

APOLOGIES AS CORRECTIVE JUSTICE IN TORT LAW: REPARATION AND COMPENSATION AS (PARTIAL) REDEMPTION IN A TORTS SYSTEM

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ABSTRACT:

Apologies have become very fashionable both within and outside the legal systems of the world. The common law world has attempted to encourage apologies by the use of protective legislation, which aims to reduce litigation. Apologies can also be used as remedies and this article argues that the tort system, and in particular the law of negligence, can benefit from using apologies as part of the arsenal of compensation. This requires consideration of the nature of loss. The article argues that recognition of a broader view of loss is of benefit and that apologies can assist in recognition of fault (a corrective justice goal) alongside monetary damages to create compensation which better addresses human needs by acting as a bridge between wrong and loss.

Keywords *Apologies, Torts, corrective justice, Compensation, Remedies*

I Introduction

Everyone knows that apologising is a good thing to do. It is fashionable at the moment. Not only is it fashionable to apologise for past wrongs including breaches of human rights, war atrocities and other political wrongs¹, but also jurisdictions all over the common law world have introduced legislation, which protects apologies. Most of this legislation has been introduced in order to reduce litigation, (including by the encouragement of early settlement), in order to reduce costs.² That aim means that the apology as seen as something *outside* the legal transaction. There is a space between the legal transaction involving the establishing of fault and the awarding of compensation to make up for it. Nothing is ever so simple, of course. This article seeks to explore some of the reasons why it may be useful to see apologies as having a compensatory role, which is consistent with corrective justice views of tort law outside the law of defamation. It also seeks to establish a model for the optimum way to deal with tortious wrongs. The article focuses on negligence because it is the dominant tort in most areas, and most exemplifies the fault basis of much of tort law. In doing this it is useful to re-examine the nature of loss as it operates in tortious negligence. What this suggests is, that while the arguments that the role of tort law as a compensatory mechanism is deeply flawed are correct and we clearly should be moving to no-fault compensation schemes to deal with injury. we should not be ignoring the importance of corrective justice and that a reparation scheme based on corrective justice needs to exist alongside and parallel to any compensation scheme; indeed articulated to it. Such a scheme should include apologies.

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¹ For example, the apology by the Pope to people affected by priestly paedophiles; Queen Elizabeth II's apology to the Maoris of New Zealand; German Government's apology to Jews who survived the Holocaust; see M Nobles, *The Politics of Official Apology*, (Cambridge UP, 2008)

² See Vines, 'Apologising to avoid liability: cynical civility or practical morality?' (2005) 27 (3) *Sydney Law Review* 483-505; Vines, Prue, 'The Power of Apology: Mercy, Forgiveness or Corrective Justice in the Civil Liability Arena' (2007) 1(1) *Public Space: the journal of law and social justice*; Vines, Prue, 'Apologies and civil liability in the UK: the view from elsewhere' (2008) 12 (2) *Edinburgh Law Review* 200.

A great deal of the common law world has passed legislation protecting apologies in the hope that this will reduce propensity to sue. This article draws on some of the literature regarding apologies consider one aspect of the apology as remedy. The role of the apology in relation to propensity to sue is very much a forward-looking one (from the point of view of the legislature anyway). The hope is that if an apology is made that future litigation will be reduced or disappear. However, that forward looking mechanism is only possible if we think of it in terms of its backward looking mechanism – that is the power of the apology to heal and exactly what it is that heals.

The article proposes a way in which we might meet both the objectives of compensation and corrective justice, and that part of the arsenal of reparation, which is important for doing this, is for the law to incorporate apology into its systems in a way, which it has not yet done.

When Australian Prime Minister Kevin Rudd apologised to the Stolen Generations in February 2008, the press was much exercised about whether there was a necessary connection between apologising and claiming compensation in a negligence or other claim. This was based on the acknowledgement of fault, but also on certain assumptions – that it is easy to apologise; that it is meaningless to apologise without compensating in some way; that symbols are not real, that acknowledging moral fault is the same as acknowledging legal fault, and so on.

In fact, in 2007 the first Australian case, which awarded compensation to an Aboriginal person for being removed from their family, was decided. The *Trevorrow*³ case concerned a man who was removed from a functional Aboriginal family when he was a baby, placed in a dysfunctional white family and clearly had his life destroyed. In negligence, a major barrier to such litigation was the fact that this was government policy but in *Trevorrow's* case, it was clear that the government department had been advised before his removal that they had no right to remove Aboriginal children. Therefore, there was no policy barrier. There was no apology in *Trevorrow's* case until after the case had been decided. This shows that there is no *necessary* legal connection between an apology and compensation in this context. I have argued elsewhere⁴ that there is no necessary or automatic connection between apology and liability in negligence as demonstrated by cases such as *Dovuro Pty Ltd v Wilkins*⁵ where an apology (including saying that they were in breach of duty) was not regarded as creating liability in negligence.

However, the fact that jurisdictions all over the world have developed apology-protecting legislation for use in civil liability shows the importance of this transaction. This paper argues that an apology might be seen as part of corrective justice and that this might help to meet the aims of tort law in general. It may be that any reduction or lack of litigation might occur because one of the aims of tort law, that of corrective justice has been met by the apology itself. This requires us to consider the nature of loss as it is felt by the person and as it is recognised by the legal system in tort.

³ *Trevorrow v State of South Australia (No 5)* [2007] SASC 285

⁴ Prue Vines, 'Apologies and Civil Liability in the UK: a view from Elsewhere' (2008) 12 (2) *Edinburgh Law Review* 200-230; 'Apologising to avoid liability: cynical civility or practical morality?' (2005) 27 *Sydney Law Review* 483

⁵ (2003) 215 CLR 317; 201 ALR 139. See also *Phinney v Vinson* 605A 2d 849 (Vt) 1992), although there are occasions when an apology has been regarded as an admission of fault leading to liability in the US. Australia, UK and Canada are clearer that it will not be.

II The nature of apologies

The word 'apology' covers a range of things. It is useful to consider the links between apology and morality, and indeed religion. Apologies are part of a cycle recognised in moral and religious writing as the redemption cycle, consisting of wrongful act or thought, apology or confession, penance, forgiveness and redemption. In psychological thought and the literature of reconciliation, the apology is part of a reconciliation cycle involving wrongful act, apology recognising fault, forgiveness and reconciliation. In criminal law an apology is seen as part of restorative justice. In the context of tort law this background is more significant than it may at first appear.

This paper mostly discusses a 'full apology'. That is an apology, which includes an acknowledgement of fault along with an expression of regret. The moral/religious and psychological cycles above rely on the full apology. The reason they do is that they depend for meaning on the existence of fault. Apologies can also be 'partial' in that they only include an expression of regret, as in, 'I'm sorry your grandmother died'. This does not include any recognition of fault; it is merely an expression of sympathy. Such apologies are used quite extensively in the protective legislation, which has been passed across the common law world since 1986,⁶ but it is clear that that is a significant flaw in such legislation. Other things, which might accompany an apology, include compensation or reparation of the monetary kind. In response, there may be forgiveness and/or reconciliation. Nicholas Tavuchis⁷ has referred to the 'apology sequence', which includes all these elements. The reason why the full apology is the only one worth discussing in relation to tort law is that the connection between an apology and the fault basis of tort law can only be real if the apology acknowledges fault.

The use of apology as a remedy or mitigator in defamation law is familiar. This article argues that the apology actually operates in a remedial or compensatory way – that is, that when an apology is made to the claimant before they sue, they have already received some reparation, and this is the mechanism that reduces their desire to sue. That reparation is largely psychosocial, but it is nevertheless real. Its reality is recognised by the fact that an apology in defamation can be used to reduce the amount of damages awarded.⁸ Thus, it is certainly possible to see apologies as a remedy, even though apologies are not very often ordered as such a remedy.⁹ Although as a version of verbal shorthand and in some legal areas the word apology means merely saying 'I'm sorry', few people actually regard that as a true apology. Apologies have a moral or ethical dimension, which is an important part of their function for whichever community is determining the need for the apology. The available sociological and psychological literature on apologies is quite clear that an apology, which does not include an acknowledgement of fault, is not regarded as real by the vast majority of people.¹⁰ As Lazare says, 'The most essential part of an effective apology is acknowledging the offense'.¹¹

⁶ See Prue Vines 'Apologising for Personal Injury in Law: Failing to Take Account of Lessons from Psychology in Blameworthiness and Propensity to Sue' (2015) 1 22(4) *Psychiatry, Psychology and Law*, 624-634;

⁷ N Tavuchis, *Mea Culpa: a sociology of apology and reconciliation*, (Stanford University Press, 1991). See also Nick Smith, *I was Wrong: the meanings of Apology* (Cambridge University Press, 2008) for a long list of elements making up the 'categorical' apology of which acknowledgement of fault is only one.

⁸ *Summertime Holdings Pty Ltd v Environmental Defender's Office Ltd* (1998) 45 NSWLR 291.

⁹ Gijs van Dijck, 'The Ordered Apology' (2016) <https://ssrn.com/abstract=2896884>

¹⁰ See especially, Nicholas Tavuchis, *Mea Culpa: a sociology of apology and reconciliation*, (Stanford University Press, 1991); Aaron Lazare, *On Apology*, (Oxford University Press, New York, 2004)

¹¹ Lazare, p 75.

The acknowledgement that there has been an offence or fault on the part of the apologisee is critical because of this moral dimension, which is a vital part of a community's creation of meaning for itself. One apologises for a wrong rather than for a loss.¹² (One may certainly express regret for any loss.) The loss may well be a problem for the victim, but the moral question to which the apology responds is whether there has been a wrong. The question of what one should apologise for is a matter of those civil norms,¹³ which are mediated by culture or community and may therefore differ according to the micro- or macro-culture of the people concerned. When a person apologises and acknowledges a fault that validates the civil norm, which has been violated. That communication process adds meaning to the norm, clothes it in reality and anchors it to the people concerned. It fosters both the dyadic relationship and the sense of meaning and morality of the community within which the dyad operates. The dyad here might be two individuals or it might be two collectives where a public apology is being made.

Critics of those calling for apologies sometimes regard apologies as cheap:

'Apologies absolve the conscience of the group making the apology. They can be given at little cost, as they invariably involve a disclaimer of particular conduct no longer engaged in...Unless an apology is accompanied by action designed to address the underlying causes, it will not prevent similar harm being occasioned by different means'¹⁴

They would add to the sequence 'corrective behaviour/reparation' of some kind. However, the critique is too simple. In some situations an apology may be reparation itself; in others it may accompany some compensation. Apologies seem to have a strong evolutionary basis in that they are useful adaptive behaviours, which can be identified in all the primates¹⁵ and have existed for some thirty million years. This suggests one reason why people may desire apologies even if they are not public. That is, apologies operate to reduce aggression,¹⁶ while maintaining a sufficient level of aggression in the species to ensure hunting of other species can continue. Psychological studies also show that apologies dissipate anger in a way which is related to the severity of the harm, whether or not the level of responsibility for the harm is high or low.¹⁷ This appears to be an effect outside morality. It is parallel to outcome responsibility as it has been discussed by Steven Perry and Tony Honore¹⁸ and it is significant in negligence because of the way in which negligence focuses on a wrong only if the wrong causes damage.

¹² Sandra Marshall, 'Noncompensatable Wrongs, or Having to Say You're Sorry' in M Kramer (ed) *Rights, Wrongs and Responsibilities*, (2001) at p 213 ff.

¹³ This part of the article is based on a previous article by the author, 'The Power of Apology: mercy, forgiveness or corrective justice in the civil liability arena?' (2007) 1 *Public Space: the journal of law and justice* 1-51. Available at : <http://epress.lib.uts.edu.au/ojs/index.php/publicspace/home>

¹⁴ Desmond Sweeney, 'Aboriginal Child Welfare: thanks for the apology, but what about real change?' (1995) 3 (76) *Aboriginal Law Bulletin* 4-9 at 5.

¹⁵ E O'Hara and D Yarn, 'On Apology and Consilience' (2002) 77 *Washington Law Review* 1121. They refer to the work of Frans de Waal, *Peacemaking among Primates*, (1989).

¹⁶ Psychological studies demonstrate this effect: see, for example, K Ohbuchi, M Kameda and N Agarie, 'Apology as Aggression Control: its role in mediating appraisal of and response to harm' (1989) 56(2) *Journal of Personality and Social Psychology* 219.

¹⁷ M Bennett and D Earwaker, 'Victims' Responses to Apologies: the effects of offender responsibility' (1994) 134 *J Soc Psychology* 450.

¹⁸ S Perry, 'The Morality of Tort Law' (1992) 77 *Iowa Law Journal* 449-514; T Honore 'The Morality of Tort Law' in Owen (ed) *Philosophical Foundations of Tort Law*, (Clarendon Press, 1995)

Apologies connect to the human need for respect and dignity; and they operate to allow identification and re-invigorate or strengthen the moral community within which they are made. This is one reason why the acknowledgement of fault is such an important part of apologies. An apology can amount to explicit recognition of the moral worth of a victim and thus can be empowering. At the same time the making of an apology by an offender shows the community that that person is capable of recognising the moral norms of the community and has sufficient empathy (essential for social functioning) to be allowed to belong. This moral re-balancing is connected to the emotional re-balancing, which psychological studies have identified as an important role of apologies.

An apology can force the apologiser into a humbling position, which rebalances the relationship and heals the victim by rebuilding the victim's self-esteem and social status. This rebalancing can occur even if the apology is forced on the wrongdoer or is insincere. On the other hand, when an apology is voluntary, an apology, which is perceived as sincere, appears to be more powerful than an insincere one in the extent to which the wronged party will accept it as healing and re-balancing. This makes sense because an insincere apology, which is voluntary, is clearly an attempt to manipulate. On the other hand, an insincere and involuntary apology involves humiliation for the apologiser and is therefore equalising in a different way. The emotional re-balancing of apology identified by psychologists is part of its healing quality, which is something drawn on quite significantly by restorative justice theorists.¹⁹

People may also apologise in order to look good to third parties,²⁰ and hence, the public nature of apology may be important. Some moral theorists, in contrast, have argued that only private apologies can be meaningful for the same reason – that the public apology becomes political rather than moral²¹ and yet the argument that apologies enforce and strengthen the moral norms of a community seems to suggest that public apologies have a moral strength that private apologies do not.

Because of these qualities, apologies can be seen, not just as leading to compensation, but as compensation or reparation in themselves. The United Nations has acknowledged this when it states in its list of reparations for violations of human rights law, 'Public apology, including acknowledgement of the facts and acceptance of responsibility.'²² Lucia Zedner has also argued that an apology can be part of reparation and that reparative justice recognises social wrongs. In certain situations an apology can *be* compensatory, particularly if humiliation or loss of dignity is the wrong done to a person. In that situation the public giving of an apology may be essential. It is the quality of reparation within the apology itself which is important for corrective justice. The law of damages for negligence recognises consequential or other losses once the loss is recognisable for the purpose of establishing liability. That is why one can get damages for mental distress consequent on physical injury, but one cannot get damages for mere mental distress which are not consequent on some other recognisable

¹⁹ For example, Heather Strang, *Repair or Revenge: victims and restorative justice* (Clarendon Press, Oxford, 2002)

²⁰ For example, Erving Goffman, *Relations in Public: Microstudies of the Public Order*, (Basic Books, New York, 1971)

²¹ Nicholas Tavuchis is one of these. See also Danielle Celemajer, 'From the Levinasian apology to the political apology; reflections on ethical politics' Refereed paper presented to the Australasian Political Studies Association Conference, University of Newcastle, 25-27 September, 2006.

²² *Basic Principles and Guidelines on the Right to Reparation of Gross Violations of Human Rights Law and Serious Violations of International Humanitarian Law*, Adopted and Proclaimed by the General Assembly Resolution 60/147 of 16 December 2005, paragraph 22(e).

type of harm. Apologies can both recognise the wrong and by doing so compensate for some of these types of harm which are either unrecognised or currently fit into 'general damages'.²³

III Aims of tort law

The aims of negligence law are usually described as three-fold: deterrence, compensation and corrective justice. There is competition between these three aims, and different people consider their ranking differently. Some have argued strongly that we should replace the tort system with a social insurance non-fault compensation scheme, because the tort system fails to compensate people adequately.²⁴ Others argue that corrective justice is the major aim of tort law and thus reject the social insurance scheme because it does not deal adequately with finding of fault and people's naive sense of justice. Yet others argue that deterrence is the major aim of tort law but the evidence is patchy and seems to be confined to particular areas such as product liability and medical negligence (where it may create over-servicing rather than mere deterrence). The aims of tort law to which we usually refer seem at times to be in conflict with each other, leading to a situation where either the goals are not met, or they are only partially met. Assuming that these are good goals, if this is the case, there is a problem. Of the three, two are concerned with loss already suffered – compensation and corrective justice. Deterrence alone looks forward. Deterrence is not discussed further here because we are concerned with remedies and the aims of tort law as considered in terms of past loss.

The corrective justice theory of tort law is the view based on Aristotle's *Nicomachean Ethics* that individual moral rights are the foundation on which tort law is based. The theory focuses strongly on the connection between law and morality by arguing that there is a specific obligation against the individual who causes harm to correct that harm in some way²⁵ Michael S Moore's definition of the corrective justice goal of tort law is:

'On my view, the best goal for tort law to serve is that of corrective justice. Such a corrective justice view of tort law asserts that we all have primary moral duties not to hurt others; when we culpably violate such primary moral duties, we then have a secondary moral duty to correct the injustice we have caused. Tort liability rules are no more than the enforcement of these antecedently existing moral duties of corrective justice.'²⁶

Fault is central to negligence law because of its connection to moral responsibility,²⁷ and in particular, to personal responsibility. Ernest Weinrib has been a leading proponent of

²³ See Windeyer J in *Skelton v Collins* (1966) 115 CLR 94

²⁴ P Atiyah, *The Damages Lottery*, (Hart, 1997); Ison *The Forensic Lottery: a critique of tort liability as a system of personal injury compensation*, (Staple Press, 1967); JLR Davis 'Damages for Personal Injury and the Effect of Future Inflation' 56 *ALJ* 168; Luntz and Hambley, *Torts, Cases and Commentary*, 5th ed, Butterworths, 2002 ch1; But contra see Gordley, 'The Aristotelian Tradition' in Owen (ed) *Philosophical Foundations of Tort Law*, (Oxford: Clarendon Press, 1995)

²⁵ See S Perry, 'The Moral Foundation of Tort Law' (1992) 77 *Iowa Law Review* 449 and Weinrib, E 'The Special Morality of Tort Law' (1989) 34 *McGill LJ* 403 for accounts of corrective justice theory.

²⁶ 'Causation and responsibility' in (1999) 16(2) *Social Philosophy and Policy* 1 at 4.

²⁷ For example, E Weinrib, 'Toward a Moral Theory of Negligence Law' in MD Bayles and B Chapman (eds), *Justice, Rights and Tort Law*, (Reidel, Dordrecht, 1983); J Coleman 'Moral Theories of Torts: their scope and limits' in MD Bayles and B Chapman (eds) above; S Perry 'The Moral Foundation of Tort Law' (1992) 77 *Iowa Law Review* 449; L Alexander 'Causation and Corrective Justice; does tort law make sense?' (1987) 6 *Law and Philosophy* 1-23; L Schwartz 'Apportionment of Loss under modern comparative fault; the significance of causation and blameworthiness' (1991) 23 *U Toledo Law Review* 141; C Schroeder 'Corrective Justice and Liability for Increasing Risk' (1990) 37 *UCLA Law*

corrective justice theory in tort law. He draws on Aristotle's account of corrective justice, emphasising the transactional nature of the relationship between victim and wrongdoer.²⁸ Stephen Perry elaborates this by pointing out that although negligence law is outcome-responsibility based (that is, it takes the view that the wrongdoer must be responsible for the outcome of his or her actions rather than just the actions themselves), the fault principle is what operates to determine who should compensate.²⁹ In my view Perry's emphasis on outcome-responsibility is a significant improvement on the 'pure' theory of corrective justice in tort law because it better reflects the law of negligence, the dominant tort. Compensatory damages also address needs and many people regard this as the most significant aspect of damages. If damages are only about need then no-fault schemes are the best way to deal with loss.³⁰ The problems of tort used as a compensation scheme will not be considered here in detail, but to summarise, the evidence is that using torts as the mechanism for compensation creates the following problems with the compensation in the form of damages:

- Compensation awarded is insufficient to deal with the real injuries suffered³¹ - that is, it doesn't meet the need created by the wrong
- Compensation only goes to those who prove fault leaving equally needy people uncompensated³²
- Compensation using torts principles gives more to wealthy people and less to poor people, thus maintaining and entrenching social inequity³³

This is all familiar, but it does not mean that the answer is not to have compensation. What is the nature of this compensation? Compensation in the form of damages is both symbolic and real. That is the reason that nominal damages are used. Damages are real in the sense that they are monetary and can be used to buy 'the things that you need money for'.³⁴ The rule that compensatory damages are given to put the person back in the position they would have been in if the wrong had not happened is only an approximation of true compensation, because money simply cannot buy everything. The traditional rules reject the idea of compensation as punishment (hence the arguments about exemplary or punitive damages' availability in negligence) but compensation is traditionally seen as the 'corrective' aspect of 'corrective justice'. Corrective justice, then, lies in between compensation and punishment in some way.

