of sentence of death, the *special reasons* for such sentence.[Emphasis added]

Fourthly.	–	Imprisonment, which is of two descriptions, namely:- (1) Rigorous, that is, hard labour; (2) Simple;
Fifthly	–	Forfeiture of property;
Sixthly	–	Fine

Serious crimes like waging war against the Government of India; criminal conspiracy to commit an offence punishable by death; abetment of mutiny, if consequently mutiny is committed; perjury resulting in conviction and execution of an innocent person; committing murder; kidnapping for ransom; dacoity accompanied with murder; repeat offender of committing rape or causing death in the course of rape etc. are visited by the punishment of life imprisonment or capital punishment.[3] There has been ongoing debate on the retention/abolition of capital punishment. The concept of "rarest of rare", which has emerged from the intent to make death sentence less frequent, has been debated over and over in numerous judicial pronouncements.[4]

This paper steers clear of that debate around capital punishment, and instead attempts to understand the first alternative punishment, *i.e.*, 'imprisonment for life' in serious crime cases. This alternative punishment of life imprisonment, like the capital punishment, is fraught with controversies. The term 'imprisonment for life' essentially means imprisonment for the convict's natural life.[5] But what makes it problematic is that the term "natural life" is indeterminate. Further, procedural laws also have provisions like remission and commutation which impinge on the term of life imprisonment. So in effect, life imprisonment is till the last breath of the convict unless committed or remitted by the competent authority in accordance with law. This essentially means that the judiciary has the role of deciding the punishment after adjudication of guilt, and then starts the role of the executive.

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3 In these serious crimes, the offender may be sentenced to death or imprisonment for life, as an alternative. The death sentence being highest in the penal range in these crimes and life imprisonment being lowest.

4 For example see, *Bachan Singh* v. *State of Punjab,*(1979) 4 SCC 754*; Machhi Singh* v. *State of Punjab,* AIR 1983 SC 1957; *Rajendra Prasad* v. *State of Uttar Pradesh,* AIR 1979 SC 916.

5 The Constitution Bench in *Gopal Vinayak Godse* v. *State of Maharashtra,* (1961) 3 SCR 440 clearly laid down the law thus: "A sentence of transportation for life or imprisonment for life must prima facie be treated as transportation or imprisonment for the whole of the remaining period of the convicted person's *natural life*". (Emphasis added).

2. Procedural Law *vis-à-vis* Life Imprisonment

The executive in India has been vested with wide statutory powers of suspension, remission, and commutation of sentences vide sections 432 and 433 of the Code of Criminal Procedure, 1973 ('Cr.PC').[6] The sections, *inter alia*, mandate that the appropriate government may, at any time, with or without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced. The appropriate government, *inter alia*, may, without the consent of the person sentenced, commute a sentence of death, for any other punishment provided by the IPC, and a sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine.

Since life imprisonment is an alternative punishment to capital punishment, a caveat of 14 years was put through section 433 A of Cr.PC which reads thus:

> Restriction on powers of remission or Commutation in certain cases. Notwithstanding anything contained in section 432, where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided by law, or where a sentence of death imposed on a person has been commuted under section 433 into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment.

Hence a minimum of 14 years will have to be spent in jail by a convict sentenced to life imprisonment even when he earns remissions or gets commutation by the executive. But this does not entail that the life imprisonment was made determinate for 14 years. The prison manuals, which again are the executive domain, have provisions for earning remission. But these are procedural nitty gritties and dependent on the reformatory zeal of the state. A three-judge bench in *Ashok Kumar @ Golu* v. *Union of India* [7] was invited to decide whether 433A was a 'colourable piece' of legislation or'fraud legislation'. The court, in order to decide the *lis*, engaged with remission and commutation in great detail to clear the air. It reiterated that the law governing suspension, remission, and commutation of sentence is both statutory and constitutional. The stage for exercise of this power is post-judicial. The duty of the judge is to award the appropriate punishment to the guilty individual/s and that ends the judicial

6 The constitutional powers vested in the executive under articles 72 and 161 have not been discussed but that should not be taken to mean that these issues are less important, they merely fall outside the scope of the present paper.

7 (1991) 3 SCC 498.

function. And after that the function of the executive commences of giving effect to the judicial verdict and that involves remission, commutation, and suspension as well, guided by the procedural law.[8] The court also discussed the applicability and the reason for enacting section 433A thus:[9]

> [O]ne who could have been visited with the extreme punishment of death but on account of the *sentencing court's generosity* was sentenced to the lesser punishment of imprisonment for life and another who actually was sentenced to death but on account of executive generosity his sentence was commuted under Section 433(a) for imprisonment for life have been treated under Section 422 A as belonging to that class of prisoners who do not deserve to be released unless they have completed 14 years of actual incarceration.

It is evidently clear from the above that the said provision was expected to apply to exceptionally heinous offences which deserved capital punishment.

3. Life Imprisonment Means Remainder of Life

The judicial function is to adjudicate the guilt and on such adjudication, pronounce the sentence. As early as in 1961, in *Gopal Vinayak Godse* v. *State of Maharashtra*,[10] a constitution bench of the Supreme Court of India ruled that a prisoner sentenced to life imprisonment was bound to serve that remainder of his life in prison unless the sentence is commuted or remitted by the appropriate authority. That means that life imprisonment does not have a fixed term and it ordinarily lasts as long as the life of the convict lasts. Unless of course he is granted remission by competent authority under section 432 and 433 Cr. PC.

Maru Ram v. *Union of India* [11] and a catena of other cases followed this dictum:[12]

> We follow Godse's case to hold that imprisonment for life lasts until last breath of the prisoner and whatever the length of the remissions earned the prisoner could claim release only if the remaining sentence is remitted by the government.

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8 Para 11

9 *Ibid* (emphasis added)

10 (1961) 3 SCR 400.

11 (1981) 1 SCC 107.

12 See, *Mohd. Munna* v. *Union of India*, (2005) 7 SCC 417; *Bangal* v. *B.K. Srivastava*, (2013) 3 SCC 425; *Arjun Jadav* v. *State of West Bengal*, (2014)15 SCC 426; *Duryodhan Rout* v. *State of Orissa*, (2015) 2 SCC 783.

Things were more or less going fine till the *Swamy Shraddananda* case[13] unsettled the sentencing principle. The two judges sitting on the bench could not concur on the sentencing for a gruesome murder—one wanted to impose death sentence but the other judge was of the view that imprisonment for life would serve the ends of justice. But the judge, perhaps not happy with the operation of section 433A, wanted to award him life imprisonment with a qualification that he would not be released from prison till the end of his life. Given the difference of opinion between the two judges, the matter was referred to a three judge bench, which after having considered the entire precedent [14]on the point, observed thus:[15]

> [T]he unsound way in which remission is actually allowed in cases of life imprisonment make out a very strong case to make a special category for the very few cases where death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond the application of remission.

The court made it clear that this will have no effect on the constitutional power of remission and commutation but would be applicable to procedural laws and prison manuals.[16]

This was hailed as judicial ingenuity[17] by the present author at that time, but a need was felt that the legislature must step in as it was their domain. Post *Shraddananda*, a trend started where the convicts were arbitrarily sentenced

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13 *Swamy Shraddananda (2) @ Murali Manohar Mishra* v. *State of Karnataka*, (2008) 13 SCC 767.

14 *Pandit Kishori* v. *King Emperor*, AIR 1945 PC 64; *Gopal Vinayak Godse* v. *State of Maharashtra*, AIR 1961 SC 600; *Maru Ram* v. *Union of India*, (1981) 1 SCC 107; *State of M.P.* v. *Ratan Singh*, (1976) 3 SCC 470; *Shri Bhagwan* v. *State of Rajasthan*, (2001) 6 SCC 296.

15 *Swamy Shraddananda (2), Supra* note 13 at 804.

16 It must be clarified that no special category was as such delineated but referred to cases (like the present one) which are extremely brutal and diabolic and just fall short of rarest of rare category and so do not deserve capital punishment. And so get a life imprisonment but which, as mentioned by the court, due to faulty remission policy may work out only to a term of 14 years! And hence these may be treated as special category cases beyond the pale of remission. What is this 'faulty policy' is the moot point The policy is that remission is given to prisoners on a monthly, quarterly or annual basis and this remission is added to the convict's period of actual incarceration. So in effect what this means is that remission is given on a fixed term (for example in Karnataka and Bihar life imprisonment is deemed to be 20 years!). See *Swamy Shraddananda (2) @ Murali Manohar Mishra* v. *State of Karnataka*, (2008) 13 SCC 767 at 799-80. This, however, is in complete violation of the law laid down by the Supreme Court and hence faulty.

17 Jyoti Dogra Sood, "Criminal Law" XLVI *ASIL* 279(2008).

to imprisonment for a term of 21,30, or 35 years with no remission raising concerns of the judiciary overstepping its judicial role and entering in the domain reserved for the executive. In *Sandeep* v. *State of U.P* ,[18] "life imprisonment was for 30 years without remission" was granted, in *Neel Kumar* v. *State of Haryana,*[19] it was again "30 years without remission", in *Selvam* v. *State*[20] it was "minimum 30 years in jail without remission", in *Rajkumar* v. *State of M.P.*[21] the court ordered that "the appellant must serve 35 years in jail without remission", in *Birju* v. *State of M.P.* [22] the punishment was "20 years without remission", with no logic being put forth for the number game of 20, 30 and 35 years of incarceration. So it became a matter of numbers with no convincing justification or reasoning whatsoever. However, there were some benches which conformed to the scheme of separation of powers. For example, in *Rameshbhai(I),*[23] there was (like the *Shraddananda* case) a difference of opinion as regards capital punishment, and so the case was placed before a three judge bench,[24] which upheld life imprisonment subject to any remission or commutation at the instance of the government for good and sufficient reasons! [25]

A bench (of a lesser strength) in *Sangeet* v. *State of Haryana*[26] pontificated on the artificial construct (which was being done in cases after cases)of life imprisonment to be 20 years and by remissions to be effectively for14 years.[27] The court cautioned that the problem has arisen due to the procedure being followed in many states that the life imprisonment is artificially considered to be imprisonment for 20 years! The court reminded us the *Ratan Singh*[28]dictum which had held that "a sentence of imprisonment for life does not automatically expire at the end of 20 years including the remission because the

18 (2012) 6 SCC 107.
19 (2012) 5 SCC 766.
20 (2014) 12 SCC 274.
21 (2014) 5SCC 353.
22 (2014) 3 SCC 421.
23 *Rameshbhai Chandubhai Rathod* v. *State of Gujarat,* (1) (2009) 5 SCC 740.
24 *Rameshbhai Chandubhai Rathod* v. *State of Gujarat* (2), (2011) 2 SCC 764. The case was distinguished from *Dhananjoy Chatterjee* v. *State of West Bengal,* (1994) 2 SCC 220 as the appellant was a young man of 27 years and had chances of being rehabilitated and reformed.
25 Also see *Subhash Chand* v. *Krishan Lal,*(2001) 4 SCC 459 wherein U.U. Lalit as a counsel had submitted that the said Krishan Lal, if sentenced to life imprisonment (instead of death penalty) would never claim his premature release or commutation of his sentence on any ground.
26 (2013) 2 SCC 452.
27 See, *Supra* note 16.
28 *State of M.P.* v. *Ratan Singh,*(1976) 3 SCC 470.

administrative rules framed under the various Jail Manuals cannot supersede the statutory provisions...". And keeping in mind *Ratan Singh*, the court in *Sangeet* explained that "if the law is applied as we understand it, meaning thereby that life imprisonment is imprisonment for the life span of the convict, with procedural and substantive checks laid down in the Cr. PC for his early release, we would reach a legally satisfactory result on the issue of remission".[29] The *Sangeet*[30] judgment was rejected as per incuriam as *Shraddananda* was a three-judge bench decision, while *Sangeet* was of a smaller bench. The courts, the author feels, missed the opportunity of reinstating the separation of powers.

