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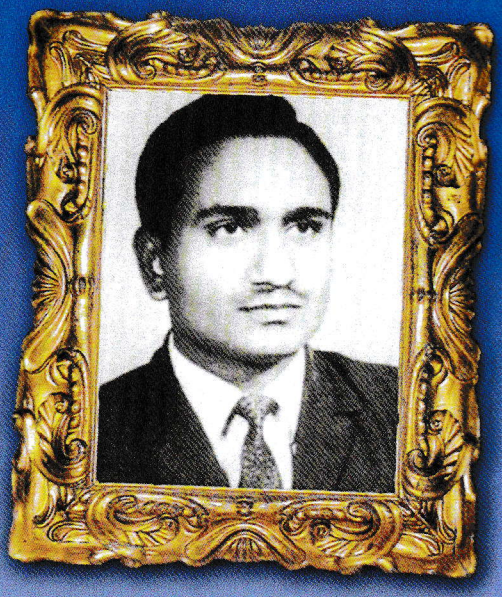
A TRUE VISIONARY

"You see things and you say **Why***? But I dream of things that never were and say* **Why** *not?"*

- George Bernard Shaw



Shri Jagannath Gupta
(1950 - 1980)

Also a true visionary...who dared to dream!
He lives no more but his dreams live on....and on!

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And more dreams to come!

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JIMS JOURNAL OF LAW

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Editor's Desk

It is a matter of immense pleasure to publish this issue of JIMS Journal of Law. The Editorial Board is grateful to all the authors who have contributed scholarly articles of contemporary relevance and look forward for more academic endeavours from prospective authors. This issue of JIMS Journal of Law presents multiple facets of contemporary legal issues providing valuable legal insight. It covers corporate governance and business performance wherein author has tried to show that how it gained prominence in the wake of liberalization during 1990s and was introduced by Industry as a voluntary measure to be adopted by Indian Companies. This issue also covers concept of environmentally displacedperson from an environmental justice perspective.Here author is of opinion that instead of choosing a controversial term like 'climate refugee' or 'environmental refugees' a more mellowed down term like 'environmentally displaced persons' would serve the purpose.It also covers development of unmanned aerial vehiclewherein author has overviewedthe international position and is looking specifically into the drone law of United States. One of the articles deals withpublic interest litigation whichconstitutes a significant segment of the expanding judicial repertoire and has acquired legitimacy. Author is of the view that public interest litigation is now tending to become publicity interest litigation and has a tendency to be counter-productive. This issue also coversperception of Parallel Import and the Intellectual Property Laws in India wherein author is of opinion that if Parallel Imports are done away with, the manufacturers will have their own business monopolies, leading to goods being available at higher prices.One of the articles explains the concept of compulsory license under Indian Patent regime in brief and specifically deals with the lacunae present in the grant of compulsory license after the Patent (Amendment) Act, 2005, as to whether the idea of embedding the provision for compulsory license in real sense is being served or not.With the 'e'-revolution, E- commerce has emerged as the potential symbol of a virtual economy as consumers do not have to go to physical market for shopping; almost all their needs are only one click away. Author is of the view that though modern technological developments have made a great impact on the quality, availability and safety of goods and services but the fact remains the same that the consumers are still victims of exploitative practices. The plague of terrorism has been hunting the world in general and India in particular for the last few decades.One of the authors is of view thatit is a global threat to democracy, the rule of law and human rights which requires a global response.I take utmost pleasure and privilege in presenting this intellectual and thought provoking issue of JIMS Journal of Law to Bar, Bench and academia with a huge expectation that this issue will bring reforms in the society by raising legal awareness and achieving access to justice for all.

Thanking You

CORPORATE GOVERNANCE AND BUSINESS PERFORMANCE: A COMPARITIVE ANALYSIS OF CODE.

Ms. CHARU MAHESHWARI
Assistant Professor
FAIRFIELD INSTITUTE OF MANAGEMENT TECHNOLOGY

Corporate Governance has become buzz word in the corporate world. It has gained prominence in the wake of liberalization during 1990s and was introduced by industry association confederation of Indian Industry as a voluntary measure to be adopted by Indian Companies.

There is a growing perception that good Corporate Governance in the globalised business world is associated with prosperous companies. It is crucial for sustainable development not only for the individual company but for society as a whole. That is why it is the part and parcel of development agenda of any developed or developing economy. The essence of corporate governance lies in strenuous cooperative efforts on the part of its constituents towards a common goal that is to improve and strengthen the economic efficiency of the company.[1] It requires the harmonizing their diverse interest by preventing asymmetry of benefits across various stakeholders especially between the owner-manager and the rest of the shareholders.

The best corporate governance practices are never static.[2] These have to be reviewed periodically in the light of experience gained, the needs of the day, the law, improved Technology, and national and international standards. It demands a climate of commitment, consistency, Responsibility, Fairness, Integrity, Ethics, Values, Efficiency and effectiveness which have to be deployed throughout the organization to derive the best results.

The concept of corporate Governance gain further momentum as due to advancement in Technology there is increase in high profile corporate scandals after corporate governance failure scams like Stock market Scam, the UTI Scam, Ketan Parikh Scam and Satyam Scam which was severely criticized by shareholders and called for a need to make corporate Governance in India transparent as it greatly affects the development in the country.

DEFINITION :

According to **Sheleifer and Vishny**, Corporate Governance deals with the way suppliers of finance assure themselves of getting a return on their investment.[3]

Standard and Poor viewed Corporate Governance as "the way a company is organized and managed to ensure that all financial shareholders receive their fair share of company's earnings and assets.[4]"

The **Kumar Mangalam Committee** set up by Indian SEBI observed that the main objective of corporate governance is the enhancement of share holder's value keeping in view the interest of the other stakeholders"[5].

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[1] Corporate Governance, available at http://www.investopedia.com/terms/c/corporategovernance.asp (last visited on April 10,2018.

[2] Corporate Governance- meaning, scope and benefits, available at http://www.managementstudyguide.com/corporate-governance.htm (last visited on April 10 ,2018).

[3] Sheleifer and Vishny, *"A Survey of Corporate Governance"*, Volume 52, the Journal of the American Finance Association.

[4] Standard and Poor's Corporate Governance scores and evaluation available at http://www.eneiset.gr/files/info/CRITERIA%20PUBLIC%2020January04.pdf (Visited on13.1.18

A former president of World Bank, **Mr. J.Wifensohn**, viewed Corporate Governance as "promoting fairness, transparency and accountability"

Narayana Murthy Committee set up by Indian SEBI felt that Corporate Governance is about openness, integrity and accountability"[6].

A simple version of the term is narrated by **Sir Adrian Cadbury**, the chairman of Cadbury committee and father of modern corporate governance. To him, "Corporate Governance is defined as holding the balance between economic and social goals and also between individual and community goals. The governance framework is there to encourage the efficient use of resources and equally to require accountability for the stewardship of those resources. The aim is to align as nearly as possible the interest of individuals, corporations and society."[7]

Another expert observes that Corporate Governance "refers to processes by which managements are directed, controlled and held to account. It encompasses authority, accountability, stewardship, leadership, direction and control exercised in the organization."[8]

Thus the corporate governance refers to "whole set of legal, cultural and institutional arrangements that determine what public corporations can do, who controls them, how that control is exercised and how the risk and return from the activities they undertake are allocated." people to think of ling term relations; information needs of all stakeholders are met and to ensure that executive management s monitored properly in the interest of shareholders.

The sum total of these definitions is that Corporate Governance has to be responsible, accountable, ethical , fair , open and transparent and for the overall growth and development of an enterprise and the economy of developed, developing and transient societies.

NEED AND ESSENCE OF CORPORATE GOVERNANCE

A corporation is a congregation of various stakeholders, namely customers, employees, investors, vendor partners, Government and society. In this changed scenario an Indian corporation, as also a corporation elsewhere, should be fair and transparent to its stakeholders in all its transactions. This has become imperative in today's globalized business world where corporation need to access global pools of capital, need to attract and retain the best human capital from various parts of the world, and need to live in harmony with the community. Unless a corporation embraces and demonstrates ethical conduct, it will not be able to succeed.

Corporation need to recognize that their growth requires the cooperation of all the stakeholders; and such cooperation is enhanced by the cooperation adhering to the best

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[5] Kumara Mangalam Birla Committee Report, available at http://shodhganga.inflibnet.ac.in/bitstream/10603/8683/11/11_chapter%203.pdf (visited 10.01.2018).

[6] Narayana Murthy Committee Report on Corporate Governance, available at http://shodhganga.inflibnet.ac.in/bitstream/10603/8683/11/11_chapter%203.pdf (visited on 12.01.18)

7Corporate Governance, available at http://www.icaew.com/en/library/subject-gateways/corporate-governance/codes-and-reports/cadbury-report. (Last Visited on April 15,2018).

[8] Dr. C.B. GUPTA , " *Governance, Ethics and Social Responsibility of Business",* 22.2 (Sultan Chand & Sons, Educational Publishers, New Delhi).

Corporate Governance practices. In this regard management needs to act as trustees of the shareholders at large and prevent asymmetry of benefits between various sections of shareholders, especially between the owner-managers and the rest of the shareholders.[9]
Corporate Governance reforms in India have been prompted by the following:[10]

a.) **Global Competition-** increasing exposure of Indian firms to foreign competition is a major reason behind governance reforms in the corporate sector. Indian companies can gain global recognition and survive in the world markets by improving their efficiency, quality and governance practices. Well-governed companies like Infosys, wipro, Tata motors and others have proved that good Governance is very essential for success at global level.

b.) **Scams-** there have been several scams both in the stock market and the corporate sector in India. Harshad Mehta (known as the Big Bull) diverted Rs. 40 million from banks to stock brokers during April 1991 to May 1992 by taking advantage of loopholes in the banking system. He died in prison in 2002. Indian capital market suffered a loss of more than Rs. 12 billion due to the Bhansali scam during 1992-96. Ketan Parekh created another scam. Satyam Computers was a well known IT firm. Its founder S. Ramlinga Raju cooked account books and his fraud involved about Rs.80 billion.

c.) **Foreign Capital-** Indian companies which wanted to raise capital abroad through ADRs, GDRs, etc. had to adopt international standards of accounting and reporting. Their desire to get listed on International Stock Exchanges led to the improvements in corporate governance practices.

d.) **Foreign Institutional Investors-** In the last few decades, funds flow from foreign institutional investors in India's capital markets has steadily increased. One of the main reasons for growing confidence in Indian Stock Markets has been better Corporate Governance.

HISTORICAL BACKGROUND OF CORPORATE GOVERNANCE

The concept of good governance is very old in India dating back to third century B.C. where Chankaya (Vazir of Patliputra) elaborated fourfold principles of king i.e. Raksha, Vriddhi , Palana, and Yogakshema. Substituting the king of the state with company CEO or Board of Directors the principles of Corporate Governance refers to protecting shareholders wealth (Raksha) , enhancing the wealth by proper utilization of assets (vriddhi) , maintenance of wealth through profitable ventures (palana) , and above all safeguarding the interests of shareholder (yagakshema).
The fiscal crisis of 1991 and resulting need to approach the IMF induced the government to adopt reformative actions for economic stabilization through liberalization. The momentum gathered albeit slowly once the economy was pushed open and the liberalization process got initiated in earl's 1990s .As a part of liberalization process and advancements in Technology, in 1999 the government amended the Companies Act, 1956. Further amendments have followed subsequently in the year 2000, 2002, and 2003, 2013 and 2017. A variety of measures have been adopted including the strengthening of certain shareholders rights, the empowering SEBI etc.

[9] Prabhash Dalei, Paridhi Tulsyan and Shikhar Maravi, *"Corporate Governance In India: A Legal Analysis"* (2012) (Hidayatullah National Law University Raipur, India).
[10] *Supra* Note 8 at 3.

The major corporate governance initiatives launched in India since the mid 1990s are as discussed below:

THE CII CODE

On account of interest generated by Cadbury Committee Report of U.K. , the Confederation of Indian Industry (CII) took special initiative with the objective to develop and promote a code of Corporate Governance to be adopted and followed by Indian Companies both in private and public sector , Banks and financial institutions . The final draft of code was circulated in 1977 and the final code called "Desirable Corporate Governance Code" was released in April 1998. The committee was driven y the conviction that Good Corporate Governance was essential for Indian Companies to access domestic as well as global capital at competitive rates. The code was voluntary, contained detailed provisions with focus on listed companies.[11]

KUMAR MANGALAM BIRLA COMMITTEE REPORT

While the CII Code was well received by corporate sector and some progressive companies also adopted it, t was felt that under Indian conditions a statutory rather than a voluntary code would be more meaningful. Consequently the second major initiative was undertaken by the Securities Exchange Board of India (SEBI) which set up a committee under the chairmanship of Kumar Mangalam Birla in 1999 with the objective of promoting and rising of standards of good corporate governance. The committee in its report observed "The strong Corporate Governance is indispensable to resilient and vibrant capital market and is an important instrument of investor protection. It is the blood that fills the veins of transparent corporate disclosure and high quality accounting practices. It is the muscle that moves a viable and accessible financial reporting structure."[12] In early 2000 the SEBI Board accepted and ratified the key recommendations of this committee and these were incorporated into clause-49 of listing agreements of Stock Exchanges. These recommendations aimed at providing the standards of Corporate Governance, are divided into mandatory and non-mandatory recommendations. The recommendations have been made applicable to all listed companies with paid up capital of Rs.3 Crore and above or net worth of Rs.25 Crore or more at any time in the history of the company.[13] The ultimate responsibility of putting the recommendations into practice rests directly with board of directors and the management of the company.

REPORT OF TASK FORCE

In May 2000, the department of Corporate Affairs (DCA) formed a board based study group under the chairmanship of Dr. P.L. Sanjeev Reddy, Secretary of DCA. The group was given the ambitious task of examining ways to "operationalise the concept of corporate excellence on a sustained basis"[14] so as to "sharpen India's global competitive edge and to further

[11] Meaning and Concept Of Corporate Governance, evolution of Corporate Governance in India and other parts of the world. Need and essence of Corporate and role of GAG in this respect, available at http://rtiallahabad.cag.gov.in/rti-website/rti-allahabad/downloads/material/Background%20training%20materail%20on%20corporate%20governance.pdf. (Last Visited on February 16,2019).

[12] Rajesh Chakrabarti, *"Corporate Governance in India- Evolution and Challenges"*, 18, College of Management, Georgia Tech.

[13] Poonam Rajharia , Dr. Bhawna Sharma, *"Corporate Governance in India Evolution, Issues and Challenges for the future."* Volume2, IJSRM, 1815-1824, (2014).

[14] Santosh Pande and Kshama V Kaushik, *"Study on the state of Corporate Governance in India: Evolution, Issues and Challenges for future"*, available at

develop corporate culture in the country. In November 2000 the task force on corporate excellence set up by the group produced a report containing a range of recommendations for raising governance standards among all companies in India. It also recommended setting up of a centre for corporate excellence.

NARESH CHANDRA COMMITTEE REPORT

The Enron debacle of 2001 involving the hand-in-glove relationship between the auditor and the corporate client, the scams involving the fall of the corporate giants in U.S. like the WorldCom , Owest , Global Crossing, Xerox and the consequent enactment of the Regional Training Institute, Allahabad led the Indian Government to wake up. A committee was appointed by Ministry Of Finance. and Company Affairs in august 2002 under the chairmanship of Naresh Chandra to examine and recommend amendments to law involving the auditor client relationships and the role of independent directors. The committee made recommendations in two key aspect of corporate governance: Financial and Non- financial disclosure: and independent auditing and board oversight of management.

NARAYANA MURTHY COMMITTEE REPORT

The SEBI also analyzed the statistical of compliance with clause-49 by listed companies and felt that there was a need to look beyond the mere system and procedures if corporate governance was to be made effective in protecting the interest of investors. The SEBI therefore constituted the committee under the chairmanship of Narayana Murthy for reviewing implementation of the corporate governance code by listed companies and issue of revised clause 49. Some of the major recommendations of the committee primarily related to audit committees, audit reports, independent directors, related party transactions, risk management, directorships and director compensation, code of conduct and financial disclosures.[15]

J.J. IRANI COMMITTEE REPORT

The companies Act 1956 was enacted on the recommendations of the Bhabha Committee set up in 1950 with the object to consolidate the existing corporate laws and to provide a new basis for corporate operation in independent India. With enactment of this legislation in 1956 the companies Act 1913 was repealed.

The need for streamlining this Act was felt from time to time as the corporate sector grew in pace with the Indian economy and as many as 24 amendments have taken place since 1956. The major amendments to the Act were made through Companies (Amendment) Act 1998 after considering the recommendations of Sachar Committee followed by further amendments in 1999, 2000, 2002 and finally in 2003 through Companies Amendment Bill 2003 pursuant to the report of R.D. Joshi Committee. After hesitant beginning in 1980, Indian took up its economic reform programmed in 1990s and a need was felt for a comprehensive review for Companies Act, 1956. Unsuccessful attempts were made in 1993 and 1997 to replace the present act with a new law. In current national and international context the need for simplifying corporate law has long been felt by the government and the corporate sector

http://iica.in/images/Evolution_of_Corporate_Governance_in_India.pdf.

[15] Sonali Soni, *"Corporate Governance In India: Past, Present and Future"*, available at http://indiacsr.in/corporate-governance-in-india-past-present-future-by-sonali-soni-top-prize-winner-article/. (Last Visited on February 14,2019)

so as to make it amenable to clear interpretation and provide a framework that would facilitate faster economic growth. The government took a fresh initiative in the regard and constituted a committee in 2004 under the chairmanship of Dr. J.J. Irani with the task of advising the government with the proposed revision to the Companies Act, 1956. The recommendation of the committee submitted in May 2005 mainly relate to management and board governance, related party transactions, minority interest, investors education and protection, access to capital, accounts and audit, mergers and amalgamations , offences and penalties, restructuring and liquidation, etc.

GLOBAL SCENARIO- U.S. AND U.K.

The concept of Corporate Governance took roots in countries like US and UK and has subsequently spread to other countries. After 1990, the transition from central planning to market driven economies, particularly the privatization of state-owned companies, and the need to provide governance rules for the emerging private sector, brought the issue of corporate governance to the centre stage. As a fall out of 1997 economic and financial crisis, Asian countries too became keenly interested in the issue of corporate governance. The OECD took early initiatives to address governance issues. Since the mid-1990s, at international level, various corporate governance reports, guidelines and regulations have come into existence. The major international developments in corporate governance are as follows:[16]

— Cadbury Committee Report.
— OECD Principles.
— The Sarbanes-Oxley Act.

CADBURY COMMITTEE REPORT ON CORPORATE GOVERNANCE

In an attempt to prevent the recurrence of business failures in countries like UK and to raise the standards of corporate governance, the Cadbury Committee, under the chairmanship of Sir Adrian Cadbury, was set up by the London Stock Exchange in May 1991. The committee, consisting of representatives drawn from the top levels of British industry, was given the task of drafting a code of practices to assist corporations in U.K. in defining and applying internal controls to limit their exposure to financial loss, from whatever cause. In the view of 'Sir Adrian Cadbury', "a code of corporate governance cannot be imported from outside; it has to be developed based on the country's experience. There cannot be any compulsion on the corporate sector to follow a particular code. Equilibrium should be struck so that corporate governance is not achieved at the cost of the growth of the corporate sector".[17]

The Committee investigated accountability of the Board of Directors to shareholders and to the society. It submitted its report and associated "Code of Best Practices" in Dec 1992 wherein it spelt out the methods of governance needed to achieve a balance between the essential powers of the Board of Directors and their proper accountability. The resulting report, and associated "Code of Best Practices," published in December 1992, was generally

[16] Corporate Governance: National and International Scenario, available at http://www.icsi.edu/docs/webmodules/Programmes/33NC/33souvearticle-smitajain.pdf (Last Visited on February 15,2019).

[17] Meaning and Concept Of Corporate Governance, evolution of Corporate Governance in India and other parts of the world. Need and essence of Corporate and role of GAG in this respect, available at http://rtiallahabad.cag.gov.in/rti-website/rti-allahabad/downloads/material/Background%20training%20materail%20on%20corporate%20governance.pdf. (Last Visited on February 16,2019).

well received. The Cadbury Code of Best Practices had 19 recommendations. The recommendations are in the nature of guidelines relating to the Board of Directors, Non-executive Directors, Executive Directors and those on Reporting & Control. Whilst the recommendations themselves were not mandatory, the companies listed on the London Stock Exchange were required to clearly state in their accounts whether or not the code had been followed. The companies who did not comply were required to explain the reasons for that.

COMPARITIVE ANALYSIS OF CORPORATE GOVERNANCE IN USA AND INDIA.

- ***UNITED STATES OF AMERICA:***

The corporate governance system in USA is quite novel. It neither resembles two-tier board of Germany and France nor is the replica of unitary board Of U.K. The governance system as evolved over the years got its legitimacy from rule-based or systematic checks and balances approach so that it could halt the incidence of frequent frauds, scams and scandals being encountered by the corporate world. The system intends to inject a vibrant and democratic culture to put a brake on unlimited powers vested in few hands.

The high dispersion of ownership structure, extensive influence of CEO/Chairman in boardroom in formulation, implementation and monitoring of policy, reliance on committees system, induction of majority independent director on the board, attractive compensation plans for executives and board members, abundant use of proxy solicitors to arouse interest of shareholders, enactment of stringent legislations etc. are some of the hall mark of U.S. Governance framework.[18]

a.) LEGAL FRAMEWORK OF CORPORATE GOVERNANCE IN U.S.A.

With a view to promote Global Governance standards, various countries have developed codes as a part of best practices; Codes attached to listing requirements of Stock Exchange; the common laws, rules and regulation affecting business. These codes are issued by the companies, institutional investors, private sector associations, international forums etc. majority of the codes being not mandated by law are voluntary in nature. However the codes linked with stock exchange regulatory requirements have to be strictly complied with and thus enjoy coercive powers on philosophy of "comply or explain" principles.[19] In this context, pioneering efforts have been made by International Corporate Governance Network (ICGN) in 1995, OECD Guidelines in 2004, United Nations Intergovernmental Working Group on International Standards of Accounting and Reporting (ISAR), World Business Council for Sustainable Development (WBCSD) in 2004. Even in 2009, International Finance Corporation and U.N. Global Compact in its report stressed on financial performance and long term sustainability.

U.S.A. has however, been quite a loof to such type of codes. Instead, right from the beginning it has relied on the Acts, Rules and Regulations which are binding in nature and have little scope for relaxation and exemptions.

U.S.A. is one of the rarest countries in the world where companies are governed by the statute enacted by the respective states. That is why there is no single Federal Corporate Law

[18] Jackson Gregory, "*Understanding Corporate Governance in United States*", 9, available at https://www.boeckler.de/pdf/p_arbp_223.pdf (Last Visited on February 24, 2019).

[19] The Corporate Governance landscape in United States, available at http://www.globalcorporategovernance.com/n_namericas/063_066.htm (Last Visited on February 24,2019).

(as it exists in India) with the exception that exchange of securities including shares are mandated by a national legislation.

The second dominant player concerned with healthy growth and promotion of companies in U.S.A. is the U.S. Securities and Exchange Commission (SEC). Set up in 1934, it acts as the nerve-centre of USA Corporate Governance framework. It substantially monitors and controls the functioning of the companies from various parameters.[20]

Lastly, the Audit Committees, as the protector of investors and shareholders are expected to prevent frequent incidence of frauds, scams, and mis-management of financial affairs in the companies. Companies are required to disclose in its annual report whether Audit Committee is in place or not. More so, a company cannot be listed on New York Stock Exchange until and unless it has constituted an Audit Committee. Also, it was to consist solely of outside directors, develop a written charter[21] and oversee financial reporting process[22] regularly through internal and external auditors.