To talk about apologies as having a corrective justice role in negligence law requires a consideration of the nature of loss. But first it is useful to point out how the compensation

Review 439; D Owen 'The Fault Pit' (1992) 26 *Georgia Law Review* 703; T Honore, *Responsibility and Fault*, Hart Publishing, Oxford, 1999 and many more.

²⁸ E Weinrib, *The Idea of Private Law*, (Harvard University Press, Cambridge, Massachusetts, 1995) at p 57

²⁹ Perry, S 'The Moral Foundation of Tort Law' (1992) 77 *Iowa Law Review* 449 at 497

³⁰ See, for example, H Luntz, 'Reform of the law of negligence: wrong questions – wrong answers' (2002) 8(2) *UNSWLJ Forum: Reform of the Law of Negligence: balancing costs and community expectations* 18

³¹ G Grant, K Burns, R Harrington, P Vines, E Kendall and A Maujean 'When lump sums run Out : Disputes at the Borderlines of Tort Law, Injury Compensation and Social Security' in K Barker, K Fairweather and R Grantham, *Private Law in the 21st Century* (Hart Publishing, 2017)

³² Eg H Luntz, 'Reform of the law of Negligence: wrong questions – wrong answers' (2002) 8(2) *UNSWLJ Forum: Reform of the Law of Negligence: balancing costs and community expectations* 18

³³ Eg Abel 'A Critique of Torts' (1990) 37 *UCLA L Rev* 785

³⁴ As defined by a Vanuatu taxi –driver who told me that he could live quite well without money for everything except 'the things that money you need money for' by which he meant only his children's school fees

goal and the corrective justice goal are diluted and hamstrung by the current tort system in most common law systems.

It seems clear that when people are injured and develop needs because of that that they need to be compensated. It is also clear that when someone is at fault that it creates a different need, which appears to be a felt moral need in both the community and in the individual. Sometimes these two things happen together. When they happen together, the tort system works quite well. However, they often happen separately and they often happen in disproportion to each other. Negligence is particularly interesting in this regard, because it is quite common for someone to be catastrophically injured by another person who has only done a very small thing, which would often not be regarded as morally wrong or not very morally wrong. When this happens we sometimes get outcries that negligence has got out of control- eg the headline 'Toddler's rabbit bite leads to claim for \$750,000' which appeared in a newspaper in 2002. The disproportionate nature of damages which can be payable when someone has merely had a moment's inattention in a motor vehicle similarly creates disquiet about the legal process.³⁵ Related to this is a further problem of disproportionality caused by the way the legal system assesses damages. Corrective justice's goal of equality between the parties and co-relativity between the wrong and the righting of the wrong requires proportionality between the wrong/harm and the compensation. Compensation according to need does not do this, despite some of the rhetoric of corrective justice, because the compensation theory of corrective justice assumes that the loss is the same as the wrongfulness. But this is not so in the mind of the community. This is particularly so in negligence as compared with criminal law, for example. The distinction between loss and wrong and the possible disproportion between the wrong and what is seen as redressing the wrong cause major problems in dealing with negligence. We turn to consider the nature of loss.

IV The nature of loss

In tort law we recognise loss in relation to liability in two different ways. One is the recognition of the loss suffered by a person when a tort has been committed regardless of whether the existence of the loss is required for the action to stand. This kind of loss can be recognised in relation to all torts, but I differentiate that recognition from the recognition of loss required for liability in an action on the case such as negligence, where damage is the gist of the action. I am going to concentrate on negligence because damage (loss) in negligence lies at the heart of liability. In the end we compensate for the first kind of loss, but in the case of negligence we do not compensate at all unless the kind of loss is regarded as capable of founding an action, or as being recognisable for that purpose by the courts. However, the legal system can recognise wrong regardless of damage in some torts, such as in trespass.

The law is capable of recognising a range of harms and the feminist literature,³⁶ among others, has demonstrated the extent to which the construction of harm has power and can change

³⁵ J Waldron 'Moments of carelessness and massive loss' in D Owen (ed), *Philosophical Foundations of Tort Law*, (Oxford: Clarendon Press, Oxford, 1995)

³⁶ Leslie Bender 'Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power and Responsibilities' (1990) *Duke LJ* 848; L Bender, 'A Lawyer's Primer on Feminist Theory and Tort' (1988) *38 J Leg Education* 3; Lucinda Finlay, 'Breaking the silence: including women's issues in a torts course' (1989) *1 Yale JL & Feminism* 41; M Chamallas and L Kerber, 'Women, Mothers and the Law of Fright: a history' (1990) *88 Michigan Law Review* 814; Prue Vines, Mehera San Roque and Emily Rumble, 'Is "nervous shock" a Feminist Issue? The duty of care and psychiatric injury in Australia' (2010) *18(1) Tort Law Review* 9-32

over time. The recognition of loss for the purposes of negligence has developed over time from the purely physical eg personal injury and property damage,³⁷ to economic loss and mental harm. The latter is still fairly restricted in Australia (but not everywhere else) to psychiatrically recognisable harm and distinguished firmly from 'distress or sorrow'.³⁸ However, in other domains loss includes injury to personhood – reputational torts being the obvious example. A loss may occur which is felt subjectively as an injury to personhood or personal dignity but which also can be characterised as a normative loss separate from the physical and psychological realm. It is important to recognise this sort of loss theoretically, in terms of corrective justice, because it helps us with the problem that if fault is not acknowledged, some litigants will remain unsatisfied, even if they do obtain some form of compensation. It is this type of loss for which an apology may be able to compensate.

Thus it is possible to change what the law recognises as loss and it is arguable that the recent emphasis on apologies is a recognition that loss is broader in negligence than we have been recognising; and that apologies are capable of equalising wrongs by compensating loss in the corrective justice sense, even though they may not be sufficient in every case.

One of the difficulties with situating apology in the legal domain rather than confining it to the moral domain from which it comes³⁹ is that the moral domain seems to see wrongs as losses, while the legal system differentiates between wrongs and losses, particularly in the case of actions such as negligence where damage must be proved. The theoretical account of corrective justice discussed above refers to both moral rights and responses to their breach, but in most cases, only the declaration of fault is the vindicating mechanism. This has implications for using apologies as corrective justice. An apology used in a legal arena may offer a bridge between these two conceptions, in that in itself it offers both vindication/corrective justice and compensation or reparation. The argument is that the combination of apology and compensation in various combinations may address both the aims of corrective justice and compensation better and more comprehensively than the declaration of fault or liability in a judgment with damages awarded does at present. This is because the nature of loss needs to be considered more broadly than the legal system normally allows. To extend the idea of loss in personal injury to consideration of humiliation and loss of dignity for which an apology might be a better response than monetary compensation would allow the apology to be used as a remedy to better meet the claims of corrective justice.

V Corrective Justice and Apologies

Aristotelian notions of corrective justice focus on the dyad where one party hurts the other, and then the balance between the parties must be corrected or equalised. A jumping off point here lies in the issue considered by Weinrib in 'The Gains and Losses of Corrective

³⁷ For example, in *Donoghue v Stevenson* [1932] AC 562, Mrs Donoghue sued for personal injury (gastro-enteritis) and nervous shock (psychiatric harm). It is doubtful whether she could have sued for nervous shock had she not had the physical injury as well. Until *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 it was assumed that pure economic loss was the domain of contract and that one could not sue for it in negligence, and so on.

³⁸ *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 per Windeyer J at 403 and much repeated.

³⁹ Elsewhere I have discussed the problem of putting a moral matter (apology) into a legal field (civil liability): 'The Power of Apology: mercy, forgiveness or corrective justice in the Civil Liability Arena' (2007) 1(1) *Public Space: the journal of law and social justice* 1-51 (available at <http://epress.lib.uts.edu.au/ojs/index.php/publicspace/home>)

Justice'.⁴⁰ He talks about the problem that Aristotle talked about – the correlative relationship between the parties in terms of gain and loss. This would appear to be a problem for tort law (especially negligence law) as corrective justice because there appears to be no gain, only loss in most cases – otherwise we might be talking about restitution or unjust enrichment. That is, the person who has been injured has suffered a loss, and then when the wrongdoer pays compensation to equalise that loss for the plaintiff the wrongdoer in turn suffers loss with no apparent gain at any stage. Weinrib does not see this as problematic, but rather as a problem of terminology and that it is 'normative gain or loss' which is at issue rather than (implicitly) real gains and losses. What he means by 'normative gain or loss' is not perfectly clear. It seems that he doesn't require the gain on the part of the defendant when he or she does the wrong nor the loss when they pay compensation to be real.

But this view of loss ignores an important dimension of the law of torts. That is that it is the application of morality or ethics to the real world in a real way, and it is indeed the application of that normativity to situations involving real people. It thus has more dimensions than are ordinarily recognised. Thus, to say that the correlativity is 'only' normative may miss a great deal of the moral richness of tort law. It may be that there *is* a gain when someone negligently inflicts injury on another – that gain is a gain in power, a gain which we mostly pay little attention to, but nevertheless a gain which needs to be countered by a loss of power. It is arguable that an apology being given, which is necessarily humbling, reduces that gain and that this is one of its corrective justice 'moves'. The idea of 'normative loss' might reflect Aquinas' view that 'a person striking or killing has more of what is evaluated as good, insofar, that is, as he fulfils his will, and so is seen to receive a sort of gain'.⁴¹ Indeed, Beever points out that when Aristotle referred to gains and losses he was using terms which did not fit previous ideas and his use of terms such as 'gain' or 'profit' (in Greek with all the problems of translation for us) was probably an extension of the way those words were normally used then.

The generally accepted view is that corrective justice theory in law is about the rights people have in relation to each other, and what should be done when those rights are violated. Beever refers to this as an 'area of interpersonal morality'.⁴² Similarly, Michael Moore refers to 'primary moral duties not to hurt others'. This is interesting because such primary moral duties are often couched in terms of intention, but in tort law generally the action (for example, in trespass) and/or the outcome (as in negligence) is what counts and the intention is relatively reduced in importance. That is 'intention' means something qualitatively different in tort law from what it means in criminal law.⁴³ Negligence exemplifies this in the most extreme way because it is about accidental damage.

Liability in negligence generally results in damages. Damages operate as compensation, as a marker of wrongdoing and as acknowledgment that redress is needed. Apologies do some of this same work although apologies do not address need in the same way as damages do. However, damages are often seen as the central vehicle of corrective justice in the sense that they operate to redress the balance between the parties by correcting the loss suffered by one party at the expense of the other who caused it. The obvious problem for compensation as a goal is that the requirement of a finding of fault in negligence (which meets a corrective justice need) means that a large number of people who have needs created by injury do not

⁴⁰ 'The Gains and Losses of Corrective Justice' (1994) 44 *Duke Law Journal* 277-97.

⁴¹ As quoted in Gordley 'The Aristotelian Tradition' in Owen (ed) *Philosophical Foundations of Tort Law* (1995) at p 138

⁴² A Beever, *Rediscovering the Law of Negligence*, (Hart Publishing, 2007) p 56

⁴³ See for example, *Carrier v Bonham* [2002] 1 Qd R 474

get those needs met. The existence of damages focused largely on fault caused outcomes, means that when wrong is done which does not result in harm, there may be no declaration or recognition of it and there will be a felt moral loss which is not corrected. Apologies can be part of this corrective justice mix if one considers compensation as practical reparation for need created and apology as reparation for the emotional and moral pain suffered for the victim. Some people have called this symbolic reparation, but this is only symbolic if one does not regard humiliation or emotional pain as real; indeed, the loss created by a wrong may indeed be a normative loss felt by a moral community.

Corrective justice theory is the closest account of tort law to the moral theories of apology, which are discussed above. As such, it might be thought that incorporating apologies into tort law would make no difference to how the apologies work. However, the moral account of apology focuses centrally on what was done, that is, on the moral wrongfulness of the action taken by the perpetrator, while tort law focuses on outcome responsibility.⁴⁴ Outcome responsibility (that is that what we hold someone responsible for is the outcome of an action) is important because in negligence one can do something bad (morally wrong) but unless it causes harm to someone there is no liability. Steven Perry has argued (correctly, in my view), that the individualised sense of fault which is the focus of Weinrib's corrective justice theory should be modified by outcome responsibility to better reflect the law of negligence. However, he argues that people can (while negligent) be outcome responsible in the absence of fault. This makes no sense in respect of Australian law where to be negligent is to be at fault. The fault lies in the failure to take care where there is a duty to take care.

Perry's emphasis on 'degradation of some aspect of human well-being' is illuminating because it is what can allow us to consider that the balance of the relationship between the two parties is disturbed not just in terms of money or injury, but also in terms of human dignity. Honore puts this slightly differently. He argues that corrective justice creates a 'claim to put things right'. His view, with which I agree, is that the claim to put things right can sometimes be satisfied only by the harm-doer, as when an apology is claimed, but other times such as where the claim is for money can be satisfied by someone else, such as an insurer.⁴⁵ In corrective justice terms an adequate apology may be seen as an equaliser of the relationship.

In negligence the wrongness of behaviour is only legally significant if there is harm. Usually that harm is physical injury, property damage or economic loss. This distinguishes the moral compass of negligence law from theories of morality which are entirely based on intention. At the same time, in torts such as trespass the only intention required does not involve intention to hurt but merely the intention to voluntarily move the body. Again this view of intention, although closer to the moral theories still differs from that of most theories of morality which are concerned with issues such as malice, intending to cause harm or do wrong etc. Many moral communities (Christians being one) see the morality of an action (even of thought) as something to be confessed/apologised for and forgiven, whether or not it causes physical harm. This is similar to the recognition of fault in trespass, but very different from the recognition of fault in negligence.

On the other hand psychological studies have shown that the more serious the consequences are, the more likely there is to be attribution of responsibility to the person who caused

⁴⁴ T Honore, *Responsibility and Fault*, (Hart Publishing, Oxford, 1999); S Perry 'The Moral Basis of Tort Law' (1992) 77 *Iowa Law Review* 449

⁴⁵ T Honore, 'The Morality of Tort Law' in D Owen, *Philosophical Foundations of Tort Law*, (Clarendon Press, Oxford, 1995) p 79

them.⁴⁶ That is, harm does seem to psychologically increase people's perception of fault. At the same time, people are likely to attribute responsibility away from a person they identify with. If this conflicts with a desire for justice, the identification is what will prevail.⁴⁷ The assignment of responsibility is a very complex part of human behaviour⁴⁸ of which the law partakes in a significant way.

VI Apology as a bridge connecting wrong and loss

The account of apologies given so far should show that apologies can have a range of roles, including compensation, reparation and redemption,⁴⁹ and that these are a significant part of the role of negligence law as corrective justice. (The redemptive need may be less significant for our purposes). Until now, this article has been concerned to establish that apologies can have a corrective justice function. Now we turn to how this might be used to create a 'tort' system which meets both the corrective justice and compensation needs (and thereby distributional justice function) by linking the corrective justice and distribution functions through addressing the problem of disproportion. The argument here is that the problems

⁴⁶K Shaver 'Redress and Conscientiousness in the Attribution of Responsibility for Accidents', (1970) 6 *J Expt'l Soc Psych* 100; E Walster 'Assignment of Responsibility for Accidents' (1966) 3 *J of Pers and Soc Psych* 1973; D Kanouse 'Language, Labelling and Attribution' in EE Jones et al (eds) *Attribution: perceiving the causes of Behaviour*, (NJU, Morristown, 1972)

⁴⁷ A Chaikin and J Darley 'Victim or Perpetrator: defensive attribution of responsibility and the need for order and justice' (1973) 25 *J of Personality and Soc Psych* 268.

⁴⁸ The psychological studies of attribution show a number of things of interest to negligence theory, including first, that the assignment of moral responsibility is very complex and may be altered by very subtle semantic shifts, secondly that levels of generality of explanation beget explanations at similar levels of generality and thirdly that there is indeed a naive sense of moral responsibility. See S Lloyd-Bostock, 'Attributions of Cause and Responsibility as Social Phenomena' in J Jaspars, F Fincham and M Hewstone (eds), *Attribution Theory and Research*, (Academic Press, London 1983); V Lee Hamilton, 'Intuitive Psychologist or Intuitive Lawyer? Alternative Models of the Attribution Process' (1980) 39 (5) *Journal of Personality and Social Psychology* 767; S Lloyd-Bostock 'The Ordinary Man and the Psychology of Attributing Causes and Responsibility' (1979) 42 *Modern Law Review* 143; F Franco and L Arcuri, 'Effect of Semantic Valence on Implicit Causality of Verbs' (1990) 29 *British Journal of Social Psychology* 161; M Ross and D Ditecco, 'An Attributional Analysis of Moral Judgments' (1975) 31 (3) *Journal of Social Issues* 91; E E Jones et al (eds) *Attribution: perceiving the causes of behaviour*, (General Learning Corporation, 1972)

⁴⁹ .Definitions:

compensation OED: compensate '1. something to reduce or balance the bad effect of loss, suffering or injury, 2. make up for (something undesirable) by exerting an opposite force or effect' From Lat *compensare* 'weigh against'

Reparation: OED: '1. the making of amends for a wrong 2. Compensation for war damage paid by a defeated state. 3 (archaic) the action of repairing'

Retribution : OED 'Punishment inflicted in the spirit of moral outrage or personal vengeance' From Lat *retribuere* – 'assign again'

Redemption: OED' a thing that saves someone from error or evil'

Reconciliation: OED reconcile: 'restore friendly relations between'.

with the systems we put forward generally are that they seem to be able to either meet the corrective justice function (because they declare fault and award damages only if the harm doer is at fault) OR the compensation function (awarding damages regardless of fault). Corrective justice responds to the attribution of fault, but compensation should respond to need. In fact, it is desirable to have both functions met. It is also desirable to have those met without complete disconnection. A proper consideration of apologies suggests that it might offer a kind of bridge (because it has both reparative and vindicatory functions) between these two so that we can indeed have both goals met with a more or less coherent system.

The psychological needs of individuals and communities, and the needs of moral communities are part of the society in which tort law operates; it is a mistake to ignore them altogether. It is important to have some kind of link between the legal and the moral/psychological universes, and indeed, the concept of the reasonable person and the concepts of reasonable care assume the traversing of all those universes in which people live.

Corrective justice's goal of equality between the parties and co-relativity between the wrong and the righting of the wrong requires proportionality between the wrong/harm and the compensation. Compensation according to need does not do this, despite some of the rhetoric of corrective justice, because the compensation theory of corrective justice assumes that the loss is the same as the wrongfulness. But, this is not so in the mind of the community. This is particularly so in negligence as compared with criminal law, for example. The distinction between loss and wrong and the possible disproportion between the wrong and what is seen as redressing the wrong cause major problems in dealing with negligence. To my mind, this is one of the problems caused by any system of pure outcome responsibility. The fact that apologies focus on moral wrong and that they have a healing and reparative function of their own may be used to redress this disproportion in some cases. It is important to be able to avoid a punitive response and to be able to focus on the co-relativity. Robyn Carroll ⁵⁰shows that in cases where apologies have been ordered judges have emphasised that such apologies are ordered for redress not punishment.⁵¹

The distinction and/or the disproportion between the wrong and the loss can be addressed to some extent by apologies. This is particularly likely when the wrong has not led to very large losses; but apologies may also be useful when the loss is large. They may well redress the wrongfulness, leaving the loss to be met by compensation. An apology used in a legal arena may offer a bridge between these two conceptions, in that in itself it offers both vindication and compensation or reparation.

It is worth considering how these might be brought together. To meet both goals no-fault compensation schemes might be developed which are linked to the possibility of formal apologies (voluntary or coerced) which might be independently assessed. Such a linkage would not require fault to be established for compensation, but where there was fault would require or recognise an apology. An apology might also reinforce the moderation of damages, on the basis that the non-economic parts of the award, such as that for pain and suffering, might be better repaired (at least partially) by an apology than an award of money.⁵²

⁵⁰ Robyn Carroll, 'Beyond compensation: apology as a private law remedy' in J Berryman and R Bigwoods (eds) *The Law of Remedies: new direction in the Common Law*, (Toronto: Irwin Law, 2008)

⁵¹ She refers to *De Simone v Bevacqua* (1994) 7 VAR 246 (a harassment case); *Falun Dafa Association of Victoria Inc v Melbourne City Council* [2004] VCAT 625; *Ma Bik Yung v Ko Chuen* [2002] HKLRD 1.