But by that logic *Ashok Kumar* was also 3 judge bench which upheld section 433 A and benches of equal or lower strength, including *Shraddananda*, should have followed it, without creating an exception to the rule mentioned under section 443 A![31] If the judicially caused confusion was not enough, the Criminal Law Amendment Act (2013) under section 376(2) qualified the term life imprisonment to mean "for the rest of that person's natural life". Were the *Godses* and *Maru Rams* not saying that?

Then came a writ petition before the court[32] that sought directions to the effect that the apex court is not competent to fix number of years of imprisonment, with or without remission, when it commutes a death sentence to life imprisonment while upholding the conviction for a capital offence. The court *held* that the Supreme Court is very much competent to do so and declared that no further discussion on the issue is required.[33]

So sentencing even in terms of life imprisonment became a tricky and a contentious proposition. So when a constitution bench was set up in *Union of*

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29 *Id.*, para 58. The Cr.PC in section 432 grants power to the appropriate government to suspend or remit sentences subject to the fulfillment of certain conditions found in the jail manuals or statutory rules. Apart from these procedural impediments the Code in section 433A also puts in a substantive impediment.

30 See *Gurvail Singh @ Gola (2)* v. *State of Punjab*, (2013) 10 SCC 631; *Sahib Hussain* v. *State of Raj*asthan (2013) 9 SCC 778.

31 The judgment was on the constitutionality of section 433A and perhaps everything else was regarded as *obiter dicta* and ignored. But all the assertions were put forth to buttress the argument that it was within the legislative competence to enact section 433 A and hence it becomes relevant.

32 *Gurvail Singh, Supra* note 29.

33 The court relied on *State of Uttar Pradesh* v. *Sanjay Kumar*, (2012) 8 SCC 537 and *Sahib Hussain @ Sahib Jan* v. *State of Rajasthan*, (2013) 9 SCC 778.

India v. *Sriharan*,[34] some issues regarding life imprisonment were also referred for a definitive pronouncement. The issues, *inter alia*, were: i) whether imprisonment for life means for the rest of one's life without any right to claim remission; and ii) whether as held in the *Shraddananda*[35] case, a special category of sentence—instead of death, for a term exceeding 14 years and putting that category beyond the application of remission—can be imposed?

The two questions are in a way inter related and the court through *Maru Ram*,[36] *Godse*,[37] and the ilk came to the conclusion that imprisonment for life in terms of section 53 read with section 45 of the IPC only means imprisonment for the rest of the life of the prisoner subject, however to the right to claim remission etc. as provided under Articles 72 and 161 of the Constitution to be exercisable by the President and the Governor of the State and also as provided under section 432 of the Cr.PC. The *Shraddananda* case was no doubt a horrendous one but criminal law is replete with horrendous cases and this was neither the first nor the last. The majority judgment, after narrating the entire diabolicity of the *Shraddananda* crime, came to the conclusion that the courts are within their right to pronounce sentence of imprisonment till the end of life or for 20 years, 30 years etc. when pronounced after a detailed analysis and the judicial wisdom decides the years depending on the proportionality of the crime committed. Countering the argument that it is an encroachment on the power of the executive, the court asserted that the executive should not feel slighted as executive action must be subservient to judicial pronouncements. Moreover, it was of the opinion that since section 433A of the Cr.PC imposes a restriction of fourteen years the court is within its right to extend that period to 20, 30, or 40 years in the interest of public at large. The court perhaps got confused as 14 years in section 433A was put by the legislature and the court is not competent to do so as per the separation of powers. [38] Section 433A is a restriction on the powers of the executive to commute (the executive may for political or other

34 (2014) 11 SCC 1.

35 (2008) 13 SCC 452.

36 *Maru Ram* v. *Union of India*,1981 (1) SCC 107.

37 *Gopal Vinayak Godse* v. *The State of Maharashtra*, (1961) 3 SCR 440.

38 In 1978 Parliament enacted section 433 A Cr. P.C. which made a 14 year term mandatory for the two classes of prisoners: i) who were sentenced for offences for which the sentence of death could have been imposed and ii) who were sentenced to death but whose sentence was commuted to life imprisonment under section 433 Cr. P.C. The Constitution Bench in *Maru Ram* upheld the Parliament's competency to pass section 433 A Cr. P.C. since it falls under Entry 2 of List III as a cognate provision integral to remission and commutation as it sets limits to the power conferred to the executive by the preceding two sections *i.e.* 432 and 433 of Cr. P.C.

compulsions commute the sentence but section 433 A ensures that convicts guilty of serious crimes do not go unpunished due to the indulgence of the executive). However, section 433 A does not vest discretion in the judiciary to determine a determinate term of life imprisonment. There is also no mention of the *Ashok Kumar* case. The majority judgment has now with one stroke defeated the reformatory principles developed over the years and has invoked the deterrent theory.[39] When the counsel gave the argument of "ray of hope" for the convict in terms of remission, the majority had this to say: "such ray of hope was much more for the victims who were done to death and whose dependents were to suffer the aftermath with no solace left. Therefore, when the dream of such victims in whatever manner and extent it was planned, with reference to oneself, his or her dependents and everyone surrounding him was demolished in an unmindful and in some cases in a diabolic manner in total violation of the rule of law... they cannot be heard to say only their ray of hope should prevail and kept intact."!

The dissenting judgment was categorical that "courts cannot and ought not deny to a prisoner the benefit to be considered for remission of sentence. By doing so, the prisoner must be condemned to live in the prison till the last breath without there being a ray of hope to come out. This stark reality will not be conducive for reformation of the person and in fact push him into a dark hole without there being semblance of light at the end of the tunnel."

Interestingly, the law is that the Sessions Court can impose death penalty subject to confirmation by the high court. However, majority judgment in *Sriharan* stated that the power to alter punishment to any specified period of 20, 30 years and so on can only be exercised by the High Court and, in the event of further appeal, by the Supreme Court and not by any other court. So the present position is that Sessions Court can award sentence of life imprisonment or of death but not the altered punishment of imprisonment for a specified period. This, it is humbly submitted, defies logic.

The courts, in the post *Shraddananda*, were somehow missing a fundamental point that the role of the court is to adjudicate guilt and quantify punishment that commensurate to the guilt. The execution of the punishment was not their forte. The punishment ironically was being conceptualized with respect to the

[39] There are several theories of punishment viz. retributive, deterrent, reformatory and just deserts. Of late reformation theory and just deserts have been the most popular theories guiding sentencing in Indian courts.

executive. These roles are categorically mentioned in *Ashok Kumar*. However, the constitution bench by a majority judgment altered this dynamics.

Having (un)settled the position that it is within the judicial competence to circumscribe the life imprisonment to a number of years beyond the pale of remission, the issues relating to life imprisonment seemed settled. But then a three-judge bench referred to the Chief Justice a question: "whether consecutive life sentences can be awarded to a convict on being found guilty of a series of murders for which he has been tried in a single trial". A constitution bench deliberated on the issue in *Muthuramalingam* v. *State*.[40] The appellants in the instant case were found guilty and sentenced to suffer varying sentences, including 'life imprisonment for life' for each one of the murders committed by them. And importantly, the sentence of 'imprisonment for life' for each one of the murders was directed to run consecutively.[41] The fall out of this punishment would have been that the appellants would have to undergo life sentences ranging from two to eight such sentences depending on the murders committed by them. The state wanted one life for one murder! The courts have the power to pronounce sentences for offences in a single trial which may run consecutively or concurrently. However, there is a legal impossibility[42] of 'imprisonment for life' to run consecutively to another 'imprisonment for life'.

The court, in the instant case, stressed that life being one, no two life imprisonments can be served by the convict. The courts may award life imprisonment for different offences but they would have to be super imposed on one another and made to run concurrently. Even in cases where the commission of the offences is in different transactions, the accused remaining the same, only one life imprisonment can be served by him—that is the law of nature—he/she gets only one life.[43]

As far as the question of whether a life sentence and term sentence could run consecutively, the court was of the opinion that it was legally tenable as the

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40 (2016) SCC OnLine SC 713.

41 In *State of Rajasthan* v. *Jamil Khan*, (2013) 10 SCC 721 the apex court gave life imprisonment for murder and another life imprisonment for rape and ordered the sentences to run consecutively. See also *Sanaullah Khan* v. *State of Bihar*, (2013) 3 SCC 52; *Kamalanatha* v. *State of Tamil Nadu*, (2005) 5 SCC 194; *Ranjit Singh* v. *Union Territory of Chandigarh*, (1984) 1 SCC 31.

42 Given the interpretation of life imprisonment in *Godse* case which is an authoritative precedent.

43 Jyoti Dogra Sood, "Case Comment" ILI *Newsletter* Vol. XVIII Issue III.

convict can be directed to undergo the fixed term, and the life imprisonment can run consecutively. The court's observation is in keeping with the spirit of section 31 of the Cr. P.C.[44]

4. Conclusion

Sentencing is an important facet of criminal law and it is very unfortunate that in cases after cases, the judicial discretion, which is the hallmark of sentencing in India, can hardly qualify as judicious. It must be kept in mind that the crime creation and prescription of punishment is a legislative domain. The task of the judiciary is to try the accused and on determination of guilt pronounce the sentence authorized by law. Within this, the judiciary has lot of discretion - for example, in serious crimes, the courts may give death penalty or spare his life and award imprisonment for life. However, the judiciary must not interfere in the domain of legislature. If a lacuna is felt, the judiciary must exhort the legislature to fill in the gap.

Moreover, there are no set principles being discussed in the *Sriharan* judgment on the basis of which the number of years of imprisonment without remission would be constructed. A bench may settle for 14 years on the basis of section 433 A in a heinous crime as in *Rameshbhai Chandubhai Rathod* for which a *Dhananjoy* was executed or the judge may arbitrarily give a 21, 25, or 30 years without remission. The courts lost a golden opportunity of institutionalizing separation of powers and in the process, also with one stroke of the pen did away with the reformatory jurisprudence of sentencing developed over the years. The

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[44] **31. Sentence in cases of conviction of several offences at one trial.-**
(1) When a person is convicted at one trial of two or more offences, the Court may, subject to the provisions of section 71 of the Indian Penal Code,(45 of 1860) sentence him for such offences, to the several punishments prescribed therefor which such Court is competent to inflict; such punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the Court may direct, unless the Court directs that such punishments shall run concurrently.
(2) In the case of consecutive sentences, it shall not be necessary for the Court by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court:

Provided that-

(a) in no case shall such person be sentenced to imprisonment for a longer period than fourteen years;
(b) the aggregate punishment shall not exceed twice the amount of punishment which the Court is competent to inflict for a single offence.
(3) For the purpose of appeal by a convicted person, the aggregate of the consecutive sentences passed against him under this section shall be deemed to be a single sentence.

dissenting judgment cautioned that the convict will be pushed into a dark hole with no light at the end of the tunnel if punishment without remission is pronounced. But unfortunately, as of now that has become the law of the land. Perhaps a wider discussion on the matter was required and it is imperative that on such fundamental issues the bench strength of the court must at least be 13 if not a full house. The *Muthuramalingam* judgment is, however, a very rational interpretation of section 31 of the Cr. PC and needs to be lauded as it has put to rest the conflicting response of the Supreme Court on the issue.