Mean while U.S.A. was plagued with relentless governance failure and financial turmoil. There were mass scale over-statements of future earnings, improper deferral of expenses etc. it lead to further strengthening the role of Audit Committee. Accordingly, the Blue Ribbon Committee constituted and it highlighted in its report the imperative need for effectiveness of Audit Committee.

The massive bankruptcy of Enron and World Com and virtual demise Arthur Anderson, culminated in the enactments of famous Sarbanes-Oxley Act, popularly known as SOX Act, 2002. This Act virtually examined all gamuts of Corporate Governance with special reference to auditor's independence, corporate responsibility, disclosures, penalties, conflict of interest etc. That is why it is regarded as the single most important piece of legislation affecting the companies since Securities Exchange Act of 1934.

b.) GOVERNING BOARD AND ROLE OF CEO IN U.S.A.

The organizational framework of U.S. governing bodies is comprised of single board. This unitary system is different from some of the European countries that have already shifted or are in process to do so to segregate the supervisory and managerial activities within an enterprise.[23] It is also quite different from unitary board system of U.K. unlike latter where the chairman of the board is always an independent non-executive director and also independent of the executive team, the U.S. Boardroom is presided over by the Chief Executive Officer. It is he who holds the "dual" role both as a chairman and C.E.O. of a company and holds unfettered powers, control and un-challenged leadership in the entire board. His concentration of powers and influence is undeniable from the hard realities that he has complete grasp of company's affairs, presides over board meeting and above all is the key instrument in selection / nomination of other board members and top executives.[24]

Thus, dominance of authority in a single hand is the cause of grave concern leading to several ailments affecting American corporate model.

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[20] B.B. Goel, Prarthna Goel, and Shaily Goel, *"Corporate Governance: initiatives and Reforms",21* Regal Publications, New Delhi, (2014).

[21] *Ibid.*

[22] Dr. C.B. Gupta , *" Governance, Ethics and Social Responsibility of Business"* 24.23 (Sultan Chand & Sons, Educational Publishers, New Delhi).

[23] Corporate Governance : USA Versus Europe, (Last Visited on February 24, 2019).

[24] B.B. Goel, Prarthna Goel, and Shaily Goel, *"Corporate Governance: initiatives and Reforms",22,* Regal Publications, New Delhi, (2014).

➢ ***INDIA***

Corporate Governance has its deep roots in India due to the liberal support extended by a host of Governmental/ regulatory/legislative/private initiatives. These can be classified as under:

1.) Industry's initiatives:

In a liberalized market economy and post-Asian financial crisis in 1990s of Indian Corporate Governance started blooming with the efforts and initiative taken by none else than by industry itself. The Confederation of Indian Industry (CII) constituted a National Task Force in 1996 to examine domestic Governance problem and suggest best practices to be followed by Indian Companies.

2.) Governance Code:[25]

The CII's Task Force Report culminating into "Desirable Corporate Governance: A Code" is the first voluntary code applicable for listed companies. It suggested a unitary Board with majority independent directors; audit committees having non-executive directors; financial and non-financial disclosure; CEO and CFO Compliance certificate; safeguarding the interests of shareholders and creditors rather than all stakeholders.

Another CII's Task Force on Corporate Governance (February 2009) to ponder over the issues of voluntary mechanism in corporate governance. The report dealt with major themes, such as, Board of Directors, Auditors, etc. the major difference between the two reports is that the current one is entirely based on Voluntary rather than obligatory approach.

3.) SEBI'S Initiatives:

SEBI as market regulator has evinced keen interest in protecting investors, regulating business of Stock Exchange, prohibiting unfair and fraudulent practices of intermediaries, ensuring timely disclosures etc.[26] It has also been constituting committees from time to time for strengthening best corporate practices.

4.) Legislative initiative:[27]

In the wake of liberalization and globalization process, the Act has been amended on several occasions particularly by Companies (Amendment) Act, 1999, 2000, and 2002.

The Companies (Amendment) Act, 1999 permits a company by buy-back its own shares; issue sweat equity shares to employees and directors at a discount; facility for nomination of shares in the event of death of an equity-holder; establishment of an investor education and protection Fund; setting up of an National Advisory Committee for laying down Accounting Standards.

According to Companies (Amendment) Act, 2000 there is about ten-fold increase in penalties for non-compliance; postal ballot concept has been introduced to pass the resolutions in a general meeting etc.

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[25] Priyanka Kaushik Sharma, *" Corporate Governance Practices In India: A synthesis of Theories, Practices and Cases"*, 56, Palgrave Macmillan, (2015).

[26] Ashish K. Bhattacharyya, *"Corporate Governance In India: Change and Continuity."*,78, Oxford University Press, (2016).

[27] Praveen B. Malla, *"Corporate Governance- History, Evolution and India Story"*, Taylor and Francis, (2010).

The companies (Amendment) Act, 2002 provides for replacement of existing Companies Law Board with National Company Law Tribunal (NCLT) yo monitor the closure or winding up of the companies.

Meanwhile, Companies Bill (No. 121 of 2011) introduced in Lok Sabha which revolutionized the Governance norms. Some of the salient features are as follows:

- Concept of One person Company has been introduced.
- At least 1/3rd of the Board members should comprise independent directors.
- An individual cannot hold dual office of chairman and Managing Director unless Articles of a company so provide.
- Audit Committee to comprise of minimum three directors with majority of independent directors.
- Insider trading of securities is prohibited.
- Formation of stakeholder's relationship Committee.

Thus, the new Companies Act is likely to have a dramatic u-turn to come up to expectations of a large number of promoters, shareholders and other Stakeholders.

Therefore, all these changes in Companies Act ensure Good Corporate Governance in India.

CONCLUSION

Since the late 1990s, significant efforts have been made by the Indian Parliament, as well as by Indian corporations, to overhaul Indian Corporate Governance. The current Corporate Governance regime in India includes both voluntary and mandatory requirements like voluntary guidelines by Ministry Of Corporate Affairs and for listed companies, the vast majority of clause 49 of the listing agreements requirements is mandatory.

Corporate Governance is perhaps one of the most important differentiators of business that has impact on profitability and growth and even sustainability of the companies. It is multi-level and multi-tiered process which is distilled from an Organization's culture, its policies, values and ethics of the people running the business and the way it deals with various stakeholders.

RE-LOOKING THE ISSUE OF ENVIRONMENTALLY DISPLACED PERSON FROM AN ENVIRONMENTAL JUSTICE PERSPECTIVE

RUPAK KUMAR JOSHI[*]
Ashutosh Kumar[†]

Abstract

There is no dearth of evidence to say that there exists an overwhelming number of people who are migrating from their nation of origin to neighboring states and also internally, due to disasters which are unprecedented both in terms of destruction and frequency. However, the problem lies in quantifying and ascertaining the dominating cause of the disaster as well as the displacement. In fact, there has been growing consensus on the reliability of the data published byIPCC and other organizations which clearly points out that anthropogenic climate change is real. Nevertheless, there is a struggle for data to prove that in substantial number of cases, the dominating cause of migration is anthropogenic climate change. This paper is an effort to bring a paradigm shift in the way we look at the issue of 'environmentally displaced persons'. This shift shall be from looking at the issue from a 'refugee law crisis' approach to an 'environmental justice crisis' approach. This shift is needed because refugee law regime has failed to provide protection to this ever-growing group of displaced people. More so, because the 'environmental law' regime is scientifically better equipped to solve the problem of ascertaining the cause of displacement. The issue of environmentally induced displacement thus deserves special attention in Paris Conference of Parties to be held in December 2015, where a binding climate agreement is expected to be signed. This paper also builds a case for formulating a workable legal solution to the issue of environmentally induced displacement through a specialized UN organization which specializes in dealing with environmental issues.

INTRODUCTION

The Inter-Governmental Panel on Climate Change (IPCC) fifth assessment report released in 2014 is a reflection of the gravity of the issue of 'environmentally displaced people'. This report on climate change impact, adaptation and vulnerability featured a specific chapter on security implication of climate change. It concluded that slow and rapid onset environmental changes have 'significant' impact on forms of migration that compromise human security.[‡] In stark contrast to the IPCC report which raised serious security concerns due to displacement caused by climate change, is the statement made by UNHCR which clearly disowns the issue of 'environmentally displaced persons'.

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[‡] *Available at:* http://www.ipcc.ch/pdf/assessment-report/ar5/wg2/WGIIAR5-Chap12_FINAL.pdf (accessed on 20 Oct. 2015)

The UNHCR has clarified[28] that terminologies like 'environmental refugees' and 'climate refugees' have no basis in international law as these terms do not fulfill the criteria under 1951 Convention or 1969 Protocol. Two reasons for giving a narrow interpretation to defining refugees are prominent from the UNHCR perspective document:

"Using such terminologies which are not recognized by the international legal community, will undermine the efforts of the international legal regime to uphold the rights and obligations of refugees which are clearly defined for the protection of the refugees.

Environmental factors do not fall under the five 'Convention' grounds and also does not satisfy the condition of persecution, thus creating confusion by using terms like 'environmental refugees'."

IPCC in 1990 predicted that "the gravest effects of climate change may be those on human migration as millions are displaced by shoreline erosion, coastal flooding and severe drought". A lot has changed since 1990. Although, we still have not found a legal recognition of the issue of 'environmentally displaced person' in any international instrument including The 1951 Convention relating to the Status of Refugees, climate change negotiations is seeing a shift from limiting the discourse fromeuro-centric 'mitigation'actionto an increasing focus on 'vulnerability', 'adaptation', 'capacity building'[29] and 'loss and damage'[30]. Capacity building has been discussed in almost all of the recent Conference of Parties including the ones held in Doha, Warsaw and Lima. It also holds great importance in the Ad Hoc Working Group on the Durban Platform for Enhanced Action Negotiations and negotiations under Subsidiary Body for Implementation (SBI) held as a preparation for the Paris Conference to be held in December 2015, where a binding agreement on Climate Change is expected to be signed by parties to UNFCCC. In Cancun(2010)[31], the Conference of Parties developed an understanding on long term cooperative action to address climate change loss and damage including the climate induced migration. This was the first explicit reference to the issue of climate induced population movement by the international community.

These developments among others have brought the much deserved international attention from north centric climate action to issues of south, environmentally induced displacement being one of the most important among them.

Further, the various issues faced in providing protection to 'environmentally displaced people' has been discussed in the paper. Special attention has been given to the problems related to ascertaining the scale, incidence and nature of environmentally induced displacement. It has also been presumed that a special section on whether anthropogenic climate change is real is not required as these facts are well settled. As to the question 'Do environmentally displaced people exist?', although there is active debate over the issue, this researcher has presumed *de facto* existence of those displaced due to anthropogenic climate change (as in the case of a Kiribati national where the New Zealand Court of Appeal conceded that Climate Change is a growing concern for international community, but the

[28] U.N. High Comm'r for Refugees (UNHCR), *Climate Change, Natural Disasters and Human Displacement: A UNHCR perspective,* (August 17, 2015) (hereinafter UNHCR Perspective) *available at:* http://www.unhcr.org/5448c8269.html (accessed on August. 17, 2015)

[29] *Available at:* http://unfccc.int/cooperation_and_support/capacity_building/items/7060.php(accessed on September 23, 2015)

[30] *See generally* Report of the Conference of the Parties on its nineteenth session, held in Warsaw from 11 to 23 November 2013*Available at:* http://unfccc.int/resource/docs/2013/cop19/eng/10a01.pdf(accessed on September 24, 2015)

[31] *Available at:* http://unfccc.int/meetings/cancun_nov_2010/items/6005.php(accessed on September. 21, 2015)

phenomenon and its effects on countries like Kiribati is not appropriately addressed under the Refugee Convention)[32], however *de jure* recognition of the issue is lacking, which calls for an effort to bring together the challenges in addressing the issue and its solution.

1. the issue of defining 'environmentally displaced people'

A plethora of issues are associated with defining people who are displaced due to environmental factors. Among them are the issues like whether to include people who have decided to migrate to another country, not out of compulsion but voluntarily, whether permanence of the destruction caused in the country of origin is a pre-requisite to granting of refugee status by the receiving state, whether suddenness of a disaster is a criteria for refugee determination and determination of the anthropogenic element of a disaster before refugee status is granted. All these factors among others need to be taken into consideration before coming to a convenient definition of 'environmentally displaced person'.

But before delving deeper into the technicalities involved in the above issues, it is important to highlight some of the definitions adopted by scholars which have earned wide acceptance.

drop the term 'refugee'

The term refugee is too problematic to be used to address people who have been displaced. The term 'refugee' is conceptually inadequate to meet the complex structural causes and consequence of flight.[33]Moreover, in contrast to the elements involved in the conventional definition of refugee as defined in the 1951 convention, which revolves around 'persecution' as the central criteria for refugee status determination, environmentally displaced person demands a broader outlook as it is based on multi-causality.[34]Multi causality includes a complex mixture of social, economic and institutional factors. This has been confirmed in cases of El Salvador, Haiti, the Sahel and Bangladesh, among many other nations.[35]Although the term persecution is too narrow to be used to address the issue of 'environmentally displaced persons', it can safely be deduced from AmartyaSen's epochal work on famines[36] which points out hidden issues of rights in relation to inequality, poverty, market and policy failures as deeper causes of so called natural disasters.

Open-Ended Approach

El- Hinnawi[37] (a researcher in UNEP) is credited by many to have made the first attempt to define Environmental Refugees in 1985 as:

"Those people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life [sic]. By 'environmental disruption' in this definition is meant any physical, chemical, and/or

[32]*Should international refugee law accommodate climate change?*, UN NEWS CENTER, 3 July 2014, available at http://www.un.org/apps/news/story.asp?NewsID=48201#.Vebgnfmqqkp (accessed on September. 19, 2015)
[33]Zetter, R.W., (2007) "More labels, fewer refugees: remaking the refugee label in an era of globalization", Journal of Refugee Studies, Vol. 20(2), pp: 172-192.
[34]Lonergan, S., (1998) "The role of environmental degradation in population displacement", Environmental change and security program report, Issue no. 4. Washington: Woodrow Wilson International Centre for Scholars, pp: 5-15.
[35]*Ibid*
[36]AmartyaSen, *Poverty and Famines: An Essay on Entitlement and Deprivation*, Oxford: Clarendon Press, 1981, pp. 23
[37]ESSAM EL-HINNAWI, ENVIRONMENTAL REFUGEES 4 (1985)

biological changes in the ecosystem (or resource base) that render it, temporarily or permanently, unsuitable to support human life."

Although the definition coined by Hinnawi is vague and open ended, many authors have picked up elements from it to define 'Environmental' as well as 'Climate Change' Refugees.

Close- Ended Approach

Bierman and Boas[38] who are advocates of the proposition that the issue of 'Climate Change Refugees' shall be dealt by adding a protocol to the UNFCCC defines them as "people who have to leave their habitats, immediately or in the near future, because of sudden or gradual alterations in their natural environment related to at least one of three impacts of climate change: sea-level rise, extreme weather events, and drought and water scarcity."

Biermann and Boas make no distinctions based on the character of the migration. First, while the text of their definition refers to "people who have to leave," Biermann and Boas explicitly reject voluntariness as a criterion for determining whether a migrant is covered. Second, they argue that whether relocation is permanent or temporary should not matter. Finally, Biermann and Boas write that they intentionally did not distinguish in their definition between internal and transboundary migrants. They object to these distinctions primarily because they do not want different categories of people who flee climate change events to receive different levels of protection.

Instead, Biermann and Boas base the parameters of their definition on the cause of relocation, i.e., climate change. They encompass sudden and gradual environmental change because climate change can cause both. To ensure they cover only climate-induced migration, they limit the types of environmental disruptions that can qualify refugees for assistance to three "direct, largely undisputed climate change impacts": "sea-level rise, extreme weather events, and drought and water scarcity." They do not cover events that they say are only peripherally related to climate change. For example, they exclude from their definition impacts only loosely linked to migration (e.g., heat waves), migration caused by mitigation measures (e.g., construction of dams to alleviate water shortages), migration from other types of environmental disasters (e.g., industrial accidents and volcanoes), and impacts only indirectly linked to climate change (e.g., conflicts over natural resources).

Biermann and Boas's definition seeks to encompass all those who flee the most direct impacts of climate change, but it has legal and scientific shortcomings. It makes a large number of people eligible for assistance by adopting broad elements related to the character of the migration, but in doing so, it runs counter to legal precedent associated with traditional notions of refugees. For example, the definition takes an approach opposite to the Refugee Convention by including both refugees and IDPs and by not requiring the displacement to be forced. At the same time, Biermann and Boas's focus on enumerated climate change impacts seems too restrictive. It relates to the idea that the international community should bear responsibility for harm to which it has contributed, but it does not take into account the possibility that advances in science could enable more accurate determination of which events are caused by climate change.[39]

[38] Frank Biermann& Ingrid Boas, *Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees*, (Global Governance Project, Global Governance Working Paper No. 33, 2007)

[39] Docherty Bonnie & Tyler Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugee*, 33-2, HARV. ENVTL. L.REV. 349, 372 (2009) at 368

A Blended Approach[40] —

Bonnie &Giannini who are advocates of a new binding instrument specifically for 'Climate Change Refugee' elaborates on the nature of definition by highlighting its key elements, without actually defining them.

The proposed new definition of climate change refugee requires the following six elements to be met for a refugee to be considered a victim of climate change:

a) Forced migration;

b) Temporary or permanent relocation;

c) Movement across national borders;

d) Disruption consistent with climate change;

e) Sudden or gradual environmental disruption; and

f) A "more likely than not" standard for human contribution to the disruption.

The definition is designed for a binding instrument rather than for a general policy. Therefore it circumscribes the class of people it covers according to existing legal principles and precedent associated with the term refugee. It balances such restrictions with an eye to meeting humanitarian needs and to addressing the particular character of climate change-induced migration.

A holistic approach where inputs from disciplines like law, science, economics, technological innovation, development, and poverty alleviation are taken is desired. Conditions beyond environmental disruption, such as poverty, can contribute to displacement that is primarily caused by climate change. Climate-induced problems may lead to circumstances, such as armed conflict, that increase population flows. Various stresses, including population growth and poor governance, influence the determination of environmentally displaced persons. Climate change migration also involves a wide range of actors, including individuals, communities, home and host states, and the international community more broadly, which complicates efforts to deal with climate change migration fairly and effectively.

A holistic approach where inputs from disciplines like law, science, economics, technological innovation, development, and poverty alleviation are taken is desired.

2. technical challenges in determining refugee status

A hurricane can be a natural phenomenon or a result of anthropogenic climate change. Therefore, according to the IPCC, identifying causation can be scientifically challenging. Some writers explicitly include both natural and human-caused harm in their definitions of environmental refugee, some exclude natural disasters. Whichever side is been taken in an instrument which may be drafted in the future to deal with the issue of environmentally displaced person, there are too many technical aspects related to environment involved to be addressed by a Refugee agency or any other humanitarian aid agency for that matter.

Technicalities in estimating environmentally displaced persons

[40] *Ibid,* at 372

Undoubtedly, the human induced factor in climate change are widely accepted. Anthropogenic emission of Carbon Dioxide and other greenhouse gases, deforestation are some of the contributing factors of climate change. Arguments in favor of anthropogenic climate change is that there are scientific evidence that the human induced Green House Gases(GHG) emission have potential for climate change and there is dramatic increase in concentration in GHG in last 150 years.

But, in applying the principle of Common but Differentiated Responsibility in relation to Climate Change, there is an ongoing debate on the contribution and quantification of the anthropogenic climate change in the environmentally displaced phenomenon.

The countries which lie in the receiving end of the issue of environmentally displaced person generally take certain typical defenses in order to get away with their historical responsibility towards anthropogenic climate change. Science is unable to qualify which environmental disaster is caused due to anthropogenic interference and which are caused naturally. There is enough evidence of environmental disaster and climate change without human intervention. Secondly, subjection of the earth to anthropogenic influences is not a formal experiment and there cannot be an absolute quantification of the intensity and potential of the anthropogenic factors. Thirdly, our primary information sources are observation and physical modelling, both well supplied with uncertainties. In order to observe the data of the past the scientist have to depend on some proxy indicators of climate variables, for instance amount of growth estimated from tree ring data are used to infer seasonal and annual temperatures.

Estimating the number of environmentally displaced person is complex. Take the case of identifying and mapping potential environmental 'hotspot' along with monitoring changing conditions, which is quintessential to solving the problem of protecting environmentally displaced persons according to Dr. Camillo Boano of Refugee Studies Center of University of Oxford[41]. This involves examining 'tipping' points that trigger displacement rather than adaption in local regions, tracking migration trend in relation to environmental depletion and tailor development policies of resilience and sustainable development to evolving local needs. A refugee agency is not expected to have comprehensive understanding of these technicalities, and therefore a specialized environmental agency is appropriate to address these essential requirements before an international instrument to deal with environmentally displaced persons in introduced in the international arena.

Need for a specialized member from IPCC for refugee determination mechanism

Determining individual state's contributions to climate change is difficult and should be left to the body of scientific experts. A global fund should consider the scientific findings along with data on states' capacities to pay to determine each state's ultimate responsibility. It should also reevaluate its allocations of responsibility periodically to make sure they remain up-to-date.

The UNFCCC formed a similar organ with its Subsidiary Body for Scientific and Technological Advice ("SBSTA"). The UNFCCC requires SBSTA, from a scientific and technological perspective, to assess existing knowledge on climate change, to evaluate measures to implement the UNFCCC, to identify valuable new technologies, to offer advice

[41]Boano, Camillo, Zetter, Roger and Morris, Tim, *Environmentally displaced people: Understanding the linkages between environmental change, livelihood and forced migration,*CliMig, *available at:* https://climig.omeka.net/items/show/613 (accessed on November 15, 2015)

on research and development, and to respond to states parties' questions. The SBSTA consists of "government representatives competent in the relevant field of expertise. The 'independent' body of expert for 'environmentally displaced persons' could be on the lines of SBSTA.

First, the environmentally induced displacement instrument should assign the body of scientific expert's responsibility for determining the types of environmental disruptions encompassed by the definition of climate change refugee. It would ascertain which disruptions are consistent with climate change and to which disruptions human acts more likely than not have contributed. At this point in time, it is difficult for scientists to determine if climate change caused a specific event. The IPCC, however, has identified many potential effects, including increased temperatures, rising sea levels, desertification, and more intense storms, and has identified the likelihood that humans contributed to them. A member from IPCC in the body of expert is preferable. Even if existing science cannot eliminate all uncertainty, the precautionary principle states that some uncertainty is not an excuse to avoid action.[42]

Second, the body of scientific experts should provide information on state's contributions to climate change to help the global fund allocate the common but differentiated responsibilities for assisting climate change refugees.

Finally, the body of scientific experts should conduct general studies about the problem of climate change as it relates to refugee flows. It should both compile existing knowledge, including that generated by the IPCC, and drive future research agendas.

allowing voluntary migrants to be given refugee protection

Some authors identify environmental refugees by the character of their movement. First, they consider whether a person was compelled to relocate or did so voluntarily. An extreme environmental disaster or the submersion of an island state would force inhabitants to abandon their homes, while the general degradation of a region's natural environment might lead people to decide to seek better fortunes elsewhere. El-Hinnawi limits his definition to those "forced to leave."[43] Myers, who offers a more recent but also commonly cited definition from 2005, adopts a similar approach.[44] He describes environmental refugees as those "who can no longer gain a secure livelihood in their homelands" and "who feel they have no alternative but to seek sanctuary elsewhere."