⁵² Stephen Waddams, 'The Price of Excessive Damages Awards' (2005) 27(3) *Sydney law Review* 543. This, of course, assumes that the amount of damages given for the harm is adequate. In the

The arguments for no-fault compensation systems seem unanswerable. If we can find a way to deal with the need for corrective justice. This may seem to be re-arguing Coleman's conception of corrective justice⁵³ in particular in the attempt to distinguish loss from wrong. However, the problem with such theories of corrective justice is that they attempt to incorporate two goals into one scheme and become too complex. I propose not a scheme but a linkage, so that where there is fault there is apology plus compensation and where there is not there is still compensation. Gordley argues that nothing in traditional Aristotelian theory prevents this : ⁵⁴

'nothing in the traditional Aristotelian theory would prevent people from establishing such a plan, for example, because they wished to avoid the costs and errors of litigating questions of fault. In the Aristotelian theory...the defendant's gains do not have to be canceled as long as the plaintiff is compensated. The citizens are free to assume voluntarily a burden that would otherwise rest on defendants as a matter of corrective justice'

The compensation plan would therefore rest on alternative or complementary bases – corrective justice and need, depending on the level of fault. This should be done on a social security or insurance basis, according to need (as in the scheme run by the New Zealand Accident Compensation Corporation), with a loose linkage to the corrective justice system which would separately assess fault where the victim wished and determine the need for the apology or recognition of an apology already given. There might also be the possibility of a punitive damages, some of which might be reduced if the apology is given.

VII Conclusion: Towards meeting the (multiple) aims of tort law

This article has demonstrated that many of the aims of tort law cut across each other. Corrective justice proponents have rejected the idea of no-fault schemes on the basis that they neglect the necessary moral recognition of responsibility. And compensation proponents have noted that the fault basis of liability leaves many injured people uncompensated. The system of tort liability in play at present in most of the common law world does not resolve these contradictions. In this article the apology is suggested to be a significant mechanism which might be used to reconcile these conflicting aims. This proposal is very much an initial attempt to reconcile the conflicting aims of tort law. The apology provides a unique mechanism to create a system of dealing with accidental wrongs which works in a civilised way to meet the moral requirements of corrective justice while also ensuring that people's physical needs are properly supported.

context of tort reform caps on damages which are significant in Australia and many US jurisdictions, this is unlikely to be the case.

⁵³ Jule Coleman, *Risks and Wrongs* (Cambridge University Press, 1992)

⁵⁴ 'The Aristotelian Tradition' in Owen (ed) *Philosophical Foundations of Tort Law*, p 139-40

Changing Dimensions of Online Advertisement Law

-Dr. P. Sree Sudha

Abstract

This article discusses the legal framework of online advertising and common legal issues pertaining thereto. This article also addresses the implementation of general legal provisions to online advertising issues in different jurisdictions and the diversity of approaches. It provides the legal boundaries that are specifically applicable to online advertising. The article then provides a legal analysis on online advertising with a focus on Indian laws and practice. In the conclusion, there are general evaluations on the legal aspect of online advertising and certain suggestions on the development of a legal framework on online advertising.

Keywords Implementation, Provisions, Evaluations, Advertising, Framework

I Introduction

Back in the mid-1990, the Internet medium caught corporations' attention. They sought to tap the power of the Internet in order to communicate with their customers and to present and promote their products and services.⁵⁵ It is commonly accepted that online advertising started when a web magazine, *HotWired*, sold a banner ad to a telecommunications company, AT&T, and displayed the ad on its webpage for the first time, in 1994.⁵⁶ It has made great progress since then. Throughout the past decade, online advertising boosted its growth. It eclipsed radio advertising in 2007 and by 2011; online advertising was projected to surpass television revenues. According to media reports in India digital advertising segment was shown the maximum growth with 45% in 2015, and an expected 47% growth in 2016-17 and digital is the third highest category of advertising in India. It also became a key economic driver in the Internet economy,⁵⁷ by funding many websites and services as well. Today it is difficult to surf the Internet without seeing online advertising. As the variety and audience of online advertising increased, different legal issues arose and the necessity to set a legal framework for this area inevitably emerged. Legal rules regulating advertising are not generally limited to any particular medium through which an advertisement is communicated and are applicable to the online context as well. For example, under Indian laws, the scope of the rules governing advertising covers any advertisement, including the written distinction or limitation as to any mediums through which the advertisements are communicated.⁵⁸ But generally it is not always clear what those rules mean, raising issues of interpretation when applied to online communications. Accordingly, new issues arise almost as fast as technology develops, and new online technologies such as meta tags and sponsored search engine results require careful application of rules written at a time when such technologies were yet unimagined.

This article provides an overview of the legal aspects of online advertising and presents an analysis on the common legal issues arising from online advertising and how they are regulated and implemented in different jurisdictions, in particular under Indian laws.

⁵⁵ J. D. Hart (2008) "Internet Law: A Field Guide," Sixth Edition, *BNA Books*, p 577

⁵⁶ G. Schneider (2007) "Electronic Commerce," (2007), Seventh Annual Edition, *Thomson Course Technology*, p 184

⁵⁷ B. Craig, *Cyber Law* (2013) "The Law of The Internet and Information Technologies," First Edition, *Pearson*, p208

⁵⁸ S. Guha, B. Cheng, P. Francis, Privad, "Practical Privacy in Online Advertising, Microsoft Research India," available at <http://research.microsoft.com/en-us/um/people/saikat/pub/imc10-ads/>, visited on 20-1-2017

II Legal Aspects of Online Advertising

In the online advertisement industry there are basically three main actors. On one side there are the advertisers that want to reach consumers, on the other side there are the consumers who may or may not be receptive to receiving advertising messages and in between there are the intermediaries. This trilateral relation often gives rise to legal issues regarding consumer protection, privacy and trademark infringement. However, the legal boundaries created as remedies to these legal issues have to balance the promotion of competition in the online environment by allowing fair use of trademarks, protection of consumers from deceptive practices and a free zone for businesses in promoting their brands, products or services.

2.1 Consumer Protection

The need for consumer protection in online advertising emerges from misleading and deceptive advertising acts and practices. Like advertisements through traditional mediums such as newspapers or televisions, online advertisements can also mislead consumers both by what they say, and by what they fail to say.⁵⁹ In essence, online advertisements may harm consumers by deceiving them into entering non-welfare maximizing transactions. The application of general consumer protection rules to online advertising is conducted by the courts' and other authorities' interpretations and implementations in different jurisdictions. Often there are both self-regulatory and statutory means to regulate and oversee online advertising practices.

Having said that, as the United States Federal Trade Commission ("FTC") stressed "*cyberspace is not without boundaries, and deception is unlawful no matter what the medium*".⁶⁰ The FTC is the principal authority governing and enforcing online advertising in the United States through the federal Lanham Act, supplemented by the self-regulatory National Advertising Division and enforcement by individual states.⁶¹ The FTC defines its mission as: "*To prevent business practices that are anticompetitive or deceptive or unfair to consumers; to enhance informed consumer choice and public understanding of the competitive process; and to accomplish this without unduly burdening legitimate business activity.*"⁶²

In addition to enforcing the Lanham Act, the FTC published a set of rules, "Dotcom Disclosures" in relation to online advertising, providing guidelines that businesses should consider as they advertise online to ensure that they comply with US law. The FTC's first guideline on online advertising disclosures was published in 2000 and as per the developments in the information technologies since then, FTC published new guidelines in March 2013. "Dotcom Disclosures" include instructions for online advertisers on how to make clear and conspicuous disclosures to prevent an advertisement from being deceptive. It provides a comprehensive and explicit guide, by indicating and giving examples and including images, as to the most recent and most common types of online advertisement, such as space constrained ads, banner ads and even the advertisements placed in smart phone applications. It provides guidelines as to where, when and how to place disclosures, to ensure that the

⁵⁹ M. J. Radin, J. A. Rothchild, R. A. Reese, G. M. Silverman (2006), "Internet Commerce - The Emerging Legal Framework," *Foundation Press*, p.303

⁶⁰ Federal Trade Commission, Dot Com Disclosures (2013), available at: <http://www.ftc.gov/os/2013/03/130312dotcomdisclosures.pdf>, visited on 20-1-2017

⁶¹ See Better Business Bureau, National Advertising Division (2013), available at <http://www.bbb.org/us/nationaladvertising-division/>; Columbia University National Attorneys General Program, Deceptive Advertising (2013)

⁶² Available at <http://www.ftc.gov/ftc/about.shtm>, visited on 20-1-2017

consumer clearly understands the consequences of their choices and actions. The FTC's aim is to ensure that products and/or services are described truthfully online and that consumers are making conscious transactions.

Similar to the FTC and its governance, in the United Kingdom is the British Code of Advertising, Sales Promotion and Direct Marketing ("CAP Code").⁶³ It provides the rules for non-broadcast advertisements, sales promotions and direct marketing communications, i.e. all types of marketing practices. The CAP Code encompasses, for example, advertisements in newspapers, leaflets, mailings, emails, text transmissions, fax transmissions, online advertisements, other electronic and printed material and this Cap Code is enforced and administered by an independent body, called the Advertising Standards Authority ("ASA"). Unlike the FTC, the ASA is a self-regulatory organization that is independent of the government and the advertisers and does not enforce statutes. The ASA can refer cases to the Office of Fair Trading for legal action as a last resort.

In one of its decisions, the ASA held that an advertising claim that stated "FREE YouView box – normally £299!" on the website www.talktalk.co.uk was misleading. Although it was actually available to purchase for £299 for seven days, ASA did not consider that long enough to establish a generally-sold-at price. The ASA held that the claim breached CAP Code (Edition 12) rules 3.1 (Misleading advertising), 3.7 (Substantiation), 3.17 (Prices) and 3.40 (Price comparisons). ASA's decision constitutes a common example of how consumer protection law provisions are applied to online advertising disputes in the UK.

Finally, the European Union also has its own consumer protection legislation.⁶⁴ Consumer protection legislation includes directives on unfair contract terms, unfair commercial practices and misleading advertising. The Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 on misleading and comparative advertising, sets out the minimum standards for consumer protection throughout Europe, despite the differences between the legislation and practices of its member states.⁶⁵ In this respect the Directive 2006/114/EC constitutes a framework for its member states. It also has its own self-regulation system based on the International Chamber of Commerce's ("ICC") Code of Advertising Practice. ICC's Code of Advertising Practice intends to provide a display of a good practice, enhance reliability confidence, in the advertising and marketing communications across the world, increase overall public confidence, ensure responsibility with respect to children, and promoting freedom of speech in marketing communications. It also reduces governmental control over advertising sector with its self-regulation system which enables voluntary rules and standards of practice that are beyond governmental regulations, set out by self-regulatory organizations such as European Advertising Standards Alliance.⁶⁶ In broad terms all advertising should be legal, decent, honest and truthful and should respect the cultural differences of the relevant country.

2.2 Privacy

The increasing use of information technology and the Internet ensures that data protection remains one of the most important and relevant laws that online businesses are required to

⁶³ Available at <http://www.cap.org.uk/Advertising-Codes/~media/Files/CAP/Codes%20BCAP%20pdf/BCAP%20Code%200712.ashx>, visited on 20-1-2017

⁶⁴ Accessed from the web site: See http://ec.europa.eu/consumers/rights/index_en.htm, visited on 20-10-2016

⁶⁵ Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006L0114:en:NOT>, visited on 20-10-2016

⁶⁶ See <http://www.iccwbo.org/advocacy-codes-and-rules/areas-of-work/marketing-and-advertising/self-regulation>, visited on 20-10-2016

comply with. The Internet is all about the transfer of information. Not only is the Internet used to disseminate information, but also to collect it. One of the main reasons for the preference of online advertising is its targeted approach to consumers. However, this targeted advertising requires obtaining personal information and data, thus it also leads to privacy concerns.⁶⁷

For example, in 2001, privacy litigation was brought against the online advertiser Double Click Inc. (now owned by Google) in the United States, alleging that the use of web cookies violated three federal laws. A federal District Court noted that the cookies placed on users' computers were used to gather information about the user, and to provide that user with the online advertising it will be interested in.⁶⁸

However, the court held that DoubleClick Inc. only gathered information concerning a user's activities on an affiliated website and that it did not access information on a user's own computer. Although the court interpreted the use and placement of cookies as interception of electronic communications, it emphasized the user's "consent" and the purpose of the interception. As such, the court dismissed the users', i.e. the plaintiffs', claims regarding violation of privacy provisions.

In the FTC' 1998s first proceeding on a privacy issue related to online advertising in the United States, the FTC asserted that GeoCities had failed to disclose how the personal information collected from its registration process would be used. Furthermore, the FTC claimed that GeoCities was using the collected information to send promotional messages to its member users. In order to send such promotional messages, GeoCities had to disclose the collected information to third parties. Moreover, FTC charged GeoCities for not posting a clear and prominent privacy notice as per FTC's principles. GeoCities agreed to settle the FTC charges of deceptively collecting personal information. According to the settlement, GeoCities had to post a clear and prominent privacy notice, providing the users with the information such as how the collected information is used, to whom it is disclosed, how it could be removed.⁶⁹

In another dispute, the FTC commenced an inquiry into whether DoubleClick had engaged in unfair trade practices by tracking the online activities of Internet users and combining the tracking data with detailed personal profiles in a public database.⁷⁰ The Electronic Privacy Information Center, i.e. the complainant, had alleged that the data tracking was done without the knowledge of users and in violation of DoubleClick's assurances included its privacy policy that such tracking information would remain anonymous. The FTC closed its investigation after obtaining DoubleClick's assurance that it would not link users' browsing activities to their buying habits. As part of the settlement, DoubleClick modified its privacy policy to disclose its use of pixel tags, and agreed to create an opt-out for cookies and to clarify its Internet address finder email practices. Furthermore in 2012 the FTC received a complaint alleging that Facebook shared information in ways that were inconsistent with its statements to consumers (i.e. its users) and that its practice was unfair and deceptive. There was a list of violations in the complaint submitted to FTC, including sharing personal information with the advertisers. Facebook proposed a settlement to FTC which required Facebook to take several steps to ensure adherence to its promises in the future, including giving clear and prominent notice to consumers and obtaining their consent before sharing their information by overstepping their privacy settings, and maintaining a comprehensive privacy program to protect consumers'

⁶⁷ See, B. Craig (2013), "Cyber Law, The Law of The Internet and Information Technologies," *Pearson*, Ch.11, p.208

⁶⁸ *In re Doubleclick Inc. Privacy Litigation*, 154 F. Supp. 2d 497, 00 Civ. 0641 (S.D.N.Y., March 28, 2001)

⁶⁹ J. D. Hart (2008), "Internet Law: A Field Guide," *BNA Books*, Sixth Edition, Ch.8. XII. A. Spam, Advertising and Spyware, Ch.6.III.D.3.a. Data Collection and Privacy, p.377

⁷⁰ S. Olsen (2001), "FTC Drops Probe into DoubleClick Privacy Practices," *CNET News.com* (Jan. 22), available at http://news.com.com/2100-1023_3-251325.html, visited on 20-1-2017

information, and giving consent to third parties privacy audits.⁷¹ FTC approved the settlement and did not further investigate or impose any penalties. The settlement did not attest whether Facebook violated the law or not. However FTC may impose penalties upon violation of the settlement in the future. As the cases above illustrate, legal issues related to privacy are typically dependent on the privacy policies of the online advertisers or other intermediaries, in other words dependent on the agreement between the parties. However, these policies should provide assurances and be clear and well communicated to the users.⁷²

In this regard, in 2012 the European Commission has proposed a comprehensive reform of its Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data protection rules for the purposes of promoting online privacy rights and increasing reliability of European digital market.⁷³ Another issue that is particular for online advertising within the scope of both consumer protection and privacy is unsolicited commercial e-mail messages, in other words “junk” e-mail or in other words “spam”.⁷⁴ The burden of ever-increasing spam required a revised legal framework and a change in the email messaging system.⁷⁵ For example, in 2002, European Parliament adopted a strict anti-spam measure, the Telecommunications Data Protection Directive.⁷⁶ The Directive provided an opt-in approach, i.e. companies may not send unsolicited emails to prospective customers unless the customers previously agreed to receive them. On the other hand, the United States enacted opt-out based Controlling the Assault of Non-Solicited Pornography and Marketing Act (“CAN-SPAM”) in 2003.⁷⁷ Contrary to the European Parliament’s approach, the United States’ approach enables companies to send unsolicited emails to prospective customers, without requiring any consent. However, unsolicited e-mail generating companies are obliged to provide an opt-out option for the recipients, enabling them to stop receiving these e-mail messages if they are willing to.

III Trademark Infringement

In online advertising, some companies seek to improve their rankings in search engine results by placing selected search terms in metatags⁷⁸ and by purchasing keywords from search engines. This is an appropriate and a fair way of advertising unless it constitutes any trademark infringements. Trademark infringements may occur from third parties’ use of the trademark

⁷¹ FTC Approves Final Settlement With Facebook, available at <http://ftc.gov/opa/2012/08/facebook.shtm>, visited on 20-1-2017

⁷² See, B. Craig, *Cyber Law* (2013), “The Law of The Internet and Information Technologies,” *Pearson*, First Edition, Ch.11, p.217

⁷³ See, http://ec.europa.eu/justice/newsroom/data-protection/news/120125_en.htm, visited on 20-1-2017

⁷⁴ Bryan Craig (2013), “Cyber Law, The Law of The Internet and Information Technologies,” *Pearson*, First Edition, Ch.11, p.208

⁷⁵ P. B. Maggs, J. T. Soma, J. A. Sprowl (2010), “Internet and Computer Law Cases-Comments-Questions,” *WEST*, Third Edition, p.444

⁷⁶ See Directive on Privacy and Electronic Communication, Directive 2002/58/EC of the European Parliament and of the Council, 2002 O.J. (L 201) 37, available at <http://register.consilium.eu.int/pdf/en/05/st03/st03677.en05.pdf>, visited on 20-1-2017

⁷⁷ J. D. Hart (2008), “Internet Law: A Field Guide,” *BNA Books*, Sixth Edition, Ch.8. XII. A. Spam, Advertising and Spyware, p.632

⁷⁸ A metatag is a word or code embedded in a data field on a website that is not normally part of any publicly viewable web page. Search engines read a website’s metatags to determine the subject(s) addressed on the site so that the search engine can determine whether the site is responsive to a search query input by a user. J. D. Hart, *Internet Law: A Field Guide*, 2008, *BNA Books*, Sixth Edition, Ch.2. II., p. 74

owner's mark, or a confusingly similar mark, to identify the third party's goods or services or falsely to imply an association between the trademark owner and the third party. In a dispute in the U.S., a federal District Court held that the purchase of keyword advertisements triggered by a search containing another company's trademark should be deemed as use of that trademark in commerce and that it is sufficient to give rise to trademark infringement claims.⁷⁹

However the law is far from settled and there are also court decisions reaching the opposite result. Courts have concluded that using the trademarks of another to trigger online advertisements is not a "use in commerce"⁸⁰ except where the "use" of the mark is visible to end users.⁸¹ In this approach, the court interprets trademark infringement as limited to the use of another's trademark on products and services which are visible to consumers and users. Therefore, these courts concluded that there is no infringement.

From this point of view, in one case, the U.S. federal District Court dismissed trademark infringement claims against the defendant's purchase of the keyword "Zocor", the plaintiff's popular anti-cholesterol medication's name, from search engines to trigger the display of sponsored links to defendants' websites.⁸² The court stated that such purchases did not constitute the requisite use in commerce of plaintiff's mark necessary to sustain such claims. The court also granted defendant's motion to dismiss trademark infringement claims arising out of its use of plaintiff's trademark "Zocor" on its website, at which the defendant sold both plaintiff's own product, as well as a generic version described as "generic simvastatin". "Simvastatin" is the active ingredient in "Zocor." Because it also sold branded Zocor at its website, the court held that this was a permitted fair use of plaintiff's mark. On the other hand, French⁸³ and German⁸⁴ courts seem to be reluctant to liberalize online advertising.

They have implemented a more restraining approach in the disputes regarding trademark infringements through sponsored links. In 2005 German court held that the layout of the defendant's site can lead to confusion, and that the sponsored links to the plaintiff's competitors were sufficient to determine trademark infringement. The dispute was on the defendant's use of the plaintiff's trademark as a keyword in its sponsored links on a search engine. French courts also adopted a unified approach, parallel to German courts, for trademark infringements through online advertising in France.

⁷⁹ *Edina Realty, Inc. v. TheMLSONline.com*, 2006 WL 737064, Civil No. 04-4371 (D. Minn. 2006) (JRT/FLN)

⁸⁰ *Hamzik v. Zale Corp./Delaware*, No. 3:06-cv-1300, 2007 WL 1174863 (N.D.N.Y. Apr. 19, 2007) (noting that no "use" occurs for purposes of the Lanham Act where the use of the mark was invisible to users, but if a defendant displays its mark along with plaintiff's mark, the defendant's actions could constitute "use in commerce")

⁸¹ *FragranceNet.com, Inc. v. FragranceX.com, Inc.*, 493 F. Supp. 2d 545 (E.D.N.Y. 2007) (defendant's use of keywords was not a "use in commerce" because plaintiff's mark was not placed on any goods or containers or displays and the use was not intended to indicate source or origin)

⁸² *Merck & Co., Inc., et al. v. Mediplan Health Consulting, Inc.*, d/b/a RxNorth.com 425 F.Supp.2d 402 (S.D.N.Y., March 30, 2006)

⁸³ *Societe Google France v. Societe Viaticum & Societe Luteciel*, No. R.G. 03/00051 (CA Paris Mar. 10, 2005) (Fr.) (holding Google France liable for trademark infringement for its sale of plaintiff's trademarked terms to plaintiff's competitors; when Google users ran a search for these marks, the triggered competitors' advertisements would appear on the search results page near the natural Google search results)

⁸⁴ *Zinke v. Placht*, No. 2a O 20/05 (LG Dusseldorf Mar. 30, 2005) (F.R.G.) (affirming the issuance of a temporary injunction by a German court where results of a search for the mark "Aladon" displayed competitor's sponsored links more prominently than the listing for the trademark owner)

The European Court of Justice brings another perspective to the issue of trademark infringements through keywords and sponsored links with its decision of 23 March 2010. The court stated that a third party's use of a sign which is identical with or similar to a trademark owner's mark at least implies that the third party is using the sign in its own commercial communication. However, the court also stated that intermediaries that allow its clients, i.e. the advertisers, to use signs, which are identical with, or similar to, trademarks, do not themselves use those signs.⁸⁵ Therefore, the Court held those online advertising intermediaries' sales of another's trademark as keyword does not constitute a trademark infringement. This decision is an important one promoting the improvement of online advertising and a good example to follow for the conservative European Courts.