FAIR TRIAL UNDER CRIMINAL JUSTICE SYSTEM IN INDIA: CONCEPTS AND IMPLICATIONS

Professor (Dr.) Gurpal Singh*
Professor (Dr.) G.I.S. Sandhu**

The main object of administration of criminal justice system is protection of society and preventive of crime. This object can be achieved by punishing the guilty and protecting the innocent. Ends of punishment can appropriately be attained by awarding proper punishment as per accepted tenets of penology. In adversary system of justice which is envisaged in the Code of Criminal Procedure, 1973, the prosecution is required to prove its case beyond a reasonable doubt and the accused is presumed innocent. Article 21 of the Constitution requires that the procedure to deprive a person of his life or liberty must be just, fair and reasonable. In the administration of justice it is of prime importance that justice should not only be done but it must also be seen to have been done.[1]Therefore, to dispense fair and impartial justice in accordance with accepted principles of natural justice and ensure protection of rights and interests of all the parties in criminal case, a fair trial becomes sine qua non of Article 21 of the Constitution.[2]

A fair and impartial trial has a sacrosanct purpose. It is heart of criminal justice jurisprudence and an important facet of democratic polity governed by rule of law. It is ingrained in the concept of due process of law.[3]Universal Declaration of Human Rights, 1948 (Articles 10 to 12) provides for right to fair trial which is enshrined in Article 21 of the Constitution. Denial of fair trial is crucification of human rights.[4] Right to fair trial is not only a basic fundamental right but a human right also. For proper understanding of various attributes of fair trial, it is essential to know about purpose of trial and criminal procedure.

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* Former Head and Dean Faculty, Department of Law, Punjabi University, Patiala.
** Registrar-cum-Professor of Law, Rajiv Gandhi National University of Law, Punjab.

1 *Jahid Seikh* v. *State of Gujrat*, (2011) 7 SCC 762.
2 *Selvi J, Jayalalitha* v. *State of Karnataka*, AIR 2014 SC 9 para 27.
3 *Ratti Ram* v. *State of M.P.*, (2012) 4 SCC 516.
4 *Selvi J Jayalalitha* v. *State of Karnataka* AIR 2014 SC 9.

1. Criminal Trial

A criminal trial is a judicial pronouncement of issues in the case. Its purpose is to give a judgment on facts in issue or relevant facts in a case. Since the object is to mete out justice, convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent and punish the guilty. The proof of the charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and documentary; direct and circumstantial. It should not be an isolated scrutiny.[5]

2. Criminal Procedure

On the whole criminal law consists of substantive criminal law and procedural criminal law. Substantive criminal defines offences and prescribes punishment for the same, Procedural criminal law deals with administration of the substantive law i.e. enforcement of the substantive law. It outlines the procedure for investigation, inquiry, trial, appeal, revision reference, bail etc. The substantive criminal law, in India is embodied in the Indian Penal Code and special and local enactments which define offences and prescribe punishments. However, the procedural criminal law for all offences is generally envisaged in the Code of Criminal Procedure, 1973[6]. By its very nature the Code of Criminal Procedure is a compendium of laws relating to criminal procedure. The provisions contained therein are required to be interpreted keeping in view the well recognized rules of consideration that procedural prescriptions are meant for doing substantive justice. If violation of procedural provisions does not result in denial of fair hearing or cause prejudice to the parties, the same has to be treated as directory and not mandatory, notwithstanding the use of the word shall.[7]

As per the mandate of Article 21 articulated by judicial exposition, from time to time. criminal procedure must be just, fair and reasonable to all the parties interested in the case. This highlights special significance of Criminal

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5 *Zaheera Haibullaha Shiekh* v. *State of Gujarat*, (2006) 3 SCC 374; *Mohd Hussain* v. *State (Govt. of NCT of Delhi)*, AIR 2012 SC 3860; *Selvi J Jayalalitha* v. *State of Karnataka* AIR 2014 SC 9; *Babu Kumar* v. *State*, (2015) 8 SCC 787.

6 *The Code of Criminal Procedure* 1973, S. 4.

7 *Shiv Singh* v. *Nagendra Tiwari*, 2010 Cri. L.J. 382 (SC)

Procedure. In this context, the importance of the Code of Criminal Procedure is based on three special considerations viz:

(i) It is more constantly used and affects greater number of persons than any other law.

(ii) The nature of its subject-matter is such that human values are involved in it to a greater degree than in other laws.

(iii) As the law of criminal procedure is complimentary of the substantive criminal law, its failure would seriously affect the substantive criminal law which in turn would considerably affect the protection that it gives to society. Therefore, it has been rightly said that too much expense, delay and uncertainty in applying the law of criminal procedure would render even the best penal laws useless and oppressive.[8]

3. Fair Trial and the Code of Criminal Procedure

The Code of Criminal Procedure is a Code of procedure and like other laws, is designed to further the ends of justice and not to frustrate them by introduction of technicalities. Object of the Code is that the accused gets full and fair trial along certain well established and well understood lines that accord with our lines of natural justice. If he does if he is tried by a competent court, if he is told and clearly understands the nature of the offence for which he is being tried, if the case against him is fully and clearly explained to him and he is afforded a full and fair opportunity of defending himself, then provided there is substantial compliance with the outward forms of law, mere inconsequential errors or omissions in the trial are regarded as venal (motivated by susceptibility to bribery) by the Code/ and the trial is not vitiated unless the accused can show substantial prejudice, that broadly, is the basic principle on which the Code is based.[9]

The underlying object of the Code of Criminal Procedure is to ensure fair trial to accused according to accepted principles of natural justice. Fair trial includes within its sweep, speedy trial. Irregularities or technicalities or departure from procedure of the Code is not to be regarded as denial of fair trial unless there is failure of justice to accused or it causes prejudice to accused in his defence.

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8 Law Commission of India 37th Report on the *Code of Criminal Procedure*, 1898, pp-1-2.

9 *Willie Stanley* v. *State of M.P.*, AIR 1956 SC 116; *Manipal* v. *State of Haryana*, (2011) 7 SCC 762

4. Concept of Fair Trial

Fair trial means trial before an impartial judge, a fair prosecutor and atmosphere of judicial calm. Fair trial is that trial in which bias or prejudices for or against the accused, the witnesses or the cause which is being tried are eliminated. If witnesses get threatened or are forced to give false evidence that would not result in fair trial. The failure to hear material witness is certainly a denial of fair trial. Denial of fair trial is as much injustice to the accused as is to victim and the society. The concept of fair trial entails familiar triangulation of interest of the accused, the victim and the society, and it is the community that acts through the State and the prosecution agencies. Crimes being public wrongs in breach of and violation of public rights and duties affect the whole community and are harmful to the society in general.[10] The object of fair trial is to mete ends of justice and to convict the guilty and protect the innocent. The trial should be a search for truth and not a bout over technicalities. Therefore, right to free and fair trial is implicit in the guarantee of Article 21 of the Constitution. The right to fair trial being a basic fundamental right, any hindrance in fair trial could also be violation of Article 14 of the Constitution.[11]

Fair trial is the main object of criminal procedure, and it is the duty of the Court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails protection of interests of the accused, the victim and the society, therefore, fair trial includes the grant of fair and proper opportunities to the concerned persons and the same must be ensured as this is Constitutional as well as human right. Therefore, under no circumstances person's right to fair trial be jeopardized.[12]

The Criminal Court for ensuring fair trial is expected to act as effective instrument of dispensing justice. The presiding judge must not be a silent spectator and a mere recording machine but should become a participant in trial intelligently by taking active interest and elicit all relevant materials necessary for reaching correct conclusion so as to find out the truth and

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10 *Zaheera Habibullah H. Seikh* v. *State of Gujrat* 2005 Cri L J 2050 para 38; *Selvi J Jayalalitha* v. *State of Karnataka* AIR 2014 SC 9;

11 *Selvi J Jayalalitha* v. *State of Karnataka* AIR 2014 SC 9 para 29

12 *Natasha Singh* v. *CBI* (2013) 5 SCC 741

administer justice with fairness and impartiality, both to the parties and the community it serves.[13]

In order to ensure a fair trial Court is duty bound to see that neither the prosecution not the defense takes unnecessary adjournments and take the trial under their control. The Court is under obligation to see that witnesses cited by prosecution are produced by it and if summons are issued, they are actually served on the witnesses. If the Court is of the opinion that material witnesses have not been examined, it should not allow prosecution to close the evidence. The Public Prosecutor who conducts the trial has a statutory duty to assist the Court. The Court is not expected to accept every version of prosecution as if it is sacred. It has to apply its mind on every occasion. Non application of mind by the trial court has the potentiality to lead to the paralysis of the conception of fair trial.[14] After analyzing various facet of fair trial in the modern context, the Supreme Court in *State of Haryana v. Ram Mehar*[15] succinctly explained the concept of fair trial as:

The concept of the fair trial is not in realm of abstraction. It is not a vague idea. It is not a concrete phenomenon. It is not rigid and there cannot be any straightjacket formula for applying the same. On occasions it has the necessary flexibility. Therefore, it cannot be attributed or clothed with any kind of rigidity or flexibility in its application. It is because fair trial in its ambit requires fairness to the accused, the victim and the collective at large. Neither the accused not the prosecution not the victim which is part of the society can claim absolute predominate over the other. Once absolute predominance is recognized, it will have the effect, potentiality to bring an anarchical disorder in the conducting of trial defying established legal norm. There should be passion for doing justice but it must be commanded by reasons and not propelled by any kind of vague instigation. It would be dependent on the fact situation, established norms and recognized principles and eventual application of the factual scenario in entirety. There may be cases which may command compartmentalization but it cannot be stated to be inflexible rule. The centripetal purpose is to see that injustice is avoided when the trial cannot be allowed to such an extent so that the systematic order of conducting a trial in accordance with CrPC. or other enactments get

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13 *Zahera Habibullah H Seikh* v. *State of Gujrat* 2005 Cri.L J 2050 (SC)

14 *Babu Kumar* v. *State of Bihar*, (2015) 8 SCC 787 para 22

15 AIR 2016 SC 3942

mortgaged to whims and fancies of the defense or the prosecution. The command of the Code cannot be thrown to winds. In such situation, as has been laid down in many an authority, the Courts have significantly an eminent role. A Plea of fairness cannot be utilized to bailed castles in Spain or permitted to perceive a bright moon in a sunny afternoon. It cannot be accepted to manure a fertile mind to usher in the nemesis of the concept of trial as such.[16]

5. Attributes/ Features of Fair Trial

5.1 Adversary System

The Code of Criminal Procedure which embodies procedure for administration of substantive criminal law is mainly based on adversary system i.e. accusatorial method. In this system prosecutor who represents the State (Society or People) accuses the defendant (accused person) of commission of crime and law requires him to prove his case beyond reasonable doubt by adducing evidence.[17] The law affords fair opportunity to accused to defend himself. The judge acts impartially like an umpire and balances the scales of justice by protecting interests of the accused, the victim and the community. The system is, by and large dependable for proper reconciliation of public and private interest i.e public interest in punishing criminals and private interest in preventing wrongful convictions. No guilty should escape and no innocent should suffer is the mainstay of adversary system of justice which is an important feature of fair trial.[18]

The adversary system, in India has undergone some transformation by legislative prescriptions and judicial exposition, it can still be considered reasonably as a vital component of the concept of fair trial which is now regarded as heart of Criminal Jurisprudence and an important facet of democratic polity governed by rule of law.[19]

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16 *Id.*, para 24

17 *Rafiq Ahmed* v. *State of U.P.* (2011) 8 SCC 300

18 Justice V.R. Krishna Iyer, Report of Expert Committee on Legal Aid – Percessual Justice to the People, Government of India, Ministry of Law, Justice and Company Affairs, Department of Legal Affairs, May 1973, p. 70.