Others divide people who flee environmental harm into subcategories based on the degree of compulsion. In a 2007 United Nations University report, Fabrice Renaud and his coauthors articulate three categories: "environmentally motivated migrants," who "'may leave' a steadily deteriorating environment"; "environmentally forced migrants," who " 'have to leave' in order to avoid the worst"; and "environmental refugees," who "flee the worst," including natural disasters. These approaches suggest a recognition that the classification of environmental refugee should be reserved for those who are forced to relocate.

[42]This version of the precautionary principle borrows from Principle 15 of the Rio Declaration on Environment and Development. U.N. Conference on Environment and Development, June 3-14, 1992, Rio Declaration on Environment and Development, princ. 15, U.N. Doc. A/CONF.151/26 (Vol. 1) (Aug. 12, 1992) [hereinafter Rio Declaration].

[43]*Supra,* note 37

[44]Norman Myers, *"Environmental Refugees: An Emergent Security Issue,"* 13th Economic Forum, Prague, 2005, *available at*http://www.osce.org/eea/14851 (accessed on August 3, 2015).

The decision to migrate is better conceptualized as a continuum. People who have absolutely no control over their relocation represent the right-hand end of the continuum, designated as "involuntary." Moving to the left across the continuum are people with more control over the decision to migrate. At the far left of the continuum, voluntary migrants include only those who maintain control over every decision in the migration process. Such a continuum overcomes the debate over legalistic definitions of refugees and allows for a broad range of constraints on the decision-making process.[45]

The author subscribes to the concept of continuum as suggested by Diana C. Bates, as it takes a more practical approach to providing humanitarian assistance to people displaced to either sudden disasters (which compel the migrate) or slow onset disasters (which may equally lead to migration, although there is greater chances of other factors influencing the decision). Hurricanes and tsunamis are sudden catastrophes, while desertification is gradual degradation. Neither El-Hinnawi nor Myers make this distinction. Dun and her coauthors[46] explicitly include both "slow onset and rapid onset" environmental changes in their definition of environmental displacees, which they consider to be similar to the more commonly used term environmental refugee.

Slow onset displacement is very difficult to predict because of the types of migration (seasonal, return, repeat, permanent and temporary), the multi-causality of intervening variables (socioeconomic status and migrant selectivity) and the complexity of environmental outcomes (deforestation and fisheries depletion).[47]

a temporary answer to a permanent question

A person might move only for a short time if his or her home and community can be repaired after an environmental disaster, or he or she might never be able to return because the destruction makes the area uninhabitable. On this point, El-Hinnawi and Myers have different views, with the former allowing for both kinds of relocation in his definition and the latter only for permanent or semi-permanent relocation. Olivia Dun and her coauthors[48] divide environmental refugees into three categories based on the degree of their compulsion to leave; for each, however, they specify that temporary and permanent displacement are covered. They describe temporary displacement as lasting up to three years, and permanent as anything longer, "even though eventual return may still be possible.

The author believes that humanitarian assistance shall be given to both temporary and permanently displaced people because both are in equal need of humanitarian protection.

natural disaster v. anthropogenic climate change disasters

To make a distinction between whether a disaster is natural or anthropogenic is not an easy task. It demand the expert knowledge of scientific experts and therefore the author has

[45] Diane C. Bates,Environmental Refugees? Classifying Human Migration Caused by Environmental Change, 23 POPULATION & ENV'T 465, 468 (2002)

[46]Olivia Dun, Fran¸coisGemenne& Robert Stojanov, Environmentally Displaced Persons: Working Definitions for the EACH-FOR Project (Oct. 11, 2007), *available at*: http://www.each-for.eu/documents/Environmentally_Displaced_Persons_-_Working_Definitions.pdf(discussing environmentally displaced persons; dividing them into environmental migrants, environmental displacees, and development displacees; and explicitly avoiding the term environmental refugee)

[47] Curran. S., "Migration, Social Capital, and the Environment: Considering Migrant Selectivity and Networks in Relation to Coastal Ecosystems", Population and Development Review, Vol. 28, 2002, pp. 89-125.

[48]*Supra* note 46

suggested the establishment of a scientific body for the determination of refugees and for responsibility sharing among international parties.

Although the term persecution is too narrow to be used to address the issue of 'environmentally displaced persons', it can safely be deduced from AmartyaSen's epochal work on famines[49] which points out hidden issues of rights in relation to inequality, poverty, market and policy failures as deeper causes of so called natural disasters.

3. lessons to learn from progressive nations who have provided temporary protection to environmentally displaced persons

Although majority of nations do not have any law or policy regarding environmentally displaced persons, there are a few exceptions, which can provide some clues for the prospective instrument for environmentally displaced persons.

European union

No specific instrument regulates environmentally displaced individuals' protection at the EU level. However some scholars have argued that to an extent or another, available instruments providing complementary forms of protection could be applicable to environmentally displaced individuals,[50]as enshrined in the Council Directive 2001/55/EC of 20th July, 2001.[51]

The purpose of the directive is to establish minimum standard for giving temporary protection in the event of a mass influx of displaced persons from third world countries who are unable to return to their country of origin. However, the directives suffers from certain limitation. Firstly, it is applicable only in cases of mass influx. Secondly, it does not provide for a clear mechanism of determination of candidates for protection. Thirdly, only temporary protection is granted.

finland

Only few of EU member states have introduced express provisions addressing the protection of environmentally displaced individuals. Section 109 clause 1 of the Aliens Act provides that *"Temporary protection may be given to aliens who need international protection and who cannot return safely to their home country or country of permanent residence because there has been a massive displacement of people in the country or its neighboring areas as a result of an armed conflict, some other violent situation or an environmental disaster."*

The Finnish laws not only recognizes the environmentally displaced persons, it also provides specific humanitarian aid to these displaced people. It is also interesting to note that the principle of *non-refoulement,* around which the traditional refugee regime revolves, also features in the Finnish law protecting environmentally displaced people. Section 88A (1) of the Aliens Act provides that *"An alien residing in Finland is issued with residence permit on the basis of humanitarian protection, if there are no grounds under Section 87 or 88 for granting asylum or providing subsidiary protection, but he or she cannot return to his or her country of origin or country of former habitual residence as a result of an environmental catastrophe..."*. It is important to note here that this humanitarian aid is provided to aliens

[49]AmartyaSen, *Poverty and Famines: An Essay on Entitlement and Deprivation*, Oxford: Clarendon Press, 1981, p. 23

[50]Ammer M, *Climate Change and Human Rights : The status of Climate Refugee in Europe* , Oxford University Press, 2009 ,p.56

[51]*Available at:* www.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:212:0012:0023:EN:PDF

who were already residing in Finland when the disaster hit the country of origin. Therefore it does not cover refugees in true sense, nevertheless comes close to the concept of 'refugee sur-place' in refugee laws.

sweden

The Aliens Act under Section 2 (3) provides that *"a person otherwise in need of protection is an alien who in cases other than those referred to in Section 1(refugee grounds) is outside the country of the aliens nationality, as he or she is unable to return to the country of origin because of an environmental disaster."*

Italy and Cyprus have similar provision which provide protection to environmentally displaced persons. However, in Cyprus humanitarian aid is provided to environmentally displaced person, only to those who already have been given refugee status under the refugee law.

Canada and Australia

Among the four political parties in Canada, only the green party makes reference to environmental refugees. It stated that it will *"advocate for the inclusion of environmental refugees as refugee category in Canada and accept an appropriate share of the world's environmental refugees into Canada".*[52]Canada made temporary arrangements for people who were already resident in Canada at the time of the Indian Ocean tsunami and following the Haitian earthquake in 2010.

Australia has an ad-hoc policy towards environmentally displaced persons. This means that temporary protection may be provided to aliens who have reached the shore of Australia. In 2009 Australia announced a policy to support Pacific islanders who continue to abandon their villages to rising waters.

4. conclusion

It is clear that the UNHCR has out rightly rejected the use or incorporation of the term 'climate change refugees' or 'environment refugees' and UNFCCC is a specialized instrument which hardly deals with functions essential to the issue of 'environmentally displaced person' like humanitarian assistance. Additionally, the author doubts the level of acceptance an independent international instrument specifically for the current issue will receive. It is therefore suggested by the author that the middle path lies in the framing a new instrument under the aegis of United Nation International Strategy for Disaster Reduction (UNISDR).

UNISDR is part of the United Nations Secretariat.The UN General Assembly adopted the International Strategy for Disaster Reduction in December 1999 and established UNISDR and its secretariat to ensure its implementation. Its mandate was expanded in 2001 to serve as the focal point in the United Nations system to ensure coordination and synergies among disaster risk reduction activities of the United Nations system and regional organizations and activities in socio-economic and humanitarian fields (GA resolution 56/195).UNISDR's core functions span the development and humanitarian fields.Its core areas of work includes ensuring disaster risk reduction (DRR) is applied to climate change adaptation, increasing investments for DRR, building disaster-resilient cities, schools and hospitals, and strengthening the international system for DRR.

[52] Green Party of Canada, *Immigration and New Canadians*, 2011

The author also recommends that till the time consensus is built to frame a new instrument under UNISDR, it is wise to formulate a well-framed guideline in the lines of the guidelines for internally displaced people which has been readily accepted by the international community. It is worth mentioning that inputs can be taken from the report published by UNHCR 'Planned Relocation, Disaster and Climate Change: Consolidating Good Practices and Preparing for the Future' and the suggestions made in the Nansen Conference held in 2014.

PROPOSED SOLUTION

Keeping the above developments in mind, the authors suggests that instead of taking the drastic step of amending the 1951 convention and changing the very essence and nature of the instrument by adding a terminology (climate change refugee) which does not directly fit into the meaning of persecution (although it is a highly debatable term) and the five convention grounds or adding a protocol to the UNFCCC as has been suggested by many scholars and has been criticized by some[53], a definition which harmonizes with the various stakeholders involved would make more sense. Therefore, in the opinion of the author, instead of choosing a controversial term like 'climate refugee' or 'environmental refugees' a more mellowed down term like 'environmentally displaced persons' would serve the purpose.

[53] According to Bonnie & Giannini "The UNFCCC applies directly to climate change, but it too has legal limitations for dealing with climate change refugees. As an international environmental law treaty, the UNFCCC primarily concerns state-to-state relations; it does not discuss duties that states have to individuals or communities, such as those laid out in human rights or refugee law.
It is also preventive in nature and less focused on the remedial actions that are needed in a refugee context.52 Finally, although the UNFCCC has an initiative to help states with adaptation to climate change, that program does not specifically deal with the situation of climate change refugees. Like the refugee regime, the UNFCCC was not designed for, and to date has not adequately dealt with, the problem of climate change refugees. Bonnie & Giannini, *supra* note **Error! Bookmark not defined.**, at 358

DEVELOPMENT OF UNMANNED AERIAL VEHICLE: AN INTERNATIONAL PERSPECTIVE WITH SPECIAL REFERENCE TO INDIA

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I .Prefatory

In the beginning, drones[1] were almost exclusively the province of militaries. At first little more than remote-controlled planes used in the World War I era, military drones advanced steadily over the decades, eventually becoming sophisticated tools that could survey battlefield enemies from the sky. Today, the terms "drone" and "unmanned aircraft system" denote a vehicle that navigates through the air from point A to point B and is either remotely controlled or flies autonomously. While they vary in size and shape, such vehicles all feature a communications link, intelligent software, sensors or cameras, a power source, and a method of mobility (usually propellers).

Inevitably, drone technology spilled out from the military and into other parts of the public sector. In the United States over the last decade, federal researchers turned to drones for monitoring weather and land, the Department of Homeland Security started relying on them to keep an eye on borders, and police adopted them for search-and-rescue missions. Then came everyday consumers, who took to parks on the weekend with their often homemade creations. Outside government, drones were mostly flown for fun, not profit.

Until recently, that is. In the last several years, a new group of actors has come to embrace drones: private companies. Inspired by the technological progress made in the military and in the massive hobby market, these newcomers have realized that in everything from farming to bridge inspection, drones offer a dramatic improvement over business as usual. Companies like Amazon and Google have invested a significant amount of money in planning their drone services to their consumers.

So there remains a huge scope of integration of drones in domestic space. However, this is not as simple as attractive it is. There are range of legal issues and evolution of legalities regarding drones taking place all over the world. The paper shall try to give an overview of the international position and would look specifically into the drone law of United States and finally it shall analyse the position in India as well.

I. Potential Usage and Market of Drones

As more and more actors have invested in drone research and development, the vehicles themselves have become cheaper, simpler, and safer. Perhaps even more exciting are the changes in software, which has advanced at lightning speed, getting smarter and more reliable by the day: now, for example, users can fly drones without any guidance and set up so-called geo-fences to fix boundaries at certain altitudes or around certain areas. The economics are now attractive

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1In this paper the term drone shall be used interchangeably with its substitutes like UAV (Unmanned Aerial Vehicle) and RPAS (Remotely Piloted Aircraft Systems).

enough that many industries are looking to drones to perform work traditionally done by humans—or never before done at all. [54]

Many applications involve inspection; it's far cheaper and safer to send a drone with a camera into a remote or dangerous place than to send a human. Oil and gas companies are using drones to monitor pipelines, oil rigs, and gas flares. Utility companies can use them to check electrical wires and towers. Engineers are beginning to use them to inspect bridges and buildings for damage and to survey land. In agriculture, meanwhile, drones offer a bird's-eye view of farms, without the cost of aircraft or satellites. Farmers are starting to rely on drones to diagnose the health of their crops, assess damage after a storm or flood, herd livestock, and eradicate pests. In Australia and Japan, drones are fertilizing crops. [55]Drones could soon deliver light packages, too. Already, Amazon and Google have spent millions of dollars developing drone delivery programs, although much work remains to be done to make the services practical. Some entrepreneurs have tried out drones to deliver beer at concerts and champagne to hotel balconies. In Singapore, which has more service jobs than available workers, one restaurant chain is planning to replace waiters with drones. In remote parts of the world with little transportation infrastructure, drones could be used for humanitarian purposes, delivering medicine and other essentials. They could also play a role in protecting endangered species by tracking illegal poachers.[56] The list is virtually non-exhaustive and it can go on to the extent of human imagination.

The potential size of the commercial drone market is hard to pin down, in part because in the United States, the shaky regulatory environment is leading many companies to keep their plans private. Still, forecasts are upbeat. In 2014, the firm Lux Research estimated that by 2025, the global market for commercial drones will reach $1.7 billion, with drones used for agriculture generating $350 million in annual revenue and those used in the oil and gas industry generating $247 million. The drone industry is poised for greatness.[57]

I. Legal Issues involved

a. Privacy

These machines now mean that for individuals like the posited homeowner's adolescent neighbour, barriers such as high fences no longer constitute insuperable obstacles to their voyeuristic endeavours. Moreover, ease of access to the internet and video sharing websites provides a ready means of sharing any recordings made with such cameras with a wide audience. Persons in the homeowner's position might understandably seek some form of redress for such egregious invasions of their privacy. Other than some form of self-help[58] what alternative measures may be available? The application, called Snoopy, runs on drones

[54]See generally Des Butler, The Dawn of the Age of the Drones: An Australian Privacy law Perspective, UNSW Law Journal, Vol 37(2), p.437; See also Roland E Weibel and R John Hansman, 'Safety Considerations for Operation of Unmanned Aerial Vehicles in the National Airspace System' (Report No ICAT 2005-1, International Centre for Air Transportation, Massachusetts Institute of Technology, March 2005) 19.

[55]Gretchen West,Drone On, Foreign Affairs, 2015, Vol. 94, Issue 3

56*Ibid.*

57*Ibid.*

58 Such as may be encouraged by bounties for shooting down drones, as at least one American town has been reported as considering: Keith Coffman, 'Don't Like Drones? Folks in Deer Trail, Colorado Mull Paying Citizens to Shoot Them Down', The Sydney Morning Herald ,18 July 2013, Available at-http://www.smh.com.au/technology/technology-news/dont-like-drones-folks-in-deer-trail-colorado-mull-paying-citizens-to-shoot-them-down-20130718-2q5rd.html#ixzz2ZMSXOsCH <Accessed on 5th April, 2016>

and looks for a smart phone signal while it is searching for a Wi-Fi network. The software is designed to trick a victim's mobile device into thinking it's connecting to a trusted access point to access data from the handset once attached. Snoopy could be used by attackers to steal a victim's data, including user credentials, credit card numbers and location data. The researchers at Sensepoint successfully demonstrated the ability of the Snoopy application to steal Amazon, PayPal, and Yahoo credentials from random citizens while the drone was flying over their heads in the streets of London.[59]

b. Safety

There are concerns from safety angles to. Flying drones poses a threat to manned civilian aircrafts and there are possibilities that an aerial collision can happen in case the flight of drone goes ill regulated. Further, battery failure in air or any other technical fault can land the drone on some individual which can cause injury and grievous hurt. The issue of fixing the liability is extremely pertinent in these cases.

c. Snooping

Recently, a radioactive drone landed on the terrace of Japan's president's abode. Although after investigation no significant threat was sensed but a possibility arose for the thoughtful that drones can be use as agents of snooping and stealing government's secret information by flying over sensitive zones, keeping a track of official's guests etc.

II. International Legal Position

The International Civil Aviation Organization (ICAO) was created in 1944 upon the signing of the Convention on International Civil Aviation (commonly referred to as the Chicago Convention), as a UN specialised agency.[60] It publishes Standards and Recommended Practices (SARPs) which are intended to assist States in developing national aviation regulations. Each ICAO member country has a national aviation agency, or agencies, to oversee the different aspects of civil aviation, such as pilot licensing or air traffic management services. Under Article 8 of the Chicago Convention, all RPAS regardless of size are prohibited from flying over another state's territory without its permission.[61] However, this article has less to do with civil and commercial application of drones and is more concerned about sovereignty breach issues due to unmanned aerial vehicles respectively.

Given the lack of availability of guidelines, ICAO set up an Unmanned Aircraft Systems Study Group (UASSG) in 2007, which brought together experts from its Member States, stakeholder groups and industry, to discuss the impact of RPAS on aviation regulation. In November 2014, in response to the rapid developments in RPAS technology, the UASSG was elevated to the status of a Panel, and it aims to publish Standards and Recommended

59http://securityaffairs.co/wordpress/23374/hacking/snoopy-drone-data-stealer.html <Accessed on 5th April, 2016>

60ICAO has 191 Member States which work collectively to harmonise and standardise the use of airspace for safety, efficiency and regularity of air transport.

61The Civil Aviation Authority, CAP 722: Unmanned Aircraft Systems Operations in UK Airspace: Guidance (10 August 2012) Section 1, Chapter 2, p 1: https://www.caa.co.uk/docs/33/CAP722.pdf

Practices (SARPs) on unmanned aircraft by 2018.[62] These SARPs will include guidance on airworthiness, operations and pilot licensing.

As an interim measure, ICAO has recently completed drafting the Manual on Remotely Piloted Aircraft Systems (RPAS) (Doc 10019).[63] This document provides readers with analyses of how the existing regulatory framework developed for manned aviation applies to unmanned aircraft and provides insight into the changes that will be coming. It serves as an educational tool for States and stakeholders, it supports the development of SARPs and guidance material by ICAO and it gives a basis for other standards-making organizations to harmonize their activities.[64]

Therefore, as far as international guidelines on drones are concerned, they are still in a very nascent stage. We have to wait till final guidelines are up. Till then matter is best left to state practices. We shall be focusing on the position in United States and then finally on the status of drone flight in India.

III. Drones in United States

a. The Pirkercase.

Position of drones in USA can be gauged from the time of Pirker's case decision by Administrative Law Judge where for the first time in United States use of drones for peaceful purposes came before the court.

In United States, for decades, the definitions of "aircraft" did not include "model aircraft," the majority of which are now of the "drone" type. The Federal Aviation Administration (FAA) neither considered nor treated them as "aircraft." However, that all changed when, for the first time in history, the FAA issued a Proposed Order of Assessment against a foreign national named Raphael Pirker.

Pirker is a well-known, highly skilled and experienced drone pilot. In 2011, at the request of the University of Virginia, Pirker flew a drone over the campus to obtain video footage and was compensated for the flight. That flight resulted in the FAA issuing a Proposed Order of Assessment of a civil penalty of $10,000.00. In its Order of Assessment, the FAA listed all of its alleged facts concerning the flight, including an allegation that Pirker was compensated for it. However, the FAA did not rely upon that compensation at all for its proposed civil penalty. It couldn't. There existed no FAR that prohibited commercial operation (and there still exists no such FAR). Instead it based its Proposed Order of Assessment solely upon an allegation that Pirker flew recklessly, in violation of FAR 91.13. The Proposed Order of Assessment, in relevant part reads:

"By reason of the foregoing, you violated the following section(s) of the Federal Aviation Regulations:

a. Section 91.13(a) which states that no person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

62 An ICAO Panel can generate Standards and Recommendations while this is not possible under an ICAO Study Group.

63 Available at- http://www.dronezine.it/wp-content/uploads/2015/03/10019_cons_en-Secured-1.pdf

64 *Ibid.*

Pirker's attorney filed and won a Motion to Dismiss.[65] In March 2014, Administrative Law Judge Patrick Geraghty, in a well-reasoned, logical and scathing decision,[66] granted Schulman's Motion to Dismiss and the FAA lost. The Administrative Law Judge ("ALJ") held that drones (which he referred to as "model aircraft.") are *not* aircraft under the federal definitions, and therefore the FAA had no jurisdiction over Pirker's flight. Not surprisingly, the FAA appealed the decision immediately to the full NTSB Board.

In November 2014, the NTSB issued its appeal decision,[67] reversing the ALJ's granting of Pirker's Motion to Dismiss. It held that drones *are* aircraft as the word is defined under federal law and therefore subject to the recklessness regulation. It remanded the matter to the ALJ to decide whether Pirker's flight was, in fact, conducted recklessly.

The NTSB's decision was very narrow in one respect: it held that because drones are aircraft, FAR 91.13, the only FAR at issue in the matter, applies to drones. It did not address "commercial use" since that was not addressed by the Judge, and it did not hold that any other FAR applies to drones.

The Board's decision was very *broad* in another respect: it did not qualify which size drones are aircraft. So both a 1-ounce child's "toy" drone and a 55-pound industrial-sized drone are aircraft, and both are equally subject to FAR 91.13. In fact, given the extremely broad federal definition of aircraft, even paper airplanes are now subject to FAR 91.13.

As for Raphael Pirker, there was no decision on remand to the ALJ. Judge Geraghty first demanded that the FAA explain its authority to bring the recklessness action against a foreign national in the first place, since according to the FAA itself, it's not supposed to. The FAA'sOrder2150.3B[68] (Chapter 6, paragraph 34(a)) makes that clear. It reads:

34. Violations of FAA Regulations by Foreign Persons.

General. Legal counsel for the region with geographic responsibility for the investigation processes a case against a foreign person who violates the Federal Aviation Regulations. Legal counsel takes legal enforcement action against an airman who *commits a violation while exercising the privileges of his or her FAA airman certificate, a foreign individual who commits a passenger violation, or a foreign air carrier operating under* 14 C.F.R. part 129. All other violations committed by foreign persons, except Canadian persons, are referred to the appropriate foreign aviation authority through the Department of State. Violations committed by Canadian persons, for whom legal enforcement action is not taken, are referred directly to Transport Canada. (*emphasis supplied.*)

Pirker's actions did not fall under any of the emphasized language above. He is *not* an FAA certified airman. He did *not* commit a passenger violation and he is *not* a foreign air carrier. This means that the entire Pirker matter, if handled as the FAA's Order itself says it should be handled; it *should* have been handled by the "appropriate foreign aviation authority" through the Department of State, *not* by the FAA, a fact that had been argued by Schulman.