There are also cases where generating unsolicited e-mail messages may lead to trademark infringements. In a dispute in the United States, a federal District Court held that the defendant violated the Federal Trademark Dilution Act of 1995, i.e. infringed the plaintiff's (an online services company, America Online Inc.⁸⁶) rights arising from its trademark ownership, by sending the spam e-mail messages subject to the dispute. Dilution occurred because the plaintiff's mark was tarnished by its association with the transmission of spam that advertised pornographic materials. Each e-mail contained a fake header, which falsely indicated that the spam was sent from the plaintiff. Defendant also identified its spam targets by harvesting e-mail addresses of the plaintiff's subscribers from the plaintiff's chat rooms.

Another aspect of the issue is the "initial interest confusion doctrine".⁸⁷ In a case before the United States Court of Appeals for the Ninth Circuit, the court determined that use of another's trademark in the meta tags of websites may constitute trademark infringement, if initial interest confusion is likely to occur. According to the court, initial interest confusion occurs when another's trademark is used in order to capture the consumers' initial interest, even if it does not result in an actual benefit for the one using another's trademark.⁸⁸

⁸⁵ *Google France and Google Inc. et al. v Louis Vuitton Malletier et al.* available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=83961&pageIndex=0&doclang=EN&mode=lst&dir>, visited on 20-1-2017

⁸⁶ *America Online v. LCGM, Inc., et al.* 46 F. Supp.2d 444, Civ. Act. No. 98-102-A, (E.D. Va., Nov. 10, 1998), available at <http://www.i-lawgroup.com/AOL%20v.%20LCGM.pdf>, visited on 20-1-2017

⁸⁷ D. C. Glazer, D. R. Dhamija, *Revisiting Initial Interest Confusion On The Internet*, available at <http://fordhamipconference.com/wp-content/uploads/2011/04/Glazer-1.pdf>, visited on 20-1-2017

⁸⁸ "West Coast's use of "moviebuff.com" in metatags will still result in what is known as initial interest confusion. Web surfers looking for Brookfield's "MovieBuff" products who are taken by a search engine to "westcoastvideo.com" will find a database similar enough to "MovieBuff" such that a sizeable number of consumers who were originally looking for Brookfield's product will simply decide to utilize West Coast's offerings instead. Although there is no source confusion in the sense that consumers know they are patronizing West Coast rather than Brookfield, there is nevertheless initial interest confusion in the sense that, by using "moviebuff.com" or "moviebuff" to divert people looking for "MovieBuff" to its web site, West Coast improperly benefits from the goodwill that Brookfield developed in its mark. Recently in *Dr. Seuss*, we explicitly recognized that the use of another's trademark in a manner calculated 'to capture initial consumer attention, even though no actual sale is finally completed as a result of the confusion, may be still an infringement" *Brookfield Communications Inc. v. West Coast Entertainment Corp.* 174 F.3d 1036 (9th Cir. April 22, 1999), available at <http://caselaw.findlaw.com/us-9th-circuit/1068417.html>, visited on 20-1-2017

IV Overview of Indian Law on Online Advertising

With respect to online advertising, the Indian legal system lacks a comprehensive and specific law. The power to regulate advertisements may be exercised by a vast variety of authorities, including the courts, Central and State Governments, tribunals or the police authorities. The rules, regulations and legislations for regulation of digital advertisements include:

- Advertising Standards Council of India (ASCI)
- Constitution of India
- Consumer Protection Act, 1986
- Information Technology Act, 2000
- Indian Penal Code, 1860
- The Young Persons (Harmful Publications) Act, 1956
- Indecent Representation of Women (Prohibition) Act, 1986
- The Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003
- The Cigarettes (Regulation of Production, Supply and Distribution) Act, 1975
- The Drugs and Magic Remedies (Objectionable Advertisements) Act, 1955
- The Drugs and Cosmetics Act, 1940
- The Emblems and Names (Prevention of Improper Use) Act, 1950
- Securities and Exchange Board of India (SEBI) (Stock-brokers and Sub-brokers) Rules, 1992 - Code of Conduct for Stock-brokers
- Securities and Exchange Board of India (SEBI) (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 1995
- Securities and Exchange Board of India (SEBI) (Mutual Funds Regulation), 1996: SEBI Guidelines for Advertisements by Mutual Funds
- Securities and Exchange Board of India (SEBI) (Disclosure and Investor Protection Guidelines), 2000
- The Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994
- The Transplantation of Human Organs Act, 1994
- The Representation of the People (Amendment) Act, 1996
- The Lotteries (Regulation) Act, 1998
- The Infant Milk Substitutes, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act, 1992
- The Competition Act, 2002
- The Contract Act, 1872
- The Civil Defense Act, 1968

To scrutinize certain principles and fairness in the sphere of advertising, Advertising Standards Council of India was established in India in 1985. ASCI deal with complaints received from consumers and industry against such advertisements which are false, misleading, indecent, illegal, leading to unsafe practices or unfair to competition and are in contravention to the advertising code.⁸⁹ Even though there is no as such provision for regulating advertisement

⁸⁹ See <http://www.ascionline.org/> for Advertising Code. The ASCI Code is a self-regulatory code which is not legally binding on parties. However, in practice ASCI members include various media, publishers etc. who normally abide by decisions of the Complaints Council set up by ASCI. The ASCI Code covers all media including the online media. Please also refer to the section on General

policy in the Constitution of India, which should be adopted by press or media, the Supreme Court has given guidelines for the same through a series of decisions.⁹⁰

Consumer Protection Act, 1986 provides better protection of the interests of consumers and to make provision for the establishment of consumer councils and other authorities for the settlement of consumers' disputes and for matters connected to it, including protection against unfair trade practices.⁹¹

India is one of the very few countries in the world besides Singapore to have legislated Cyber laws.⁹² The IT Act specifically empowers that anyone who publishes in the electronic form, any material which is lascivious or which tends to degrade persons who are likely to read, see or hear the matter contained or embodied in it, shall be punishable with imprisonment and fine.⁹³ Even there is a provision in the IT Act, which applies to any offence by which any person shall be punished irrespective of his/her nationality if the act constituting the offence involves a computer, computer system or computer network located in India.⁹⁴ As per the provisions of Indian Penal Code, 1860 certain advertisements are considered as criminal offences. It is dealt under different provisions of the Code.⁹⁵ The Young Persons (Harmful Publications) Act, 1956 prevents the dissemination of certain publications harmful to young persons. To be more précised harmful publication indicates such publications which would tend to corrupt a young person whether by inciting or encouraging him to commit offences. The Act also proclaims that whoever advertises or makes known by any means that any harmful publication can be procured from or through any person, then he shall be punished with imprisonment or with fine, or with both.⁹⁶

Indecent Representation of Women (Prohibition) Act, 1986 prohibits indecent representation of women through advertisements⁹⁷ or in publications, writings, paintings, figures or in any other manner and for matters connected therewith or incidental thereto. The Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 and the Cigarettes (Regulation of Production, Supply and Distribution) Act, 1975, states that no person shall advertise for the distribution, sale or supply of cigarettes, and also shall not take part in the publication of such

Requirements. Disobedience of ASCI's decision does not lead to any civil or criminal consequences. Its enforcement mechanism is through non-publication of the contravening advertising by its media members.

⁹⁰ *Hamdard Dawakhana v. Union of India* AIR 1960 SC 552; *Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd* (1995) 5 SCC 139

⁹¹ As the Monopolistic and Restrictive Trade Practices Act, 1984 is repealed after the coming into force of Competition Act, 2002 the unfair trade practices provisions of the MRTP Act will be enforced under the Consumer Protection Act.

⁹² Rodney D. Ryder (2009) "Guide to Cyber Laws (Information Technology Act, 2000, E-commerce, Data Protection & the Internet," 2nd Edn. Reprint p399

⁹³ Section 67 of the IT Act, 2000

⁹⁴ Section 75 of the IT Act, 2000

⁹⁵ Section 292 (1) of Indian Penal Code, 1860; Section 292(2)(d) of Indian Penal Code, 1860; Section 292 (2)(e) of the Indian Penal Code, 1860; Indian Penal Code, 1860, Section 292- Exceptions, Section 292 A of Indian Penal Code, 1860; Section 292 A (e), (d) of Indian Penal Code, 1860; Section 293 of IPC, 1860; Section 294 A of IPC, 1860, Section 153 A of IPC, 1860, Section 153 B of IPC, 1860

⁹⁶ Section 3 of the Harmful Publications Act, 1956

⁹⁷ Section 2(a) of the Indecent Representation of Women (Prohibition) Act, 1986 defines advertisement- "Advertisement" includes any notice, circular, label, wrapper or other document and also includes any visible representation made by means of any light, sound, smoke or gas.

advertisement, unless the specified warning is included in such advertisement.⁹⁸ The Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 (DMRA) controls the advertisement⁹⁹ of such drugs which is said to provide magical remedies and to deal with other matters relating to it.

As per the Drugs and Cosmetics Act, 1940 (DCA), no person shall himself or by any other person on his behalf offer for sale¹⁰⁰ any drug or cosmetic which is not of a standard quality, or is misbranded, adulterated or spurious. The Act gives similar restrictions to advertisements for traditional drugs such as Ayurvedic, Siddha and Unani. The Emblems and Names (Prevention of Improper Use) Act, 1950 is enacted to prevent the improper use of certain emblems¹⁰¹ and names, for professional and commercial purposes.¹⁰²

In the exercise of the powers conferred by section 30 of the Securities and Exchange Board of India (SEBI) Act,¹⁰³ 1992, the Board makes the regulations on the code of conduct for Stock-brokers to be known as SEBI Stock-brokers and Sub-brokers Rules in 1992. The provisions of the Rules specified that a stock-broker or sub-broker is prohibited from advertising his business publicly unless permitted by the stock exchange, including in their internet sites, by its subsidiaries, group companies etc. The Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, contains provision¹⁰⁴ which prohibits advertisements relating to predetermination of sex. The Act provides for the prohibition of advertisements of any kind for anybody or person pertaining to facilities for pre-natal diagnosis of sex available at any Centre or place.

The Transplantation of Human Organs Act, 1994 provides for the regulation of removal, storage and transplantation of human organs for therapeutic purposes and for the prevention of commercial dealings in human organs and for matters relating to it¹⁰⁵ and provisions are there for the punishment for commercial dealings in human organs.¹⁰⁶ While detailing the provisions of the Representation of the People (Amendment) Act, 1951 (RPA),¹⁰⁷ it is observed that during the period of forty-eight hours before the conclusion of the poll for any elections in that polling area, a person shall not display to the public any election matter by means of cinematograph, television or other similar apparatus.¹⁰⁸ The statute even provides penalty for

⁹⁸ Section 5 (1), the Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 (CTPA)

⁹⁹ Section 2(a) of the Drugs and Magical Remedies (Objectionable Advertisements Act), 1954 defines "advertisement" includes any notice, circular, label, wrapper, or other document, and any announcement made orally or by any means of producing or transmitting light, sound or smoke

¹⁰⁰ Section 18 of the Drugs and Cosmetics Act, 1940

¹⁰¹ Section 2(a) of the Emblems and Names (Prevention of Improper Use) Act, 1950 defines emblem as any emblem, seal, flag, insignia, coat-of-arms or pictorial representation specified in the Schedule.

¹⁰² Schedule of the Emblems and Names (Prevention of Improper Use) Act, 1950 enumerates the list of emblems and names which are prohibited from improper use in professional and commercial purposes

¹⁰³ Accessed from the web site: <http://www.sebi.gov.in/acts/act15ac.html>, visited on 12-1-2017

¹⁰⁴ Chapter VII Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994

¹⁰⁵ Preamble of The Transplantation of Human Organs Act, 1994

¹⁰⁶ Chapter VI, Section 19 of The Transplantation of Human Organs Act, 1994

¹⁰⁷ Section 126 of The Representation of the People (Amendment) Act, 1951 (RPA)

¹⁰⁸ Section 126 A is inserted in The Representation of the People (Second Amendment) BILL, 2008 which provides a person shall not conduct any exit poll and publish or publicize by means of the print or *electronic media* or disseminate in any other manner, whatsoever, the result of any exit poll during such period, as may be notified by the Election Commission in this regard. For the purpose of this section, "electronic media" includes internet, radio and television including Internet Protocol Television, satellite, terrestrial or cable channels, mobile and such other media either owned by the Government or private person or by both.

anyone including the advertisers who contravene the above provision with imprisonment or fine or with both.

The Lotteries (Regulation) Act, 1998 authorizes State Government has the discretionary powers to organize, conduct or promote a lottery, including advertising thereof subject to some conditions¹⁰⁹ specified in the Statute. It is also provided that the State Government may prohibit within itself the sale of tickets of a lottery organized, conducted or promoted by every other state;¹¹⁰ if any contravention on the above the Central Government may, by order published in the Official Gazette, prohibit a lottery organized, conducted or promoted thereof.¹¹¹ The penalty¹¹² clause of the Act is such that if any person acts as an agent or promoter or trader in any lottery organized, conducted or promoted in contravention of the provisions of the Act or sells, distributes or purchases the ticket of such lottery, he shall be punishable with imprisonment or with fine or with both.

In online advertising scenario, the law related to gambling is applicable to online gambling. The online lottery is the most popular form of internet gambling in India. Most companies who markets/distributes/conducts the state government-sponsored lotteries through the internet are restricted from selling their services in the states that banned lotteries. So it is advised that the companies (as a safeguard) seek an undertaking from their consumers relating to their residence under which the advertisers who publishes the same should also make a note of it.

The Infant Milk Substitutes, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act, 1992¹¹³ as Amended in 2003 regulates the production, supply and distribution of infant milk substitutes, feeding bottles and infant foods with a view for protecting and promoting breastfeeding and for the matters relating to it including

¹⁰⁹ Section 4 of the Lotteries (Regulation) Act, 1998, the conditions includes the following:-

- a) Prizes shall not be offered on any pre-announced number or on the basis of a single digit;
- b) The State Government shall print the lottery tickets bearing the imprint and logo of the State in such manner that the authenticity of the lottery ticket is ensured;
- c) The State Government shall sell the tickets either itself or through distributors or selling agents;
- d) The proceeds of the sale of lottery tickets shall be credited into the public account of the State.
- e) The State Government itself shall conduct the draws of all the lotteries;
- f) The prize money unclaimed within such time as may be prescribed by the State Government or not otherwise distributed, shall become the property of that Government;
- g) The place of draw shall be located within the State concerned;
- h) No lottery shall have more than one draw in a week;
- i) The draws of all kinds of lotteries shall be conducted between such periods of the day as may be prescribed by the State Government.
- j) The number of bumper draws of a lottery shall not be more than six in a calendar year;
- k) Such other conditions as may be prescribed by the Central Government.

¹¹⁰ Section 5 of the Lotteries (Regulation) Act, 1998

¹¹¹ Section 6 of the Lotteries (Regulation) Act, 1998

¹¹² Section 7(3) of the Lotteries (Regulation) Act, 1998

¹¹³ The Act is named as The Infant Milk Substitutes, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act, 1992 as Amended in 2003 (IMS Act) visit <http://www.bpni.org/documents/IMS-act.pdf>, visited on 20-1-2017

advertisement¹¹⁴ of the same.¹¹⁵ The Competition Act, 2002 provides prohibition of certain agreements in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.¹¹⁶

The provisions of Trademarks Act, 1999 clearly emphasize that the following are considered as trademark infringement if it is advertised in such a way as to:¹¹⁷

- takes unfair advantage of and is contrary to honest practices in industrial or commercial matters; or
- is detrimental to its distinctive character; or
- is against the reputation of the trade mark.

Thus if used properly and without any malafide intention, then comparative advertisement can prove beneficial otherwise that may mislead consumers resulting into irreparable loss as well as legal battles.¹¹⁸

As per the Contract Act, 1872, the advertisements for gambling, lottery and prize games have held to be wagering contracts and thus void and unenforceable,¹¹⁹ are prohibited in India. While reading the provisions of the Act along with the ASCI guidelines it is understood that even the incorporation of a visual representation of such gaming room or table could be construed as indirect advertisement.¹²⁰

The Civil Defense Act, 1968 gives power to the Central Government to make rules for securing civil defense¹²¹ for prohibiting the printing and publication of any book or other document containing matters prejudicial to civil defense.¹²² Rules could also be made for demanding security from any press used for the purpose of printing/publishing of any book or other document containing matters prejudicial to civil defense.

V Conclusion

As discussed above the rapid growth of online advertising opened the plethora of legal issues therefore, there is a need for certain uniformed principles for addressing these problems. A variety of different approaches used by USA, EU and India caused unpredictability and uncertainty. In an ever-evolving environment such as the Internet, at least fundamental uniformity is required, in order to maintain reliability in online transactions and prevent infringements and/or unfair or deceptive acts and practices.

Online advertising should be treated beyond national policies due to its comprehensive nature as it is attempted in the European Union. The general obligations and rights of the online advertising actors and allocation of liabilities should be unified at least at the minimum level.

¹¹⁴ Section 2(a) of The Infant Milk Substitutes, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act, 1992 as Amended in 2003 (IMS Act): "advertisement" includes any notice, circular, label, wrapper or any other document or visible representation or announcement made by means of any light, sound, smoke or gas or by means of electronic transmission or by audio or visual transmission.

¹¹⁵ Preamble of The Infant Milk Substitutes, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act, 1992

¹¹⁶ Chapter II of the Competition Act, 2002

¹¹⁷ Section 29(8) of Trademarks Act, 1999

¹¹⁸ *Reckitt Benckiser v Hindustan Lever* 2008 (38) PTC 139; *Pepsi Co Inc v Hindustan Coca Cola Ltd* 2003 (27) PTC 305 (Del)

¹¹⁹ Section 24 to 30 of the Indian Contract Act, 1872

¹²⁰ Chapter III, Clause 6(d) and (e) of the ASCI Code

¹²¹ Chapter II of the Civil Defence Act, 1968

¹²² Chapter II, Section 3(1)(w) of the Civil Defense Act, 1968

Setting minimum standards in all jurisdictions would provide foreseeability, reliability and development of the marketing communications. Regulating the rest may remain in the hands of self-regulatory authorities and/or national regulatory authorities which should be flexible and actively involved enough to seize the needs of the developing marketing communications and technologies. In order to achieve this purpose, authorities might establish a global structure such as an institution or an organization specialized in advertising related legal matters. Besides, there may be a supervisory council within the same structure which might supervise national authorities and act as a supra-national authority which may enforce its decisions on national level.

However uniformity should not be understood in a way to provide constraints on online advertising that prevents the market to develop and to move forward. Uniformity serves for the consistency and reliability of online advertising world-wide. Increase of reliability, consistency and confidence in the online advertising would certainly increase its benefits for consumers, advertisers and the companies marketing their products or services. Unlike the European Union member states' strict application of legislative framework on advertising practices, the application of online advertising rules should be liberalized for promoting new developments and competitive environment. Unified rules should only provide basic principles and procedures on which the regulatory authorities would build up their interpretations and determinations. These rules should welcome the innovations that the sector would bring in the future. In the Internet medium, in a moment's time an expression may have numerous consequences in many different jurisdictions. Therefore, online advertising issues should be dealt sensitively, considering collective justice. Online advertising has two phases consisting of both the commercial and the consumer correlatively. There should be a balance in the legal boundaries between these two sides. Legal provisions providing online advertisers a free zone for collecting user data and for promoting and convincing consumers should provide protection for the consumers regarding deceptive ads and privacy invading practices. On the other hand, while protecting consumers, the competitive environment of commerce should be maintained. This balance is important also for both enabling consumers to reach products that they actually desire and to maintain a fair commercial environment.

Abuse of Dominant Position and Anti-Competitive Practices: A Comparative study of India, USA, UK and EU

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Abstract

The Competition law strives to maintain free and fair market by curbing dominant forces in the market from exploiting their power. Competition laws endeavor at the conception of a better market and extensive preference for consumers. The Indian competition regime is based mainly on the jurisprudence developed in the EU and the US. The Competition Commission of India and the Competition Appellate Tribunal have taken a dynamic part in developing the law and creating awareness amid the industry players and have imposed hefty penalties by way of Orders to deter anti-competitive practices and develop a severe competition law framework in India. In this paper, an endeavor is being made to try to bring out the main points of distinction in different jurisdictions regarding the abuse of dominant position and the consequent concepts. The purpose of this research paper is to examine whether the CCI fully equipped with tools to handle the global players in the Indian Markets after raising the FDI caps in different sectors of India economy and to prevent the cross border anticompetitive practices in India in the present scenario of globalization. The existence or acquisition of dominance through competence and product superiority is not what the competition law strikes at. Dominance is not per se illegal, whereas an abuse of such dominant power in the market has been held to be unlawful and the competition authorities have tackled such abuses as and when they arise.