19 *Selvi J Jayalalitha* v. *State of Karnataka*, AIR 2014 SC 9, *Babul Kumar* v. *State of Bihar* (2015) 8 SCC 787

5.2 Presumption of Innocence

The cardinal principal in the administration of criminal justice is that every person accused of an offence shall be presumed innocent. Presumption of innocence is a human right of accused.[20] The burden of proving guilt of the accused is upon the prosecution and unless it relieves itself of that burden, the court cannot record a finding of the guilt of the accused. The presumption of innocence does not end if accused dies during trial. It is well settled principle that prosecution cannot continue against the dead person. A criminal Court cannot continue proceedings against a dead person and find him guilty. Such proceedings and findings are contrary to the very foundation of criminal Jurisprudence.[21]

The principle of presumption of innocence is undoubtedly an essential feature of fair trial. However, there are some exceptions to this established principle. Some special enactments dealing with some vital issues of socio-economic nature provide for presumption of *mens rea* and it is for the accused to prove its innocence. There is an example of section 30 of the Protection of Children from sexual offences Act, 2012 which requires a culpable mental state on the part of the accused, which the trial court shall presume. It will be a defense for the accused to prove that he had no such mental state with respect to the offence of which he is charged.

5.3 Independent, impartial and Competent Judges

A Fair trial being essential part of Article 21 of the Constitution[22] can only be ensured if trial is conducted by an independent, impartial and competent judge. The Code of Criminal Procedure, 1973 provides for separation of the Judiciary from the Executive. The Separation ensures independent functioning of judiciary, immune from all suspicion of Executive influence or control. The appointments of Sessions Judges and Magistrates are made by the State Government in consultation with the High Court. The rules in this respect provide that only persons with sound knowledge of law with requisite qualifications and experience are to be appointed on these posts. After the first

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20 *Ram Narian Poply* v. CBI, AIR 2003 SC 451; *Mohd Hussain* v. *State*, AIR 2012; *Raj Kumar* v. *State of Rajasthan*, 2013 Cri.L.J. 3276 (SC); *Subhadramma* v. *State of AP*, AIR 2016 SC 3095

21 *U. Subhadramma* v. *State*, AIR 2016 SC 3095

22 *Selvi j Jayalalitha* v. *State of Karnataka*, AIR 2014 SC 9 para 29

appointment by Government, the Judges or Magistrates, thereafter, work only under the direct control and supervision of the High Court and not the Government. Thus, trial judges are independent of any sort of the Executive influence or control. It is only such atmosphere of independence which is necessary for ensuring fair trial. In order to have a fair trial it is necessary that the Judge or Magistrate must not be in any manner connected with the prosecution or interested in the prosecution. This principle, to some extent, has been recognized and given effect to by Section 479 Cr.P.C. Therefore Fair trial requires a trial before an impartial judge and atmosphere of judicial calm. The Apex has observed that a Court cannot turn a blind eye to oppressive or vexatious conduct that occurs in relation to criminal trial.[23]

5.4 Public Trial: Venue of Trial at Public Place

Justice should not only be done but should be seen to have been done. In this context, one of the components of fair trial is that the trial should be a public trial. i.e. it is held at a public place where entry of public is allowed to watch the proceedings. Section 327 of the Code makes a provision for open Court which is generally accessible to the public. Even if the trial is held inside jail or private house, it does not cease to be a public trial. In *Kehar Singh v. State (Delhi Admn)*[24] the Supreme Court held that it is then to be an open Court and anyone who wants to attend trial can do so with the restrictions contemplated as regards the number of persons that could be contained in the premises where the court sits. Merely because it is shifted from the ordinary place where the Session Court is held to the Tihar Jail does not become a trial not open to public. The Court room is a temple of justice and everybody has a right of access. However, trial judge may regulate the access.[25]

5.5 Parties to be Represented by Competent Lawyers

In a criminal case the fair trial requires triangulation of interests of the accused, the victim and the society. Fair trial is search for truth to punish the guilty and protect the innocent by preventing miscarriage of justice.[26] Therefore, the one of the important feature of fair trial is that the parties involved in criminal case

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23 *Ibid.*

24 AIR 1988 SC 1883

25 *Chhatisgarh Mukti Morcha* v. *State of MP*, 1996 Cri.L.J. 2239 (MP)

26 Zaheera Habibullah H. Seikh 2005 Cri.L.J. 2050 (SC); *Mohd. Hussain* v. *State (Govt. of NCT) Delhi*, AIR 2012 SC 3860

should be given proper opportunity to present their case. This necessitates representation of parties by competent lawyers. The victim is represented by State Counsel and accused has a fundamental right to be defended by a counsel of his choice. If accused is not able to engage counsel, then Government is to provide him counsel as legal aid is fundamental right of indigent accused under Article 21 of the Constitution and an essential ingredient of fair trial.[27]

5.6 Accused to be informed of Accusation

Fair trial necessitates that the accused must be informed at the earliest of the allegations against him so as to provide him opportunity for his defense. Presumption of innocence being human right of accused, he should be given clear notice of the allegations made out against him. Such notice should be given in simple language that he understands and explained to him. The Code of Criminal Procedure, 1973, clearly provides that when an accused person is brought before the Court for trial, the particulars of the offence of which he is accused shall be stated to him.[28] Detailed provisions in this respect have been laid down in sections 211 to 224 of the Code which relate to framing and joinder of charge.

5.7 Trial to be Held in the Presence of Accused

The presence of accused throughout his trial in court would enable him to properly understand the case against him as it is unfolded in the Court by the prosecution. This would help him in preparing his defense. A criminal trial in the absence of accused is unthinkable. A criminal trial in the absence of accused is not envisaged in the Code though no specific provision is found to that effect in the Code. The mandatory presence of accused during trial can be inferred from the provisions of the Code which under circumstances allow the Court to dispense with personal attendance of the accused.[29] In such cases of personal exemption of appearance of accused the evidence shall be recorded in the presence of his counsel.[30] The Supreme Court has laid down guidelines in this respect in the case of *Kaya Mukherjee v. Magmateasin Ltd.*[31] The

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27 *Hussainara Khatoon* v. *State of Bihar*, AIR 1979 SC 1360, 1369; *Mohd Hussain* v. *State (Govt. of NCT) Delhi*, AIR 2012 SC 3860

28 *The Code of Criminal Procedure*, 1973, Ss. 228, 240, 246 and 251.

29 *Id.*, Ss. 205 and 317.

30 *Id.*, S. 273

31 2008, Cri. L.J. 2597 (SC)

guidelines are that if the accused makes an application to the Court praying that he may be allowed to answer the question without making his physical presence in the Court on account of justifying exigency the court can pass appropriate orders there on provided such application is accompanied by an affidavit sworn by the accused himself containing the following matters. (a) A narration of facts to satisfy the court of his real difficulties to be physically present in the court for giving such answers. (b) An assurance that no prejudice would be caused to him in any manner by dispensing his personal presence during such questioning.(c) An undertaking that he would not raise any grievance on that score at any stage of the case.[32]

5.8 Evidence to be Taken in Presence of Accused

In a criminal case, the prosecution is required to prove its case against the accused beyond reasonable doubt by cogent and convincing evidence. Fair trial requires that evidence should be taken in the presence of accused. Section 273 of the Code strives to achieve this object. It provides:

Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceedings shall be taken in the presence of the accused or when his personal attendance is dispensed with, in the presence of his pleader. (provided that when evidence of a woman below the age of eighteen years who is alleged to have been subjected to rape or any other sexual offence is to be recorded, the Court may take appropriate measures to ensure that such woman is not confronted by the accused while at the same time ensuring right of cross examination of the accused).[33]

Now in view of introduction of information technology in the administration of Criminal Justice, evidence can be recorded by audio-video electronic means. The accused may not be present in the Court. The proviso to Sub Section (1) of section 275 provides that the evidence of a witness may also be recorded by audio-video electronic means in the presence of the advocate of the person accused of offence.[34]

When evidence during trial is given in a language not understood by accused, it shall be interpreted to him in open Court in the language understood by him.

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32 *Id.*, para 26.

33 *Proviso inserted by The Criminal Law (Amendment) Act*, 2013 (Act 13 of 2013)

34 *Proviso added by Criminal Law (Amendment) Act* 2008 (Act 5 of 2009)

If accused appears by pleader, and the evidence is given in language other than the language of the Court and not understood by the pleader, it shall be interpreted to pleader in that language.[35] However, non compliance with section 279 will be considered as a mere irregularity not vitiating the trial if there was no prejudice or injustice caused to the accused person.[36]

5.9 Right to Cross-Examine Witnesses and Produce Defence Evidence

Fair trial entails that evidence given in trial should be credible. Evidence given by witness, may become more reliable and credible if it is given on oath and tested by cross examination. A Criminal trial which denies the accused person the right to cross-examine prosecution witnesses is based on weak foundation, and cannot be considered as a fair trial.[37] The cross examination should be conducted expeditiously and not be prolonged.[38] Cross examination of witnesses is essential to verify the veracity of the statements of the witness examined in Court during trial. Accused has opportunity through cross examination, to discredit the evidence of the witnesses by pointing out various contradictions made during cross-examination. For ensuring fair trial to accused according to accepted principles of natural justice, the accused should be given opportunity to produce evidence to prove his innocence. Sections 233 and 247 of the Code provide for evidence of defence. The accused can produce witnesses in his defence. He can request the Judge to summon any defence witness and the Judge is, normally, under obligation to summon such witness. The refusal without any legal justification by a Magistrate (Court) to issue process to the witness named by the accused person was held enough to vitiate the trial.[39]

In order to ascertain credibility of defence witnesses, the prosecution or counsel of victim of crime has the right to cross-examine defence witnesses. Therefore, cross examination of prosecution and defence witnesses is a facet of fair trial as it helps the trial court in its search for truth i.e. to find out the guilty and the innocent. The presiding judge should play active role in ensuring fair

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35 *The Code of Criminal Procedure*, 1973, S. 279.

36 *Shivnarayan Kabra* v. *State of Madras*, 1967 Cri.L.J. 946 (SC).

37 *Sukanraj* v. *State of Rajasthan*, AIR 1967 Raj 207.

38 *Vinod Kumar* v. *State of Punjab*, (2015) 3 SCC 220.

39 *Habeeb Mohamad* v. *State*, AIR 1954 SC 51; *Sreedhar Pillay* v. *P.J. Alexander*, 1992 Cri.L.J. 3433 (Ker).

trial during taking of evidence under such rules as will protect the innocent and punish the guilty.[40]

5.10 Expeditious Trial

Justice delayed is justice denied. Speedy justice is more desirable in criminal cases where liberty of a person is at stake and consequences of prolonged proceedings are far reaching. One of the main objects of the Code of Criminal Procedure, 1973 was to provide speedy justice as it stated that every effort should be made to avoid delay in investigation and trial which is harmful not only to the individuals involved but also to the society.[41] The provisions of the Code are consistent with the constitutional guarantee of speedy trial emanating from Article 21 of the Constitution.[42]

The Apex Court has declared that speedy trial and fair trial to a person accused of crime are integral part of Article 21. Expeditious trial is an important facet of fair trial.[43] Speedy trial is read into Article 21 as an essential part of right to life and liberty.

Section 437 (6) of the Code mandates the Magistrate to release the accused on bail who is in detention if the trial is not concluded within 60 days from the first date fixed for hearing . However, this only mitigates hardships of accused but does not give him speedy trial. Moreover, the provision is applicable only to trial before the Magistrate.

Section 309 of the Code contain important directions to the courts regarding expeditious trial. It states:

(1) In every inquiry or trial the proceedings shall be continued form day-to-day until all witnesses in attendance have been examined, unless the court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded:

Provided that when the inquiry or trial relates to offence under section 376, sections 376 A , Section 376 B, Section 376 C or Section

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40 *Selvi J. Jayalalitha* v. *State of Karnataka*, AIR 2014 SC 9 para 29.