65http://www.kramerlevin.com/files/upload/FAA-v-Pirker.pdf <Accessed on 25th March, 2016>
66http://www.ntsb.gov/legal/alj/Documents/Pirker-CP-217.pdf <Accessed on 25th March, 2016>
67http://www.ntsb.gov/legal/alj/Documents/5730.pdf <Accessed on 25th March, 2016>
68http://www.faa.gov/documentLibrary/media/Order/2150.3B_W-Chg_8.pdf <Accessed on 25th March, 2016>

In the end, Pirker settled[69] the case that never should have been brought against him by the FAA, for $1,100.00, with no admission of wrongdoing on his part. The FAA got an NTSB decision that drones are "aircraft" as that term is defined under the federal statutory and regulatory definitions, and subject to a single FAR— 91.13 (recklessness). Unless and until definitions of aircraft change or a new definition for drones is created, drones will remain aircraft.

b. The New FAA Rules

Because of the mounting pressure on clarifying its stands on private usage of drones FAA on 15th February, 2015 proposed a framework of regulations[70] that would allow routine use of certain small unmanned aircraft systems (UAS) in today's aviation system, while maintaining flexibility to accommodate future technological innovations.

The proposal offers safety rules for small UAS (under 55 pounds) conducting non-recreational operations. The rule would limit flights to daylight and visual-line-of-sight operations. It also addresses height restrictions, operator certification, optional use of a visual observer, aircraft registration and marking, and operational limits. [71]

The proposed rule also includes extensive discussion of the possibility of an additional, more flexible framework for "micro" UAS under 4.4 pounds. The FAA is asking the public to comment on this possible classification to determine whether it should include this option as part of a final rule. The FAA is also asking for comment about how the agency can further leverage the UAS test site program and an upcoming UAS Centre of Excellence to further spur innovation at "innovation zones." [72]

The proposed rules would also require an operator to maintain visual line of sight of a small UAS. The rule would allow, but not require, an operator to work with a visual observer who would maintain constant visual contact with the aircraft. The operator would still need to be able to see the UAS with unaided vision (except for glasses). The FAA is asking for comments on whether the rules should permit operations beyond line of sight, and if so, what the appropriate limits should be.[73]

Further, an operator would have to be at least 17 years old, pass an aeronautical knowledge test and obtain an FAA UAS operator certificate. To maintain certification, the operator would have to pass the FAA knowledge tests every 24 months. A small UAS operator would not need any further private pilot certifications (i.e., a private pilot license or medical rating).[74]

69http://www.scribd.com/doc/253446698/Pirker-Faa-Settlement#scribd <Accessed on 25th March, 2016>
70Summary of the regulations available at - http://www.faa.gov Accessed on 25th March, 2016>
71*Ibid.*

72Press Release – DOT and FAA Propose New Rules for Small Unmanned Aircraft Systems, 15th February 2015, Available at- http://www.faa.gov/news/press_releases/news_story.cfm?newsId=18295 <Accessed on 25th March, 2016>
73*Supra* note 18
74*Ibid.*

The new rule also proposes operating limitations designed to minimize risks to other aircraft and people and property on the ground: A small UAS operator must always see and avoid manned aircraft. If there is a risk of collision, the UAS operator must be the first to manoeuvre away. Other obligations include-

- The operator must discontinue the flight when continuing would pose a hazard to other aircraft, people or property.
- A small UAS operator must assess weather conditions, airspace restrictions and the location of people to lessen risks if he or she loses control of the UAS.
- A small UAS may not fly over people, except those directly involved with the flight.
- Flights should be limited to 500 feet altitude and no faster than 100 mph.
- Operators must stay out of airport flight paths and restricted airspace areas, and obey any FAA Temporary Flight Restrictions (TFRs).

Existing prohibition against operating in a careless or reckless manner is maintained. An operator is barred from allowing any object to be dropped from the UAS. Operators would be responsible for ensuring an aircraft is safe before flying, but the FAA is not proposing that small UAS comply with current agency airworthiness standards or aircraft certification. For example, an operator would have to perform a pre-flight inspection that includes checking the communications link between the control station and the UAS. Small UAS with FAA-certificated components also could be subject to agency airworthiness directives.[75]

Although these rules are open for comments, but the criticisms are already rolling in. Those who are raising the questions on the viability of the proposed rules say that when it comes to flying electronic devices weighing up to 55 pounds, safety is an essential requirement. But are the delays justified? Moreover, the proposed rules are vague and incomplete, where they could easily be straightforward and even obvious. Special rules for micro-drones should have come first, not just hinted at last. And an unnecessarily restrictive requirement that all drone operation require continual "line of sight" visibility and daylight-only operation means that some of the most high-potential applications, including local delivery services and night-time agricultural monitoring, are still banned.[76]

IV. Position in India

Indian position on peaceful usage of drone has varied from absolutely nothing to complete ban and then rethinking on the ban by mulling regulatory guidelines on the lines of FAA. In October 2014, the Indian government banned drones. The Director General of Civil Aviation

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75*Ibid.*

76Larry Downes, Whats Wrong with the FAA's New Drone Rules, Harvard Business Review, March 2, 2015 Available at https://hbr.org/2015/03/whats-wrong-with-the-faas-new-drone-rules. However, this does not mean that regulations have not been appreciated. The Consumer Electronics Association (CEA) of United States issued the following statement on behalf of CEA President and CEO Gary Shapiro praising the initiation of the process- "...decision by the FAA is an important milestone as the agency develops rules to allow unmanned aircraft to operate safely in U.S. airspace. We support the FAA's action and related guidance that provides a model for other private businesses seeking approval to operate drones in populated areas under controlled environments." Available at- http://www.ce.org/News/News-Releases/Press-Releases/2014/Let-Them-Fly-CEA-Applauds-FAA%E2%80%99s-Ruling-on-Drones.aspx?feed=Policy-Press-Releases <Accessed on 25th March, 2016>

(DGCA) issued a stern public notice[77] in the first week of October citing "security threats" as the reason why no one could fly drones in Indian airspace till further notice. It stated that-

"UAS has potential for large number of civil applications. However, its use besides being a safety issue, also poses security threat. The Airspace over cities in India has high density of manned aircraft traffic. Due to lack of regulation, operating procedures/standards and uncertainty of the technology, UAS poses threat for air collisions and accidents. The civil operation of UAS will require approval from the Air Navigation Service provider, defence, Ministry of Home Affairs, and other concerned security agencies, besides the DGCA."[78]

On the positive note however, the notice also said -

"DGCA is in the process of formulating the regulations (and globally harmonize those) for certification & operation for use of UAS in the Indian Civil Airspace. Till such regulations are issued, no non government agency, organization, or an individual will launch a UAS in Indian Civil Airspace for any purpose whatsoever."[79]

According to the recently released draft guidelines,[80] unmanned aircraft operations at or above 200 feet AGL (above ground level) in uncontrolled airspace will require permit from DGCA. Also, operation of civil drones in controlled airspace is restricted. We will have to wait for the final roll out after the process of inviting comments and suggestions get over. Drafters went through operational regulations that exist in New Zealand, Australia, UK and of the FAA (Federal Aviation Administration) and then it shall be fine tuning the rules as per Indian needs.[81]

Whatever the final guidelines may be, their inspiration should lie in the nuggets provided by Professor R Swaminathan who in one of the most exhaustive papers available on the subject, published by Observer Research Foundation titled "Drones in India"[82] points out that the need is to first quickly reorient the processes and procedures of airspace, especially the rules of certification and the monitoring processes of the ATC, to allow for UAVs to start co-existing with civilian and commercial aircrafts. It is only when a certain level of limited and controlled co-existence is brought about that the larger policy issues ofa complete integration of UAVs with the existing systems can be unraveled. The second is to evolve a unique identification code for UAVs so that very single drone, whether small or big, is completely accounted for. When all is said and done, drones falling in the wrong hands are a genuine risk for national security and need to be closely monitored.[83] The third is to create a stringent set of manufacturing standards and quality-control processes for drones and UAVs. They have to pass through the same—or at least similar—production processes, certification requirements and airworthiness procedures that manned aircrafts and commercial aerial vehicles are

77http://dgca.nic.in/public_notice/PN_UAS.pdf <Accessed on 15th April, 2016>
78*Ibid.*
79*Ibid.*
80http://www.dgca.nic.in/misc/draft%20circular/AT_Circular%20-%20Civil_UAS(Draft%20April%202016).pdf <Accessed on 15thMay, 2016>
81http://www.dnaindia.com/money/report-operational-rules-draft-for-uas-likely-to-be-in-place-this-week-2062274 <Accessed on 15th April, 2016>
82Available at-
http://www.orfonline.org/cms/export/orfonline/modules/occasionalpaper/attachments/Occasional_Paper_58_142321 <Accessed on 15th April, 2016>2748249.pdf
83*Ibid.*

subjected to before they are allowed to take to air.[84]With these suggestions in the offing we can expect the DGCA to come up with fair guidelines well suited to Indian conditions.

V. Conclusion

Drones are a Pandora's Box. Main legal issues associated with them are those of privacy and safety and each country has its own way of dealing with these. Few selected countries like Spain, Australia, New Zealand, Germany and France have provisional norms regulating the peaceful uses of drones but most of the countries including the advanced countries like United States are yet not settled on it. A lot will depend on the upcoming ICAO guidelines on drones and its civilian and commercial application as that will pave way for other countries to adopt them as a model that are yet unsure as to how to deal with this whole issue. As far as India is concerned, it is appreciable that we are making strides towards catching up with this technology having enormous potential for civilian and commercial applications. Hopefully, the DGCA will have a robust set of final guidelines soon.

84*Ibid.*

PUBLIC INTEREST LITIGATION: RECENT TRENDS IN INDIA

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I. ACCESS TO JUSTICE AND PIL: INTRODUCTION

India must have a socio-economic revolution ... [to achieve] the real satisfaction of the fundamental needs of the common man ... (and) a fundamental change in the structure of Indian s
Sarvepalli Radhakrishnan[85]

The opening word of Preamble of Indian Constitution[86] starts with "WE THE PEOPLE of India" and ends with "HERE ADOPT, ENACT AND GIVE TO OURSEVES THIS CONSTITUTION". 'We the People' through representatives assembled in Constituent Assembly adopted and gave themselves to the Constitution, tricolor and national anthem—Jana, gana, mana symbolize the inauguration of sovereign democratic republic. The constitution expresses to resolve of the people for building of that 'heaven of freedom'-

Where the mind is without fear and head is held high, where the clear stream of reason has not its way into dreary desert sands of dead habit, where the mind is led towards by three into ever widening thought and action.

And the world into which Guru Rabindra Nath Tagore wanted the country to awake, and the Ram Raj which Mahatma Gandhi would wish to be ushered in the country.[87]

The Preamble of the Constitution of India reflects the real mind of the makers of Constitution.[88] The jurisprudence[89] woven around the Preamble to our Constitution has many dimensions, radical and crimson. The whole Constitution was drafted in light of the directions given in objective resolution[90] that reads as follows: where it shall be guaranteed and secured to all the people of India justice, social, economic and political; freedom of thought, expression... ; and

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[85] *CAD*, II, 269-273.

[86] *Kesavananda Bharati* v. *State of Kerala*, AIR 1962 SC 933, Shelat and Grover,JJ. Observed "The Constitution makers gave to the Preamble the pride of place. It embodies in a solemn form all the ideals and aspirations for which the country had struggled during the British regime ..." also *see*: V.R.Krishna Iyer, *The dialectics & dynamics of Human Rights in India (Yesterday, Today and Tomorrow)*, 274 (Eastern Law House, Calcutta, 1st end; reprint 2000). The Constitution is more than a legal parchment. It is a Fabian socio-economic instrument with a revolutionary thrust.

[87] M.C.Jain Kagzi, *Kagzi's The Constitution of India,* 2, 946 (India Law House, New Delhi, 6th edn;2004).

[88] Justice G.P Singh, *Principles of Statutory Interpretation*, 158, (Lexis Nexis Buttorworths Wadhava Nagpur, Gurgaon, 13th edn.,2012), mentions *Sussex Perrage case*, 8 ER 1034 (HL). *See Wharton's Law Lexicon,* 1324(Universal, Delhi, 15th edn., reprint:2012).

[89] *Supra* note 2 at 275 where Justice Iyer explains: "Jurisprudence cannot go it alone. It is people's militancy without violence, literacy without arrogance, sense of accountability without authoritarianism that can make the Constitution the great guarantee and perennial locomotive of people's right. The *crème de la crème* of the Constitution, in its political vision, economic mission and development action, is what the Preamble tersely spells out. The Preamble itself is a value-based jurisprudence in its abbreviated excellence.

[90] Adopted on January 22, 1947; See: B.Shiva Rao (ed.), *The Framing of India's Constitution Select Documents*, II, 4 (Universal, New Delhi, Reprint 2012).

this ancient land attains its rightful and honoured place in the world and makes its full and willing contribution … and the welfare of mankind.

Further Nehru on December 13,1946 in his speech on the resolution in constituent assembly[91] said: …

It is resolution and yet, it is something much more than a resolution. It is a declaration. It is a firm resolve. It is a pledge and an undertaking and it is for all of us I hope a dedication. And I wish this House, if I may say so respectfully, should consider this resolution not in a spirit of narrow legal wording, but rather look at the spirit behind that Resolution.

The content of social justice was best expressed by Nehru in his speech at Constituent Assembly on 14-15 August, 1947:

The service of India means the service of millions who suffers.[92] It means the ending of poverty and ignorance and disease and inequality of opportunity. The ambition of great man our generation has been wipes the tear from every eye. That may be beyond use but as long as there are tears and suffering our work will not over.[93]

The aim of constitution is not only to provide certain liberties but want to actualization of these liberties to the common man of society which can be attained by justice and equality.

The concept of Justice has very vast dynamism with its multifaceted connotation.[94] The symbol of scales of justice reflects the association of justice with the balancing of adverse claims and process of rendering justice may also be depicted.[95]Such a complex nature of justice and its operation require systematic approach to the 'understanding' of law which helps in knowing the existing and emerging rule and their social relevance.[96] Here researcher seeks to mention that purpose of this assignment is not to undertake the jurisprudential study of the concept of social justice but to explain its new phenomenon which emerged as Public Interest Litigation (here in after PIL) and also restricted to recent trends in India for exploring the policy of Apex Court behind admitting any petition as PIL. It also enables to assess

[91] *CAD*, I, 57-62.

[92] At the dawn of Independence, on commencement of the constitution, we then 36 crores (approximately) of the Indians comprised nearly one-sixth of humanity. Eighty of every hundred of us live in 300,000 villages. We can never forget that the people of India as a whole, not the elite nor the upper starta nor, indeed, the power-brokers and creamy layers but all the people are the title-holder under the Constitution. The majority among us consists of the rural millions, the poor, the so-called socially and educationally backward. That is why Justice Vivian Bose once stated that the Constitution was meant for the butcher, the baker and candle-stick maker; and further Krishna Iyer added in his book *Supra* note 2 also for the tortured prisoner, the bonded labourer, the discriminated gender, the marginalized dissenter and the disabled, deprived human.

[93] *Supra* note 2 at 202, also *available at*: http://www.theguardian.com/theguardian/2007/may/01/greatspeeches (Visited on August 15, 2014).

[94] The notion of justice is fundamental to all organized civilizations, communities and cultures. The Indian view of Justice is performance of one's duty as dharma, as knowledge as maintenance of orderly protecting life and property and welfare and happiness. *See* M.Ramajois, *Legal and Constitutional History of India* (Universal, Delhi, 1st edn; reprint 2005).

[95] Mamta Rao, *Public Interest Litigation Legal Aid and Lok Adalas*, 38-62 (Eastern Book Company, Lucknow, 3rd edn., 2010).

[96] Khushal Vibhute & Fillipos Aynalem, *Legal Research Methods Teaching Material*, 4 (Prepared under the Sponsership of theJustice and Legal System Research Institute, 2009), available on : http://chilot.files.wordpress.com/2011/06/legal-research-methods.pdf. (Visited on August 15, 2013).

efficacy of law as an instrument of socio-economic changes and to identify bottlenecks, if any.

In the last three decades, the concept of PIL has been evolved, nurtured and implemented in the constitutional adjudicatory process by the Supreme Court for the administration of Justice to the socially, economically and politically disadvantaged sections of society.[97] This march of Law has given rise to a set of new problems and practical difficulties and identified as "problems of Principle", "Problem of Practice" and "problem of Procedure". The journey so far in PIL jurisprudence put an indelible footprint on constitutional development.[98]There are abundance of Books, Articles and Judgments on the PIL so far the purpose of research it is highly relied upon Restatement of Public Interest Litigation prepared by Supreme Court Project Committee on Restatement of Indian Law and Annual Survey of Indian Law.

II. GROWTH OF PUBLIC INTEREST LITIGATION

For those who take people's sufferings seriously, there is no rejoicing; even revolutions provide transient occasions of celebrations. The SAL is at best an "establishment revolution" still, it nourishes hope in an otherwise darkening landscape of Indian law and Jurisprudence. Upendra Baxi[99]

The traditional paradigm of the adversarial judicial process[100] envisioned a passive role for the courts and only a person who has suffered an injury or whose right is violated can approach the court and a person who has a cause of action and *locus standi* to raise an issue before a court of law must do so within a prescribed time limit provided by the law of limitation.[101]The same rule applied to writ petitions under Article 32 and 226 of Constitution of India. However, slowly it became clear that if the Guarantee of fundamental rights under the Constitution had to be more meaningful to everyone, the court would have to make it more accessible by relaxing the rules of *locus standi* and allowing public spirited persons to approach the Court for redressal of grievances on behalf of the silent suffering oppressed.[102]The law of standing,[103] that is persons who can bring complaints of rights-violation, has been thus revolutionized; and access to constitutional justice has been fully democratized.[104]The express language of Articles 32 and 226 of the Constitution provided the

[97] In 1981 the Supreme Court's attention was drawn to a news report about sexual exploitation of children by hardened criminals in Kanpur Jail, *Munna* v. *State of U.P.*,(1982) 1 SCC 545. Other cases are *Sheela Barse* v. *Union of India*, AIR 1986 SC 1773, *Francis Coralie* v. *Union territory of Delhi*, AIR 1981 SC 746, *Unni Krishnan* v. *State of A.P.*, AIR 1997 SC 3297.

[98] Indian Law Institute, *Restatement of Indian Law Public Interest Litigation*, xiii-xv (Universal, Delhi, 2011).

[99] Upendra Baxi, " Taking Suffering Seriously: Social Action Litigation Before the Supreme Court of India" published in V.R.Krishna Iyer, Rajeev Dhavan *et.al.(eds.), Judges and Judicial Power*, 306 (Sweet & Maxwell, London, 1985). Prof. Baxi stated that "The Supreme of India is at long last becoming, after thirty two of the Republic, The Supreme Court for Indians". Further he quoted *state of Rajsthan v. Union of India* (1979) 3 SCC 634 Where Goswami J. held, Supreme Court as " last resort for the oppressed and the bewildered".

[100] Clark D.Cunningham, " Public Interest Litigation in Indian Supreme Court : A study in the light of American Experience" 29 *JILI* 504 (1987). And also see: Raju Ramchandaran and Gaurav Agrawal, *B.R.Agrawala's Supreme Court Practice & Procedure*, 47 (Eastern Book Company, Lucknow, 6th edn.,2002). Further see :*Supra* note 13 at 14.

[101] S.P.Sathe, *Judicial Activism in India*, 196 (Oxford University Press, New Delhi, 9th impression,2012).

[102] *Supra* note 16, Raju Ramchandran at 41.

[103] The requirement of *locus standi* of a party to any litigation is mandatory. *See* Sections 79, 91, 92, Order I and Order XXVII of the Code of Civil Procedure, 1908.

[104] Upendra Baxi, "Judicial Discourse: Dialectics of the face and the Mask" 35 *JILI* 1-12 (1993). Also Published in Souvenier,ILI Golden Jubilee 1956-2006.

basis and impetus for clear and marked departures from the position existing in English law. The phrase, "in the nature of" occurring both in Articles 32(2) and 226(1) marks the distinctive feature of the width of power[105] conferred on the Supreme Court and High Court.[106]

III. LIBERALISATION OF THE LOCUS STANDI RULE

In England Lord Denning in various judgments liberalized and lowered standing requirement in series of cases which are known as Blackburn Series of Cases. Lord Denning has taken a view that an ordinary individual can move the High Court and he shall be heard if he has "sufficient interest".[107]

The expression sufficient interest is being given a generous interpretation by the courts.[108]

In the case of *Thorsan* v.*Attn.Gen. of Canada*,[109] the Supreme Court of Canada has relaxed the requirements for *locus standi*, in respect of declaration sought by tax-payer attacking the validity of federal legislation.

In New Zealand, the New Zealand Judicature (Amendment) Act, 1972, imposes no specific requirement as to standing but the judicial tendency is to look for a sufficient interest in all the circumstances.

In United States, a statutory provision conferring standing is given effect though the person concerned does not have the direct personal interest that would otherwise be required, in *Association of Data Process Service Organisation* v. *Camp.*,[110] Douglas J., held that 'legal interest' test goes to the merits. The question of standing is different. It concerns, apart from the case or controversy test, the question is whether the interest sought to be protected or regulated by the statute or constitutional guarantee in question.

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[105] (1950) SCR 3, *SeeId* at 1-2, The Supreme Court was inaugurated on January 28, 1950. The proceeding of the inaugural sitting of the Supreme Court of India have been reproduced in where in his inaugural address the Attorney General, Shri M.C.Setalwad, reminded, the Court that its writ would run through the territory of the Country and said "Your foremost task will be to interpret the Constitution which is but a means of ordering the life of a progressive people." Further he reiterated the words of Justice Holmes of the United States: "The provisions of the Constitution are not mathematical formulas having their essence in the form; they are organic living institutions ... Their significance is vital, not formal; is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth." He also told that, In the attainment of this noble end, we hope and trust that this Court will play a great and singular role and establish itself in the consciousness of the Indian people.

[106] Charanjit Lal v.Union of India, AIR 1951 SC 41.

[107] Justice Bhagabati Prosad Banerjee and Bhaskar Prosad Banerjee, *Judicial Control of Administrative Action*, 105 (Lexis Nexis Butterworths Wadhwa Nagpur, Gurgaon, 2nd edn., 2012). Here referred as *R. v. Commissioner of police, ex parte, Blackburn*, [1968] 1 ALL ER 763. *R. v. Commissioner of police, ex parte, Blackburn*, (1973) QB 241, Where the writ petition was entertained on the ground of failure of the police authorities to enforce the law against pornography.

[108] S.P.Sathe, " Judicial Activism : The Indian Experience" 6 *WUJLP* 71 (2001). For similar view also see : S.P.Sathe, " Public Particiption in Judicial Process : New Trends in Law of Locus Standi with Special Reference to Administrative Law" 26 *JILI* 5 (1983).

[109] (1975) 1 SCR 138.

[110] 397 US 150 (1970).

So questions of standing with regard to nature of public interest litigation are relevant factors and are primarily focused on whether parties have the right to access the courts or to seek judicial review, and not on the merits of the case.[111]

In India the requirement of *locus standi* of a party to any litigation is mandatory.[112]It will be befitting to recall the observation of Supreme Court in *People's Union for Democratic Rights* v. *Union of India*[113] regarding *locus standi* which reads thus:

But the traditional rule of standing which confines access to the judicial process only to those to whom legal injury is caused or legal wrong is done has now been jettisoned by this Court... ... it is therefore necessary to evolve a new strategy by relaxing this traditional rule of standing in order that justice may become available to the lowly and the lost.