Keywords *Jurisprudence, Awareness, Penalties, Globalization, Market*

I Introduction

Competition is a situation in the market in which firms or sellers independently strive for the buyers' patronage in order to achieve a particular business objective for example, profit, sales or market share.¹²⁵ Competition law attempts to control the formation of monopolies and aim at fair play in the markets. The primary objective of the competition policy is to promote efficiency and maximize welfare. The definition of welfare is of paramount importance and it is the sum total of consumers surplus and producers surplus.¹²⁶ These laws vary from country to country depending upon the economic policy of that nation, and the market strategy that is followed therein, giving these laws a domestic character. The underlying objective of the Competition law being promotion of consumer welfare, the Competition laws endeavors to curtail anti competitive elements in the market by allowing freedom of choice to the consumers. Mainly Competition Laws across the globe primarily deal with three areas namely, anti competitive agreements, the abuse of dominant position and mergers/combinations. Some laws specify different concepts like 'monopoly' or 'attempt to monopolize' which do not have meanings precisely comparable to "Abuse of Dominance".

The Monopoly and Restrictive Trade Practices Act, 1969 ("MRTP Act) was the initial competition related legislation of India followed by the enactment of the Competition Act, 2002 (Act) as amended by the Competition (Amendment) Act, 2007 follows the philosophy of modern competition laws. The Act prohibits anti-competitive agreements, abuse of dominant position by enterprises and regulates combinations (acquisition, acquiring of control and

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¹²⁵ www.competition-commission-india.nic.in/advocacy/speech_member.pdf, visited on Sept 21, 2016

¹²⁶ Paul A. Samuelson & William A. Nordhaus: Economics 54 (16th Ed.1998, Tata McGraw-Hill Publication Co. Ltd. New Delhi)

Mergers & Acquisitions), which causes or likely to cause an appreciable adverse effect on competition within India.¹²⁷ The above stated objectives of the Act are sought to be achieved through the Competition Commission of India (hereinafter referred as CCI) which has been established by the Central Government with effect from 14 October 2003.¹²⁸

In late 1980's India suffered huge financial deficits, and this gave birth to the Liberalization, Privatization and Globalization (LPG) regime in 1991. The change in the economic outlook of the State resulted in several changes being made to the MRTP Act through the 1991 Amendment. Post- 1991 the economic policy aimed at regulating, rather than restricting, the growth and expansion of the private sector in the country. Soon it was realized that the existing law on competition was not adequate and a need for a new law was greatly felt. Therefore, a High Level Committee was set up to look into the competition law and policy of India and to make recommendations. The Committee suggested that the MRTP Act be replaced with a more modern law that takes into account the new market structure. In India, under the Monopolies and Restrictive Trade Practices Act, 1969, a dominant undertaking is one, which enjoys 25 per cent of total market share in India or substantial part thereof.¹²⁹ Pursuant to the recommendations of the Committee, the Competition Act 2002 was enacted. The Act was further amended in 2007 and in 2009 sections 3 and 4 were notified¹³⁰, thus, empowering the Competition Commission, the regulatory body established under the Act¹³¹, to take cases relating to anti- competitive agreements and abuse of dominance. The Competition Commission has suo moto authority, unlike the MRTP Commission, to take up cases under any of these provisions.

II DOMINANCE

Dominance, in economics, is measured in contrast to the position of similar firms within a distinct market. A firm or undertaking is said to be dominant when it holds enough market power to operate ignorant to competitive forces. According to Prof. Ander man, the test for dominance of an enterprise is “the power to limit output to raise prices and to take out profits above the competitive level from that market”¹³².

However, the ECJ has defined dominant position in the case of *United Brands v. Commission*¹³³ as follows:

“a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of its consumers”.

¹²⁷ http://cci.gov.in/index.php?option=com_content&task=view&exp=0&id=12 visited on September 22, 2016

¹²⁸ Ibid

¹²⁹ Section 2 (d) of the MRTP Act envisages that dominant undertaking means an undertaking which either by itself or along with inter connected undertakings produces, supplies, distributes or otherwise controls one fourth of the total goods produced or services rendered in India or substantial part thereof.

¹³⁰ Notification of the Ministry of Company Affairs dated 20th May 2009

¹³¹ Sec. 7, The Competition Act, 2002

¹³² Ander man Steve, *EC Competition Law and Intellectual Property Rights- The Regulation of Innovation*, Pg.206

¹³³ [1978] ECR 207, available at:-

<http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1055&context=njilb> accessed on April 17, 2016

US antitrust law is defined as monopoly power rather than dominance, and has been specified as the power to control prices or to curb competition. In *US Steel Corp.*¹³⁴ the Court held that to hoist prices above those that would be charged in a competitive market is what market power capable of. The Courts further observed that monopoly power does not mean that the enterprise has raised price and eliminated competition, but it is the power to hoist prices and the ability to eliminate competition. The US Courts have clearly drawn a line between existence and exercise. It must be understood that existence of dominance is not forbidden, it is the exercise of monopoly power that leads to punishment. In India the statute on competition law itself endow with the definition of dominant position. It utters that an enterprise has a dominant position in the market if it has the power to function separately of its competitors and affect them and its consumers in its favor.¹³⁵

It is then the responsibility of the Commission to decide whether the enterprise is dominant therein, and for this purpose, the Commission is guided by the factors specified in Section 19¹³⁶ of the Act. This section enumerates factors that are pro-competitive- such as social costs incurred by the enterprise, or fueling economic development in the nation and may work to mitigate the liability of the delinquent enterprise. Other factors like the market share of the enterprise, the monopoly exercised by it, entry barriers in that market, etc. may work for or against the enterprise.

The traditional definition of dominance is that it relates to a position of economic strength enjoyed by an enterprise in the relevant market which enables it to prevent effective competition by affording it the power to behave independently of competitors and of customers.¹³⁷ Dominant Position has been appropriately defined in the Competition Act, 2002 in terms of the position of strength enjoyed by an enterprise, in the relevant market, in India, which enables it to (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market, in its favor.¹³⁸ Thus, it can be regarded as the ability of the enterprise to behave/act independently of the market forces that determines its dominant position. In a perfectly competitive market, no enterprise has control over the market, especially in the determination of price of the product. However, perfect market conditions are more of an economic "ideal" than reality. Keeping this in view, the Act specifies a number of factors that should be taken into account while determining whether an enterprise is dominant or not.¹³⁹

The MRTP Act provided certain numerical thresholds for deciding dominance. According to it an undertaking would be dominant if it controls one- fourth of the provision or production of goods and services in the market. Such an approach may allow a leading enterprise to escape merely on the ground of numbers. It is very much likely that an enterprise holding a small market share, say 20%, may enjoy high concentration of market power, in case of minute and scattered competitors. On the other hand an enterprise holding a large market share, say 60%, may not enjoy such power in case its competitor also holds a high share, say 35-40%. Thus, fixing a numerical value to the criterion of dominance may go against the very spirit of this

¹³⁴ 429 US 610 (1977), available at <http://supreme.justia.com/cases/federal/us/429/610/> accessed on April 17, 2016.

¹³⁵ Explanation to Section 4, The Competition Act, 2002

¹³⁶ 19(4), The Competition Act, 2002

¹³⁷ *Hoffman La Roche v. Commission* (1979) 3 CMLR 211

¹³⁸ Explanation to section 4(2) of Competition Act, 2002

¹³⁹ Section 19(4) enumerates the factors for determining dominance

section.¹⁴⁰ However, once an undertaking holds a dominant position in the market, it has the obligation, not to abuse its position.

III Prohibition of Abuse of Dominance

Ordinarily, merely the fact that a firm or enterprise or undertaking is in a dominant position in the relevant market alone is not forbidden by competition law. But the competition laws of the EU¹⁴¹, UK¹⁴² and India¹⁴³ hold a general prohibition on the abuse of dominance by undertakings/enterprises. The law of the United Kingdom and the EC law forbid abuse of dominant position in the 'market' or 'common market' respectively, in so far as it may concern trade 'within the United Kingdom' or 'between the member states' respectively. In other words, the abuse of dominant position is forbidden subject to an additional condition of such abuse affecting trade in the United Kingdom or between member states. No such circumstance has been laid down in Indian legislations. It can be said that in the law of India, the conduct of the enterprise or firm alone is to be taken into account and not the effect of such conduct on competition. Under the antitrust laws of the United States, the terms "dominance" or "abuse of dominance" are not used. The corresponding concept under that law is of 'monopoly' and 'attempt to monopolize'.¹⁴⁴ There are mainly three stages in determining whether an enterprise has abused its dominant position.

- Defining the relevant market.
- Determining whether the concerned undertaking/enterprise/firm is in a dominant position/ has a substantial degree of market power/ has monopoly power in that relevant market.
- Determination, of whether the undertaking in a dominant position/ having considerable market power/monopoly power has engaged in conducts particularly forbidden by the statute or amounting to abuse of dominant position/monopoly or effort to monopolize under the applicable law.

¹⁴⁰ Raghavan Committee Report, 2000, available at http://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition_policy_law_svs_raghavan_committee.pdf accessed on April 25, 2016 at 20:00 IST

¹⁴¹ Article 82 of the Treaty of the European Communities states, "Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be for bided as incompatible with the common market in so far as it may affect trade between Member States".

¹⁴² Section 18 (1) of the Competition Act, 1998 of the United Kingdom provides" ... any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is for bided if it may affect trade within the United Kingdom."

¹⁴³ Section 4 (I) of the Indian Competition Act states, "No Enterprise shall abuse its dominant position". There are however certain differences in these basic provisions. While the Indian law forbids abuse of dominant position by enterprises in general.

¹⁴⁴ Section 2 of the Sherman Act states: "Every person who shall monopolize, or attempt to monopolize, or combine or plot with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and..."

IV Relevant Market

The primary focus in delineating a “relevant market” is to pinpoint both the sphere and the periphery of practices¹⁴⁵ and activities¹⁴⁶ that are said to have an appreciable adverse effect on competition¹⁴⁷, i.e. to describe the scope of such practices and activities, the ramifications of which can be considered a significant obstruction to free trade and consumer interest. The relevant product market¹⁴⁸ is defined in terms of substitutability.

The initial step in determining whether an undertaking/enterprise/firm has abused its dominant position is defining the relevant market. The notion of relevant market has two dimensions precisely, the relevant product market and the relevant geographical market. According to Black’s Law Dictionary (7th Ed), the product market is that part of the relevant market that applies to a firm's particular product by identifying all reasonable substitutes for the product and by determining whether these substitutes limit the firm's ability to affect prices. The relevant geographical market is a market comprising that area in which the conditions for the supply of goods and services are distinctly homogenous and can be distinguished from the conditions existing in the neighborhood areas. The Courts of most jurisdictions studied have taken note of the importance of defining the relevant market (both geographical and product) as the first step in determining the abuse of dominance/misuse of market power/monopoly or attempt to monopolize.

In India, the statute itself states that for determining the appropriate market, the appropriate product market or the appropriate geographic market, or both are to be taken into account. The European Court of Justice has in a number of decisions such as in the case of Hoffman La Roche v. Commission of the European Communities¹⁴⁹ and NV Nederlandsche Banden Industries Michelin v Commission of the European Communities¹⁵⁰ observed that it is essential to define the relevant market both in terms of product and geography or location.

The American Courts also gave emphasis to the importance of first defining the relevant markets, taking into account both the product and geographic aspects. In cases such as Walker Process Equipment’s Inc. v. Food, Machinery and Chemical Corp.,¹⁵¹ it was observed that without a definition of the relevant market, there is no way to measure the Defendants ability to minimize or destroy competition. Defining relevant market is indispensable to a monopolization claim under section 2 of the Sherman Act.

V Dominant Position

¹⁴⁵ "Practice" includes any practice relating to the carrying on of any trade by a person or an enterprise; as per Section 2 (m) of the Competition Act, 2002.

¹⁴⁶ Activity" includes profession or occupation; as per Article 2 :Explanations (a) of the Competition Act,2002

¹⁴⁷ Section 3 (1) of the Competition Act, 2002

¹⁴⁸ Section 2(t) of the Competition Act, 2002

¹⁴⁹ [1978] ECR 207, available at:-

<http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1055&context=njilb>
accessed on May 17, 2016 at 20:00 1ST.

¹⁵⁰ [1979] ECR 461.

¹⁵¹ 382 US 172 (1960), available at <https://supreme.justia.com/cases/federal/us/382/172/case.html>
accessed on May 25, 2016 at 20:00 1ST.

While the laws of numerous countries forbid or state illegal the abuse/ monopoly or attempt to monopolize the exploitation of market power or provide for a prohibition of certain conduct by undertakings in a dominant position having a substantial degree of market power, the manner in which “dominant position”, 'monopoly' or 'substantial degree of market power' is defined is different in different countries. ‘The concept of dominance is broader than economic power over price. It is not the same as economic monopoly, although a monopoly would clearly be dominant’. The common definition of dominant position or market power followed in jurisdictions such as the European Union, United Kingdom, United States and India take into account the capability of a firm or enterprise to behave independently of its competitors and the absence of competition or constraint from the conduct of competitors. The Indian Competition Act contains a definition of dominant position that takes into account whether the concerned enterprise is in such a position of economic strength that it can function independently of competitive forces or can affect the relevant market in its favor.

Explanation (a) to Section 4 of the Indian Competition Act defines dominant position as “dominant position means a position of strength, enjoyed by an enterprise, in the relevant market in India, which enables it to-

- Operate independently of competitive forces prevailing in the relevant market or
- Affect its competitors or consumers or the relevant market in its favor.

The EU treaty does not contain a precise definition of “dominant position”. However, the European Court of Justice has in some decisions defined “dominant position”. For instance, in the case of *N. V. Netherlands Banden industries Michelin v. Commission of the European Communities*¹⁵², it was observed that dominant position under Article 86 of the EC Treaty it as “a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to a significant extent independently of its competitors, its customers and ultimately of the consumers.”

According to the Competition Act of the United Kingdom, Section 18 (3), “dominant position” means a dominant position within the United Kingdom; and “the United Kingdom” means the United Kingdom or any part of it”. Section 18 does not provide what is meant by dominant position. Section 60 (1) of the UK Competition Act provides that the purpose of this section is to ensure that so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising under this Part in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community law in relation to competition within the Community. Sub section (2) provides that at any time when the court determines a question arising under this Part, it must act (so far as is compatible with the provisions of this Part and whether or not it would otherwise be required to do so) with a view to securing that there is no discrepancy between-

- the principles applied, and decision reached, by the court in determining that question; and

¹⁵² [1983] ECR 3451, available at:-

<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61981CJ0322&from=EN> accessed on April 29, 2016 at 14:00 1ST

- the principles laid down by the Treaty and the European Court, and any relevant decision of that Court, as applicable at that time in determining any consequent question arising in Community law.

Further, sub section (3) states that the court must, in addition have regard to any relevant decision or statement of the Commission. In consonance with the provisions of section 60, the Competition Authorities of the United Kingdom have placed reliance on the definition of dominant position laid down by the European Court of Justice i.e. under community law. For instance, in the case of *Napp Pharmaceutical Holdings Ltd. v. Director General of Fair Trading*¹⁵³, the Competition Appeal Tribunal observed (citing the case of *Hoffman La Roche v. Commission of the European Communities*) that “according to the classical test, a dominant position under Article 82 of the Treaty is 'a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers, As stated before, under the antitrust law of the United States, the term corresponding to “dominant position” is “monopoly”. “Monopoly Power” is defined as the power of the concerned entity to control prices or to restrict or exclude competition. In the case of *United States v. E.L. du Pont de Neumours and Co*¹⁵⁴, it was noticed that, “Our cases determine that a party has monopoly power if it has, complete control over “any part of the trade or commerce among the several States,” a power of controlling prices or unreasonably restricting competition”. In the case of *Jefferson Parish Hospital Distt No.2 v. Hyde*¹⁵⁵ citing inter alia *United States Steel Corp. v. Fortner Enterprises*¹⁵⁶, it was observed that market power is the ability to raise prices above those that would be charged in a competitive market. These interpretations in *du Pont* and *Jefferson Parish* have been cited and followed in a number of cases.

VI Factors to be taken Into Account to Determine Dominant Position.

A number of factors are taken into account to determine whether a particular undertaking or group of undertakings is in a dominant position in the relevant market. In some jurisdictions, the competition legislations themselves state the factors to be taken into account but in others case laws may have to be studied to identify the factors. The Indian Competition Act expressly states the factors that are to be taken into account to determine dominant position.¹⁵⁷ Under the competition laws of the European Union, also, it has been renowned

¹⁵³ [2002] CAT 1: [2002]. Comp. AR 13, available at:-

file:///C:/Users/Mandakini/Downloads/JdgNapp150102%20(1).pdf accessed on April 31, 2016 at 23:00 1ST

¹⁵⁴ 351 US 377 (1956), available at <http://supreme.justia.com/cases/federal/us/351/377/> accessed on April 30, 2016 at 21:20 IST

¹⁵⁵ 466 US 2 (1984), available at <http://supreme.justia.com/cases/federal/us/466/2/> accessed on April 30, 2016 at 21:30 IST

¹⁵⁶ 429 US 610 (1977) available at <http://supreme.justia.com/cases/federal/us/429/610/> accessed on April 30, 2016 at 21:40 IST

¹⁵⁷ The Indian Act states under Section 19 (4) that the Commission may have regard to some precise factors for determining whether an enterprise is in a dominant position including market share of the enterprise, size and resources of the enterprise; size and importance of competitors; economic power of the enterprise including commercial advantages over competitors, vertical assimilation of the enterprises or sale or service network of such enterprise; dependence of consumers on such enterprise, monopoly or dominant position whether acquired as a result of any statute or by virtue of being a

that market share is one of the significant indicators of dominant position¹⁵⁸. In the case of *Hoffmann-La Roche & Co. AG v Commission of the European Communities*¹⁵⁹, it was observed that the existence of a dominant position may be obtained from several factors which, taken separately, are not necessarily determinative but among these factors a highly significant one is the being of very large market shares and that substantial market share as evidence of the existence of a dominant position is not a constant factor and its importance varies from market to market according to the structure of these markets, especially as far as production, supply and demand are concerned. In the United Kingdom also, the key factors to be considered in the determination of whether an undertaking is in a dominant position includes market shares, barriers to entry and the conduct of the parties. In the case of *Office of Fair Trading v W. Austin & Sons & Ors*¹⁶⁰, it was noted that whether such a dominant position exists may be established by many factors, including high and importunate market shares, barriers to entry, and the conduct of the parties.

In the context of the United States it has been observed that market shares have been used as one index or screen of market power but other factors such as barriers to entry, availability of substitutes, the number and size of competitors, and the nature of the product are also considered in determining whether or not a firm has extensive market power¹⁶¹. The US law also indicates that in that country a predominant share of the market generally would entail the existence of monopoly power. Under US law, market shares of above 70 per cent have been held to constitute 'monopoly power'. It is noted that a market share of over 90 per cent is almost always sufficient to support an implication of monopoly and that a market share of less than 40 per cent virtually precludes a finding of monopoly.¹⁶² Under the Indian Competition Act, there is no precise provision with regard to the presumption of dominance where an undertaking has a very large market share. As the significant provisions in this context have not been given effect to yet, the position on this point is vague. The presumption of existence of a dominant position at certain specified levels of market share has been provided under the laws of many jurisdictions. The threshold level specified seems to be the highest being in the United States. The Presumption of dominance at certain levels of market share is rebuttable in most cases seem to be a conclusive test of dominance and at these levels; no other factor seems to be taken into account.

government company or public sector undertaking or otherwise; entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers; countervailing buying power; market structure and size of market; social obligations and social costs; virtual advantage by way of the contribution to the economic development by the enterprise enjoying a dominant position having or likely to have a significant adverse effect on competition; or any other factor which the commission may consider significant for the inquiry.

¹⁵⁸ *Azko Chemie BY v. European Commission*, 1986 ECR 1965, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61986CJ0062> accessed on April 30, 2016 at 22:00 IST

¹⁵⁹ [1978] ECR 207, available at

<http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1055&context=njilb> accessed on May 17, 2016 at 20:00 IST

¹⁶¹ *United States v. Microsoft (Dist. of Columbia)*,

¹⁶² *United States v. Grinnel Corp.*, 384 U. S. 563 (1966), available at :- <http://supreme.justia.com/cases/federal/us/384/563/> accessed on May 02, 2016 at 20:10 IST and *Eastman Kodak Co. v, Image Technical Services Inc.*, 504 US 451 (1992), available at <http://www.law.cornell.edu/supct/html/90-1029.ZO.html> accessed on May 02, 2016 at 20:10 IST

VII Abuse of Dominant Position

'Abuse of dominance' is not defined in most of the competition laws. However, many competition laws enumerate some conducts which, if engaged in by an enterprise in a dominant position as amounting to abuse of dominance. Different conducts have been expressly declared to amount to abuse of dominance under the competition laws of different jurisdictions. It may be observed that the list of practices specified in various laws as amounting to abuse of dominance is generally illustrative and not exhaustive. The treaty of the EU does not contain an express definition of abuse of dominance but simply lists certain conduct which, if engaged in by a dominant undertaking will amount to abuse of dominance. Article 82 of the Treaty of the EC states that such abuse may in particular consist of:

- i. directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- ii. limiting production, markets or technical development to the prejudice of consumers;
- iii. applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- iv. making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.