41 Statement of Objects and Reasons of the *Code of Criminal Procedure*, 1973.

42 *Hussainara Khatoon* v. *State of Bihar*, AIR 1979 SC 1360; *A.R, Antulay* v, *R.S. Nayak*, AIR 1992 SC 1701; *Mohd. Hussain* v. *State*, AIR 2012 SC 3860; Ajay Kumar v . Union of India, AIR 2015 SC 2389 ; *Bablu Kumar* v. *State of Bihar*, (2015) 8 SCC 787.

43 *Moti Lal Saraf* v. *State of J & K*, 2006 Cri.L.J. 4765 (SC).

376 D of Indian Penal Code (45 of 1860) , the inquiry or trial shall , as far as possible be completed within a period of two months from the date of filing of the charge sheet.

(2) If the Court after taking cognizance of the offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn , any inquiry or trial, it may from time to time , for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:

Provided that no magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time.;

Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing:

Provided also that no adjournment shall be granted for the prupose of only enabling the accused person to show cause against the sentence proposed to be imposed on him.

Provided also that:

(a) No adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of the party;

(b) The fact that the pleader of a party is engaged in another court , shall not be ground for adjournment;

(c) Where the witness is present in the court but a party or his pleader is not present though present in Court, is not ready to examine or cross examine the witness, the Court may, if it thinks fit, record the statement of the witness and pass such orders as it thinks fit dispensing with the examination-in-chief or cross examination of the witness, as the case may be.[44]

The amended provisions of section 309 are meant for augmenting expeditious completion of trial. Section 309 does not prescribe any time limit, as a general rule, for conclusion of trial. The seven judge Bench in *P. Ramachandra Rao v. State of Karnataka* [45] held that period of limitation for conclusion of trial of

[44] The *Code of Criminal Procedure*, 1973, S. 309 (Amended by Act 45 of 1978, Act 5 of 2009 and Act 13 of 2013). The object of the amendments was to remove difficulties those arose from time to time, in the way of conducting expeditious trial.

[45] AIR 2002 SC 1856.

criminal case or criminal proceedings is prescribed by the Supreme Court in *"Common Cause"* (i), *"Common Cause"* (ii), *Raj Deo Sharma* (i) *Raj Deo Sharma* (ii) [46] should not have been prescribed and these decisions are not good law. The guidelines laid down regarding right to speedy trial are not exhaustive but only illustrative. They are not intended to operate as hard and fast rules or to be applied in a straight-jacket formula. Their application would depend on fact situation of each case. It is difficult to foresee all situations and no generalization can be made.

The seven Judge Bench advised the trial Courts to exercise powers under Sections 309,311 and 258 of the Code of Criminal Procedure to effectuate the right to speedy trial. A watchful and diligent trial judge can prove to be a better protector of such right than any guidelines.[47] The trial court should play proactive role in ensuring fair trial by adhering to the mandate of section 309 and the directions of the Supreme Court for speedy trial.[48] The trial court should ensure examination of all material witnesses and not allow unwarranted adjournments so that truth becomes victim and accused gets time to win over victims.[49] The right to speedy trial is implicit in Article 21. It is the right of the accused. The fact that speedy trial is also in public interest and serves a social purpose also, does not make it any less right of accused. It is in the interest of all concerned that guilt or innocence of accused is determined as quickly as possible in the circumstances. The Constitutional guarantee of speedy trial is properly reflected in section 309 of the Code of Criminal Procedure.[50]

A perusal of the provisions of section 309 and other related provisions of the Code and various laudable judgments of the Apex Court for effectuation of right of speedy trial leads to logical conclusion that the real problem lies in effective enforcement of right to expeditious trial. Inspite of various amendments of the Code for ensuring speedy trial and directions of the Supreme Court to that effect, the ground reality presents a dismal picture. Justice Deepak Misra, a distinguished Jurist Judge has succinctly explained that factual situation as:-

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46 AIR 1996 SC 1619; (i) AIR 1997 SC 1539, (ii) AIR 1998 SC 3281 (iii) AIR 1999 SC 3254.

47 *Id.,* para 29; *Mohd Hussain* v. *State* , AIR 2012 SC 3860.

48 *Babu Kumar* v. *State of Bihar*, (2015) 8 SCC 787.

49 *Vinod Kumar* v. *State of Punjab*, (2015) 3 SCC 220.

50 *Ajay Kumar* v. *Union of India*, AIR 2015 SC 2389.

If one is asked a question, what afflicts legally criminal trial in its conceptual eventuality in this country the two reasons that may earn the status of phenomenal signification are, first, procrastination of trial due to non availability of witnesses when trial is in progress and second, unwarranted adjournments sought by the counsel conducting the trial and the unfathomable reasons for acceptation of such prayers for adjournments by the trial courts, despite a statutory command under section 309 Cr. P.C. and the series of pronouncements by the Supreme Court. What was malady at one time with the efflux of time has metamorphosed into malignancy. What was a mere disturbance once has become a disorder, diseased one, at present.[51]

Fair Trial and Speedy Trial: Deprivation of Right to Speedy Trial does not Universally Justify Discontinuance of Prosecution.

'Speedy Trial' and 'Fair Trial' to a person accused of crime are integral part of Article 21. There is, however, qualitative difference between the right to speedy trial and the accused's right to fair trial. Unlike the accuser's right of fair trial, deprivation of right to speedy trial does not per se prejudice the accused in defending himself. The right to speedy trial in its very nature is relative. It depends upon diverse circumstances. Each case of delay in conclusion of criminal trial has to be seen in the facts and circumstances of such case. The factors concerning accused's right to speedy trial have to be weighed vis-à-vis the impact of the crime on society and confidence of the people in judicial system, speedy trial secures right to an accused but it does not preclude the right of public justice. The nature and gravity of crime, persons involved, social impact and societal needs must be weighted along with the right of the accused to speedy trial and if the balance tilts in favour of the former, the long delay in conclusion of trial should not operate against continuance of prosecution and if the right of the accused in the facts and circumstances of the case and exigencies of situation tilts the balance in his favour, the prosecution may be brought to an end.[52] Fair trial has sacrosanct purpose to ensure justice according to accepted principles of natural justice. Denial of fair trial is as much injustice to the accused as is to the victim and society.[53]

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51 *Vinod Kumar* v. *State of Punjab*, (2015) 3 SCC 220 para I.

52 *Mohd. Hussain* v. *State (NCT of Delhi)*, AIR 2012 SC (3860).

53 *Selvi J. Jayalalitha* v. *State of Karnataka*, AIR 2014 SC 9 para 29; *Rattiram* v. *State of M.P.* (2012) 4 SCC 516 para 39; *Bablu Kumar* v. *State of Bihar*, (2015) 8 SCC (787).

5.11 Reasonable Judgement

Criminal trial is a search for truth and it is to be conducted under such rules as will protect the innocent and punish the guilty.[54] Therefore, the requirement of fair trial is that the trial Court is to notice, consider and discuss, however, briefly' the evidence of various witnesses as well as the arguments addressed at the bar.[55] The conclusion about guilt or innocence of the accused should be arrived on the basis of evidence and not on suspicious, howsoever, grave they be i.e. Judgment must be reasoned one. Suspicion, however, strong cannot take place of proof. If a criminal Court, allows its mind to be swayed by the gravity of the offence, proceeds to hand out punishment in the absence of any credible evidence, it would be doing great violence to the basic tenets of criminal jurisprudence.[56]Neither vanity of Judge nor his pride of learning in other fields should influence his decision which only be based on accepted legal principles regarding appreciation of evidence.[57] Judgment based on logical reasoning remain an important fact of fair trial.

5.12 Sentence Hearing

Fair trial entails protection of interests of accused, victim and society. Deterrence and correction are the underlying objects of modern penology. The Code provides for hearing accused on the question of sentence after he is found guilty.[58]Sentence hearing is recognisation of individualization of punishment which is essential for imposition of appropriate punishment in criminal cases. Restorative justice, being an emerging area of modern criminal justice, is envisaged in the Code especially after the amendment of the Code by Act 5 of 2009.[59]

In order to dispense justice to accused, victim and the society, the trial Judge should consider sentence hearing a vital stage of criminal case. It is now considered a facet of fair trial of modern vintage. It helps the Judge to select appropriate punishment- deterrent or reformatory. It provides opportunity to both accused and the prosecution to present before the trial court, the factors

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54 *Selvi J. Jayalalitha* v. *State*, AIR 2014 SC 9 para 291.

55 *Mukhtiar Singh* v. *State of Punjab*, (1995) 1SCC 760.

56 *Mohd. Faizan* v. *State of Bihar*, (2013) 2 SCC 131.

57 *OMA* v. *State of T.N.* AIR 2013 SC 825.

58 *The Code of Criminal Procedure*, 1973, Ss. 235 (2) and 248 (2).

59 *The Code of Criminal (Procedure) Amendment, Act*, 2008 (Act 5 of 2009)

and other material calling for lenient or harsh punishment. A sentencing decision without sentence hearing as per section 235 (2) and 248 (2) of the Code in letter and spirit is likely to be struck down as violative of rules of natural justice (fair trial)[60]

5.13 Compensation to Victim of Crime

Sub section (3) of section 357 A of the Code provides that if the trial court, at the conclusion of trial , is satisfied, that the compensation awarded under section 357 is not adequate for such rehabilitation (of Victim) or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation.

Rehabilitation of victim of crime being prime concern of modern criminal Justice, the Court must consider grant of compensation as part of trial and record reasons for not granting compensation. Restorative justice justifies even interim compensation to the victim of crime. Highlighting need of interim compensation, the apex Court observed that we are of the view that it is the duty of the courts, on taking cognizance of criminal offence, to ascertain whether there is tangible material to show commission of crime, whether the victim is identifiable and whether victim of crime need immediate financial relief. On being satisfied on application or on its own motion, the Court ought to direct grant of interim compensation. At the stage of final hearing, the court should record finding for grant of compensation.[61] Consideration of question of payment to victim of crime is now an integral part to fair trial.

A perusal of main features of fair trial outlined in the foregoing discussion leads to logical conclusion that the underlying object of fair trial is to find out the truth by following proper procedure through impartial approach. There would be failure of justice not only by unjust conviction but also by acquittal of guilty as a result of unjust failure to produce requisite evidence. Of course, the rights of the accused have to be kept in mind and safeguarded but they should not be overemphasized to the extent of forgetting the victims also have

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60 *Allauddin Mian* v. *State of Bihar*, (989) 3 scc 241; Jumman Khan v. State of UP, (1991) SCC 752.

61 *Suresh* v. *State of Haryana*, (2015) 2 SCC 227; Laxmi v. UOI, (2014) 4 SCC 427; *Ankush Shivaji Gaikwad* v. *State of Maharashtra*, (2013) 6 SCC (776).

rights which need to be protected by a balanced and impartial approach of the trial court.[62]

'Failure of Justice' and 'prejudice to accused' are the key words frequently used in the analysis of concept of fair trial. Therefore, it is essential to understand these words in the context of fair trial, particularly, their exposition by the Supreme Court.

5.14 Failure of Justice

Sections 462 to 466 of the Code are aimed at protecting or upholding in most cases the orders passed by criminal Court which lacked jurisdiction or had committed illegalities or irregularities unless failure of justice has been occasioned or is likely to be occasioned thereby. The Supreme Court in *Shamnsaheb M. Multani v. State of Karnataka*[63] reitracted in *Blimanna v. State of Karnataka*[64] explained the meaning of the phrase "failure of Justice" observing that the superior court must examine whether the issue raised regarding failure of justice is really a failure of justice or whether it only a camouflage, the Court must further examine whether the said aspect is of such a nature, that non explanation of it has contributed to penalizing the individual and if the same is true then the Court may say that since he was not given opportunity to explain such aspects, there was failure of justice on account of non-compliance with the principle of natural justice. The expression "failure of justice" is an extremely pliable or facile expression which can be made to fit into any situation of case.