Further in this context, it would be quite relevant to quote the observations made by Bhagvati, J., in *S.P.Gupta* v. *Union of India*[114]

The only way in which access to Justice can be done is by entertaining writ petitions and even letters from public-spirited individuals seeking judicial redress for the benefit of persons who suffered a legal wrong or a legal injury or whose constitutional or legal rights been violated but who by reason of their poverty or socially or economically disadvantaged position are unable to approach the court for relief.

IV. SCOPE OF PUBLIC INTEREST LITIGATION

The Supreme Court in *Janta Dal* v. *H.S.Chaudhari*[115]laid down the scope and object of PIL and in this connection held-

The horizon of PIL is widely extended and which at present constitutes a new chapter in justice delivery system acquiring a significant degree of importance in the modern legal jurisprudence practiced by courts in many parts of the world, based on the principle, "Liberty and Justice for all."

Campbell C.J., in *R* v. *Bedfordshire*[116]defined 'Public Interest' as:

A matter of public or general interest "does not mean that which is an interesting as gratifying curiosity, or as gratifying curiosity or a love of information or amusement but that in which a class of the community have a pecuniary interest or some interest by which their legal rights or liabilities are affected.

The expression 'litigation' means a legal action including all proceedings therein, initiated in a Court of Law with the purpose of enforcing a right or seeking a remedy. Therefore,

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[111] *Supra* note 14 at 49.

[112] Sections 79 – Suits by or against Government, 91 – Public nuisance or other wrongful acts affecting the public, 92 – Public Charities, Order 1 - Parties to Suits and Order XXVII - Sits by or against the government or public officers in their official capacity, of the Code of Civil Procedure, 1908.

[113] (1982) 3 SCC235.

[114] AIR 1982 SC149.

[115] AIR 1993 SC892.

[116] (1855) 24 LJQB 81 (84), In Shrouds Judicial Dictionary, Vol. 4 (Sweet and Maxwell, London, 2nd edn., 1906). For similar definition see: Bryan A.Garner (ed.), *Black's Law Dictionary* 1350 (West, U.S.A, 9th edn., 2009).

lexically the expression 'PIL' means[117] a legal action initiated in court of Law for the enforcement of public interest or general interest in which the public or a class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected.[118]In 1976, Professor Abram Chayes of the Harvard Law School coined the phrase "public law litigation" to refer to the practice of lawyers in the United States seeking to precipitate social change through court-ordered decrees that reform legal rules, enforce existing laws, and articulate public norms.[119]

The flexibility of PIL procedure can best be illustrated by what *i.e.* termed as 'epistolary jurisdiction'. Taking a cue from the American Supreme Court's decision in *Geideonv. Wainwright*,[120]where a postcard from a prisoner was treated as a petition, the Supreme Court said in the S.P.Gupta Case that a public-spirited person could move the court even by writing a letter.[121] The Court has accepted letters and telegrams as petitions. The danger of such ease of access leading to the apprehension that a litigant could indulge in forum- shopping and address a particular judge was expressed by Pathak J., in the *Bandhua Mukti Morcha* case:

When the Jurisdiction of the Court is invoked, it is the jurisdiction of the entire Court... No such communication can be properly addressed to a particular judge... Which judge or judges will hear the case is exclusively a matter concerning the internal regulation of the business of the court, interference with which by a litigant or a member of the public constitutes the grossest impropriety.[122]

At the time of independence, the bulk of citizens were unaware of their legal rights, and much less in a position of assert them. The guarantees of fundamental rights and the assurances of directive principles, described as the 'conscience of the Constitution',[123] would have remained empty promises for the majority of illiterate and indigent citizens under adversarial proceedings. Unlike this system in PIL there are no winners or losers and the

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[117] Sangeetha Mugunathan, " Scope and Limitation of Public Interest Litigation in India" *MLJ- CIVIL* 33 (2005).

[118] In *Azad Rickshaw Pullers Union* v. *State of Punjab,* AIR 1981 SC 14, The Supreme Court, instead of striking down the law, made arrangements for getting loans from the Punjab National Bank for enabling rickshaw pullers to buy the vehicles. Commenting on the emergence of such collective petitions, justice Krishna Iyer observed in *Akhil Bharitya Soshit Karamchari Sangh (Railway) v. Union of India,* AIR 1981 SC 298,

Our current processual Jurisprudence is not not of individualistic mould. It is broad-based and people-oriented, and envisions access to justice through "class actions", "Public Interest Litigation", and "Representative proceedings". Indeed, little Indians in large numbers seeking remedies in courts through collective proceedings, instead of being driven to an expensive plurality of litigations, is an affirmation of participative justice in our democracy. We had no hesitation in holding that the narrow concept of "cause of action" and "person aggrieved" and individual litigation is becoming obsolescent in some jurisdictions.

[119] Abram Chayes, "The Role of the Judge in Public Law Litigation" 89 *HLR* 1281 (1976). Also see *Supra* Note 33.

[120] (1963) 372 U.S.335.

[121] Ashok H. Desai and S. Muralidhar, " Public Interest Litigation : Potential and Problems" in B. N. Kripal, Ashok H. Desai *et.al* (eds.), *Supreme But not Infalliable* 158 (Oxford University Press, New Delhi, 2000). Many of the early PILs, including *Sunil Batra (II)* V. *Delhi Administaration* (1980) 3 SCC 488, *Dr. Upendra Baxi* v. *State of U.P* (1983) 2 SCC 583, *Veena Sethi* v. *State of Bihar* (1982) 2 SCC 253, and *People's Union of for Democratic Rights* v. *Union of India* (1982) SCC 253, commenced with the petitioners sending letters to the Supreme Court.

[122] (1984) 3 SCC 161.

[123] Granville Austin, *The Indian Constitution: The Cornerstone of a Nation* 50 (Oxford University Press, New Delhi, 1999).

mindset of lawyers and judges can be different from that in ordinary litigation. This was explained by the Supreme Court in *Dr. Upendra Baxi* v. *State of UP*[124]

PIL involves a collaborative[125] and cooperative effort on the part of the state government and its officers, the lawyers appearing in the case and the Bench for the purpose of making human rights meaningful for the weaker sections of the community.

V. CONSEQUENCES OF LIBERALISING*LOCUS STANDI*

Broadly development of PIL can be categorized[126] into three phases:[127]

First Phase: It began in the late 1970s and continued through the 1980s and the PIL cases were generally filed by public-spirited persons for the relief sought against the action or non-action on the part of executive agencies resulting in violations of FRs under the Constitution.[128] Hence in the first phase, the PIL truly became an instrument of the type of social transformation/revolution[129] that the founding fathers had expected to achieve through the Constitution.[130]

Second Phase: The second phase of the PIL was 1990s decade. In comparison tothe first phase, the filing of PIL cases became more institutionalized; several specialized NGOs and lawyers[131] started bringing matters of public interest to the courts on a much regular basis. And the result was that the breadth of issues raised in PIL also expanded tremendously.

In this phase, the petitioners sought relief not only against the action/non-action of the

Executive but also against private individuals, in relation to policy matters, and regarding something that would clearly fall within the domain of the legislature. For instance, the courts did not hesitate to come up with detailed guidelines where there were legislative gaps.[132] The

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[124] (1996)4 SCC 106 at 117.

[125] *Supra* note 16.

[126] *State of Uttaranchal* v. *Balwant Singh Chaufal,*(2010) 3 SCC 402.

[127] Surya Deva, "Public Interest Litigation in India: A Critical Review" 1 *CJQ* 19 (2009), *available at*: http://ssrn.com/abstract=1424236 (Visited on September 13, 2014).

[128] Rajeev Dhavan, " Law as Struggle: Public Interest law India" XXXVI *JILI* 302 (1994), and also *see*: Parmanand Singh, " Protecting the rights of the disadvantaged groups through Public Interest Litigation" in Mahendra P.Singh, Helmet Goerlich *et .al.* (eds.), *Human Rights and Basic Needs* 305 (Universal, Delhi, 2008). And present author's survey of cases on PIL published in Annual Survey of Indian Law, Volumes XXI – XXIX (1985- 1993).

[129] *Supra* note 17 at 209.

[130] Practice and Procedure Handbook published by Supreme Court of India, 49 (2010), *available at*: http://supremecourtofindia.nic.in/handbook3rdedition.pdf (Visited on September 23, 2013).

[131] Common cause, Peoples union for civil Liberties and M.C.Mehta *etc.*

[132] *Visakha* v. *Rajsthan*,AIR 1997 SC 3011, Since there was no legislation against sexual harassment , the Court felt that it was necessary to fill in the gap. Chief Justice J.S.Verma said:
The primary responsibility for ensuring such safety and dignity through suitable legislation, and the creation of a mechanism for its enforcement is of the legislature and the executive. When, however, instances of sexual harassment resulting in violation of fundamental rights of women workers under articles 14, 19 and 21 are brought before us for redress under article 32, an effective redressal requires that some guidelines should be laid down for the protection of these right to fill the legislative vacuum.
In *Laxmikant Pandey* v. *India*, AIR 1987 SC 232, the Supreme Court gave directions as to what procedures should be followed and what precaution should be taken while allowing Indian children to be adopted by foreign adoptive parents. In *M.C.Mehta* v. *state of Tamil Nadu* (1996) 6SCC 756, Known as child labour case, referring to the directive principles of state policy, Justice Hanasaria said:

courts enforced FRs against private individuals and granted relief to the petitioner without going into the question of whether the violator of the FR was the state.

The second phase was also the period when the misuse of PIL not only began but also reached to a disturbing level, which occasionally compelled the courts to impose fine on plaintiffs for misusing PIL[133] for private purposes and hence it moved much beyond the declared objective for which PIL was meant. So the court moved to protect the interests of the middle class rather than poor populace, and sought means to control the misuse of PIL for ulterior purposes.

Third Phase: The current phase, which began with the 21st century. Court somehow struck in choosing that which matter should be entertained as PIL due to lack of litigation policy. The thing which was normal in second phase now become common and no one knows that whose petition would be entertained as PIL result thereby a number of criticisms of public interest litigation have emerged, including concerns related to separation of powers, judicial capacity, and inequality. Win rates for fundamental rights claims are significantly higher in this phase when the claimant is from an advantaged social group[134] than when he or she is from a marginalized group, which constitutes a social reversal, both from the original objective of public interest litigation and from the relative win rates in the1980s.[135] Further Varun Gauri in his article gives the data in support of the argument that how the win rates in selected fundamental rights cases before the Indian Supreme Court has been marginalized among Claimants from advantaged and disadvantaged social classes. During 1961-1989, the win rate of advantaged social class was 57.19 and disadvantaged was 71.4% and respectively it was 68.1% and 47.1 % during 1990- 1999 and further it was 73.3 % and 47.2% during 2000- 2008.

VI.RECENT TRENDS

In BALCO Employees Union Vs Union of India[136] where the employees union of the government company had challenged its disinvestment on various grounds including the arbitrary and non transparent fixation of its reserve price, the Supreme Court while dismissing the petition went on to make the following observations:

There is, in recent years, a feeling which is not without any foundation that public interest litigation is now tending to become publicity interest litigation or private interest litigation and has a tendency to be counter-productive.

It is duty of all the organs of the State to apply these Principles. Judiciary being also one of the three principal organs of the State, has to keep the same in mind when called upon to decide matters of great public importance. Abolition of child labour is definitely a matter of great public concern and significance.

Another landmark cases of this category where Superme Court issued issued directions ar : *M.C.Mehta* v. *Union of India*, AIR 1998 SC 37, *Vineet Narain* v. *Union of India* (1998) 1 SCC 226.

[133] P.P.Rao, " Public Interest Litigations" in Lokendra Malik, *Reclaiming the vision*: *Challenges of Indian Constituional Law and Governance* 143 (Lexis Nexis, Gurgaon, 1st ed., 2013).

[134] Theodore Eisenberg, Sital Kalantry, *et.al* (eds.), " Litigation as a measure of well being" *Cornell Law Faculty*

Working Papers Paper 99 (2009), available at: http://scholarship.law.cornell.edu/clsops_papers/99 (Visited on September 23, 2014).

[135] Varun Gauri, "Public Interest Litigation in India: Overreaching or Underachieving?" *The World Bank Policy research working paper5109* (November 2009), available at

http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-5109 (Visited on September 13, 2014).

[136](2002) 2 SCC 343.

PIL is not a pill or a panacea for all wrongs. It was essentially meant to protect basic human rights of the weak and the disadvantaged and was a procedure which was evolved where a public spirited person filed a petition in effect on behalf of such persons who on account of poverty, helplessness or economic and social disabilities could not approach the court for relief. There have been, in recent times increasing instances of abuse of PIL. Therefore there is a need to re-emphasize the parameters within which PIL can be resorted to by a petitioner and entertained by the court.

The court in this case refused to consider the petition of Mr B. L. Wadhera, a lawyer known for having taken up many serious public interest cases, on the ground that he was not directly affected by the disinvestment of Balco.[137] It went on to observe,

It will be seen that whenever the court has interfered and given directions while entertaining PIL, it has mainly been where there has been an element of violation of article 21 or of human rights or where the litigation has been initiated for the benefit of the poor and the underprivileged who are unable to come to court due to some disadvantage. In those cases also it is the legal rights which were secured by the courts. We may, however, add that public interest litigation was not meant to be a weapon to challenge the financial or economic decisions which had been taken by the government in exercise of their administrative power. No doubt a person personally aggrieved by such decisions which he regards as illegal, can impugn the same in the court of law, but, public interest litigation at the behest of a stranger could not to be entertained. Such litigation cannot per se be on behalf of the poor and the downtrodden, unless the court is satisfied that there has been violation of article 21 and the persons adversely affected are unable to approach the court. The decision to disinvest and the implementation thereof is purely an administrative decision relating to the economic policy of the State and challenge to the same at the instance of a busybody cannot fall within the parameters of public interest litigation. On this ground alone, we decline to entertain the writ petition filed by Shri B.L.Wadhera".

In BALCO the employees association had filed a PIL challenging the decision of the Government to disinvest majority of shares of Bharat Aluminum Company Limited, a public sector undertaking. The workman contended that they have been adversely affected by the decision of Government of India to invest 51% shares in BALCO to private parties. It was held that process of disinvestment is policy decision involving complex economic factors.

Inspired by this case, *Centre for Public Interest Litigation* v. *Union of India,*[138] a PIL was filed to challenge the decision of Government of India to sell its majority shares in Hindustan Public Corporation Limited (HPCL) Bharat Petroleum Corporation Limited (BPCL). Court held unlike BALCO petitioner here did not challenge the disinvestment policy. The Court issued directions restraining the central Government from Proceeding of disinvestment without amending the Statutes.

In *Gurvaur Devaswom Managing Committee* v. *C.K.Rajan,* [139]the PIL was filed pointing out serious irregularities, corrupt practices, mal-administration and mismanagement prevailing in

[137] Prashant Bhushan, " Public Interest Litigation: Supreme Court in The Era Of Liberalisation" in B.D.Dua, M.P.Singh *et .al.* (eds.), *Indian Judiciary and Politics* 163 (Manohar, Delhi, 2007), also *available at*: http://bharatiyas.in/cjarold/ files/2%20Philosophy% 20of%20SC% 20on%20PIL%20-%20Prashant%20Bhushan.pdf (on October 19, 2014).

[138] (2003) 7 SCALE 491.

[139] (2003) 6 SCALE 401.

a temple in Kerala. The court refused to interfere in the functioning of religious place because of religious freedom of people was involved.

In *Anees Ahmad* v. *University of Delhi*[140] Court find that the petition was maintainable and banned the Permanent teachers of Delhi University from enrolment as an Advocate. In *Jafar Imam Naqvi* v. *Election Commission of India,* [141]two judges Bench said that the matter of handling hate speeches could be a matter ofadjudication in an appropriate legal forum and may also have some impacting an election disputes raised under the Representation of People Act, 1951.While dismissing the Petition in limine Bench has observed as follows;

A public interest litigation pertaining to speeches delivered during election campaign, we are afraid, cannot be put on the pedestal of areal public interest litigation. There are laws to take care of it. In the name of a constitutional safeguard entering into this kind of arena, in our convinced opinion, would not be within the constitutional parameters.

In another PIL filed in an NGO, *Pravasi Bharat Sangathan* v. *Union of India*[142]A bench headed by Justice B.S. Chauhan had refused to frame guidelines regarding ban on hate speeches itself, asked the commission to look into it and give its recommendation to the Centre.

Actually the statistics suggests that court has no time rather less interested in the PIL matters entertained in recent years. In actuality, PIL makes up a relatively small per cent of the Supreme Court's docket (between 1-2% of both its admission and regular hearing docket from 2005-2011), and these cases are accepted for regular hearing less often than average.[143] The letters instead of appearing before a judge, they are combed through by Court staff and those letters that meet the requirements for public interest litigation listed on the Supreme Court website[144] are then listed as admission matters before the judges. For example, in 2008, 24,666 letters were sent to the Court of that only 226 were then placed before judges, who then accepted or rejected them for regular hearing.

With a view to "preserve the purity and sanctity" of PIL, the Supreme Court issued specific directions in *State of Uttaranchal* v. *Balwant Singh* Chaufal[145] as under:

- The courts must encourage genuine and bonafide PIL, and effectively curb PIL filed for extraneous considerations.
- Instead of every individual judge devising his own procedure for dealing with the PIL, it would be appropriate for each High Court to properly formulate rules for encouraging the genuine PIL and discouraging the PIL filed with oblique motives.

[140] AIR 2002 Del. 440.
[141] (2014) 7 SCALE
[142] Decided on March 12, 2014.
[143] Nick Robinson, "The Indian Supreme Court by the Numbers" *LGDI Working Paper No 2* (December 14, 2012) *available at*: http://www.azimpremji university. edu.in/sites/default/files/userfiles/files/ LGDI_ WorkingPaper_ 14December 2012_T he%20Indian%20Supreme%20 Court%20by%20the%20Numbers_ NickRobinson.pdf (Visited on October 19, 2014).
[144] Supreme Court of India, Compilation of Guidelines to be Followed for Entertaining Letters/Petitions, *available at*: http://supremecourtofindia.nic.in/circular/guidelines/pilguidelines.pdf (Visited on October 19, 2014).
[145] *Supra* Note 42.

- The registrar general of each High Court was directed to ensure that a copy of the rules prepared by the High Court was sent to the secretary general of the Supreme Court immediately thereafter.
- The courts should *primafacie* verify the credentials of the petitioner before entertaining a PIL.
- The court should be *prima facie* satisfied regarding the correctness of the contents of the petition before entertaining the PIL.
- The court should be fully satisfied that substantial public interest was involved before entertaining the PIL.
- The court should ensure that the PIL which involves larger public interest, gravity and urgency is given priority over other petitions.
- The courts, before entertaining the PIL, should ensure that the PILwas aimed at redressal of genuine public harm or public injury.
- The court should also ensure that there was no personal gain, private motive or oblique motive behind filing the PIL.
- The court should also ensure that the petitions filed by busybodies for extraneous and ulterior motives must be discouraged by imposing exemplary costs or by adopting similar novel methods to curb frivolous petitions or petitions filed for extraneous considerations.

The analysis of PIL "cases" shows that they do not appear to consume a significant share of the resources of the Supreme Court; they constitute less than 1% of the overall case load.[146] The subject matter of PIL cases and orders remains difficult to discern because over 70% of them are classified as "other," which is problematic from the point of view of judicial transparency.[147]

VII.CONCLUSION

PIL today constitutes a significant segment of the expanding judicial repertoire and has acquired legitimacy. Through the new jurisdiction the judges have undertaken expanded responsibilities as critics and monitors of the governments and its agencies.PIL has served well over the years as a strategy to enhance the credibility of the judiciary as an institution. Subjective, and hence arbitrary, exercise of power would, however, destroy the credibility of PIL itself.PIL cannot provide an avenue for substituted governance nor can the court, in a democratic set up governed by separation of powers, assume the task of governance which the Constitution leaves to the elected representatives or to expert bodies who are accountable to the collective wisdom of the legislature. Ideologically, PIL activism performs a formidable task of addressing and confronting domination formations in civil society and activates public discourse on practices of power. The significance of this movement lies in the creation of norms for a just and equal society.

[146] Published by Supreme Court in its Annual Report (2007-2008), *available at* :supreme court of India. nic.in/annual report/annual report2007-08.pdf (Visited on October 9, 2014).
[147] *Supra* note 51.

P ERCEPTION OF PARALLEL IMPORT AND THE INTELLECTUAL PROPERTY L AWS IN INDIA

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INTRODUCTION

The import of Non-Counterfeit or Genuine Goods from one country to another without the permission of the IP owner basically constitutes Parallel Imports. The import of goods is for sure lawful, yet is unapproved on the grounds that they are imported without the authorization of the trade mark holder. The items hence imported are regularly named as Gray Products (and not duplicate, inferable from the way that they are Genuine). The Parallel Imports cases are firmly identified with Trademarks and Copyrights and furthermore similarly to the International Trade Market, for all intents and purposes saw when individuals import products (for instance books or cell phones) which have Trademarks and Copyrights connected with them. Both Intellectual Property law and competition law regulated parallel importation as an essentially a trade practice. In the trademark law context, the rights of a manufacturer or trader are significantly affects by the parallel importation, as trademarks helps and protect the trademark holder and related traders to earn goodwill in the market and to protect their commercial reputation. As territorial rights, trademarks also indicate the source of the trademarked products or services. A conflict of interest between the traders arises when parallel importation results in a misrepresentation of the source, reputation or quality of the trademarked goods. The first statutory provision on parallel import was introduced in patent amendment act, 2002.

MEANING

Parallel import means that patented or marked goods are purchased in a foreign market and resold in the domestic market. These are known as passive parallel imports. Instead, active parallel imports occur when foreign licensees enter the market in competition with the holder of the patent or of the trade mark[148].

According to WTO 'When a product made legally (i.e. not pirated) abroad is imported without the permission of the intellectual property right-holder (e.g. the trademark or patent owner). Some countries allow this, others do not.[149],

Parallel or grey-market imports are not imports of counterfeit products or illegal copies. These are products marketed by the patent owner (or trademark- or copyright-owner, etc) or with the patent owner's permission in one country and imported into another country without the approval of the patent owner.

[148] CONLEY, Parallel imports: the tired debate of the exhaustion of intellectual property rights and why the WTO should harmonize the haphazard laws of the international community, in Tulane Journal of International and Comparative Law, 2007, 189, 190 s.
[149] https://www.wto.org/english/thewto_e/glossary_e/parallel_imports_e.htm.

CLASSIFICATION OF PARALLEL IMPORT

- **Passive parallel imports**: It occurs when patented or marked goods are purchased in a foreign market and resold in the domestic market.

- **Active parallel imports**: It occurs when foreign licensees enter the market in competition with the holder of the patent or of the trade mark.

PARALLEL IMPORT AND INTELLECTUAL PROPERTY RIGHTS

COPYRIGHT

Earlier the definition of 'infringing' copy under Sec 2(m) of Indian Copyright Act was not broad, but since the Amendment, the meaning has been broadened which now clearly states "Provided that a copy of a work published in any country outside India with the permission of the author of the work and imported from that country shall not be deemed to be an infringing copy"[150]

TRADEMARK

Section 30(4) of the Indian Trademarks Act very evidently states that "Sub-Section (3) shall not apply where there exist legitimate reasons for the proprietor to oppose further dealings in the goods in particular, where the condition of the goods, has been changed or impaired after they have been put on the market." This section allows the Trademark owner to control the circulation of goods."[151]

The two major issues that are often discussed regarding the Parallel Imports and Trademarks in India are Whether Parallel Imports make up Infringement under Section 29 of the Trademarks Act and Whether India recognises the principle of 'International Exhaustion of Rights' under Section 30 of the Trademarks Act.[152] One of the first cases concerning parallel importation and trademark law in India was *Cisco Technologies v Shrikanth*[153], in which the Delhi High Court granted an ex parte injunction in favour of the plaintiff and restrained the defendant from importing computer hardware and hardware components under the trademark CISCO (which was registered in India).