As stated above, the above list is not an exhaustive one. This was observed in the case of Tetrapak International SA v. Commission of European Communities¹⁶³ where the Court stated that it is settled case law that the list of abusive practices contained in Article 86 of the treaty is not an exhaustive enumeration of the abuses of dominant position forbidden by the treaty. "Abuse of Dominance" has not been defined in the UK Competition Act. As is the case with the Treaty of the European Communities, the UK Act lays down the conducts which if betrothed in by dominant undertakings would amount to the abuse of dominance. Section 18 (2) of the Competition Act of the UK seems to be based on Article 82 of the EC treaty. It states that, "Conduct may, in particular, constitute such an abuse if it consists of:

Yet again, the Indian Act also does not define abuse of dominance. According to Section 4 (2) of the Indian Competition Act¹⁶⁴, "There shall be an abuse of dominant position under sub-section (1), if an enterprise:

- (a) directly or indirectly, imposes unfair or discriminatory
 - (i) condition in purchase or sale of goods or service; or
 - (ii) price in purchase or sale (including predatory price) of goods or service.

Explanation: For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service referred to in sub-clause (i) and unfair or prejudiced price in purchase or sale of goods (including predatory price) or service referred to in sub clause (ii)

¹⁶³ 1996 ECR I-5951, available at:-

<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61991TJ0083&from=EN> accessed on May 07, 2016 at 20:10 IST

¹⁶⁴ Indian Competition Act, <http://indiankanoon.org/doc/1780194/> accessed on May 07, 2016 at 21:30 IST

shall not include such discriminatory condition or price which may be adopted to meet the competition; or

- (b) limits or restricts-
 - (i) production of goods or provision of services or market therefore; or
 - (ii) technical or scientific development relating to goods or services to the prejudice of consumers; or
- (c) indulges in practice or practices resulting in denial of market access; or
- (d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or
- (e) uses its dominant position in one relevant market to enter into, or protect, other relevant market”.

In the laws of the United States, as stated above there is no notion of abuse of dominant position and what is forbidden is monopoly or attempt to monopolize. It may be noted that under the Sherman Act, no precise conducts have been specified which are not to be engaged in by undertakings having monopoly power or in their attempt to monopolize. In the case of *Spectrum Sports, Inc. v. McQuillan*¹⁶⁵, it was observed that “Consistent with our cases, it is generally required that, to demonstrate attempted monopolization, a plaintiff must prove

- (i) that the defendant has engaged in rapacious or anti competitive conduct with
- (ii) a precise target to monopolize and
- (iii) a dangerous probability of achieving monopoly power. In order to determine whether there is a perilous probability of monopolization, courts have found it necessary to consider the relevant market and the defendant's ability to minimize or destroy competition in that market”.

UK Act, EC Law and the Indian Competition Act are different from each other on only one ground that according to the UK and EC laws, the conducts specified may amount to 'abuse of dominant position' whereas according to the Indian Act the conducts specified shall amount to 'abuse of dominance'. The Indian Act precisely enumerates 'practices resulting in denial of market Access' and 'using dominant position in one market to enter into or protect, other significant markets' as conducts amounting to the abuse of dominance, whereas they have not been mentioned in the UK and EU laws.

VIII Predatory Pricing

Predatory Pricing is not something that has been mentioned particularly in the competition laws of most of the countries as amounting to “abuse of dominance”. However, under the Indian competition Act, “directly or indirectly imposing unfair or discriminatory price in the purchase or sale (including predatory pricing) of goods or services” has been specified as amounting to an abuse of dominance if engaged in by a dominant enterprise. The conventional theory of predatory pricing is that the predator, already a dominant firm sets

¹⁶⁵ 506 US 447 (1993), available at <http://www.law.cornell.edu/supct/html/91-10.ZO.html> accessed on May 15, 2016 at 16:00 IST

prices so low for a sufficient period of time that its competitors leave the market and newcomers are deterred from entering and the losses incurred due to the low prices, which like any investment, will be recovered by future gains. This theory was later supplemented by the argument that the benefits of predation were not limited to the market where it predated¹⁶⁶. The European Union Community Courts do not relate the recoupment test (they do not necessarily require proof that the predator will be able to recoup its losses through cartel pricing after having driven out its competitors) and focus primarily on the relationship between the prices charged and costs, combined with an element of intent¹⁶⁷. On the other hand, the US Courts needs proof that there is pricing below cost or below an appropriate measure and also, that there is a precarious probability of recouping the investment in the below-cost prices. While in US law, both below cost pricing as well as possibility of recoupment have to be taken into account for a finding of predatory pricing, under the EU laws, it seems that it is not essential to prove recoupment of losses. The Court has observed that whenever there is a risk that competitors will be terminated, it must be possible to penalize predatory pricing.

IX Conclusion

In the era of hasty development around the globe, free and fair competition has become the need of the hour. It has become essential to wallop a balance between consumer welfare and technological development while dealing with the question of dominance. An owner shall fall under the purview of the Competition Act only if he acquires dominance in the relevant market. It has been held time and again that mere dominance is not insulting under the competition law, only its abuse is penalized. Competition for the growth of the market should be promoted. In the Competition laws of different jurisdictions studied, the size of a firm or its dominant position as such is not forbidden. However, Abuse of dominance /misuse of market power/monopoly or the attempt to monopolize are considered bad under all competition laws.

Another step is shaping whether the concerned undertaking/enterprise/firm is dominant or has monopoly power or a substantial degree of market power. Dominance or monopoly power or market power of undertakings is defined in most jurisdictions on the basis of the undertakings ability to operate independently of competition or to control prices. A number of factors are to be taken into consideration to determine dominance economic power / monopoly power. Such criteria may have been specified in the statute itself as in India or may have to be determined from decided cases. Market share seems to be the most significant criterion in all jurisdictions. "Barriers to entry in the market" seems to be one more criterion taken into account in all jurisdictions. Other criteria taken into account such as regulatory barriers, size and structure of the market, links with other undertakings etc, and the importance attached as such criteria vary in different jurisdictions although there may be some common factors. It may be noted that total market power or the complete elimination of chance for competition is not necessary in order to attract the provisions regarding the abuse of dominance. What is required is a dominant position or a substantial degree of market power.

Abuse of dominance misuse of market power monopoly has not been defined by most competition legislations. Most legislations such as those of the European Union, United Kingdom, United States and India merely specify certain conducts which the dominant

¹⁶⁶ Report by the Organisation For Economic Co-Operation And Development

<http://www.oecd.org/dataoecd/7/54/2375661.pdf> visited on May 15, 2016 at 17:15 hrs IST.

¹⁶⁷ Bloch, Robert E. et al: A Comparative Analysis of Article 82 and Section 2 of the Sherman Act.

undertaking or undertaking having market power is not to engage in. The Competition legislations of the United States do not enumerate any precise forbidden conducts.

Although the abuse of dominance or misuse of market power or attempt to monopolize is forbidden in the laws of all the countries studied, certain exemptions or exclusions from the prohibitions are available under various competition laws. The penalties prescribed for the abuse of dominance vary in different jurisdictions. While most jurisdictions prescribe punishments of fines to be levied on the erring entity, the Sherman Act of the United States declares "monopolizing or attempt to monopolize" to be a felony and also prescribes imprisonment up to a maximum of three years for the same. The remedies in cases of abuse of dominance or exploitation of market power or monopoly or attempt to monopolize range from less severe measures such as orders to adapt or cease the illegal conduct and penalties to adverse measures such as divestiture. From the above discussion, it is sufficiently clear that the existence or acquisition of dominance through competence and product superiority is not what the competition law strikes at. To conclude, it must be remembered that dominance is not per se illegal the law shall take notice of those instances only, where there has been an abuse of dominance. Mere dominance is not sufficient ground to magnetize the provisions of competition law.

REGULATION OF ONLINE INFORMATIONAL PRIVACY IN INDIA

Abhijit Rohi*

Abstract

The very nature of technology is such that it captures every action and movement of an individual in an online environment making it privacy invasive. The recent developments in technology have opened up new avenues for information collection, storing and manipulation. This article deals with four major issues. Firstly, it examines the need for online informational privacy protection; secondly, it aims at understanding the existing legal and policy framework for protection of informational privacy in India; thirdly, critically examining adequacy of legal and policy measures for online informational privacy regulation and lastly, suggesting the need for undertaking specific legal and policy initiatives for economic development of the country in a global context.

Keywords *Technology, invasive, Manipulation, Protection, Initiatives*

I Introduction

Advent and proliferation of information technology has revolutionized the field of information generation, storage, processing and transfer. The byproduct of this revolution, one of the many, is a threat to individual privacy. Information has developed an intrinsic economic value and so followed the commercial exploitation of information concerning an individual. In the present 'data-driven economy the companies make profits based on the personal data collected.¹⁶⁸

The advent and quick expansion of fields of cloud computing and data analytics are a testimony to this. As more and more data is being collected and used for increasing gains by the corporate world and by the government, with or without consent or sometimes an ill-informed consent, it is important to look afresh at the legal regulation securing the privacy as well as other interests of an individual.

The concept of privacy is one of those legal concepts, the meaning and scope of which is still disputed and debated. The concept encompasses with itself various aspects of an individual's personality and life. Privacy can then be associated with the body of a person, being physical privacy, communication between individuals, being communicational privacy and information relating to an individual, being informational privacy. Informational privacy is the ability to determine for yourself when and how others may collect and use your information.¹⁶⁹

II Why Protect Privacy?

"Right to Privacy", a seminal article was published in Harvard Law Review in 1890 by Samuel Warren and Louis Brandeis.¹⁷⁰ Privacy has been talked about since then at least in a more formalized manner within the legal academia. Different legal systems responded to the concept of privacy differently. Some have just recognized the concept of privacy in an indirect

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¹⁶⁸ Who owns your personal data? The incorporated woman, available at www.economist.com/blogs/schumpeter/2014/06/who-owns-your-personal-data (accessed on November 30, 2015)

¹⁶⁹ Robert H. Sloan and Richard Warner, *Beyond Notice and Choice: Privacy, Norms, and Consent*, 14 J. HIGH TECH. L. 370 (2014).

¹⁷⁰ Samuel Warren and Louis Brandeis, *Right to Privacy*, 4 HARV. L. REV. 193 (1890).

fashion¹⁷¹ whereas some jurisdictions have made an attempt, over the years, to introduce it more expressly as a matter of right.¹⁷² Most of the discussion of right to privacy has been revolving around the development in technology and its adoption as a means of communication which in turn had led to the users of the same being susceptible to violation of their privacy.

Privacy as understood initially was limited to right to be let alone¹⁷³ has over the years developed to encompass the concepts such as freedom of thought, control over one's body, solitude in one's home, control over information about oneself, freedom from surveillance, protection of one's reputation, and protection from searches and interrogations.¹⁷⁴

The online environment and nature of cyberspace itself is different from all other forms of existing communication mediums owing to the nature of technology used. Also based on its availability, accessibility, digital convergence and the shift it brought in the way people can exercise their freedom of speech and expression and impact of their actions in cyberspace has raised certain major issues for the protection of individual privacy. Technological defeatists¹⁷⁵ rely on a dystopian view arguing that despite the existence of privacy values, the pursuit toward safeguarding privacy is pointless because of the continued growth in surveillance capabilities.¹⁷⁶ Social Network Platforms (SNPs) have become a very common part of life for a majority of regular Internet users. The implication of this usage for the privacy of users is a topic of significant concern socially and legally¹⁷⁷ so is the reason why greater regulatory control is suggested.¹⁷⁸ The emergence of the concepts as Big Data, Meta Data, its processing, Data mining, individual online behavioral profiling, use of cookies to gather the information from the customers electronic devices etc. has over the years resulted in exposing the personal and even sensitive personal information of an individual. "Big data" refers to the acquisition and analysis of massive collections of information, collections so large that until recently the technology needed to analyze them did not exist.¹⁷⁹ The combination of

¹⁷¹ India can be considered as an example of the jurisdiction which has recognized the concept of privacy in an indirect manner as the power of the state or the government to intercept or monitor the communication between the private individuals is regulated under the law. The example of it can be Section 5 (2) of the Indian Telegraph Act, 1885 and similar provision under The Wireless Telegraphy Act, 1933.

¹⁷² USA can be considered as the example of the jurisdiction which has, more expressly through legislative means, recognized right to privacy. The example of The Right to Privacy Act, 1974 is important.

¹⁷³ *Supra*, n. 1.

¹⁷⁴ Daniel J.Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087 (2002), at 1088.

¹⁷⁵ Evgeny Morozov, *The Wrong Way to Discuss New Technologies*, SLATE (Mar. 7, 2013), http://www.slate.com/articles/technology/future_tense/2013/03/to_save_everythingclick_here_how_to_vanquish_technological_defeatism.html (Accessed on June 7, 2015)

¹⁷⁶ *Supra* n. 8 at 156

¹⁷⁷ Andrew Adams, *Facebook Code: Social Network Sites Platform Affordances and Privacy*, 23 J. L. INFO. & SCI. 158 (2014), at 158.

¹⁷⁸ *Id.*

¹⁷⁹ Omer Tene & Jules Polonetsky, *Privacy In The Age Of Big Data: A Time For Big Decision*, 64 STAN. L. REV. ONLINE 63 (2012) (commenting on the advancements on data mining and analytics and the requisite massive increase in computing power); see also Kenneth Cukier, *Data, Data Everywhere*, THE ECONOMIST (Feb. 25, 2010) archived at perma.cc/98RY-7PK2 (providing examples of the recent boom of technological computing power).

increasing power of new technology and the declining clarity and agreement on privacy give rise to problems concerning law, policy and ethics.¹⁸⁰

Professor Neil Richards contends that privacy protects intellectual pursuits, and also that there is a larger social value to ensuring robust and uninhibited reading, speaking, and exploration of ideas.¹⁸¹ Professor Julie Cohen states that innovation invariably depends upon privacy, which is increasingly under attack as Big Data analytics help mining information about individuals and as media-content providers track people's consumption of ideas through technology.¹⁸² Moreover, in a number of cases, as Professor Lior Strahilevitz argues, privacy protection has distributive effects; it benefits some people and harms other people.¹⁸³

With the emergence of cloud computing, the data is being stored at different locations sometimes on the servers which are not only located outside the country but are also owned by some third parties. This poses a new form of challenge to privacy protection. Countries like the USA and India which excel in providing information technology related services globally; the data is transferred to the companies in such countries for processing etc. posing immediate threats to privacy protection. Thus the transborder data flow (TDF), transborder data processing and transborder data storing are characterized by increased privacy concerns.

III How does India Regulate Privacy?

Before dealing with as to how does India Regulate Privacy, a look into how India recognizes privacy is important. As pointed out, earlier in this paper, India recognizes the concept privacy indirectly.

A. Legislative Attempts:

Very few statutes make reference to the term 'privacy,' two major enactments which refer to the term are firstly, Information Technology Act, 2000 (as Amended in 2008)¹⁸⁴ and secondly; The Right to Information Act, 2005.¹⁸⁵ The IT Act, 2000, under Sections 43A and 72 grants protection to the information collected about a person. The government of India has passed rules in furtherance of Section 43A.¹⁸⁶ These rules define both the expressions viz. 'personal information'¹⁸⁷ and 'sensitive personal data or information'¹⁸⁸ under Rule 2. On the other hand

¹⁸⁰ Privacy and Information technology <http://plato.stanford.edu/entries/it-privacy/#BigDat> (Accessed on June 7, 2015)

¹⁸¹ See Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1945–52 (2013).

¹⁸² See Julie E. Cohen, *What Privacy Is For*, 126 HARV. L. REV. 1904, 1918–27 (2013).

¹⁸³ See Lior Jacob Strahilevitz, *Toward a Positive Theory of Privacy Law*, 126 HARV. L. REV. 2010 (2013).

¹⁸⁴ Hereinafter referred to as IT Act, 2000.

See Section 43A: Compensation for failure to protect data, Section 66E: Punishment for violation of privacy and Section 72: Penalty for breach of confidentiality and privacy.

¹⁸⁵ Hereinafter referred to as the RTI Act, 2005.

See Section 8: Exemption from disclosure of information.

¹⁸⁶ The Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011. Hereinafter referred to as Sensitive Personal Information Rules, 2011.

¹⁸⁷ See Rule 2(1)(i) defining 'personal information'.

¹⁸⁸ Rule 3 defining 'Sensitive personal data or information'.

the concept of privacy as envisaged under Section 66E is primarily relating to the physical or bodily privacy of a person. Thus primarily only legal provisions protecting informational privacy in India are Section 43A, 72 of the IT Act, 2000 and Section 8(1)(j) of the RTI Act, 2005 along with the Sensitive Personal Information Rules, 2011. This indicates the inadequate legislative attention received by the concept of privacy in India.

B. Judicial Perspective:

Briefly describing the judicial attention gained by the concept of privacy, it is imperative to make reference to some of the most prominent judicial pronouncements in India include firstly, ***Kharak Singh v. State of Uttar Pradesh***,¹⁸⁹ in a minority judgment in this case, Justice Subba Rao held that “the right to personal liberty takes in not only a right to be free from restrictions placed on his movements, but also free from encroachments on his private life. It is true our Constitution does not expressly declare a right to privacy as a fundamental right but the said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security. In the last resort, a person’s house, where he lives with his family, is his “castle” “it is his rampart against encroachment on his personal liberty.” This case, especially Justice Subba Rao’s observations, paved the way for later elaborations on the right to privacy using Article 21 in India.

Secondly, ***Govind v. State of Madhya Pradesh***,¹⁹⁰ in which concerning privacy, more specifically with surveillance by domiciliary visits, the Court stated, “too broad a definition of privacy will raise serious questions about the propriety of judicial reliance on a right that is not explicit in the Constitution. The right to privacy will, therefore, necessarily, have to go through a process of case by case development. Hence, assuming that the right to personal liberty, the right to move freely throughout India and the freedom of speech create an independent fundamental right of privacy as an emanation from them it could not be absolute. It must be subject to restriction on the basis of compelling public interest.” Thus for the first time the highest Court in India has declared right to privacy as a fundamental right warning clearly against the absolute nature of the same.

Thirdly, ***R. Rajagopal v. State of Tamil Nadu***,¹⁹¹ in which the court was involved in balancing of the right of privacy of citizens against the right of the press to criticize and comment on acts and conduct of public officials. The right of privacy of citizens was dealt with by the Supreme Court in the following terms: - “(1) The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a ‘right to be let alone’. A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, childbearing and education among other matters. None can publish anything concerning the above matters without his consent - whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy. (2) The rule aforesaid is subject to the exception, that any publication concerning the aforesaid aspects becomes unobjectionable if such publication is based upon public records including court records. This is for the reason that once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by press and media among others. We are, however, of the opinion that in the interests of decency [Article 19(2)] an exception must be carved out to this rule, viz., a female who is the victim of

¹⁸⁹ A.I.R. 1963 S.C. 1295

¹⁹⁰ (1975) 2 S.C.C. 148

¹⁹¹ A.I.R. 1995 S.C. 264

a sexual assault, kidnap, abduction or a like offence should not further be subjected to the indignity of her name and the incident being publicised in press/media.” Thus this judgment was also the reiteration of *Govind’s Case*¹⁹², the important fact highlighted pertaining to the nature of privacy was calling it ‘a right to be let alone’.

Fourthly, *People’s Union for Civil Liberties v. Union of India*,¹⁹³ it was a public interest litigation, in which the court was called upon to consider whether wiretapping was an unconstitutional infringement of a citizen’s right to privacy. On the concept of the ‘right to privacy’ in India, the Court made the following observations: “The right privacy - by itself - has not been identified under the Constitution. As a concept it may be too broad and moralistic to define it judicially. Whether right to privacy can be claimed or has been infringed in a given case would depend on the facts of the said case.” This judgment had an effect of having enforceable right to privacy but not having a determined scope of it and leaving to be decided subjectively.

Fifthly, *Mr. ‘X’ v. Hospital ‘Z’*,¹⁹⁴ this case involved a claim for damages made by a patient against a hospital which disclosed the fact that the patient tested positive for HIV which resulted in his proposed marriage being called off and the patient being ostracized by the community. The case revolved around balancing right to privacy if Mr. X, the appellant with that of right to life of Ms. Y, with whom the marriage of the appellant was settled. The Court said that the disclosure of the information by Hospital Z did not amount to violation right to privacy of the appellant.