5.15 Prejudice

Prejudice is incapable of being interpreted in its generic sense and applied to criminal jurisprudence. The plea of prejudice has to be in relation to investigation or trial and not matters falling beyond their scope. Once accused is able to show that there has been serious prejudice caused to him with respect to either of these aspects and the same has defeated the rights available to him under the law, then the accused can seek benefit under the orders of the Court.[65] Judging question of prejudice, as of guilt, Courts must act with broad

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62 *Bhimanna* v. *State of Karnataka*, (2012) 9SCC 650; CBI v. Ashok Kumar Aggarwal 2014 (2) RCR 213 (SC).

63 (2001) 10 SCC 259.

64 (2012) 9 SCC 950.

65 *Rafiq Ahmed* v. *State of U.P.*, (2011) 8 SCC 300; *Bhimanna* v. *State*, (2012) 9 SCC 650.

vision and look to the substance and not to technicalities and their main concern should be to see whether the accused had a fair trial, whether he knew that he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was given full and fair chance to defend himself.[66]

5.16 Prejudice to Accused

The vital question of substantial prejudice to accused caused by following improper procedure or lapses in procedure was examined by the Supreme Court. In this context, the Apex Court held:

Except there is something so vital as to cut at the root of jurisdiction or so abhorrent to what one might term natural justice, matter resolves itself to a question of prejudice. Some violations of the Code will be so obvious that they will speak for themselves as, for example , a refusal to give the accused a hearing, a refusal to allow him to defend himself, a refusal to explain the nature of the charge to him and so forth. These go to the foundations of natural justice and would be struck down as illegal forthwith. It hardly matters this is because prejudice is then patent or because it is so abhorrent to well established notion of natural justice that trial of that kind is only a mockery of trial and not of the kind envisaged by the laws of our land because either way they would be struck down at once.[67] If the lapse or departure in following the procedure cause prejudice to the accused occasioning a failure of justice, then such trial is not a fair trial. The provisions contained in the Code are required to be interpreted keeping in view the well recognized rules of consideration that procedural prescriptions are meant for doing substantive justice. If violation of procedural provision does not result in denial of fair hearing or cause prejudice to the parties, the same are to be treated as directory and not mandatory notwithstanding the use of the word shall.[68]The phrase prejudice is to be understood in the context of failure of justice to the parties in the trial. The prejudice may lead to failure of justice to victim where there is unjust acquittal; it may cause failure of justice to accused by denying him his rights of making proper defense which ultimately lead to his unjust conviction.

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66 *Rattiram* v. *State of M.P.*, (2012) 9 SCC 516.

67 *Willie Stanley* v. *State of M.P.*, AIR 1965 SC 116; *Manipal* v. *State of Haryana*, (2011) 7 SCC 762.

68 *Shiv Singh* v. *Nagendra Tiwari*, 2010 Cri.L.J. 382 (SC).

Therefore, for maintaining public confidence in the administration of criminal justice, it is the duty of the trial court to uphold the majesty of law by ensuring fair trial. In the Criminal Justice System it is not only the reasonableness of substantive provisions but the procedural fairness is non-the-less significant, but demand of it would seriously jeopardise the life and liberty of an individual.

THE THIRD GENDER OF INDIA: A COMPARATIVE AND PRAGMATIC STUDY OF TRANSGENDER COMMUNITY IN THE CITY OF CHANDIGARH WITH YOGYAKARTA PRINCIPLES, 2009, AND THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) BILL, 2016

Ashish Virk[*]

MA VIE IN ROSE: MY LIFE IN PINK

> Know your identity as you know your heart. In that you would know your place in your family, in your government, in your island and in the world.'
>
> Shevon Matai

Ludovic is seven years old and born to a middle class, suburban family. He is very much like other children, but he is different in one key way, he is sure that he was meant to be a little girl, not a little boy, and he waits for a miracle to 'correct this mistake.' He desperately wants to be a girl and everything about him says that he already is one. He has it all figured out, God messed up his chromosomes, simple as that, no judgment, no morality. Ludovic is a prime example of a female brain in a male body and he is putting up a valiant struggle not to be erased as a person. His siblings, although loving their 'brother' in their home, are fatigued by having to fight for him in school when he is teased and harassed. Everything falls apart however, when he falls in love with a boy who happens to be the son of his father's boss. Ludo's father is fired from his job because his boss cannot abide by Ludovic's crush on his son. The gender variant behaviour which was once tolerated is now unsupportable. Ludovic's hair is cut to a typical boy's style, he is forced to wear traditional boy's clothing, he is taken for therapy, he is encouraged to play sports and to be more like his brother, all 'corrective actions' designed to make him to be more like a boy, to make him 'fit in' by force is necessary. Ostracized by his schoolmates, misunderstood by his family, and eventually run out of town by bigoted neighbors, Ludovic accepts that he cannot be the boy his family wants him to be. In desperate attempt to break away from his life, Ludovic tries to end his life, at which point, his family realizes that in-spite of what their community thinks, Ludovic should be accepted for who he really is. ***'Do whatever feels best. Whatever happens you'll always be My Child.'*** The final lines of the film Ma Vie in Rose (My Life in Pink) is a story about the innocence of childhood of a transgender as told through the experiences of 7 years old boy, Ludovic.

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[*] Assistant Professor, Panjab University Regional Centre, Civil Lines, Ludhiana, Punjab.

1. How Ripened Is Indian Law? A Comparative Swap: Research Methodology

> Rejecting your gay or transgender child won't make them straight. It will only mean you will lose them."
>
> Christina Engela, Inanna Rising: Women Forged in Fire

1.1 Purpose

'Our Child' is a line that every transgender child longs to hear from his or her parent. However, the story of Ludovic is unfortunately not true in actual life of a transgender in India[1] and many other parts of the world. Generally, because they do not fit into the traditional gender norms of our society we have failed to provide a respectable and dignified environment to them. The paper is hence an attempt to empirically study the transgender persons and highlight the gap between the international law in practice and national bill drafted for them. It aims to increase understanding of the issues that transgender people have to face in their day today life. It works on the priority actions required to secure transgender and their four basic rights, those are, right to equality, security, health, and education. The paper also makes a comparative analysis between the international standards, that is, Yogyakarta Principles, 2009; national law in making, The Transgender Persons (Protection of

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[1] If you are a Bollywood fan, you must have seen in various movies step sons and step daughters being beaten by step mothers or being forced to go and seek alms. It was the year 1991-92, cable TV had just arrived in India and I was watching a '*Ghar ho to aisa*' type movie on TV along with my two siblings. During the show, I cried on many occasions when an innocent kid used to be beaten up by her step mother, reminding me of my personal experience. After watching the movie, my innocent mind got this strong perception that if a kid is beaten up by his/her mother, then she must be the step mother, not the biological one. After few days, my mother started beating me with stick as usual. For the first time, I got angry of her and told her, "My mother must have died when I was born. You must be my step mother, my father's second wife that's you are beating me." I was the younger of two brothers. My God fearing Brahmin parents wanted a daughter, Laxmi, in their family and what they got was a 'Me' instead, I was an unwanted child for them. It was not possible for them to get rid of me, nor could they ever accept me. I was not allowed to attend school like my other siblings, given discarded clothes to wear and stale food to eat. There was not a single day when I was not beaten, either by father or mother. This was routine for the first eight years. Then I began to understand the difference of my sexuality as the neighboring kids started mimicking me and calling me a '*Hijira*'. Unable to bear the torture and humiliation, I left home one morning without saying anything to my parents, never to return. For a week I survived by begging, till Sultana Bua came to my rescue. It has been almost two decades since I left home. Though I am happy with my fellow eunuchs, sometimes I feel sad thinking that my parents never tried to find me. If they had wanted to, they could have found me. Today I realize that I was worst than a step son to my mother. A step son is still a son but I was neither a son nor a daughter. I was a matter of eternal shame for her, because ***I was born Eunuch***. Ever since I left my home, I have wanted to meet them, just to ask them ***'if being born a eunuch was my fault?'*** Piyush Saxena, *Life of an Eunuch: An Investigative and Empathetic Study of Transgendered People in India, A Socially and Psychologically victimized Community*, Shanta Publishing House, Navi Mumbai, 2011, pp.221-222.

Rights) Bill, 2016 and the actual facts collected by the researchers through interview schedule, observations, and casual interaction with the transgender persons in the City of Chandigarh.

1.2 Yogyakarta Principles, 2009

In November 2007, a coalition of International Human Rights Organization presented a document entitled 'The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity", which was launched by the United Nations in New York and Geneva. These principles were derived from a careful study of the various international Human Rights Treaties. The Principles aims at stating that sexual orientation and gender identity are integral to every person's dignity and humanity and must not be the basis of abuse and discrimination. Apart from key human rights mechanisms of United Nations that protect the rights of an individual, the Yogyakarta Principles is an endeavor of the United Nations to ensure effective protection of all persons from discrimination based on sexual orientation or gender identity. To ensure that there is no discrimination a distinguished group of human rights experts drafted, developed, discussed, and refined certain principles at a meeting held at Gadjah Mada University in Yogyakarta, Indonesia, from 6th- 9th November 2009. They came up with the set of principles which address a broad range of human rights standards and their application to issues of sexual orientation and gender identity. The documents give set of twenty eight rights to this section of society; however the present work will deal with only four basic rights of transgender cited in these principles.

1.3 The Historical and Present Socio-Legal Position of Transgender & The Transgender Persons (Protection of Rights) Bill, 2016

In India the eunuchs have been an integral part since centuries. Indian mythology[2] is replete with numerous instances pertaining to eunuchs. In general they occupied

[2] In *Ramayana*, when Lord Rama was banished from the kingdom of Ayodhaya, many were desirous of accompanying him during his 14 years exile. At the border, he said 'all men and women of Ayodhaya may return to their homes.' Everyone went but eunuchs stayed on. They stayed there for 14 years, homeless bearing heat, cold, and rain waiting for Lord Rama to return from exile. After returning from exile, he was shocked to find them waiting for him at the border. Apologetic for forgetting about them, he rewarded their loyalty with a boon that their blessings would be sought on ever auspicious occasion; In the epic of *Mahabharta*, at the end of the period of exile of 12 years, the Pandava princes had to further undergo a period spent without revealing one's identity for an year. During this period, Arjuna was turned into

a niche position in the ancient Indian society. Unfortunately, the British were unable to visualize the deeper meaning of eunuch tradition and hence, their traditional social roles were eliminated by them. The introduction of Criminal Tribes Act, 1871, was a big blow on the status of eunuchs in the country. Being a eunuch was in itself considered criminal under the Act. The position and status of eunuchs remained similar even after Indian independence. No special laws and policies were framed for them by the sovereign India after 1947. It was in 2012 that the Indian Judiciary came to their rescue and the Supreme Court gave a judgment[3] which is now considered to be a milestone when it comes to transgender community. The Transgender Persons (Protection of Rights) Bill, 2016 is considered to have its roots in the above mentioned judgment. It was in this judgment that the apex court directed the Government of India to treat transgender as the third gender for their welfare and for safeguarding their rights under various Indian laws. Legal recognition was provided to them under this judgment. On the guidelines of the court a legislation (The Transgender Persons (Protection of Rights) Bill, 2016) is drafted by the Parliament with the objective to provide protection of rights of transgender persons and for their welfare and for matters connected therewith and incidental thereto.

Universe of the Pragmatic Study: The research design was prepared taking into consideration the sensitive issue in hand. An interview technique was prepared to collect the data from them. The planned number was hundred; however, only sixty gave an oral and informal consent to be questioned. As the transgender community is strictly secretive about divulging an information concerning them, so it took a span of six months to convince them to share their life with the researchers[4]. The universe for the research was Chandigarh, as the researchers were able to meet transgender through a middle man which wasn't getting possible in the city of Ludhiana. The respondents were mostly

eunuch, according to a curse given earlier by Urvashi, for a period of one year, which he passed as Brihannala. For more information see: Piyush Saxena, Life of an Eunuch: An Investigative and Empathetic Study of Transgendered People in India, A Socially and Psychologically victimized Community, Shanta Publishing House, Navi Mumbai, 2011, pp. 11-12.