Samsung Electronics Co Ltd v Mr G Choudhary[154], Samsung argued that the sale of parallel-imported ink cartridges and toners did not strictly conform to Indian laws and regulations (eg, they were not accompanied by literature in English or the vernacular, and/or a label indicating the maximum retail price; they were not covered by a warranty; and use of the products would likely breach the warranty of the printer in which they were used). The Delhi High Court restrained the defendant from dealing directly or indirectly in those products.

In *Kapil Wadhva v Samsung Electronics*,[155] the Delhi High Court Division Bench reinforced the legality of parallel imports and held that the Trademarks Act enshrines the principle of

[150] Section 2(m) of Indian Copyright Act (amended Section)
[151] Section 30(4) of the Indian Trademarks Act, 1999.
[152] Article on Parallel import issues under Indian trademark law by; *Ashutosh Kane & Sakshi Pande.*
[153] 2006 (31) PTC538.
[154] 2006 (33) PTC425.
[155] 2013 (53) PTC112.

international exhaustion of rights. In other words, it held that the exclusive right of a trademark owner over its goods is exhausted once the goods have been put on the market either by the trademark owner or with its consent. The court held, among other things, that the word 'market' used in the statute implies a global market, and that the preparatory works to the Trademark Bill 1999 clearly indicate the intent of the legislature to recognise the principle of international exhaustion of rights to control further sales of the goods once they have been put on the market by the trademark owner.[156]

CONSEQUENCES OF PARALLEL IMPORTATION

Parallel importation has both economic and legal ramifications. Economically, it promotes the availability of trademarked goods at different prices, which prevents the establishment of a trade monopoly., A monopolistic approach in a parallel import-free market would lead to inflated prices of the goods sold by the trademark owner or authorized dealer. In the absence of cheaper alternatives, consumers would be obliged to purchase goods at the price set by the monopolist. This could have an adverse effect on the overall market, as well as on supply and demand.[157]

To protect the economic and legal interest of the trademark owner and to prevent deception and confusion in the mind of the consumers regarding the source or quality of products of the trade mark holder as good will is attached to it in the market, it can only achieved if the parallel imported products are materially different in the shape, size and in its appearance from those sold directly in the market can a trademark owner file suit, including for passing off, civil remedy or Criminal remedy

Therefore, it does have not only the negative effect but has also the positive impact in the market also as parallel importation is that it forces prices down of the products in the market and provides consumers with goods at lower prices. Parallel imports prevent trademark owners from exercising their exclusive right to divide markets and thus promote free trade, subject to the exhaustion doctrine followed in the particular country. But on the other hand the negative impact is that the manufacturer's distribution arrangements and ability to monitor the quality of trademarked goods are restricted. Parallel imports are also basically used as a tool and mechanism to cash in on the reputation and goodwill of the trademark owner; this can also give rise to an action for the civil remedy i.e passing off.

In parallel importation, consumers may benefited from lower prices for trademarked goods, but parallel imports do not necessarily guarantee quality assurance or an aftercare service, and may thus result in consumer dissatisfaction and cause damage to the reputation and goodwill of the trademark. On a more practical note, however, the consumer as end user of the products and has the ultimate choice and is the ultimate beneficiary of parallel trade. Most consumers in India would purchase an Apple Mobile phone or Sony product from authorized dealers only and would be aware of the repercussions if they did otherwise. Similarly, in the case of pharmaceuticals, consumers would generally exercise extra caution and purchase the same from trusted distributors, chemists or hospitals.

156 http://www.worldtrademarkreview.com.
157 http://www.worldtrademarkreview.com.

PRINCIPLE OF EXHAUSTION

Exhaustion of IP rights refers to the extent to which Intellectual Property rights holders can control the distribution of their branded goods. According to the concept of exhaustion, once Intellectual Property right holders sell in a particular jurisdiction a product to which their Intellectual Property rights are attached, they must allow the resale of that product in that jurisdiction. The Intellectual Property rights covering the product have been "exhausted" by the first sale in the market.

The principle of exhaustion of intellectual property rights has been developed by different hon'ble courts and legislatures to balance exclusive intellectual property rights both in primary and secondary markets. This principle of parallel import, however, is repeatedly challenged by the rules and regulations of international trade, and such as digital or self-replicating technologies more recently by the emergence of e-commerce and the Internet and its application to new technologies, also giving the importance to this practice. Despite the importance of this principle of this parallel import, academic research in this area of parallel is still scarce and scattered.[158]

TYPES OF EXHAUSTION

There are two type of exhaustion related to the practice of the parallel import. Such as

- National Exhaustion (or regional)
- International Exhaustion

"International (or Global) Exhaustion of Rights"

"International Exhaustion" is the principle that, the trademark owner has exhausted its trademark rights in relation to the sale of those goods anywhere in the world once goods in relation to which the trademark is used have been put on the market by a trademark owner or with its consent somewhere in the world. It is depend upon the consent of the trademark holder to give his consent or not but once he gives his consent he has exhausted his right over his product.

"National (or Regional) Exhaustion of Rights"

"National Exhaustion" describes a that type of rules that considers the brand owner's trademark rights over his product has been exhausted for a specific country or region once goods in relation to which the trademark is used have been put on the market in this particular country or region by the trademark owner or with his consent. The national exhaustion does not extend to other regions or countries thereby allowing the trademark owner to rely on its trademark rights to prevent the unauthorized sale of these goods in other markets.[159]

India has adopted the national exhaustion principle in order to regulate parallel imports, the same principle has being added under Section 30 of the Trade Marks Act 1999 (the 1999 Act). According to this principle, in a domestic market or within the territory of the country if once the goods are sold in which the trade mark is registered, the owner of that said trade

[158] https://arciala.smu.edu.sg/intellectual-property-exhaustion-and-parallel-imports.
[159] http://www.inta.org/Advocacy/Pages/ParallelImportsGrayMarket.aspx.

mark loses his rights over the goods and products and cannot prevent any subsequent sale of the same product in the domestic market of that country. Section 107 of the 1999 Act also authorizes representation of a trade mark registered abroad to operate in India as long as the same is sufficiently indicated in English.[160]

EXCEPTIONS PRINCIPLE OF EXHAUSTION

A parallel import is a practice whereby an unauthorized third party exploits the doctrine of exhaustion and imports goods which are less expensive in one country to be sold parallel with more expensive goods which are either non imported or imported from a source controlled by the trademark owner. Parallel importation refers to the import of goods outside the distribution channels contractually negotiated by the manufacturer. Because the manufacturer / Intellectual Property owner has no contractual connection with a parallel importer, the distribution channels are not controlled by the manufacturer/IP owner and hence he opposes such importation in order to separate his market.[161]

INTERNATIONAL LAWS ON PARALLEL IMPORTS

Many laws, legislation and conventions has been framed and implemented in order to curb this type of practice where the interest of the registered owner of the Intellectual property Right has been violated and infringed. Such as

- Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)- Article 6 states that "nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights"
- Since the 'Paris Convention' and the 'Berne Convention' are silent on the issue of parallel importation, other international treaties may influence domestic law on this point.

CONCLUSION

Intellectual Property Rights are the rights given to intellectual mind over the creation of their minds. Intellectual property laws protects and secure the person who has been registered with an exclusive right over the use of his or her creation for a certain period of time, where he can enjoy the rights arises due to his intellectual property and this law also gives him the right to take action against the violator of his right.

Parallel Import promotes Free Trade and encourages competition in the market, other than facilitating Trademarked or Genuine goods to be available at different prices; it also allows the consumers to have an option to buy genuine goods at a cheaper price. One should also understand that if Parallel Imports are done away with, the manufacturers will have their own business monopolies, leading to goods being available at higher prices. It provides the branding product available to the all persons at very cheap and affordable prices. This practice should be curbed in order to secure the interest of the registered owner because it is his intellectual property and that should also be protected by the laws and legislations.

[160] https://www.slideshare.net/chaswals/ip-rights-and-parallel-imports-compatibility-mode.
[161] ibid

COMPULSORY LICENSING OF PATENTS WITH SPECIAL REFERENCE TO NATCO CASE

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ABSTRACT

Patent is one of the Intellectual Property Right granted for an invention to an inventor, which gives the inventor the exclusive right of manufacturing, exploiting, using and selling that patented invention thereby restricting others from manufacturing, exploiting, using and selling the same. However, in the interest of general public as mentioned under section 84(1) of the Patent Act, 1970, provision for compulsory license has been introduced. This paper explains the concept of compulsory license under Indian Patent regime in brief and will specifically deal with the lacunae present in the grant of compulsory license after the Patent (Amendment) Act, 2005, as to whether the idea of embedding the provision for compulsory license in real sense is being served or not. An effort will be made to identify the lacunae in granting of compulsory license and suggestions for the same.

Introduction

The origin of Patent law in India can be traced back to the United Kingdom's law and practice on Patent. The first legislation in India relating to Patent was the Act VI of 1856. The objective of this legislation was to encourage inventions of new and useful manufactures and to induce inventors to disclose secret of their inventions. Subsequent to this, several amendments were made to the Patent Act accordingly. The list of which is given below:

1872 THE PATENT & DESIGNS PROTECTION ACT.
1883 THE PROTECTION OF INVENTIONS ACT.
1888 CONSOLIDATED AS THE INVENTIONS & DESIGNS ACT.
1911 THE INDIAN PATENT & DESIGNS ACT.
1972 THE PATENT ACT (ACT 39 OF 1970) CAME INTO FORCE ON 20TH APRIL 1972.
1999 ON MARCH 26, 1999 PATENT (AMENDMENT) ACT, (1999) CAME INTO FORCE FROM 01-01-1995.
2002 THE PATENT (AMENDMENT) ACT 2002 CAME INTO FORCE FROM 2OTH MAY 2003
2005 THE PATENT (AMENDMENT) ACT 2005 EFFECTIVE FROM 1st JANUARY 2005[162]

Among these the Patent Act of 1970 is known as the Parent Act for Patent legislation in India and the provisions of this Act are still in force under the Indian Patent regime in India. The Indian Patent Act of 1970 was modeled on the British Patent Act of 1949 as amended. However the Indian Patent Act granted only 'Process Patent' earlier and it was only from the 1st January, 2005 'Product Patent' for food, medicines and chemicals were introduced in the Indian Patent Law regime.

[162] http://ipindia.nic.in/ipr/PatentHistory.htm; as accessed on 16th Feb, 2019

Background of Compulsory License

When TRIPS (Trade Related Aspects of Intellectual Property Rights) Agreement was introduced in 1994, it reduced the discretionary powers of WTO members to customize key elements of their national intellectual property regimes. In January 1995, when WTO came into existence, the TRIPS Agreement, building on the existing multilateral treaties administered by the World Intellectual Property Organization (WIPO), introduced minimum standards for protecting and enforcing intellectual property rights to an extent previously unseen at the global level, including new monitoring and dispute settlement mechanisms, Article 27.1 of the TRIPS agreement requires WTO members to make Patent "available for any inventions, whether products or processes, in all fields of technology", at the same time, TRIPS also provides a reasonable fetter on the rights of the Patentee in the form of Article 30 and 31, in line with Paris Convention, thereby allowing member countries to enact provisions, inter alia, for granting compulsory license to prevent the abuse of Patent right. Compulsory license under the Patent system is an involuntary contract between a willing buyer and an unwilling seller imposed and enforced by the State. The WTO states compulsory licensing is when a government allows someone else to produce the patented product or process without the consent of the patent holder. India joined TRIPS and the deadline for complying with TRIPS obligations was January 1, 2005. Thus, the Patent Act, 1970 was amended to make it fully compatible with TRIPS.[163]

Compulsory licensing is one of the most important aspects of the Indian Patent Act, 1970, subject to the fulfillment of certain conditions. At any time after the expiration of three years from the date of the sealing of a patent, any person interested may make an application to the Controller of Patent for grant of compulsory license of the Patent, subject to the fulfillment of following conditions, i.e. (under section 84[164])

- The reasonable requirements of the public with respect to the patented invention have not been satisfied; or
- That the patented invention is not available to the public at a reasonable price; or
- That the patented invention is not worked in the territory of India.

It is further important to note that an application for compulsory licensing may be made by any person interested notwithstanding that he is already the holder of a license under the patent. The Controller, if satisfied that the reasonable requirements of the public with respect to the patented invention have not been satisfied or that the patented invention is not available to the public at a reasonable price, may order the patentee to grant a license upon such terms as he may deem fit. However, before the grant of a compulsory license, the Controller of Patent shall take into account following factors:

- The nature of invention;
- The time elapsed, since the sealing of the patent;
- The measures already taken by the patentee or the licensee to make full use of the invention;
- The ability of the applicant to work the invention to the public advantage;
- The capacity of the applicant to undertake the risk in providing capital and working the invention, if the application for compulsory license is granted;

[163] http://www.ipindia.nic.in/; Indian Patent Office; as accessed on 19nd Feb, 2019
[164] Indian Patent Act, 1970

- As to the fact whether the applicant has made efforts to obtain a license from the patentee on reasonable terms and conditions;
- National emergency or other circumstances of extreme urgency;
- Public non commercial use;
- Establishment of a ground of anti competitive practices adopted by the patentee.

The grant of compulsory license cannot be claimed as a matter of right, as the same is subject to the fulfillment of above conditions and discretion of the Controller of Patent. Further judicial recourse is available against any arbitrary or illegal order of the Controller of Patent for grant of compulsory license.[165]

Purpose of Compulsory Licensing

The very purpose of compulsory licensing is the welfare of the public at large. The provision of compulsory license has been embedded in the statute so as to curb the monopoly practices of the Patent holders and strike a balance between the Patent holder and the general public at large. Despite of the provisions being present in the statute, the purpose of its incorporation is not being fulfilled. As we can see the fact that India has recently granted its first compulsory license Post Patent (Amendment) Act, 2005. Before that no compulsory license has been granted earlier. Notwithstanding the fact that many applications have been filed before the Controller of Patent office for grant of compulsory license but none of them have been granted with the same. So where is the problem lying, is it in the provisions itself or is it in the procedure of granting compulsory license, or is it the pressure of the multinational companies over Indian economy, opposing the grant of compulsory license.

Problems in the Pharmaceutical industries in India with the advent of Product Patent

The position of the Indian Pharmaceutical industry is one of the largest in the developing world. Since past 30 years Indian drug industry has grown from almost non-existent to a world leader in the production of generic drugs. Indian drug manufactures became experts in the field of reverse engineering and increased its supply of less expensive copies of the world's best-selling patent protected drugs. This could only be possible because there was no product Patent system for drugs and medicines. While the Patent Act of 1970 provides only a process patent for food, medicine or drug substances and specifically excluded product Patent for the same. Thus India was able to copy foreign patented drugs without paying a license and was able to make it available to the public at one-tenth of the original price. During those days of Indian Generics, India (as per the Patent Act of 1970) did not recognize product Patent in areas considered vital to human life - food and health. Therefore none of the pharmaceutical patent were valid in India with respect to any drug or medicine; thereby it allowed the Indian companies to manufacture the generic medicines without licensing to the Patent holder as long as the process used for manufacturing was different from that used by the original company having patent over the end product/medicine. Thus, the Indian pharmaceuticals became experts in reverse engineering. This facilitated Indian generics to compete in the world market most importantly by providing medicines at an affordable price to the world that badly needed them. The best example for this is the antiviral drugs manufactured by Cipla. These generics were made available in Africa as well as South

[165] Dalmia vijay Pal and Katoch Pavit Singh; available on www.mondaq.com

America. The availability of these generics at an affordable price no doubt had a great effect on curtailing the spread of the HIV epidemic.[166] But at present, the scenario has been changed, now with the latest amendment made to the Patent Act i.e. the Patent (amendment) Act, 2005, it has brought within its scope the product patent under the Indian Patent regime. Thereby causing impediment to generic producers of drugs/medicines in pharmaceutical industries, the solution of which is the grant of compulsory license to the generic producers of pharmaceutical industries. So, with the latest amendment made to the Indian Patent Act in the year 2005, there has been a restriction on the Indian pharmaceutical industries to manufacture the drugs at reasonable price. In this situation, the provisions for compulsory licenses should be encouraged to tackle with this problem of Indian pharmaceutical industries.

The need of Compulsory Licensing in the Indian Patent Regime

- Health Crisis

Millions of people die every year from communicable or vulnerable diseases like HIV/AIDS, diarrheal diseases, malaria, tuberculosis and chronic disease like cancer. The death toll in developing country like India is unacceptably high, one of the major reasons for this is lack of supply of effective and affordable medicines and access of these medicines /drugs to the patients, which will be possible only when the government grants compulsory license to the pharmaceutical industries producing generic drugs at affordable prices.

- Public Interest

Keeping public interest in mind, compulsory licensing is one of the key solutions for the Indian Pharmaceutical industries to grow. Allowing compulsory licensing is the need of the hour, with the advent of the product patent through Patent (amendment) Act, 2005, the patent holders, in order to gain more profits do not want to give voluntary licenses to other pharmaceutical industries engaged in producing generic drugs with exorbitant prices, thereby enjoying monopoly over the patented medicines/drugs. Thus, there is a great need for the government to give effect to the enabling provisions of compulsory license under the Indian Patent regime.

- Compatibility with TRIPS

Agreement on trade related intellectual property rights (TRIPS) contains certain provisions that can be used to limit the Patent holders rights. These limitations or exceptions are to be effected through national legislation, in order to curb abuses of intellectual property rights and anti-competitive practices, and generally, to offset the negative impact of patent monopolies. One of the most important measures includes the right of the government to grant compulsory licenses. So, in order to be compatible with the TRIPS, the provisions of Compulsory Licensing need to be encouraged.

[166] Accesed from www.indiabioscience.org; as on 28th Feb, 2014.

- Due to emergence of Product Patent

With the emergence of product patent, the prices of patented product or the branded products went exorbitantly higher than the prices of similar medicines produced by alternative or generic sources and because of lack of license granted to the pharmaceutical companies engaged in producing the generic drugs, it has become very difficult for them to manufacture the same drugs even by reverse engineering, thereby causing great harm to the generic pharmaceuticals industries in developing country like India and other under developed countries and also to the citizens of those countries at large, who cannot afford the medicines at such high prices. Thus, compulsory licensing is a means to solve these ever increasing problems of the developing countries.

A comparison of prices for HIV/AIDS medicines illustrates the fact that the drug MNCs sell their medicines at much higher prices than those of generic producers. For example, the US price of 3TC (Lamivudine) marketed by Glaxo is USD3,271 (per patient per year) whilst Indian generic manufacturers, Cipla Ltd. and Hetero Drugs Limited, offer their generic versions for USD190 and USD98, respectively. In the case of Zerit (Stavudine), the US price offered by Bristol-Myers Squibb is USD3,589 (per patient per year) as compared to USD70 and USD47 for the generic versions by Cipla and Hetero, respectively. As for Viramune (Nevirapine) marketed by Boehringer Ingelheim, the US price is USD3,508, compared to the Cipla and Hetero prices of USD340 and USD202 (Kavaljit, 2001). This point is further illustrated by Cipla's recent offer of USD350-600 for a year's supply of a combination of these three anti-AIDS medicines, as compared to the price of USD10, 000-15,000 for the branded medicines. [167]

Thus, Compulsory licensing enables a government to issue a license to a third party, whether a private company or government agency, for the right to use or exploit a patent without the patent holder's consent. Compulsory licensees generally compensate the patent holder through payment of royalty. It is a mechanism which is used to promote competition and prevent abuse of patent rights and monopolies. In the context of pharmaceutical Patent, grant of compulsory license constitute an important tool to promote competition and increase the affordability of drugs, without depriving the patent holder of reasonable compensation in terms of royalty.

Provisions relating to compulsory licenses are provided in Article 31 of the TRIPS Agreement. Article 31 makes specific mention of five possible grounds for the granting of compulsory licenses; that is, in cases of refusal to deal, in situations of national emergency and extreme urgency, to remedy anti-competitive practices, in cases of public non-commercial use and to facilitate the use of dependent Patent however, Article 31 does not lay down an exhaustive list of grounds for the issuance of licenses, Member should be free to determine further grounds for the issuance of compulsory licenses. Therefore, the TRIPS Agreement does not limit the right of countries to establish compulsory licenses on other grounds not explicitly mentioned .The Paris Convention on the Protection of Industrial Property recognizes the right to grant compulsory licensing on the ground of failure to work

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[167] Cecilia Oh; trips, Patent and access to medicines: proposals for clarifications and reforms; June 2011; available on www.twnside.org.sg; as accessed on 02nd Jan,2019.

or insufficient working (Article 5A). This provision of the Paris Convention is incorporated into the TRIPS Agreement. On this basis, failure to work, or insufficient working of, a patent should be a legitimate ground for the issuance of compulsory licenses. From a developing country perspective, the local working of a patent is desirable, apart from its being necessary for making products available and affordable, but also for technology transfer opportunities and reduced foreign exchange expenditure caused by purchasing imports. However, the developed countries, EU and the US, in particular have tried to press for a very narrow interpretation of the TRIPS Agreement, one which seeks to prohibit the grant of compulsory licenses on the ground of non-working of a patent.[168] Whereas, for a developing country like India, it is in the public interest to encourage domestic production of patented medicines, for the purposes of controlling and preventing diseases, and in the interests of availability and affordability, compulsory licensing will be a vital policy tool.

Cases/Applications filed for grant of Compulsory License

- Natco Pharma Ltd. v. Bayer Corporation
- BDR v. BMS (Bristol Myers-Squibb's Dasatinib.(application u/s 84)
- In July, the Department of Industrial Policy and Promotion (DIPP) denied the Ministry of Health's compulsory licence application for Roche's Trastuzumab (Herceptin). Request was made under section 92 of Indian Patent Act, which allows for the government to file for a license for cases of national emergency.

Among these cases only Natco Pharmaceutical has been granted compulsory license.

Giant Pharma MNC's like Bayer Corp. is an ideal example of those MNC's which have captured the Indian Pharmaceutical market by selling their patented dugs at exorbitantly high price & the Indian patients are compelled to buy these life saving drugs thus overloading their expenses. In this case Natco Pharma Ltd tried to negotiate with Bayer Corp .to get a voluntary license to sell generic version of patented drug, but Bayer Corp. in order not to lose the market capture denied to grant the voluntary License to Natco PharmaLtd. The recent grant of first compulsory license by the Indian Patent office to an Indian Generic company Natco Pharma Ltd allows Natco Pharma Ltd to sell Bayer's patented drug Nexavar in India.

Grant of compulsory License to Indian generic company, Natco Pharma Ltd was a landmark decision which was given by Indian Patent office on 09th March 2012 .According to the decision the Controller General directed Natco Pharma to sell the generic version of liver/cancer drug Nexavar at a price 30 times lower than sold by its patent holder ,Bayer Corporation. Giant German Pharma company, Bayer corporation used to sell the patented drug Nexavar at price of Rs. 2 lakhs per month which was exorbitantly high price and was unaffordable for the patients .Moreover , even after the lapse of three years the patentee had not worked the patented invention within the territory of India .Considering above terms and conditions compulsory license was granted by Indian Patent Office under section 84 of the Indian Patent (amendment) Act, 2005 to Natco Pharma Ltd. On 4th May,2012 , German Pharma Giant ,Bayer Corporation filed an appeal with the Intellectual Property Appellate

[168] Cecilia Oh; trips, Patent and access to medicines: proposals for clarifications and reforms; June 2011; available on www.twnside.org.sg; as accessed on 02nd Jan, 2019.