And lastly, *State of Maharashtra v. Bharat Shanti Lal Shah*,¹⁹⁵ wherein the court reiterated the position in all previous judgments and also stated “The interception of conversation though constitutes an invasion of an individual right to privacy but the said right can be curtailed in accordance to procedure validly established by law. Thus what the Court is required to see is that the procedure itself must be fair, just and reasonable and non arbitrary, fanciful or oppressive.”

It is imperative to note that among all these cases, only one, that is, *Mr. ‘X’ v. Hospital ‘Z’*¹⁹⁶ dealt with disclosing or divulging the information concerning an individual. Other cases dealt primarily with interception of the communication between the parties by the state, thus implying the violation of ‘communication privacy.’ Interesting to note also that there have been numerous instances of reference to specific rights enshrined under Article 19 of the Constitution of India viz. in *Kharak Singh’s Case*,¹⁹⁷ *Govind’s Case*,¹⁹⁸ Article 19(1)(d) and Article 19(5) guaranteeing to a citizen a right to privacy of movements, in *R. Rajagopal’s Case*,¹⁹⁹ dealing with freedom of press vis-à-vis right to privacy, Article 19(1)(a) and Article 19(2). The references to freedoms under Article 19 and corresponding restrictions under the same imply the existence of unbreakable link between the freedoms under Article 19 and personal liberty as enshrined under Article 21.

¹⁹² (1975) 2 S.C.C. 148

¹⁹³ (1997) 1 S.C.C. 301

¹⁹⁴ (1998) 8 S.C.C. 296 (India) & (2003) 1 S.C.C. 500

¹⁹⁵ (2008) 13 S.C.C. 5

¹⁹⁶ (1998) 8 S.C.C. 296 (India) & (2003) 1 S.C.C. 500

¹⁹⁷ A.I.R. 1963 S.C. 1295

¹⁹⁸ (1975) 2 S.C.C. 148

¹⁹⁹ A.I.R. 1995 S.C. 264

*R. Rajagopal's Case*²⁰⁰ and *Mr. 'X' v. Hospital 'Z'*²⁰¹ stand differently from rest other cases as stated before on certain grounds. The major point of differentiation being the nature of privacy claimed in both these cases. As opposed to the other cases, the protection sought by the affected parties does not relate to the violation of privacy of their communication, it also does not deal with violation of their physical privacy; rather these cases seek protection of information concerning the parties alleging the violation of right to privacy. These cases, thus illustrate the different aspect of privacy which needed protection in their cases, viz. privacy of the information or 'informational privacy'.

Even though this has been the judicial view towards privacy over the years, currently, whether there exists a fundamental right to privacy under the Constitution of India is being questioned before the Supreme Court of India. A petition filed by Justice K.S. Puttaswamy (Retd.) challenging the constitutional validity of Aadhaar Scheme is being heard by the Court. In his arguments representing the Government of India, Attorney-General, stated that privacy is not a fundamental right.²⁰² The Court has now referred the matter to the Constitutional Bench consisting of 9 judges to authoritatively decide the constitutional matter relating to right to privacy.²⁰³

Thus looking at the existing regime in India it is clear that there is limited attention received by the concept of privacy by legislature and the judiciary is yet to decide whether right to privacy is a fundamental right. If right to privacy is recognized by the judiciary in the instant petition then owing to Article 32 of the Constitution of India any citizen can knock the doors of the Supreme Court to get right to privacy enforced. But according to Article 12 this right to get right to privacy enforced will accrue only against the authorities which fall within the meaning of 'state'; thus not guaranteeing protection against privacy invasive actions of the private entities.

IV. Is It Enough?

The preceding part indicates that the Indian legal regime had not prioritized protection of privacy, with the introduction of Aadhaar Scheme major questions are being raised aiming at protection of privacy. Also to note that the IT Act, 2000 did very little to protect privacy of citizens in an online environment till the insertion of Section 43A in 2008 and the Sensitive Personal Information Rules in 2011. These attempts are not flawless and are being criticized for being inadequate. This part deals with critically analyzing these attempts from a global perspective.

The Sensitive Personal Information Rules, 2011 are applicable only to 'body corporate',²⁰⁴ the definition of which does not include the data collected by government bodies and individuals. Thus there is no recourse against the government for collection, storage, manipulation, disclosure or transfer of data.

²⁰⁰ A.I.R. 1995 S.C. 264

²⁰¹ (1998) 8 S.C.C. 296 (India) & (2003) 1 S.C.C. 500

²⁰² Krishnadas Rajgopal, *After 60 Years SC to Relook Right to Privacy, Courtesy Aadhaar*, (Last Accessed on October 9, 2015) (available at <http://www.thehindu.com/news/national/after-60-years-sc-to-relook-right-to-privacy-courtesy-aadhaar/article7739356.ece>)

²⁰³ Krishnadas Rajgopal, *After 60 Years SC to Relook Right to Privacy, Courtesy Aadhaar*, (Last Accessed on October 9, 2015) (available at <http://www.thehindu.com/news/national/after-60-years-sc-to-relook-right-to-privacy-courtesy-aadhaar/article7739356.ece>)

²⁰⁴ As defined under Section 43A of IT ACT, 2000.

The Sensitive Personal Information Rules, 2011 are criticized by the privacy advocates on various grounds namely, the Sensitive Personal Information Rules poorly define 'body corporate,' state entities involved in collection of personal and sensitive personal information is precluded from the its scope. Emphasizing the importance of the prior consent of the individual providing personal and sensitive personal information, as the case may be, the Rule 5(1)²⁰⁵ mandates the consent to be taken by the body corporate only when it is collecting sensitive personal data, implying that no consent is required in collection of personal data, this Rule also does not mention in detail the nature of consent. Though the need of the consent regime has been clearly established,²⁰⁶ it has also been criticized on very pertinent issues, such as cognitive problems in making informed rational choices, structural problems as too many institutions collecting information, privacy self-management fails to address larger social values to state a few.²⁰⁷ Rule 5(2)²⁰⁸ highlighting lawful purpose, nexus between the function and data collected, and necessity of the data for the said purpose and Rule 5(4)²⁰⁹ concerning the retention of data collected also applies only to sensitive personal information and leaves personal information completely out of their scope.

Rule 6(1)²¹⁰ also applies only to sensitive personal data instead of all personal information. The use of the phrase "any third party" lends vagueness to this provision since the term "third party" has not been defined. The phrase "provider of information" is undefined and creates confusion as it could mean either or both of the individual who consents to the collection of his personal information or another entity that transfers personal information to the body corporate. The Sensitive Personal Information Rules, 2011 suffer from numerous flaws, incapacitating the effective protection of privacy of an individual.

In the recent past the Report of the Expert Committee headed by Justice A. P. Shah assumes a special importance to highlight the inadequate treatment received by the concept of privacy in India.²¹¹ The Report compares the data protection principles in the Organization for Economic Co-operation and Development (OECD) Privacy Guidelines, EU Data Protection Directives, Asia-Pacific Economic Cooperation (APEC) Privacy Framework, Canada PIPEDA (Personal Information Protection and Electronic Documents Act), and Australia ANPP (Australia National Privacy Principles). It then identifies nine principles viz. notice, choice and consent, collection limitation, purpose limitation, access and correction, disclosure of information, security, openness and accountability, together called 'National Privacy Principles' to be adopted in India. The Committee has also recommended the establishment of privacy commissioners at the Central and Regional levels, a Privacy Act bringing in a system of co-regulation that will give self-regulatory organizations (SROs) at the industry level the

²⁰⁵Rule 5 titled 'Collection of Information'.

²⁰⁶Robert H. Sloan and Richard Warner, *Beyond Notice and Choice: Privacy, Norms, and Consent*, 14 J. HIGH TECH. L. 370 (2014). 'Adequate informational privacy requires a sufficiently broad ability to give or withhold free and informed consent to proposed uses.'

²⁰⁷See Daniel J. Solove, *Privacy Self-Management and the Consent Dilemma*, 126, HARV. L. REV. 1880 (2013). It has also been contended that the privacy violation happens as 'a result of an aggregation of pieces of data over a period of time by different entities.'

²⁰⁸Rule 5(2) enlisting conditions for collection of sensitive personal information.

²⁰⁹Rule 5(4) stating the duration for the retention of data.

²¹⁰Rule 6(1) concerning, 'Disclosure of sensitive personal data or information'.

²¹¹ Report of the Group of Experts on Privacy, (Chaired by Justice A P Shah, Former Chief Justice, Delhi High Court), (Oct. 16, 2012) available at http://planningcommission.nic.in/reports/genrep/rep_privacy.pdf (Accessed on November 30, 2012) (Hereinafter referred to as the Report).

choice to develop privacy standards, mandatory appointments of data controllers and privacy officers.²¹²

As privacy as a concept, at times, may be considered as subjective, the privacy protection and its extent may depend upon the nature of the society, its culture and inadvertently the value attached to, by them, to privacy. The Report looks at the initiatives by different jurisdictions emphasizing the commonality of privacy protection principles followed in all those jurisdictions, it indicates the possibility of all agreeing to 'Universal Privacy Protection Principles.' The Report proposes the Privacy Act for India recognizing multidimensional privacy, horizontal applicability, conformity with privacy principles and co-regulatory enforcement regime. The recommendations in the Report appear to move Indian privacy protection regime closer to the approach adopted in the UK and the EU. A model which is rights based one and where there is single legislation addressing all the issues concerning information protection, like the Data Protection Act, 1998 of the UK and General Data Protection Regulation (GDPR)²¹³ of the EU. This rights-based model bases right to privacy at its center unlike the USA model which is termed as the one with 'obscure vision.'²¹⁴ The USA regulates privacy more importantly protects individual's informational privacy primarily from the perspective of consumer protection. Thus, the regulating authority in the USA is Federal Trade Commission (FTC) as opposed to Data Protection Commissioners in the UK. The Government of India is yet act on the recommendations of the Committee highlighting the inadequacies in the privacy protection standards and legal regime in India.

V Conclusion

The legal regime in India seems inadequate compared to the global standards in regulation of informational privacy in cyberspace. The data protection rules suffer from numerous incapacities. In the age of globalized information economies with newer levels of interdependence characterized by over increasing transborder data flows, wherein India is emerging as one of the major service providers in the field of information technology globally, it is imperative to have effective privacy regulation mechanisms under the law. This will have direct effect on opening up of new markets for India; say the market of the EU and the UK which have stricter rules and standards for privacy regulation. India will also have to take a call in deciding whether she wants to have a regime with rights based approach which will be effective only when she recognizes right to privacy as a fundamental right and then create a corresponding legal regime surrounding informational privacy. With the global nature of the internet and its technology with recent developments the countries should move towards guaranteeing uniform levels of privacy protection by adopting 'Universal Rules for Privacy Protection.'

²¹² *Id.*

²¹³ Regulation (EU) 2016/679.

²¹⁴ See Joel R. Reidenberg, *Governing Networks and Rule-Making in Cyberspace*, 45 EMORY L.J. 911 (1996).

MANUAL SCAVENGING IN INDIA: A CRITICAL APPRAISAL

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"I may not be born again but if it happens, I will like to be born into a family of scavengers, so that I may relieve them of the inhuman, unhealthy and hateful practice of carrying night soil."

- Mahatma Gandhi

Abstract

In the modern technology age of Globalizations and liberalization the society is still struggling with manual scavenging which is alarming and deteriorating the health of persons involved as well as for coming generation. The manual scavenging is a great evil existing in the society which dehumanize the human being which promote the discrimination and spot the person with low human value. Maneka Gandhi Case the Supreme Court of India gave the new dimension of Article 21 of the Indian Constitution 'Right to live with dignity' which is contrary to manual scavenging activities. Universal Declaration of Human Rights, 1948 speaks of right to health and the activities involved in manual scavenging are endangering to the health. Keeping in view these constitutional as well conventional provisions the researcher(s) tried to justify their arguments for prohibition of manual scavenging. Manual scavenging not only deteriorate the health of person involved in the acts but also adversely affect the future generation who are soft target these problems.

Key words Manual Scavenging; UDHR; Rehabilitation; untouchability; safai Karamchari.

I INTRODUCTION

Manual scavenging is one of the greatest evils attached to the human civilization. Manual Scavengers are those persons who are engaged or employed in manually cleaning the excreta by an individual or a local authority or a public or private agency.²¹⁶ The practice of 'manual scavenging' is still pervasive in India. According to Census 2011, "there are still around 800,000 Indian households with dry latrines that have to be cleaned manually. Also, there are 26 lakh dry latrines in India which are manually scavenged by 1,80,000 people."²¹⁷

It traces its roots from the caste system where the people from lower strata used to remove human excreta and this custom has continued till today. Meenakshi Ganguly, South Asia director, Human Rights Watch said, "People work as manual scavengers because their caste is expected to fulfill this role, and are typically unable to get any other work."²¹⁸ It is considered as a form of slavery of Dalit people. It is one of the lowest, polluted and most degrading

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²¹⁶ *Manual Scavenging in India*, Samajik Shaikshanik Vikas Kendra (SSVK), available at http://www.ssvk.org/pdf_doc_files/Manual_Scavenging_in_India-October%202013.pdf, last seen on 06/03/2017.

²¹⁷ Darpan Singh, *Social Justice Minister answers how big is the challenge of manual scavenging*, *Indiatoday* (30/09/2015), available at <http://indiatoday.intoday.in/story/social-justice-minister-answers-how-big-is-the-challenge-of-manual-scavenging/1/486413.html>, last seen on 06/03/2017.

²¹⁸ Digvijay Singh, *India: Caste Forced to Clean Human Waste*, Human Rights Watch, available at <https://www.hrw.org/news/2014/08/25/india-caste-forced-clean-human-waste>, last seen on 02/03/2017.

occupations.²¹⁹ Section 2(j) of the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993 defines "manual scavenger means a person engaged in or employed for manually carrying human excreta." Section 2(g) of the Prohibition of Employment as Manual Scavengers and their Rehabilitation Act 2013 also defines the term as:

“ ‘manual scavenger’ means a person engaged or employed, at the commencement of this Act or at any time thereafter, by an individual or a local authority or an agency or a contractor, for manually cleaning, carrying, disposing of, or otherwise handling in any manner, human excreta in an insanitary latrine or in an open drain or pit into which the human excreta from the insanitary latrines is disposed of, or on a railway track or in such other spaces or premises.”

People of this caste-based occupation remove the human excreta and clean the dry toilets with bare hands, brooms or metal scrappers; carrying excrements and baskets to dumping sites for disposal which is definitely against the human dignity. Engaging persons for the purpose of doing the job of manual scavenging is considered illegal in India. This custom not only violates the laws of India but it operates against the spirit of International Human Rights law. The ongoing practice of manual scavenging is a disgrace to human dignity. It is a clear violation of Article 14, 17 and 21 of the Indian Constitution. It also reflects that state has failed to take effective measures to implement the Article 47 of the Indian Constitution. Despite having various international instruments as well as legislative framework, the problem of manual scavenging has not been solved and people are still being subjected to virulent and unhealthy conditions in the absence of proper sewage system in many parts of the country. Hence, the paper seeks to investigate the concern of manual scavenging in India and problems faced by manual scavengers in the country. It will look into the framework of International Human Rights Law as well as legislative enactments of India. Further, it will try to give some suggestions to end this unhealthy practice of manual scavenging.

II INTERNATIONAL PERSPECTIVE ON MANUAL SCAVENGING

Before going into the depth of the legal framework of India, we need to be clear about the international jurisprudence of the principle which recognizes the human dignity on the basis of equality principles. The issue of manual scavenging has been addressed at the international forum in different ways. First of all, discrimination in treatment or employment is prohibited by various international conventions and secondly, right to health is a human right under Universal Declaration of Human Rights (UDHR), 1948, International Covenant on Economic, Social and Cultural Rights, 1966, Conventions on the Rights of Child, 1989 etc.

Starting with the UDHR, Article 1²²⁰ recognizes the human dignity and equality whereas Article 2 says everyone should be endowed with all the rights enshrined in the declaration without any discrimination.²²¹

Article 23(3) of UDHR mentions, “Everyone who works has a right to just and favorable remuneration enduring for himself and his family an existence worthy of human dignity and supplemented, if necessary, by other means of social protection.”²²²

²¹⁹Safai Karmchari Andolan, Safai Karmchari Andolan, available at <http://safaikarmachariandolan.org/>, last seen on 03/03/2017.

²²⁰Article 1: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in spirit of brotherhood.”

²²¹Article 2: “Everyone is entitled to all the rights and freedom set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

²²²Universal Declaration of Human Rights, 1948, art 23(1).

These articles ensure that human beings should not be discriminated and human dignity should be protected and promoted. Also, persons should be entitled for justifiable remuneration for their living conditions.

Further, Article 5(a) of Convention on the Elimination of all Forms of Discrimination against Women, 1979 conveys very powerful message to the whole international community first in order to minimize the prevailing discrimination against women and secondly, to terminate the customary practices based upon the discrimination such as manual scavenging.²²³

Article 2(1)(c) of Convention on the Elimination of Racial Discrimination, 1965 prohibits the racial discrimination among all races and casts the duty upon the states to adopt the necessary measures.²²⁴ In the profession of manual scavenging, discrimination exists against particular class of society only which not only demands the end of this discrimination rather it requires that state should take effective measures to stop this practice.

Article 24 of Convention on Rights of Child, 1989 says, “States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health.”

This article ensures the highest attainable standard of health of children. Due to the practice of manual scavenging, numerous diseases spread from parents to children and thus, state parties have a duty to regulate such kind of activities.

World Health Organization has given the definition of health is “a state of complete **physical, mental and social well-being** and not merely the absence of disease or infirmity”.²²⁵

Article 25 of the UDHR and Article 12 of International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR)²²⁶ also make the similar claim that right to health and sanitation is a fundamental human right guaranteed to all persons without any distinction.

Further, Article 12(2)(c) of ICESCR casts the duty upon the state parties to take the necessary measures “for the prevention, treatment and control of epidemic, endemic, occupational and other diseases.”²²⁷

“These health hazards include exposure to harmful gases such as methane and hydrogen sulfide, cardiovascular degeneration, musculoskeletal disorders like osteoarthritic changes and intervertebral disc herniation, infections like hepatitis, leptospirosis and helicobacter, skin problems, respiratory system problems and altered pulmonary function parameters.”²²⁸

²²³Article 5(a): “States Parties shall take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.”

²²⁴Article 2(1)(c): “States parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and to his end: (c) each State party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.”

²²⁵ Constitution of The World Health Organization, available at http://www.who.int/governance/eb/who_constitution_en.pdf, last seen on 06/03/2017.

²²⁶Art. 13(1), International Covenant on Economic, Social and Cultural Rights, 1966, 993 UNTS 3, adopted on 16 December 1966.

²²⁷ Ibid, art. 12(2)(c).

²²⁸ Rashtriya Garima Abhiyan, Manual Scavengers and Their Health, Medico friend circle, available at <http://www.mfcindia.org/main/bgpapers/bgpapers2013/am/bgpap2013h.pdf>, last seen on 08/03/2017.

Hence, states should pave the way for creating the environment for good sanitation and prevention of occupational diseases, which also includes Manual Scavenging.

The hon'ble Supreme Court of India in case of *Safai Karamchhari Andolan & Ors. v. Union of India & Ors.*²²⁹ Recognized the importance of the above-mentioned international instruments concerning the issues faced by the Manual Scavengers in India.

III MANUAL SCAVENGING IN INDIA

Manual Scavengers are the victimized people facing the most appalling form of untouchability. The practice of manual scavenging has number of adverse impacts and it affects the physical, mental, psychological as well as social conditions of the sanitary workers and their families. In India, this practice still persists in many parts. They have to face harassment²³⁰, social stigma and problem of 'social exclusion' within the society. Even if they are clean and odorless, their peers typically segregate them in public settings.²³¹ They have limited access of opportunities and are often subjected to caste based discrimination and violence.

There are following challenges experienced by the manual scavengers in urban and rural areas²³² that were highlighted by an organization named Janvikas:

1. Lowest in caste system
2. Lowest among Dalits too.
3. Victims of violence, untouchability and discrimination in everyday life.
4. No voice in development sector, little among rights based groups.
5. No political, economic or social assertion by the community.
6. Lack of leadership in the community-always led by others.
7. Engaged in most inhuman practice of manual scavenging.

According to the House Listing and Housing Census 2011, states such as Andhra Pradesh, Assam, Jammu and Kashmir, Maharashtra, Tamil Nadu, Uttar Pradesh and West Bengal reckon for more than 72 percent of the insanitary latrines in India.²³³

According to Socio Economic and Caste Census, 2011, Maharashtra has maximum number of manual scavenger households followed by the Madhya Pradesh, Uttar Pradesh, Karnataka and Punjab.

²²⁹ Safai Karamchhari Andolan & Ors. v. Union of India & Ors., Writ Petition (Civil) No. 583 of 2003.