3 *National Legal Services Authority* v *Union of India*, Writ Petition (Civil) No. 400, 2012.

4 *Acknowledgments*: We appreciate and acknowledge the hard work undertaken by: students of B.A. LL.B. 7th Semester, University Institute of Laws, Panjab University Regional Centre, Ludhiana- Nikita Chhabra, Jaskiran Kaur, Alpna Singh, Angad Singh, Chirag Bhagat, Satnam Singh, Simran, who helped the researchers by making sincere and untiring efforts in collection of data. We are heartily thankful to them.

from the age group of 25-40 years (43%), however there were above the age of 40 years as well (30%) which authenticate the study conducted. The researcher found no respondents below the age of ten years; probably it is tough to diagnose the third gender below this age. When asked at what age they diagnosed their gender majority of them (90%) stated that they realized at the age of 12-18 years of age. They generally related themselves with traditional gender class, males (20%), females (80%), and were not comfortable with the title of 'third gender'. The proceeding part of the article makes a comparative analysis of Yogyakarta Principles, 2009, with the Indian law in making and the views shared by the Transgender community in the City of Chandigarh.

2. Right to Equality and Non-Discrimination[5]

Right to equality is considered to be an important and basic right which everyone should posses merely on account of their being born as humans.

[5] *Principle 2 Yogyakarta Principles, 2009:* Everyone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity. Everyone is entitled to equality before the law and the equal protection of the law without any such discrimination whether or not the enjoyment of another human right is also affected. The law shall prohibit any such discrimination and guarantee to all persons equal and effective protection against any such discrimination. Discrimination on the basis of sexual orientation or gender identity includes any distinction, exclusion, restriction or preference based on sexual orientation or gender identity which has the purpose or effect of nullifying or impairing equality before the law or the equal protection of the law, or the recognition, enjoyment or exercise, on an equal basis, of all human rights and fundamental freedoms. Discrimination based on sexual orientation or gender identity may be, and commonly is, compounded by discrimination on other grounds including gender, race, age, religion, disability, health and economic status. States shall: Embody the principles of equality and non-discrimination on the basis of sexual orientation and gender identity in their national constitutions or other appropriate legislation, if not yet incorporated therein, including by means of amendment and interpretation, and ensure the effective realisation of these principles; Repeal criminal and other legal provisions that prohibit or are, in effect, employed to prohibit consensual sexual activity among people of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different sex sexual activity; Adopt appropriate legislative and other measures to prohibit and eliminate discrimination in the public and private spheres on the basis of sexual orientation and gender identity; Take appropriate measures to secure adequate advancement of persons of diverse sexual orientations and gender identities as may be necessary to ensure such groups or individuals equal enjoyment or exercise of human rights. Such measures shall not be deemed to be discriminatory; In all their responses to discrimination on the basis of sexual orientation or gender identity, take account of the manner in which such discrimination may intersect with other forms of discrimination; Take all appropriate action, including programmes of education and training, with a view to achieving the elimination of prejudicial or discriminatory attitudes or behaviours which are related to the idea of the inferiority or the superiority of any sexual orientation or gender identity or gender expression.

The Yogyakarta Principles, 2009, on the transgender rights state that they should be treated equal. It states that discrimination on the basis of sexual orientation and gender identity includes any distinction, exclusion, restriction or preference based on sexual orientation and gender identity; which has the purpose or effect of nullifying or impairing equality before law or equal protection of the law, or the recognition, enjoyment or exercise, on an equal basis, of all human rights and fundamental freedoms. It not only directs the state to amend or repeal legal provisions which discriminate amongst these people but also demands from the state to embody such laws which brings them at par with rest of the society.

The Transgender Persons (Protection of Rights) Bill, 2016, deals with the discriminatory areas by stating that the transgender persons shall not be discriminated in educational establishments, services, employment or occupation, health services. They have full right to free movement and opportunity to stand for or hold public or private office.[6] The Bill, however, fails to define the term discrimination. It fails to address critical issues of discrimination like violence perpetrated against them within the families for non-conforming behaviour, harassment, and bullying in educational institutions, discrimination at workplace or other humiliation and prejudicial comments on their identity, physical appearances, dressing senses etc.

However, the study conducted reveals that the right of equality, equal treatment and non-discriminatory attitude is not enjoyed by the respondents. Even though national as well as international law provides the right but this section of society face inequality at every level. The biological family discards them as unwanted children (30%). Most of them either commit suicide or runaway from their homes. They join the group (60%) or are made to join it (10%). They start living in a group and loose total contact with their biological families (73.33%). While the other respondents meet their families monthly (12.5%), six monthly or yearly (13%), all of them stated that they joined group because they were not treated equally with their other siblings, and hence was left with no option but to be in a group with other transgender persons.

6 The Transgender Persons (Protection of Rights) Bill, 2016, S 3.

3. The Right to Security of a Person[7]

This principle states that everyone has the right to security against violence committed by State, group, individual and even security from members of State. The State to take all steps, legislative, and administrative so as to address the victims and provide appropriate remedies, redress, including compensation to the victims.

The Transgender Persons (Protection of Rights) Bill, 2016, protects the transgender from harms or injuries which endangers their life, safety, health, and mental or physical well being. It also states that anyone found guilty will be punished with imprisonment which shall extend from six months to two years and with fine.[8] However, there have been number of incidents where law enforcement agencies, police etc have made transgender the victims of rape, violence etc. Section 377 IPC has also been misused by these agencies. The draft legislation has made a provision for the setting National and State Transgender Welfare Committees which have been equated with the Tamil Nadu Transgender Welfare Board but unfortunately the board has been a total failure. The composition and massive bureaucratic structure will make it more ineffective. Hence, the draft legislation fails to adequately address the critical issues of physical and social security of transgender persons.

Social security is a major area of concern for transgender, especially in country like India where there is no specific law for their overall protection. The provisions of IPC are available to them however; the nature of their victimology

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7 *Principle 5 Yogyakarta Principles, 2009:* Everyone, regardless of sexual orientation or gender identity, has the right to security of the person and to protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual or group. **States shall:** Take all necessary policing and other measures to prevent and provide protection from all forms of violence and harassment related to sexual orientation and gender identity; Take all necessary legislative measures to impose appropriate criminal penalties for violence, threats of violence, incitement to violence and related harassment, based on the sexual orientation or gender identity of any person or group of persons, in all spheres of life, including the family; Take all necessary legislative, administrative and other measures to ensure that the sexual orientation or gender identity of the victim may not be advanced to justify, excuse or mitigate such violence; Ensure that perpetration of such violence is vigorously investigated, and that, where appropriate evidence is found, those responsible are prosecuted, tried and duly punished, and that victims are provided with appropriate remedies and redress, including compensation; Undertake campaigns of awareness-raising, directed to the general public as well as to actual and potential perpetrators of violence, in order to combat the prejudices that underlie violence related to sexual orientation and gender identity.

8 The Transgender Persons (Protection of Rights) Bill, 2016, S. 19.

is different from other two genders in society. Major portion of the respondents (46.15%) said that the problem faced by them was that the other people look at them with disgust. The respondents (7.69%) narrated the stories of being harassed at public places like malls, movie theaters, public transport, public toilets etc. They felt humiliated because they are constantly looked at by the other people and made fun of due to their different dressing sense, vocal variations, facial features etc. Apart from this many (57.14%) stated that they were not given houses on rent because of their gender differences. Hence, this not only threatens their social security but also their fundamental right to move freely within the territory of country.

4. The Right to Education[9]

Principle 16 of the Yogyakarta Principles, 2009 states that everyone has the right to education, without discrimination on the basis of, and taking into account, their sexual orientation and gender identity. The principle bestows various educational rights for the transgender.

The Transgender Persons (Protection of Rights) Bill, 2016, under Chapter IV provides educational rights to transgender persons. It states all educational institutions funded or recognized by the government shall provide inclusive education and opportunities for sports, recreation and leisure activities without

[9] *Principle 16 Yogyakarta Principles, 2009:* States shall: Take all necessary legislative, administrative and other measures to ensure equal access to education, and equal treatment of students, staff and teachers within the education system, without discrimination on the basis of sexual orientation or gender identity; Ensure that education is directed to the development of each student's personality, talents, and mental and physical abilities to their fullest potential, and responds to the needs of students of all sexual orientations and gender identities; Ensure that education is directed to the development of respect for human rights, and of respect for each child's parents and family members, cultural identity, language and values, in a spirit of understanding, peace, tolerance and equality, taking into account and respecting diverse sexual orientations and gender identities; Ensure that education methods, curricula and resources serve to enhance understanding of and respect for, *inter alia*, diverse sexual orientations and gender identities, including the particular needs of students, their parents and family members related to these grounds; Ensure that laws and policies provide adequate protection for students, staff and teachers of different sexual orientations and gender identities against all forms of social exclusion and violence within the school environment, including bullying and harassment; Ensure that students subjected to such exclusion or violence are not marginalised or segregated for reasons of protection, and that their best interests are identified and respected in a participatory manner; Take all necessary legislative, administrative and other measures to ensure that discipline in educational institutions is administered in a manner consistent with human dignity, without discrimination or penalty on the basis of a student's sexual orientation or gender identity, or the expression thereof; Ensure that everyone has access to opportunities and resources for lifelong learning without discrimination on the basis of sexual orientation or gender identity, including adults who have already suffered such forms of discrimination in the educational system.

discrimination on an equal basis with others. It states that the government should formulate vocational training and self-employment schemes for this section of population.[10]

The researcher found out that the educational level of the respondents was quite disappointing. Though majority of them (66%) went to the school to get primary education, but only some (40%) had passed the fifth standard, whereas (15%) passed the eighth standard, only (20%) could pass the tenth standard and rest (15%) could pass the twelfth standard. Most of them went to government schools (95%). After having an interaction with the completely illiterate respondents (33.33%) about their reason for not attending schools, they quoted that their families restrained them from going to school, as they were afraid of discrimination, teasing and other kinds of abuse by the other inmates and authorities of the school. While discussing the importance of education, they were asked if reservations of seats are made for them in schools and at higher level of educational institutions, would they like to pursue with their education. Quite shockingly everyone (100%) rejected the idea of reservation and denied to pursue education because they feel education won't make any difference in their lives and they do not require education to earn their livelihood.

5. The Right to the Highest Attainable Standard of Health[11]

[10] The Transgender Persons (Protection of Rights) Bill, 2016, Ss. 14 & 15.

[11] *Principle 17 Yogyakarta Principles, 2009:* States shall: Take all necessary legislative, administrative and other measures to ensure enjoyment of the right to the highest attainable standard of health, without discrimination on the basis of sexual orientation or gender identity; Take all necessary legislative, administrative and other measures to ensure that all persons have access to healthcare facilities, goods and services, including in relation to sexual and reproductive health, and to their own medical records, without discrimination on the basis of sexual orientation or gender identity; Ensure that healthcare facilities, goods and services are designed to improve the health status of, and respond to the needs of, all persons without discrimination on the basis of, and taking into account, sexual orientation and gender identity, and that medical records in this respect are treated with confidentiality; Develop and implement programmes to address discrimination, prejudice and other social factors which undermine the health of persons because of their sexual orientation or gender identity; Ensure that all persons are informed and empowered to make their own decisions regarding medical treatment and care, on the basis of genuinely informed consent, without discrimination on the basis of sexual orientation or gender identity; Ensure that all sexual and reproductive health, education, prevention, care and treatment programmes and services respect the diversity of sexual orientations and gender identities, and are equally available to all without discrimination; Facilitate access by those seeking body modifications related to gender reassignment to competent, non-discriminatory treatment, care and support; Ensure that all health service providers treat clients and their partners without discrimination on the basis of sexual orientation or gender identity, including with regard to recognition as next of kin; Adopt the policies, and

It ensures that health care facilities, goods, and services are designed to improve the health status of transgender, and respond to all needs without discrimination on the basis of sexual orientation and gender identity.