Board against this decision of controller to grant compulsory license to Indian generic company, Natco Pharma to sell the generic version of the drug Nexavar.

The IPAB is the statutory forum which was earlier constituted to hear & rule appeals against the decisions of the Registrar under the Indian Trade Marks Act, 1999 and the Indian Geographical Indications of Goods (Registration and Protection) Act, 1999.The IPAB since 2nd April, 2007 has been extended to Patent law and is now authorized to hear and adjudicate upon appeals from most of the decisions, orders or directions made by the Patent Controller. Also, from April 2007, all pending appeals from Indian High Courts under the Patent Act have been transferred to the IPAB. IPAB in this case after considering the facts and conditions of this case has upheld the grant of compulsory licensing to the Natco Pharma.[169]

India granted its first compulsory license on 9th Mar, 2012 Bayer v. Natco (Nexavar) i.e. seven years after the Patent (amendment) Act, 2005. Until then there was no grant of compulsory license in any case. Not only has this, after Natco's case almost a year has been elapsed and still no compulsory license been granted. Another application for grant of compulsory license was filed at the Indian Patent office (IPO) by BDR Pharmaceuticals International Pvt. Ltd., a generic company, having its headquarters at Mumbai. Its compulsory license application covers Dasatinib, an anti cancer drug patented by BMS. In early 2012, BDR approached BMS for grant of voluntary license. In response BMS asked for more extensive and elaborative set of documents/facts. Thus, BDR sent a note to the Indian Patent Office stating that BMS was not willing to grant the license and that the information called by BMS was irrelevant, it was nothing more than a delay tactics, thereby considering BMS letter as a refusal. Thus, it filed a compulsory license application before the Indian Patent Office. BMS sells Dasatinib at Rs 1,68,000 (USD 3000 approximately) per month. BDR in its application has offered to sell at Rs 8100 (USD 150). It has also offered to hand it out free to any patient that cannot afford the drug. Based on the above brief facts, BDR's application for compulsory license have been rejected by the Indian Patent Office. If public interest has been kept at paramount interest in Natco case, then why not it has been considered in the BDR's case too. Why the application was delayed and later was rejected by the Indian Patent Office to grant compulsory license. The more the delay and more the legal impediments thrown up, the greater is the disincentive faced by prospective Compulsory License filers. And so long as the Compulsory License provisions are on the statute book, the government must ensure that they are speedily processed so as to not frustrate the process.

Another case is Trastuzumab, a life-saving drug for women with breast cancer. Trastuzumab, which is currently priced at Rs.6-8 lakhs for a full course of 12 injections, and is out of reach for all but the most privileged. Its patent has been held by Swiss pharma giant Roche. An estimated 25,000 new cases of HER2+ breast cancer are recorded in India every year, with younger women in the majority among patients. Thus, Trastuzumab has been recommended for compulsory licensing by an Expert Committee set up by the Health Ministry. The Campaign has urged the Minister to issue a notification under Sections 92 and 100 of the Indian Patent Act, which will end Roche's monopoly and open the door for local manufacturers to enter the market with affordable biosimilar versions that can compete with

[169] Umang S; Assistant Professor ,Department of pharmaceutical Chemistry; as available at www. linkedin.com

Roche's product.[170] But the recommendation is still under the consideration of the Department of Industrial Policy and Promotion in the Ministry of Commerce and no compulsory license have been granted to it, inspite of it being so expensive and knowing the fact that that will bring relief to thousands of Indian women and their families who are struggling to deal with breast cancer and its economic, social and personal costs.

The provisions of compulsory license have been enacted in the Indian Patent regime since the Patent Act of 1970 itself. But how many compulsory licenses have been granted. The study shows that under the Patent and Designs Act 1911, 59 applications for compulsory licenses were filed, of which 20 were granted. Under the Patent Act 1970, eight applications for compulsory licenses were filed, of which four were granted, two were withdrawn, one remains pending and one was refused on the grounds that the patent term had expired[171]. After the recent amendment to the patent act i.e. the Patent (Amendment) Act, 2005, India granted its 1st compulsory license. Before this no compulsory license was granted. So, the basic question is, what is the problem behind this; is there any procedural problem in grant of compulsory license or there is a lot of legal formalities to be undertaken for the grant of compulsory license?

As we can see that after almost seven years of the latest amendment to the Patent Act, India granted its 1st compulsory license to Natco. There are several other drug manufacturing companies engaged in manufacturing of generic drugs in India at a reasonable affordable price, but in order to become TRIPS compliant product patent was introduced in India, thereby creating difficulties for the Indian companies to manufacture the said drugs as they earlier manufacture. So, there's a great need to grant compulsory license to these companies, as they do not get voluntary license by the companies who have patented these life saving drugs and because of fear of losing their monopoly in the market these companies specially the multinational companies do not grant voluntary license to others, thus, in this case the government should not delay in granting the compulsory license and should bring flexibility in the procedural and legal formalities for grant of compulsory license.

Suggestions

- Simplification of procedural requirements/conditions:

The procedural conditions which have to be met before granting of compulsory license or in the process of granting of compulsory licenses should be simplified, as these conditions often cause impediments or obstacles to respond effectively or speedily to address the public health problems. Thus, effort should be made to ease the procedure of granting compulsory license in the field of pharmaceuticals.

- The grounds for grant of compulsory license should be clear and unambiguous and should be interpreted in the interest of the public at large:

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[170]Menon Nivedita; Campaign for Affordable Trastuzumab; available on www.kafila.org

[171]**Sanjay Kumar** and **Arpita Sawhney**; the pitfalls of compulsory licensing in India.

The grounds necessary for the grant of compulsory licensing like failure to work or insufficient working of a patent should be interpreted in the larger interest of the public. This will help the developing countries like India to produce domestically, thereby reducing the foreign exchange expenditures caused by purchasing imports.

- Flexible interpretation should be given to the provisions with respect to the ability of a compulsory licensee to export the medicines/drugs worldwide:

TRIPS agreement permits export of medicines manufactured under grant of compulsory license and should be interpreted flexibly with regard to amount of export. This ability to export will provide an incentive to compulsory licensees, so as to enable the generic producers to have economies of scales and thus be cost effective, at the same time, it will lead to greater volume of supply of medicines that too at more reasonable or affordable prices to other countries in order to address several public health needs.

- Moreover, granting of compulsory license by the controller of Patent office is a matter of technical knowledge i.e. the controller should be well-equipped with the technicalities present in every case for either grant/rejection of the compulsory licensing in the field of pharmaceuticals. Thus, it is of great importance to have trained personnel, well-equipped and trained examiners who can do justice with the cases brought before them.

Conclusions

Hence by going through the problems stated above and there is a need for reforms to the present Patent law regime with respect to the grant of compulsory license in India, we can conclude that keeping in mind the present scenario of Indian pharmaceutical industries engaged in producing generic drugs/medicines, compulsory licensing is the need of the hour. As the major population of developing country like India is basically the middle and low income group. This group of the population cannot afford the patented drugs at their exorbitant prices and can afford or rely only on generics. So, by granting compulsory licensing to generic producing companies, the pharmaceuticals can not only increase the reach of their drug but can also make sufficient profits (through royalties). Whatever the loss incurred by the company might be, it cannot be worse than the loss of lives of the public at large due to unavailability of the life saving drug. Now, it is time to look differently and protect the people for whom the drugs are actually manufactured rather than the profits. Thus, it can be said that now the time has come when provision of Compulsory Licensing should be implemented and strictly be imposed on the Multi National Companies for whom making money or profit motive is the only motive and are least interested in public welfare.

Therefore, the government should put every effort to bring in substantial changes in the present Patent law, which could help India to have an effective and efficient patent regime with respect of both i.e. to meet the international commitments and at the same time to meet the needs of the public at large. Hence, keeping in mind the present scenario, we can say that the provision of compulsory license seems to be one of the best solution for the Indian Pharmaceuticals companies engaged in manufacturing of generic drugs specially the life saving drugs/medicines to manufacture and sell the branded or patented drug (with exorbitantly high price) in the market at reasonable affordable prices for the general public at large.

-COMMERCE AND CONSUMER RIGHTS IN INDIA

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ABSTRACT

It is an established fact that the consumer plays an important role in an economy. With the 'e'-revolution, E- commerce has emerged as the potential symbol of a virtual economy as consumers do not have to go to physical market for shopping; almost all their needs are only one click away. Though modern technological developments have made a great impact on the quality, availability and safety of goods and services but the fact remains the same that the consumers are still victims of exploitative practices. 'Customer is the king' is nothing but a misnomer in the present times. The Consumer Protection Act, 1986 was enacted to provide speedy and inexpensive remedy to the aggrieved consumers however with the growth of e-commerce, the disputes in such businesses have also increased across the globe and also in India, the position of the consumer in an electronic environment is primarily weaker. This reduces the confidence of consumers in the e-commerce segment which calls for developing appropriate policy measures, legal structure and administrative framework within the present Consumer Protection Act, 1986 to protect the consumers' interests with respect to E-commerce.

Introduction

Earlier the principle of "Let the buyer beware" governed the relationship between the seller and buyer which relieved the seller of his obligation to make disclosure about the product. However, in the era of globalization the rule doesn't stand true. With the emergence of e-commerce, the consumers are deprived to a great extent. As a result consumer is being cheated day in and day out. Consumer awareness is low due to lack of education and awareness among the masses. Therefore, consumer protection has assumed greater importance.

E-commerce as the name says it is electronic commerce. A broader definition is: E-commerce is related to "any form of business transaction in which parties interact electronically rather than by physical exchanges or direct physical contact.[172]

Online trading has enabled businesses to reach much wider audiences while cutting the costs of traditional retailing methods. E-Commerce offers a platform with no time and space constraints, companies now don't have to locate with the tangible means of production. Similarly it has impacted the consumers in many ways. First of all consumers can buy or sell anything and everything while sitting at home comfortably. Any transaction which is to be made is just one click away from them so it has their made life easy. Quality of goods and

[172] Sanjeev Sarkar, E- Commerce and Digital Models for Business 8 (TMH, Delhi, 1st edn., 2011).

services has improved tremendously as competition has increased. Another area to which it has impacted is employment. Besides great advantages, E-commerce poses many threats because of its being borderless.

The Consumer Protection Act, 1986 aims to provide better protection of interest of consumers and provides for the establishment of consumer councils and authorities for settlement of consumer disputes. The Act extends to whole of India except the state of Jammu and Kashmir. The Act defines "Consumer" in section 2(1) (d)[173] as a person who buys goods or hires services for consideration or a price paid or promised to be paid but does not include a person who buys goods or hires services for resale or commercial purposes. Section 2(1) (b)[174]defines "Complainant" as a consumer, a voluntary consumer association formed under companies act, 1956, central or state government, one or more consumer having common interest or legal heir or representative in case death of consumer who files the complaint. Section 2 (1) (c)[175] defines "complaint" as an allegation in writing made by the complainant. This allegation may include:

- Unfair or restrictive trade practice that is quality of the good is below standard prescribed for the same.
- Goods bought suffer from defects and these may include spurious goods that are these goods are not genuine or are fake or imitated copies.
- Services that are hired or to be availed suffer from some deficiency.
- In case price charged for the goods are in excess to the price displayed on the cover or price fixed for the same by virtue of law in force or price agreed by the parties.
- In case the goods offered are in contravention to the prescribed safety standards or are risk to safety of consumer or the trader could have known after exercising due diligence that goods offered are unsafe.

A complaint can be filed by a consumer against manufacturer or a dealer of goods or service provider for any defective goods or deficiency of services provided or rendered by them to the consumer.

In general, the rights of a consumer provided by The Consumer Protection Act, 1986 are also available to electronic consumers because no special condition has been laid down in most of the consumer laws regarding applicability or non-applicability of electronic transactions. Though, the right of physical consumers and e- consumers are equal in theory but different in operation or enjoyment due to difference in the nature and place of business or medium of business but few unique practical problems like place of business, jurisdictional issues, non-availability of common dispute resolution system etc., certainly require special measures that are not provided in the existing consumer legislations.[176]The Consumer Protection Act, 1986 seeks to provide a speedy and simple redressal to consumer grievances and has specified consumer rights.

[173] The Consumer Protection Act, 1986(Act 68 of 1986), s. 2(1)(d).
[174] The Consumer Protection Act, 1986(Act 68 of 1986), s. 2(1)(b).
[175] The Consumer Protection Act, 1986(Act 68 of 1986), s. 2(1) (c)

[176] Emerging Trends of E-Commerce & Challenges to the Consumer Protection Act, 1986

1. Right to Safety

Under this right, consumers are authorized to protect themselves against the marketing of the service and goods which are hazardous for the life and property. If the particular service or goods is hazardous and dangerous to the life and property, consumers must be informed and instructed clearly about the mode for use of service and goods.

2. Right to Information

Under this right, consumers have every right to be informed about the quality, quantity, potency, purity, standard and price of service or goods, with a view to protect the consumers against unfair trade practices. Adequate information is very important in order to make a right choice.

3. Right to Choose

Under this right, consumers are authorized to get access to variety of services and goods at the competitive prices. Moreover, fair competition must be promoted so as to provide the widest ranges of services or goods at the lowest and competitive price to the consumers. The right to choose is meaningful only when a consumer has access to a variety of goods and services at competitive prices.

4. Right to be heard

This right is the crux of Consumer Protection Act, because under this right, consumers are assured that if something goes wrong with the consumers, their interest will receive due care in the appropriate Consumer Forum.

5. Right to Redressal

Under this right, if a consumer has suffered loss or injury due to unfair trade practice or restrictive trade practice and allegations made by him in a complaint have been proved, the appropriate Forum, where complaint has been made, will indemnify and compensate to the consumer.

6. Right to Education

This right informs the consumer about the practice prevalent in the market and what remedies can be availed of against them. For spreading this education, media, or school curriculum and cultural activities may be exercised as medium.

Redressal Mechanism

To further the interests of the consumer and providing him avenue for getting remedy, the Consumer Protection Act, 1986, makes provision for the setting up forums at district, state and national level along with the option to seek remedy from the Supreme Court as well. The details of the authorities are as follows:

District forum:

The State Governments are required to establish District Forum in each district. The important features of District Forum are as under:

1. Each District Forum consists of a chairman and two members appointed by the State Government. It has the powers of a civil court for enquiring into any complaint.
2. A District Forum can receive consumer complaints where the value of goods or services and the compensation claimed is less than twenty lakh.
3. The consumer can file complaint against the manufacturer for the malpractices. On receiving the complaint, the District Forum shall refer the complaint to the opposite party concerned and send the sample of goods for testing in a laboratory.

5. If the other party is responsible for the default or some unfair trade practices, the District Forum can issue an order to them directing them to either resolve the defect or replace the goods, or return the price, or pay compensation to the consumer for loss or injury etc.

An appeal against the order of the District Forum can be filed to the State Commission within 30 days.

State commission

It is set up by the State Government and its jurisdiction is restricted to the boundaries of the state concerned. The Consumer Protection Act, 1986 lays down the working of a State Commission as under:

1. The State Commission shall consist of a President who either has been a Judge of a High Court and two other members. All the three shall be appointed by the State Government.
2. Only those complaints can be filed where the value of goods or services and compensation claims comes in between Rs.20 lakhs and Rs1 crores. The appeal against the order of any District Forum can also be filed before the State Commission.
3. The State Commission is required to refer the complaint to the opposite party concerned and send the sample of goods for retesting in a laboratory, if necessary.
4. The State Commission after being satisfied that the goods were defective can issue the same order as can be issued by the District Forum.

Any person who is aggrieved by the order of the State Commission can appeal against such order to the National Commission within 30 days.

National commission

It is set up by the Central Government. The salient features and provisions of the Act pertaining to the National Commission are as under:

1. It shall include a President who is or has been a Judge of the Supreme Court and four other members appointed by the Central Government.
2. The identical complaints as can be filed in the District Forum and State Commission can be filed in the National Commission too. Appeal against the order of State Commission can also be filed before the National Commission.
3. The National Commission shall have the same powers as that of a Civil Court in dealing with cases and follow the procedure prescribed by the Central Government.
4. It has the authority to issue orders for safety provisions and pay compensation for loss or injury cause. An appeal against the order of the National Commission can be filled to the Supreme Court within 30 days.

With the rise in electronic transactions, there is a need for proper framework in relation to the electronic transactions done by the consumers. The Consumer Protection Act, 1986, governs the relationship between consumers and goods & service providers but there are no specific provisions related to online transactions. Liability for a goods/service provider arises when there is "deficiency in service" or "defect in goods" or occurrence of unfair trade practice under The Consumer Protection Act, 1986 and it specifically excludes from its ambit any service rendered free of cost. So, if only the actual sale is taking place in the online medium, the users will be considered as consumers under the said Act.

Mentioned below are some of the peculiar issues of application of the Consumer Protection Act, 1986, of in E- Commerce domain needs to be strengthened:

1. E- Contracts: They are governed by the basic principles provided in the Indian Contract Act, 1872 which mandates that a valid contract should have a free consent however the E-seller unilaterally sets the terms of the contract, he invariably exempts himself from the liability under the contract, casts rights in his own favor and limits the rights of the customer. Such non-negotiated, unilateral and complex e-contracts (commonly known as standard form contracts) cause a significant imbalance in the parties and are detrimental to the rights of the consumer. This area is not covered under the present act and remains the major cause of dispute.
2. Merchant liability: The E-commerce model, the seller/ merchant is basically a conduit between the manufacturer and the consumer, facilitating the trade by providing a platform. As there is no mechanism devised under the Consumer Protection Act 1986, to test, audit, verify or compare the quality of the product by the seller,(who is not the manufacturer of the product).The liability for any defect, deficiency cannot be squarely put on the seller for any quality defects. The Act remains silent in this respect.

3. Under the Consumer Protection Act, 1986, only a consumer, state government, central government or a registered consumer association can approach a consumer forum. Thus, a company cannot come before a consumer form complaining of unfair trade practices being indulged in by its rivals. A natural person can become a consumer only on entering in a contract for buying goods or availing a service. Thus, a person cannot go before a consumer forum merely on coming across a false advertisement or a trader indulging in an unfair trade practice. He first must contract with the party. The remedy can only be against the party the consumer has contracted with. In most cases concerning E-commerce, however, a manufacturer advertises its products but a consumer contracts with a retailer and not the manufacturer. Thus, effectively a person, who comes across an unfair trade practice, has no remedy. The only remedy for anyone is to complain to the Central or State Government. Thus, practically and effectively, only the consumer associations have been able to bring cases of unfair trade practice before the consumer forums. Hence, there is no provision of suo-moto investigation by the various forums under the present form of Consumer Protection Act, 1986.
4. In E-commerce, various problems arise due to the buyer and seller being at a distance. The buyer is not able to inspect or sample the goods or services. The buyer necessarily pays through a card. This brings in the problem of fraudulence in card payment. In E-commerce, a seller may supply inferior or defective goods and not take back the goods and refund the price. Similarly, a doubt may arise whether this right to get the refund can be waived by a contrary term in the E-contract. Also there is no mention of refund process, timeline and responsibility, unless as specified by any forum on approach by the consumer in the present Act. Therefore, there is an urgent need to make it clear that the right of the consumer to terminate the contract is absolute, irrespective of the terms of the contract.
5. Global connectivity has made territorial boundaries porous, raising a concern whether jurisdiction should remain confined to the place of business of the merchant. Contracts made over the internet are based largely on the terms and conditions contained in the website in question, and may frequently contain a 'choice of law/ jurisdiction' clause, which indicates the territory in which a dispute will be decided. But an important consideration is whether or not the terms and conditions are actually brought to the attention of the customer. In general, courts applying the rules of jurisdiction to cyberspace have required 'something more' than mere electronic contracts to support an exercise of jurisdiction. In addition to electronic contracts, there must be some act purposefully directed towards the residents of the country, where action is initiated. The above issue is untouched in the present act and leads to discontentment among innocent consumers.

Globalization and emergence of new modes of dealings and supplies and e-commerce have created new options and opportunities for consumers. However, the same have also made the consumers vulnerable to new forms of unfair trade and unethical business practices. This necessitated the need to amend the existing framework for the protection of rights and interests of consumers. The Consumer Protection Bill 2018 was introduced in the Lok Sabha on 5 January 2018 and seeks to replace the existing Consumer Protection Act 1986.

Key Highlights of the Bill[177]

1. The Consumer Protection Bill 2018 provides for establishment of the "Central Consumer Protection Authority" (hereinafter referred to as "CCPA") to regulate matters relating to violation of rights of consumers, unfair trade practices and false or misleading advertisements which are prejudicial to the interests of public and consumers and to promote, protect and enforce the rights of consumers as a class. Where the CCPA is satisfied on the basis of an investigation, it may pass such order as may be necessary, including: (a) recalling of goods or withdrawal of services which are dangerous, hazardous or unsafe; (b) reimbursement of the prices of goods or services so recalled to purchasers of such goods or services; and (c) discontinuation of practices which are unfair and prejudicial to consumers' interest. In addition to the above, CCPA has the power to issue directions and penalties against false or misleading advertisements.
2. Product liability- The existing framework has no provision with regard to product liability. Product liability as defined under the Bill means the responsibility of the product manufacturer or product seller to compensate for any harm caused to a consumer.

Liability of the product manufacturer

The product manufacturer shall be liable in a product liability action if the product contains a manufacturing defect, is defective in design, deviates from the manufacturing specifications or express warranty, or does not contain adequate instructions for usage.

Liability of the product service provider

A product service provider shall be liable in a product liability action, if the service provided by him was faulty or imperfect or deficient or inadequate in quality, nature or manner of performance; or there was an act of omission or commission or negligence or conscious withholding any information which caused harm; or the service provider did not issue adequate instructions or warnings to prevent any harm; or the service did not conform to express warranty or the terms and conditions of the contract.

Liability of the product seller

In addition to the above, the Bill also provides for the liability of a product seller, who is not a product manufacturer in certain circumstances.

3. Unfair Contracts - There is no provision for unfair contracts under the present framework. The Consumer Protection Bill 2018 defines "unfair contract" to mean a contract between a manufacturer or trader or service provider on one hand, and a consumer on the other, having such terms which cause significant change in the rights of such consumer. Any complaint against unfair contracts can be filed with the State Commission or the National Commission.
4. Unfair Trade Practices - In addition to the unfair trade practices already laid down under the present framework, there are three more types of practices which are added to the existing list to expand the scope of unfair trade practices.

[177] https://www.prsindia.org/billtrack/consumer-protection-bill-2018(visited on 22february,2019)

5. Mediation - The Bill provides exclusive provisions for reference of a dispute to Mediation as an Alternative Dispute Redressal Mechanism and provides for settling up of a Consumer Mediation Cell.
6. E- Commerce- Under the present framework there is no provision with regard to transaction done through e- commerce. However, the new bill covers within its ambit buying or selling of goods or services including digital products over digital or electronic network.
7. Territorial jurisdiction – The Bill has made changes to the territorial jurisdiction of the Dispute Redressal Agencies and includes the place of residence or business of the complainant, in addition to that of the opposite party and the place of occurrence of the cause of action.

Suggestions

Based on the above understanding of the concept of E-commerce, the following points may be incorporated in legislation for better protection of the Consumers:

1. All information required to be disclosed by merchants should be clear, accurate, and easily accessible online.
2. Satisfactory consumer protection regulations must adequately protect consumers against unconscionable conduct by sellers. A further concern arises relating to the lack of power of consumers to negotiate terms. It should be ensured that e-sellers do not use sales processes that confuse consumers into accepting unreasonable terms. Consumer protection should contain special rules protecting consumers who have a limited legal capacity and their guardians, as it is impossible to know whom you are contracting with.
3. Merchants should not make any representation or material omission or engage in any practice that is deceptive, misleading or fraudulent.
4. Merchants should clearly disclose the basic features of the good or service that they offer using terms that Consumers can understand.
5. Merchants should make available to Consumers the terms and conditions applicable to the transaction, opportunity to review the transaction, before it becomes a binding obligation and disclose to consumers at what point the transaction will be final, information about the transaction should be provided in the same language in which the good or service is offered. Merchants should make it possible for Consumers to access and maintain an adequate record of information about their transactions.
6. Merchants should provide details to the Consumers about their cancellation, return, and refund policies including the process to be followed and costs that may be incurred. If there is no cancellation, return, or refund right, this should be stated prior to completion of the Transaction
7. Fair Dispute Resolution: A suitable approach is required to ensure a fair dispute resolution between an e- retailer and a consumer.

Conclusion

The Consumer Protection Act, 1986 was passed and designed to provide speedy, inexpensive, hassle-free and compensatory redressal to aggrieved consumers. The Consumer Protection Act, 1986 has got consumer's support due to its cost-effectiveness and user-friendliness. Although implementation of the Consumer Protection Act can be viewed as a success, there are still serious shortfalls in achieving consumer welfare like jurisdictional issues, unavailability of proper dispute resolution system etc., The rise of E-commerce that disregards geographical boundaries also throws the existing legal framework for consumer protection into disarray by creating entirely new phenomena. Therefore, it calls upon the law to bring order and justice in the cyber arena especially when consumer protection is at the forefront.

It needs to be borne in mind that the Consumer Protection Act, 1986 had been enacted to deal with consumer issues that arise when a consumer physically interacts and purchases the goods or services from a seller. Though the right of physical consumers and consumers in E-commerce are equal in theory, difference in operation or enjoyment occurs due to difference in the nature and place of business or medium of business. Few unique practical problems certainly Contractual Terms and Conditions require special measures that are not provided in the existing consumer legislations. The Consumer Protection Act neither contemplates the various issues that may arise out of online transactions due to their impersonal nature nor does it provide any separate mechanism for addressing grievances that could arise from an online business transaction. The government has taken some steps to address the rising concerns of consumer protection in E-commerce and has come up with The Consumer protection Bill, 2018 which addresses some of the concerns that are affecting the rights of the consumer and has provisions to help the consumer asset their rights vis-à-vis the E-commerce. It remains to be seen whether the proposed law is effective to safeguard the interests of the consumers in real sense.

T ERRORISM: A BIG CHALLENGE BEFORE INTERNATIONAL COMMUNITY

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ABSTRACT

A fresh heartbroken terrorists attack happened in Pulwama J&K. Frequently such kind of attacks is happening in the whole world. The plague of terrorism has been hunting the world in general and India in particular for the last few decades. It has come to forefront in new millennium with 'catalytic' terrorist attack on America in September, 2001. Though India has been subjected to series of terrorist attacks for more than two decades, resulting from our neighbors pursuing terrorism as instrument of state's policy, it caught Nation's attention in wake of attack on Parliament on 13th December, 2001.In this research paper, it is focused that how human rights are effecting continuously at all stage because of terrorism. The major problem facing a serious discussion on terrorism comes from the proliferation of nomenclatures for political violence and shelter given to terrorists by so called esteemed people of J&K. Such violence comes in different forms and categories.

Keywords: Terrorism, Rights, Rome statute of International Criminal Court.

1. Introduction:

At international level "Terrorism strikes at the very heart of everything the United Nations stands for. It is a global threat to democracy, the rule of law, human rights and stability, and therefore requires a global response.'[178]

Terrorism is an ever-growing threat to world security. Most of the worst attacks in Europe have been carried out by individuals who live, work and have their families in Europe. The fight against terrorism has long been a priority for the Council of Europe and it has adopted a unique three-pronged approach: strengthening the legal framework, tackling the causes of terrorism and safeguarding fundamental values. Its commitment to the rule of law and human rights is essential in this battle.

One hundred countries, i.e. half of the countries in the world, now have among their nationals individuals who have joined the ranks of the Islamic State in Iraq and Syria. The UN has reported that there are to date 25 000 foreign fighters, with a sharp increase in the number of individuals joining IS from European countries (in particular France, the United Kingdom and Russia) and from Asia.

Before considering the applicable legal frameworks and some key recurring issues for victims of terrorist attacks, it is important to identify some of the effects that the resultant violations and trauma may have on the victims themselves. Sometimes, in the counter terrorism context, such factors are not always as prominent as they should be, even though,

[178] See Secretary-General Kofi Annan, 17 June 2004, SG/ SM/9372).

ultimately, a primary objective of rule of law based counter-terrorism efforts is to prevent victimization. In order to fully provide access to justice for victims, however, an understanding of the harm they have suffered, and the needs that arise because of that harm, is essential.[179]

Notably, the impacts identified in this section are not intended to represent the specific experiences of all survivors of terrorist acts, but rather are descriptive of a range of responses which survivors might experience.

2. The impact of terrorism on human rights:

Terrorism aims at the very destruction of human rights, democracy and the rule of law. It attacks the values that lie at the heart of the Charter of the United Nations and other international instruments: respect for human rights; the rule of law; rules governing armed conflict and the protection of civilians; tolerance among peoples and nations; and the peaceful resolution of conflict.[180] Terrorism has a direct impact on the enjoyment of a number of human rights, in particular the rights to life, liberty and physical integrity. Terrorist acts can destabilize Governments, undermine civil society, jeopardize peace and security, threaten social and economic development, and may especially negatively affect certain groups. All of these have a direct impact on the enjoyment of fundamental human rights. The destructive impact of terrorism on human rights and security has been recognized at the highest level of the United Nations, notably by the Security Council, the General Assembly, the former Commission on Human Rights and the new Human Rights Council.7 Specifically, Member States have set out that terrorism:

• Threatens the dignity and security of human beings everywhere, endangers or takes innocent lives, creates an environment that destroys the freedom from fear of the people, jeopardizes fundamental freedoms, and aims at the destruction of human rights;

• Has an adverse effect on the establishment of the rule of law, undermines pluralistic civil society, aims at the destruction of the democratic bases of society, and destabilizes legitimately constituted Governments;

• Has links with transnational organized crime, drug trafficking, money-laundering and trafficking in arms, as well as illegal transfers of nuclear, chemical and biological materials, and is linked to the consequent commission of serious crimes such as murder, extortion, kidnapping, assault, hostage-taking and robbery;

• Has adverse consequences for the economic and social development of States, jeopardizes friendly relations among States, and has a pernicious impact on relations of cooperation among States, including cooperation for development; and

• Threatens the territorial integrity and security of States, constitutes a grave violation of the purpose and principles of the United Nations, is a threat to international peace and security,

[179] https://www.unodc.org/e4j/en/terrorism/module-14/key-issues/effects-of-terrorism.html accessed on 18/01/2019 on 9:30 pm.

[180] Office of the United Nations High Commissioner for Human Rights *Human Rights, Terrorism and Counter-terrorism*; Fact Sheet No. 32,

and must be suppressed as an essential element for the maintenance of international peace and security.[181]

3. Shelter to Terrorists:

Pak-trained terrorists continue to cross over to India and let loose a reign of terror in J & K. Terrorism has already taken a heavy toll of life and property. It is a shame that even as the human civilization is marching ahead, some people are bent upon pushing the world back to the age of barbarism and brutality full of chaos and indiscipline. The law of the jungle will take us nowhere. We can only pray for good sense of prevail so that the world is able to share and enjoy the blessings bestowed upon mankind by new leaps in the field of science and technology.[182]

In a report it is stated that "although Pakistan's National Action Plan calls to "ensure that no armed militias are allowed to function in the country," several terrorist groups focused on attacks outside of the country continued to operate from Pakistani soil in 2017. These groups included the Haqqani Network, Lashkar e-Tayyiba, and Jaish-e-Mohammad. Pakistan continued military operations to eradicate terrorist safe havens in the Federally Administered Tribal Areas, although their impact on all terrorist groups was uneven.

Pakistan is committed to combating the trafficking of items that could contribute to WMDs and their delivery systems. Pakistan was a constructive and active participant in the Nuclear Security Summit process and in the Global Initiative to Combat Nuclear Terrorism, and worked to strengthen its strategic trade controls, including updating its national export control list. The State Department's Export Control and Related Border Security Program increased the Government of Pakistan's enforcement capacity by sponsoring training for Pakistani Customs and the Strategic Export Control Division officials on how to properly identify strategic commodities of concern. These commodity identification and advanced interdiction trainings were implemented by the U.S. Department of Energy.

EXBS also sponsored regional collaboration through nonproliferation fellowships and cross-border coordination with Pakistan and Afghanistan through the UN Office of Drugs and Crime – World Customs Organization's Container Control Program (CCP). Under the CCP, training was provided to enhance the targeting skills of port control unit officials at the Jalalabad border-crossing and encouraged sharing of customs data between countries.[183]

4. Pak didn't take sufficient action against LeT, JeM, says US terror report:

The United States has said the Jaish-e-Mohammed and Lashkar-e-Tayiba militant groups continue to pose a regional threat and that Pakistan did not adequately address America's concerns on terrorism in 2017.

Although al-Qaeda in Afghanistan and Pakistan has been seriously degraded, remnants of its global leadership, as well as its regional affiliate al-Qaeda in the Indian Subcontinent, continued to operate from remote locations in the region that historically have been exploited

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[181] *Ibid.*

[182] Essay on Global Terrorism- The Fight Against Terrorism – For W.B.C.S. Examination.

[183] Seehttps://www.rediff.com/news/report/pak-didnt-take-sufficient-action-against-let-jem-says-us-terror-report/20180920.htm accessed at 04/01/2019 on 4:25 pm.

as safe havens, the US State Department said in its annual Country Reports on Terrorism for the year 2017.

"Pakistan-based Jaish-e-Mohammed and Lashkar-e-Tayiba continued to pose a regional threat in the subcontinent," it said on Wednesday.[184]

The report notes that from August to December 2017, the Trump administration placed a pause on spending new foreign military financing for Pakistan, holding these funds until Pakistan addressed key US concerns, including the threat posed by the Haqqani Network and other terrorist groups that enjoyed safe haven in Pakistan. Pakistan detained Hafiz Saeed, leader of LeT and its front organisation Jamaat ud-Dawa (JuD), in January 2017, but a Pakistani court ordered his release from house arrest in November 2017, it said.[185]

In its report, the State Department rued that progress remained slow on the Pakistan government's efforts to implement UN sanctions related to designated entities and enforce anti-money laundering/countering the financing of terrorism controls.

The Financial Action Task Force, it said, continued to note with concern that Pakistan's outstanding gaps in the implementation of the UN Security Council ISIS and al-Qaeda sanctions regime have not been resolved, and that UN-listed entities -- including LeT and its affiliates -- were not effectively prohibited from raising funds in Pakistan, nor were they denied financial services."Although Pakistan's laws technically comply with international anti-money laundering/countering the financing of terrorism standards, authorities failed to uniformly implement UN sanctions related to designated entities and individuals such as LeT and its affiliates, which continued to make use of economic resources and raise funds," it said.

5. Legal framework on Terrorism:

The Rome Statute came into effect on 1 July 2002, creating the world's first long lasting International Criminal Court (ICC). After the sixtieth ratification, the Statute entered into force, in accordance with Art.126 (1). The Rome Statute, which has been approve by 120 votes to seven against with twenty one years old abstentions, provides for legal system over war crimes, criminal offenses against humanity and genocide.

The Court does not have jurisdiction over international terrorism per se, but many scholars assert that some terrorist acts could be prosecuted as offences against humanity. These terrible terrorist attacks up against the Unified States on September 11, 2001, have made it clearer than ever before that the international community needs to cooperate and take activities against terrorism with an international level.[186] Terrorism is not merely a domestic problem. In the future we will not be able to rely on national legislation only. It will be

[184] Pakistan based terror outfits JeM, LeT pose regional threat in subcontinent: US Read more at: //economictimes.indiatimes.com/articleshow/65884924.cms?from=mdr&utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst accessed on 10/01/2019 on 2:30 pm

[185] *Ibid.*

[186] The challenge for the international court :Terrorism; http://www.legalserviceindia.com/article/l247--International-Criminal-Court---Terrorism.html accessed on 14/02/2019 on 2:15 pm.

necessary to determine international concepts and methods which tackle crimes of terrorism on an international level as well.

The purpose of this newspaper is to explore what role the International Criminal Court (hereinafter: ICC) might play in combating terrorism in conditions of international law enforcement officials.

6. Terrorism as International Crime

The international community reveals it difficult to distinguish between terrorism, national liberation movements and other movement that has or hold to apply pressure to guard their self-will power. For this reason, the international law concerning terrorism has developed haphazardly and now consists of an unsystematic hodge-podge of treaties regarding unique modes of terrorism. Individual states have chosen which among these treaties they will ratify and incorporate into their domestic legal systems. Accordingly, prosecutions of acts of terrorism falling within the various treaties tend handiest to arise domestic legal forum.

In S.C. Resolution 1373, adopted on September 28, 2001, the Security Council stated that the acts committed on September 11, 2001, "like any act of international terrorism, represent a threat to the peace and security" of the international community. The dreadful terrorist attacks against the United States on September 11, 2001, have made it clearer than ever that the international community needs to cooperate and take actions against terrorism on an international level. In this sense, the role that can be played by the International Criminal Court is extremely important, owing to its nature as an international judicial body with universal jurisdiction and a specialized area of action (international crimes).[187]

7. International Terrorism and the Jurisdiction of ICC

Individual terrorists typically act independently of any state. For this, and some other reasons, the prosecution of terrorists by using the ICC raises some complex question of the interpretation as the offence defined by the Rome Statute do not easily 'fit' the activities of numerous terrorist groups.

a) Terrorism as war crime

The Rome Statute of the International Criminal Court distinguishes between four types of war crimes, namely:
(a) Grave breaches of the Geneva Conventions of 12 August 1949;

(b) other serious violations of the laws and customs suitable in international armed issue, with the establishedstructure of international law;

(c) with in the case of an armed conflict not of an international personality, extreme violations of Article3, common to the four Geneva Conventions of 12 August 1949;

(d) other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the set up framework of international law. (Article 8)

[187] *Ibid.*

Terrorist acts will, nevertheless, amount to war crimes controlled by criminal prosecution before the Court only if they are fully committed "as part of a plan or policy or a part of a huge scale

Commission of such crime".

A significant obstacle to prosecuting terrorists for war crimes before the ICC is the factor of Crime that provides that war crimes are to be interpreted "within the established framework of the international law of armed conflict".[188]

8. Under Article 8(a)(i), for example, the war crime of willful killing requires that:

- The perpetrator killed more than one persons,
- Such person or people were covered under one or more of the Geneva Convention of 1949.
- The offender was aware of the factual circumstances that established that protected status.
- The behavior came about within the context of and was associated with an international armed conflict.
- The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

These elements do not "fit" easily inside terrorist acts. However, taking Al-Qaeda as an example, each of the elements might be satisfied on the facts; there iscertainly arguably an "armed conflict" between Al-Qaeda groups with a plan to kill Western business men and women and visitorsin locations throughout the world; in the event that an armed issue is found to exist, the other elements are readily demonstrated. In the same way, the terrorist acts of certain Palestinian and Israeli groups might be considered within an international armed conflict.

b) Terrorism as Genocide

Article 2, of the Genocide Convention defines genocide as: Any of the pursuing acts committed with intention to destroy, entirely or in part, a national, ethnical, racial or religious group, as such:

- Killing members of the groups
- Causing serious physical or mental problem to users of the group;
- Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or partly;
- Imposing measuresdesigned to prevent births within the group;
- Forcibly transferring children of the group to another group.

[188] Patricia Viseur Sellers,The Prosecution of Sexual Violence in conflict: The Importance of Human Rights as Means of Interpretation, https://www.ohchr.org/Documents/Issues/Women/WRGS/Paper_Prosecution_of_Sexual_Violence.pdf visited on 11/01/2019 at 7:50 pm

9.For a crime of genocide to have been committed it is thus necessary:

(1) that one of the acts listed have been committed (i.e., killing members of a group, etc.);
(2) that the particular act has been committed against a national, ethnical, racial or religious group;
(3) that the crime has been committed with the special intent to eliminate, in whole or in part the

Group, as such, of these elements, the third of "genocidal intent" is what really distinguishes genocide from other crimes. Also the second element - the special identification of the victim need - is special for genocide.[189] From a terrorism perspective, it is difficult to regard genocide as a crime that would be very useful for prosecutions. In genocide, the perpetrator aims at destroying a community consequently. Normally, it would be difficult for non-condition actors to accomplish the main offences over a scale that implies genocidal intent.

Even so depending after the facts, terrorist attacks could be acts that fall within the definition of genocide. The attacks on Palestinian homes, Jewish settlements in occupied territories, us overseas embassies, major US cities, on international tourist destinations or civilian facilities provide instances of acts that could fulfill the definition. Dedication for such acts will, however, be based upon if whether the evidence of an intent to destroy certain groups in whole or in part is sufficient to meet the elements of the classification of genocide.

c) Terrorism as Crime against Humanity:

The concept 'crimes against humanity' evolved under the rules of customary international law and was proclaimed for the first time in the Charter of the International Military Tribunal of Nuremberg. In the International Criminal Court Statute of 1998 - which is the latest and most respected international instrument - crimes against humanity are defined as "any of the following acts when devoted as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) murder; (b) extermination; (c) enslavement; (d) deportation or forcible transfer of population; (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) torture; (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law; (i) enforced disappearance of persons; (j) the crime of apartheid; (k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.[Article7(1)].

In short, the Rome Statute of the International Criminal Court (and the draft elements of crimes adopted) and the case law of the Yugoslavia and Rwanda Tribunals suggest that the crimes against humanity have three essential elements:

[189] *Ibid.*

(1) The perpetrator has taken part in the commission of an inhumane act causing great suffering, or serious injury to the body or mental or physical health, that is, the perpetrator has committed One of the enumerated acts/underlying offences; [190]

(2) The underlying offence was committed as part of a widespread or systematic attack directed againsta civilian population ("the contextual element"); and

(3) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population ("mensrea relating to the contextual element")
In the International Criminal Court Statute an "attack directed against any civilian population" is defined as "course of conduct involving the multiple commission of acts referred to in [Article7] against any civilian population, pursuant to or in furtherance of a State or organizational policy

to commit such attack". A crime against humanity does, however, additionally envisage that a terrorist act amounts to such a crime if it is furtherance of an "organizational policy" that is not necessarily that of sovereign State. It could be argued that the acts of terrorist group further the organizational policy of their own or another non-state group. If so, the Court could determine that it has jurisdiction over such acts for the purpose of a prosecution for a crime against humanity.

Conclusion
A brief evaluation of terrorist acts with the jurisdictional strength of the ICC indicates the terrorism might be prosecuted as a crime against Humanity, war crime or possibly genocide. The emphasis of the Rome Statute lies with individual duty so there is no need to demonstrate that a State has been the wrongdoer. Now that the classes of offenders was extended to include terrorist groups, the September 11 attacks could be theoretically viewed as crimes against humanity. Of the international core crimes, the crime against humanity is the one best suited to tackle terrorist crimes with. The central requirement of crimes against humanity is that the illegal act must be devoted as part of a widespread or systematic attack directed against a civilian population. The state, or in this case the non-state actor, need not always adopt a policy as the formal policy.

However, in my opinion, it would be beneficial to amend the ICC Statute with express provisions concerning terrorism. One has to keep in mind that terrorism is a separate category and as such deserves separate contemplation and prosecution. As already laid out earlier, not all terrorist acts meet the high threshold of crimes against humanity. Consequently, certain terrorists could escape ICC jurisdiction even though their act was vile and a serious crime of international concern.

Pakistan's terrorism against India, accordingly, cannot be eliminated by negotiations with either Islamabad or Rawalpindi. The former is feckless, as infructuous overtures by Indian prime ministers since I.K. Gujral have demonstrated; the latter is capable of making peace with New Delhi, but lacks the incentives to do so. It took a maverick such as Musharraf to initiate a serious effort at détente, but his successor as army chief Ashfaq Kayani's eventual

[190] See http://www.legalserviceindia.com/article/l247--International-Criminal-Court---Terrorism.html accessed on 3/02/2019 at 3/30 pm

repudiation of this initiative confirmed that the Pakistan army prefers a continuing low-intensity war under the protective shadow of its nuclear weapons to a permanent peace with India.

[191]Indian policy makers have long been cognizant of this deplorable equilibrium. They have sought to maintain a semblance of normal relations with Islamabad, but this has proven difficult with repeated terrorist attacks launched from Pakistani soil. When such assaults have occurred, the ensuing diplomatic interruptions have sometimes been accompanied by threats of reprisal. But in the past, these warnings never advanced into significant retaliation simply because Indian leaders viewed further escalation as undermining their larger strategic objectives.

Sooner or later, however, a military riposte was inevitable, even from an otherwise soft state such as India. And such a reprisal would occur not because it promised a permanent solution to the problem of Pakistani terrorism—even the US war against Al-Qaeda in Afghanistan has not eliminated the threat of Islamist terrorism writ large—but because doing nothing proved worse than doing something, however incomplete or unsatisfactory. In these circumstances, only actualizing Pakistan's long-advertised "strategic shift" against terrorism can conclusively eliminate the risk of major regional war. Bilateral diplomacy seems ineffective because the most serious disputes simply lack solutions that would simultaneously satisfy the Pakistan army and the Indian state. Nor can India immunize itself by improving homeland security alone: its physical proximity, economic constraints, and institutional weaknesses combine to prevent hermetic security.

The ICC is currently the handiest capable international institution that could fill the current gap in the law and serve as an ideal tool in the battle against terrorism by upholding justice. The important link between peace and prosecution by an impartial court should not be underestimated. With sufficient support of the international community, the ICC could be a powerful mechanism, and it could be an especially credible one by virtue of its transparency and commitment to the legal ideals respected by most domestic legal systems. It would be a serious setback if the Court were allowed to emergestillborn.

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[191] *Ibid.*

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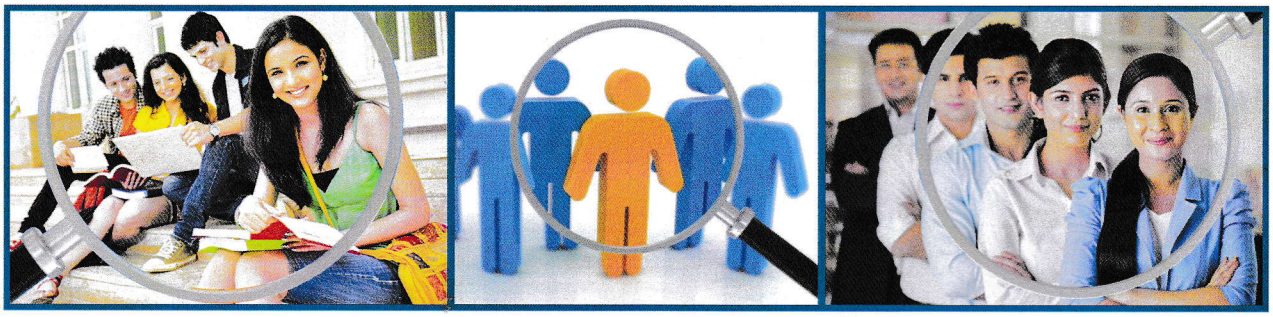

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