The Transgender Persons (Protection of Rights) Bill, 2016, provides elaborative provisions on health security for the transgender community. It directs the government to develop separate human immunede-deficiency virus Sero-survellance Centers. It also provides for medical care facility including sex reassignment surgery and hormonal therapy, counseling, and launching of schemes for a comprehensive insurance for transgender persons.[12] There is a provision of requirement of certificate[13] from the district magistrate and district screening committee which has been criticized by many including transgender community. They feel that they are already victims of harassment; this kind of medical examination would reinforce the same under the sanction of the state.

The researchers observed that the health was the most neglected area of the respondents. Various studies conducted in India on transgender reports that most of them are victims of HIV+, however the present study only dealt with their sex-reassignment surgery, as Nirvana[14] is a painful ritual prevalent in India.

programmes of education and training, necessary to enable persons working in the healthcare sector to deliver the highest attainable standard of healthcare to all persons, with full respect for each person's sexual orientation and gender identity.

12 The Transgender Persons (Protection of Rights) Bill, 2016, S 16.

13 *Chapter III Recognition of Identity of Transgender Persons Section 4-8:* The Transgender Persons (Protection of Rights) Bill, 2016.

14 She is undressed and a strong black nylon rope is tied around her waist, below the navel. The knot is made as tight as possible by other two hefty ones pulling either ends of the rope. This is done in order to restrict the flow of blood to the lower portion of her body and make it numb, since no anesthesia is used. A pot of oil is heated on the stove in a corner of the room and kept in readiness. She is then made to squat on an inverted copper pitcher. The other two take a firm hold of her legs, standing on either side and holding a leg each, pull them apart. The *Dai Ma* ties a piece of sturdy string tightly around the penis and testes and pulls on it to stretch the organs away from the body. The other group begins clapping and shouting loudly, in order to distract her mind from the impending procedure and the resultant pain. Using a very sharp knife, the *Dai Ma* quickly lops off the penis from the top and the scrotum from below. Blood gushes out profusely from the wound. This bleeding is allowed to continue as long as possible, due to the notion of 'male' blood flowing out from the body. The *Dai Ma* has to make a life-or-death decision about when to stanch the flow of the blood, too soon and no enough 'male' blood will flow out, defeating the purpose of this entire method; too late and she may bleed to death. The hot oil is poured over the wound, cauterizing the flesh and then *Dai Ma* quickly stitches the wound closed, inserting a small stick into the urethra to keep it open for urination. Some more hot oil is poured on the wound and she is taken away and made to lie on a cot in a corner. She is not allowed to sleep for few hours. The rest clap, sing and shout among them in order to keep the castrated one awake. After couple of days, she is taken back to her home by her companions, for undergoing the forty days ritual. Finally,

Majority (96.66%) of the respondents refuse to go for surgery. The reason they refuse was mainly because they were now contended with their gender (83%). They have accepted their fate and don't want to change their lifestyle. However, some of the respondents (10.34%) wanted to change their life by surgery but they cannot afford it due to financial restraints, whereas rest (3.44%) had no knowledge about sex-reassignment surgery.

6. Are Transgender People Still Strangers to Law?

> 'Every single American- gay, lesbian, straight, bisexual, transgender- every single person deserves to be treated equally in the eyes of the law and in the eyes of our society.
>
> It's pretty simple proposition.' Barak Obama

One major set of philosophical themes concerns competing conceptions of the self and its relation to the sexed body and to gender. The question that needs a legal answer is that is it the self that is prior to the institution of gender identity? The study conducted by the researchers reveals that the present setup in India is not conducive for the overall endurance of transgender, and their identity as third gender. So let us analyze international models and precedents on transgender rights to envision what could be the best strategy in India for the legal recognition of this community, their self and their sex. In this context two prominent models that emerge at international level shall now be reviewed: the gender dysphoria/diagnosis model as delineated by the World Professional Association of Transgender Health (WPATH) Standards of Care 7 (formerly the Harry Benjamin Standards of Care) and the self-identification model of gender identity as outlined by the Yogyakarta Principles and the International Bill of Gender Rights[15].

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after these forty days a eunuch attains *Nirvana.* Piyush Saxena, Life of an Eunuch: An Investigative and Empathetic Study of Transgendered People in India, A Socially and Psychologically victimized Community, Shanta Publishing House, Navi Mumbai, 2011, pp.160-62.

15 E. Coleman, W. Botzer, Standards of Care for the Health of Trans-sexual, Transgender, and Gender Non- Conforming People, *International Journal of Trans-genderism*, Vol. 13(4), 2012, pp.165-232.

6.1 The Gender Dysphoria/Diagnosis Model[16]

This model is the most prevalent across the world in the countries which acknowledge gender identity and transgender issues as legitimate concerns. In this model patients must receive approval from medical professionals to undergo surgery or have changes in their ID documentation. This model usually involves a diagnosis of gender identity disorder (GID). In some countries individuals are not only required to be diagnosed with gender dysphoria, they must also be required to undergo medical intervention including surgery, hormone treatment, or other procedures. The strengths of this model is that it set up guidelines to ensure that people are able to make fully-informed consent to undergo transition- a process which might have significant side-effects. It also acknowledges gender transition as a process, rather than a single event. The standards of this model are approved by leading medical experts from across the world.

6.2 Self-Identification Model[17]

This model of gender recognition sees right to self-determination of one's own gender as a fundamental right for all people. Individuals are not required to be diagnosed with gender identity disorder and, instead have the right to declare their own gender and have this reflected on all of their ID documents. They also have the right to access both hormonal treatment and surgery. This model does not dismiss the importance of medical intervention and treatment and this model does not disagree with all the standards of healthcare outlined by WPATH. It makes a departure from pathology model to one of self-determination and allowing transgender people to change their ID documents and bodies without diagnosis. The Yogyakarta Principles express this model through its various principles.

The careful scrutiny of both the models states that Self-Identification Model is more suitable for India however certain standards mentioned by The Gender Dysphoria/Diagnosis Model could also help in addressing some critical issues. For example, while the identity documents for a specific purpose like passports, can provide a range of options such as man, woman, transgender, male to female

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16 W. Bockting, Are Gender Identity Disorders Mental Disorders? Recommendations for Revision of World Professional Association for Transgender Health's Standards of Care, *International Journal of Trans-genderism*, Vol. 11(21), 2009, pp.53-62.

17 A. Lev, The Ten Tasks of the Mental Health Provider: Recommendations for Revision of World Professional Association for Transgender Health's Standards of Care, *International Journal of Trans-genderism*, Vol. 11(2), 2009, pp.74-99.

(MtF), female to male (FtM), third gender, there are complexities when it comes to the arena of civil rights. In India, particularly where there are strong affirmatives action policies for women, there are serious questions as to under what conditions a male to female transgender is entitled to be recognized as a woman as per the law. The dilemma for the law is whether to recognize them as third gender category through the entire gamut of civil and criminal laws by radically amending all laws or whether to include them within the existing binary gender framework?[18] Some of the suggestions[19] are summed up below after going through the laws of various other countries on the issue.

6.3 Self-Determination Model

Following Argentina's lead, India can choose to adopt the Yogyakarta Principles – that is, adopt a model of gender recognition that does not rely on a diagnosis of gender dysphoria by medical professionals. Rather, India's law can be aimed to allow individuals to self-identify as their own gender.

6.4 No Requirements for Surgery

India can follow the lead taken by Argentina and depart from current standards in countries like South Korea and Japan by not requiring gender reassignment surgery, divorce, or sterilisation in order to change one's information on ID documents.

6.5 Third Gender Options

Following Pakistan and Nepal's lead in recognising a third gender in all interactions between individuals and the states, India can consider allowing

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[18] As *Aadhaar* application has three columns for 'Gender' – Male, Female, Transgender. *http://uidai.gov.in/images/FrontPageUpdates/uid_download/enrolmentform.pdf;* Recognition of hijras/trans people as a possible "third category", "third sex" or "third gender" (these terms are loosely used in the media reports) seems to be focus of the recent public interest litigation filed by National Legal Services Authority (NALSA). *http://www.thehindu.com/news/national/court-notice-to-centre-states-on-transgender-issue/article3956185.ece* *http://articles.timesofindia.indiatimes.com/2012-10-02/india/34217135_1_transgender-community-nalsa-national- legal-services-authority.* (10th January 2017).

[19] Venkatesam Chakrapani & Arvind Narain, Legal Recognition of Gender Identity of Transgender People in India: Current Situation and Potential Options, UNDP India, 2012, pp. 33-34.

individuals to opt for gender categories outside of the gender dichotomy of male and female. Qualitative research can be conducted with the transgender community to identify the best terminology/phrasing for this category. Current efforts in India that list 'Other' and 'Eunuch' could potentially be isolating for individuals who feel as if they are being stigmatised with these names.

6.6 Transparency and flexibility

India can follow the precedent established by Portugal, which currently is believed to have the most expeditious and transparent procedures for changing gender identity on official documents. In Portugal a decision for a change in name and gender has to be granted within a maximum of eight days following the submission of a complete application, and individuals are allowed to change their gender and name on their ID documents at the same time (unlike South Africa where individuals must submit two separate applications for these changes). Additionally, individuals can be allowed to change their gender on their documents multiple times without penalty.

6.7 Confidentiality

Following the standards adopted by the United Kingdom, Jersey, and Argentina, India can consider not having public records of changing gender/name on documents. For example, in Argentina Trans* people are specifically exempted from the requirement of announcing a name change in the newspaper. Many transsexual people who are transitioning to the 'opposite' gender do not want their previous name and gender to be discovered.

6.8 Safeguards

This law should anticipate delays in implementation and provide safeguards for this. Following examples in Germany and the state of Tamil Nadu, perhaps individuals who request gender/name changes can be provided with temporary documentation that lists their 'old' and 'new' names to facilitate this process.

6.9 No Unanticipated Legal Outcomes

In the United Kingdom, change in legal sex does not have an effect on marriage and security benefits/pensions and do not adversely affect parenthood or succession rights. India can aim for this standard as well.

6.10 Sexual Reassignment Surgery as a Public Health Right

Following precedents established by Argentina, Brazil, and Iran, sexual reassignment surgery and hormone therapy should be defined as a public health right that is made freely available at hospitals across India. As part of this mandate, resources must be provided to equip medical service providers with adequate technology and skills to undergo these highly complex surgeries.

6.11 Consent

To be eligible in India for sexual reassignment surgery, individuals must have attained a minimum age for giving their consent for the surgery. While, according to current medical guidelines, individuals need to be diagnosed with gender dysphoria to undergo SRS, individuals must be informed by trained professionals about the risks, complications, and other pertinent information associated with undergoing such surgery.

6.12 Indian Standards of Care for Transgender People

The medical community in India must review the WPATH Standards of Care and identify what standards will be used. A procedure must be put in place to make sure that all individuals who choose to undergo such surgery are making fully informed decisions.

6.13 Non-discrimination Law

India might need a special law like the 2010 Equality Act in the United Kingdom, which tackles the issue of discrimination on the basis of gender identity as well as sex/gender reassignment.

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Sidhuwal, Bhadson Road, Patiala - 147 006 (Punjab)
Ph. No.: 0175-2391600, 2391601, 2391602, 2391603 Telefax: 0175-2391690, 0175-2391692
e-mail: info@rgnul.ac.in, website www.rgnul.ac.in