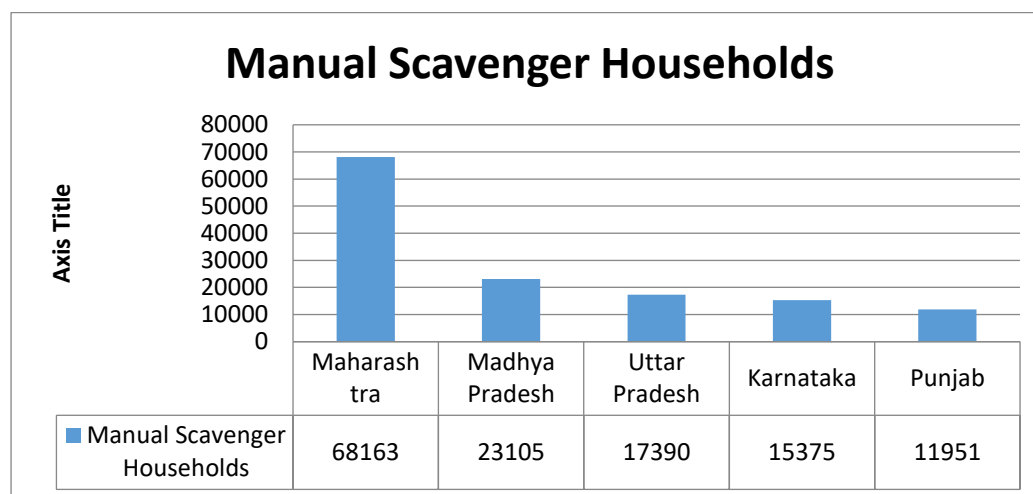
²³⁰ Abhishek Gupta, *Manual Scavenging: A Case of Denied Rights*, Indian Law Institute Law Review, p. 51 (2016).

²³¹ Siddaramu. B, *Liberation and Rehabilitation of Manual Scavengers*, 1 International Journal of Research in Humanities, Arts and Literature, pp. 29-38 (2013).

²³² *Eradication of Manual Scavenging and Community Development*, Janvikas, available at <http://www.janvikas.in/manualscavenger.html>, last seen on 07/03/2017.

²³³ *Breaking Free: Rehabilitating Manual Scavengers*, United Nations in India, available at <http://in.one.un.org/page/breaking-free-rehabilitating-manual-scavengers/>, last seen on 02/03/2017.

Graph 1: Number of Manual Scavenger Households



Source: Socio Economic and Caste Census, 2011.²³⁴

Ignorance, illiteracy, poverty and implementation of laws are some of the major issues that need to be addressed in order to put a ban on the practice of manual scavenging.

In *Safai Karamchari Andolan & Ors. v Union of India & Ors.*²³⁵ a writ petition was filed by the petitioners under Article 32 of the Constitution of India asking for issuance of a writ of mandamus against Union of India, State Governments and Union Territories to apply the execution of the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act 1993. They contended that the practice of manual scavenging violates their rights guaranteed under Articles 14, 17, 21 and 47 of the Constitution of India, 1950. In this case, the court considered the existing legal framework of India as well as numerous international instruments safeguarding the human rights of all persons and consequently, directed all the State Governments and the Union Territories to implement the Prohibition of Employment as Manual Scavengers and their Rehabilitation Act 2013 considering the rights of manual scavengers in order to eliminate this menace.

Further, in order to have comprehensive understanding of the issues and challenges, we have to go through with the actions taken by the government(s) to regulate the profession of scavenging. And then only, we can come up with the new ideas and deliberations for resolving this practice.

IV Significance of Legislative Framework

Considering the blind incongruity in the legislative framework for the protection of Manual Scavengers in India, it becomes imperative to study the existing laws in order to find the lacunae in the system. The problems of manual scavengers are wide-spread thus, to put an end to all the human rights violations, effective legal protection is required.

²³⁴ *Number of Households Any Member Belonging to PTG, LRBL, MS (Rural)*, Socio Economic and Caste Census 2011, available at <http://secc.gov.in/statewisePTGLRBLMSReport?reportType=PTG%20,%20LRBL%20,%20MS>, last seen on 06/03/2017.

²³⁵ *Safai Karamchari Andolan & Ors. v. Union of India & Ors.*, Writ Petition (Civil) No. 583 of 2003.

1. Constitutional Safeguards

“On the 26th January 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics we will be recognising the principle of one man one vote and one vote one value. In our social and economic life, we shall by reason of our social and economic structure, continue to deny the principle of one man one value. How long shall we continue to live this life of contradictions?”

-Dr. Bhimrao Ambedkar

Dr. Ambedkar stated the above-mentioned statement in the light of prevailing social and economic inequalities in India at that time and he was rightly comprehended by raising his concern over the issue as to when will we get rid of these contradictions in our society as they are still imbibing in our traditional and cultural patterns. We think that people belonging to lower caste who do not have any other way of income rather dependent upon the profession of manual scavenging must only be hired for this purpose.

However, the Constitution of India, 1950 guarantees the right to equality to all people (Article 14) and prohibits any discrimination on the basis of religion, caste, creed, sex, place of birth etc. Article 17 of the Indian Constitution heads towards ‘Abolition of Untouchability’ and in order to implement it, the Protection of Civil Rights Act, 1955 was enacted.

Section 4 of the Act proscribes ‘enforcing the social disabilities’ and prohibits any occupation which operates as a part of ‘untouchability’ practice. Further, Section 7A of the Act states: “Whoever compels any person, on the ground of “untouchability”, **to do any scavenging or sweeping** or to remove any carcass or to flay any animal or to remove the umbilical cord or to do any other job of a similar nature, shall be deemed to have enforced a disability arising out of “untouchability”.”

Article 21 of the Constitution ensures the right to life with dignity. Article 23 prohibits the forced labor and makes the act punishable. Manual Scavenging is a kind of forced labor where people belonging to lower strata are forced to opt for this hereditary occupation. Article 47 (DPSP) casts the duty upon the states to improve the living conditions and public health. Hence, to put a ban on practice of scavenging we need to have detailed understanding of the constitutional provisions.

2. The Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989

In order to tackle the concerns of people belonging to backward class of society which were not effectively addressed by the Protection of Civil Rights Act, 1955, this act was enacted. It was passed with the purpose to proscribe the instances of discrimination and harassment inclined towards the Scheduled Castes (SCs) & Scheduled Tribes (STs). The Preamble of the Act talks about the objective of the Act to be achieved and it states: *“to prevent the commission of offences of atrocities against the members of Scheduled Castes and Tribes, to provide for Special Courts for the trial of such offences and for the relief and rehabilitation of the victims of such offenses and for matters connected therewith or incidental thereto.”*²³⁶

The Act aimed towards prohibiting the atrocities and biasness towards the SCs & STs community in order to provide socio-economic and political justice to them.

3. The National Commission for Safai Karamcharis Act, 1993

Section 2 (e) of the Act defines “Safai Karamchari means a person engaged in, or employed for, manually carrying human excreta or any sanitation work.” The act contains a provision regarding ‘National Commission for Safai Karamcharis’ to look after the implementation of act and schemes related to it. The commission will also inquire about the instances of non-

²³⁶ The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989.

implementation of policies, programmes and other measures taken for the benefits and socio-economic upliftment of Safai Karamcharis. Section 8 of the act says that “the commission will give recommendations to the central government for elimination of inequalities in status, facilities and opportunities for Safai Karamcharis.”

However, it should be noted that the commission was set-up in 1994 for the duration of three years.

4. The Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993

This was the first act which was passed to outlaw the dehumanizing practice of manual scavenging in India. As the name suggests, this act puts an end to construction of Dry Latrines and prohibits the employment of persons into this profession.

Under this act, power has been assigned to the state governments for formulating the schemes “for regulating conversion of dry latrines into, or construction and maintenance of, water-seal latrines, rehabilitation of the persons who were engaged in or employed for as manual scavengers.”²³⁷

5. The Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013

This act has been formulated “to provide for the prohibition of employment as manual scavengers, rehabilitation of manual scavengers and their families, and for matters connected therewith or incidental thereto.” This act was seen to have more comprehensive approach than the 1993 Act. The earlier act was criticized on the grounds that till now no conviction has been upheld by it and it holds poor implementation.

However, 2013 Act also aimed towards the prohibition of employment as Manual Scavengers and construction of insanitary latrines but additionally, it contains the provisions regarding ‘Rehabilitation of Manual Scavengers’ by a Municipality²³⁸ or Panchayats²³⁹. The act has widened the power of local authorities to regulate the matters related to sanitary latrines.

Further, the act has provision for ‘Vigilance Committees’ to look after the implementation of the act and rehabilitation process.²⁴⁰ Apart from local authorities, place has been given to the Cantonment Board, representative from railway authority and social workers.

The act also mentions the functions of State Monitoring Committees²⁴¹, Central Monitoring Committee²⁴² and National Commission for Safai Karamchari²⁴³ for providing the recommendations for building strong legal mechanism through implementation of the act.

V COMMITTEE REPORTS/SCHEMES/WORKSHOPS

Apart from legislative enactments, both the central as well as the state governments has adopted legislative and policy efforts to end manual scavenging. Hence, we would like to highlight some important reports and schemes.

The ‘**pre-matric scholarship scheme**’ was started for the children of those persons who are engaged in unhealthy practice of cleaning in the year 1977-78 for providing the quality education to the children without any discrimination.

²³⁷ S. 6, The Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993.

²³⁸ S. 13, The Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013.

²³⁹ Ibid, s. 16.

²⁴⁰ Ibid, s. 25.

²⁴¹ Ibid, s. 27.

²⁴² Ibid, s. 30.

²⁴³ Ibid, s. 31.

The Scavengers' Living Conditions Enquiry Committee which is also known as the '**Barve Committee**' was set-up in 1949 under the chairmanship of Shri V.N. Barve. The committee observed the living conditions of manual scavengers in the state of Bombay and submitted its recommendations to the government. The committee had asked to fix the minimum wages of the manual scavengers and to improve the existing situations of these persons.

Kaka Kalelkar Commission which is also known as the Backward Class Commission submitted its report in 1955. It observed the pathetic living conditions of the manual scavengers and recommended to have up to date mechanisms of sanitary latrines. Further, it also suggested for improving the conditions of the manual scavengers so as to uplift them.

The Scavenging Conditions Enquiry Committee, 1957 which is also known as Malkani Committee was set-up by **Central Advisory Board for Harijan Welfare, Ministry of Home Affairs, Government of India** which submitted its report in December, 1960. The Committee recommended to the Central Government that modern equipments should be substituted with the practice of cleaning the night soil from the hands for improving the conditions of manual scavengers. It also recommended that flush latrines should be constructed because the problem will remain as long as dry latrines would be there in the society.

The Committee on Customary Rights to Scavenging, 1965 was established by the Central Department of Social Welfare. The committee mentioned that this practice is based upon the hereditary rights and thus, recommended for ending the cultural practices concerning the human rights violations of manual scavengers.

The Committee to study the Working and Service Conditions of Sweepers and Scavengers was set-up by National Commission on Labor as a sub-committee in 1968. It is also known as the 'Pandya Committee' because of its chairman Shri Bhanu Prasad Pandya. It had made suggestions for adopting comprehensive legal framework for the protection of scavengers considering their living conditions in a given set of affairs.

Central Advisory Board for Harijan Welfare was constituted by the Ministry of Home Affairs in 1956 under the chairmanship of Pandit Gobind Ballabh Pant.

The **Planning Commission of India** then appointed a 'Task Force' for Tackling the Problems of Scavengers in 1991-92 which had recommended for construction of 'pour flushed latrines', provide training for children of scavengers and to rehabilitate them.

In **National Workshop on Manual Scavenging and Sanitation** held by the National Human Rights Commission in August 2008, the Chairperson of NHRC remarked that "it's a matter of 'national shame' that despite an Act being in place and so many measures being taken, manual scavenging has not completely stopped in country. The 1993 Act is also a 'half-hearted effort' as there is no authority made accountable which can be held responsible for continuance of

National Scheme for Liberation and Rehabilitation of Scavengers and their dependents was launched by the Indian Government in 1991. The main task of the scheme was to identify the scavengers and dependents in a given period of time as well as to suggest the measures for liberation and rehabilitation of persons engaging in unhealthy and hereditary occupation.²⁴⁴

²⁴⁴ National Scheme for Liberation and Rehabilitation of Scavengers and their Dependents, available at <http://www.ncsk.nic.in/Reports%20NCSK/4RE%201998-99%20&%201999-2000/CHAPTER-IV%20NATIONAL%20SCHEME%20OF%20LIBERATION%20AND%20REHABILITATION%20OF%20SCAVEN GERS%20AND%20THEIR%20DEPENDENTS.pdf>, last seen on 07/03/2017.

Total Sanitation Camp, 1999 and Nirmal Gram Puraskar Yojana, 2003 were started with the objective to provide awareness and capacity building in order to promote sanitation with the help of Panchayati Raj Institutions. They called for ending 'open defecation' by constructing more and more toilets.

The Self-employment Scheme for rehabilitation of Manual Scavengers, 2007 was launched with the objective of accommodating the manual scavengers and their dependents by 2009 but now it has been extended. It was reported that "1.18 lakh manual scavengers and their dependents in 18 States/UTs were identified for implementation of the Scheme."²⁴⁵ The scheme was intended to grant the social security benefits to scavenging community.

Safai Karmchari Andolan²⁴⁶ is a national movement which was started in the year 1995 to eliminate the practice of manual scavenging in India by abolishing the dry latrines. It was initiated by the children of those persons who were engaging in the work of cleaning the excreta manually for attaining the liberation.

Recently, the Railway Ministry has agreed to come up with the idea of having 'Bio-toilets' under '**Swachh Bharat Mission**' in all the trains till 2019²⁴⁷ which will not only resolve the problem of open defecation but it will also eliminate the practice of manual scavenging.

VI CONCLUSION

In this paper, the authors have tried to highlight the customary practice of manual scavenging in India. In order to have comprehensive understanding of the human rights implications, the authors have referred various international instruments to terminate the customary practice of scavenging by ensuring the principles of human dignity and equality. Further, the paper has spotlighted the issues and challenges and discussed the efforts taken by the Central or State Governments and the hon'ble Supreme Court of India to curb the menace of scavenging.

It becomes imperative to provide more dignified work environment and effective 'socio-legal' environment to the manual scavengers, to ameliorate the standard of their lives and dependents. It not only requires governments' intervention but also mental attitude needs to be changed in the way we look scavengers in this discriminatory profession. They are experiencing human rights violation in one or other form. In this context, Meenakshi Ganguly, South Asia director, Human Rights Watch said:

*"Caste-based custom, backed by coercion, is still binding people to manual scavenging, and that demands government intervention."*²⁴⁸

²⁴⁵ Self Employment Scheme for Rehabilitation of Manual Scavengers (SRMS) – Applicable From November, 2013, available at <http://socialjustice.nic.in/writereaddata/UploadFile/SRMSFinalScheme.pdf>, last seen on 07/03/2017.

²⁴⁶ *Safai Karmchari Andolan*, Safai Karmchari Andolan, available at <http://safaikarmchariandolan.org/>, last seen on 07/03/2017.

²⁴⁷ Jyotika Sood, *All railway coaches to have bio-toilets by 2019*, Livemint, (06/06/2016), available at <http://www.livemint.com/Politics/27Y2ISogXqeNMOBUzxD83O/All-railway-coaches-to-have-biotoilets-by-2019.html>, last seen on 07/03/2017

²⁴⁸ Digvijay Singh, *India: Caste Forced to Clean Human Waste*, Human Rights Watch, available at <https://www.hrw.org/news/2014/08/25/india-caste-forced-clean-human-waste>, last seen on 08/03/2017.

VII SUGGESTIONS

Considering the serious problem of manual scavenging, it is to be suggested that instead of adopting new laws, policies and schemes, we should try to ameliorate the living conditions of scavengers within the existing legal framework.

1. Firstly, emphasis to get rid with the dry latrines which are the root cause of this discriminatory practice, then only we can resolve the problem of manual scavenging.
2. Use of Bio-toilets and flushed sanitary latrines should be promoted instead of dry latrines.
3. Instead of removing excreta from hands, we should come up with the technological or mechanical way of cleaning or decomposing method which will liberate the manual scavengers from unhealthy and demeaning job.

In this context, R Selvam, General Secretary of Ambedkar Manual Scavengers Trade Union mentioned "*The Act says that scavengers should be replaced with machinery and technology. However, the required machines have not been bought. The safety equipment including gloves is not fit for use.*"²⁴⁹ Hence, strict implementation and infrastructure development is to be focused.

4. To enhance the alternative ways for empowering manual scavengers such as creating economic opportunities for the, providing education, employment opportunities so that people can realize their full potential.
5. They work in most unhygienic environment hence, awareness programs should be organized on regular basis wherein workers engaged in scavenging should be made aware about the adverse health consequences and safety standards associated with this profession.
6. All the Municipalities, Cantonments, Panchayats and organizations must be forced to purchase the implements/tools to eliminate the manual scavenging.
7. Until the implements/tools are not procured the State Government must be vigilant and ensure the payment of extra and healthy remuneration to those employ as a special class.

²⁴⁹ Mr. Rajesh Pant et al, *Manual Scavenging and Technological Solution to Eradicate It. (Turning Scavengers to Engineers)*, 11 IOSR Journal of Mechanical and Civil Engineering (IOSR-JMCE), p. 11 (2014).

GENDER NEUTRAL POLICIES AT WORKPLACES IN INDIA

Shriya Badgaiya

ABSTRACT

Gender neutrality is an idea that condemns the discrimination or differentiation among people based on gender or sex in connection with language, rules, laws, language and other forms of social roles. It intends to bring in egalitarianism in the society by way of abolishing dominance of one sex over the other. In other words, it aims to have equal treatment of men and women in several contexts. The same is guaranteed to each and every citizen of the country by virtue of various Articles of the Indian Constitution. Even in the international arena, both the genders are treated equally in context of rights and liabilities. The word "gender" various legal implications with itself. It somehow also affects the social status of the individual such as the role of an individual in social institutions such as occupation, marriage, religion etc. It is very much the need of the hour to introduce gender neutral in every possible field. The technological advancements have also made a significant contribution towards demand of gender neutral laws in the country. The philosophy of feminism had out rightly affected the relationships between men and women. This results in the rift regarding gender issues between the two. Despite this ongoing rift, women went ahead to compete, into the man's world to which she was responded harshly and adversely as all this game between the two genders lead to various forms of abuses against women such as domestic violence, sexual harassment at workplaces. All this incidents together felt the need to establish emblematic relationship between the two by the way of gender sensitivity.

Keywords Discrimination, Dominance, Egalitarianism, Feminism, Rift

I INTRODUCTION

1.1 Meaning of Gender Neutrality

The gender negligence, also called gender-neutral or gender-neutral movement, describes the idea that politics, language, and other social institutions should avoid gender differences or gender differences, to avoid discrimination because of the impression that there are social roles for the species is more suitable than the other.²⁵⁰

1.2 Need of Gender Neutral Policy at Workplaces

The economy in India, telecommunications, technology dependency and many social aspects are constantly changing and thus the relationship between men and women. Before the feminist movement, most men and women had relationships very different from those of today. Feminism has strongly influenced the relationship between men and women at work. The struggle of the sexes still rages in the minds of many.²⁵¹

The super-women came to compete in the world of man and with the definition of man of success. The men answered angrily, which led between men and women in a constant conflict. The benefits were physical abuse, domestic violence control women and sexual harassment in the workplace. It is therefore necessary to create a symbiotic relationship between man and woman, through gender sensitivity.²⁵²

²⁵⁰Dan Savage, *what does gender neutrality mean*, THE GEORGIA STRAIGHT, (Dec.10,2014)available at <http://www.straight.com/life/785506/what-does-gender-neutral-actually-mean>,(last visited on Oct. 15,2016).

²⁵¹Ganesh K. Kulkarni, *Need for gender neutral policy at workplace*, INDIAN JOURNAL OF OCCUPATIONAL AND ENVIRONMENTAL MEDICINE, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4280774>,(last visited on Oct.15,2016).

²⁵²*Gender neutral policies are a myth: why we need a women's budget*, THE CONVERSATION, March,16,2016,available at <http://theconversation.com/gender-neutral-policies-are-a-myth-why-we-need-a-womens-budget-55231>(last visited on Oct. 20,2016).

Understand what it is that gender sensitivity and impact:

- The concept of gender sensitivity is designed to reduce the barriers of personal and economic development created by sexism.
- It is advisable to break the ice between the sexes so that they know and understand better. They should express positive feelings about their work and people around.
- Sensitivity of the sexes encourages respect for the individual regardless of sex.
- There will also be the many challenges that will fill the gender differences to promote equality in the areas of education, employment and other areas of work and family.
- According to modern trends, men and women are also active players in the family, community and national affairs. Women must be recognized as being half of the most valuable resources in the world, called people.
- Employers should work at the workplace to make equal employment opportunities and not distinguish the management of persons on the basis of gender. For all management goals, men and women are equipped with the ability to work with care.
- Human resources managers should define together how to create a friendly and supportive environment for the workers in the transition to the workplace.
- The directions should educate employees on gender sensitivity to prevent or minimize sexual harassment issues are illegal and train employees to be more smiling and not to say such progress, but with a smile.

In India, we see a growing incidence of rape and inadequate behavior towards women. In view of these incidents, the Supreme Court had pronounced the Vishaka directives on sexual harassment in the workplace in 1997, and now the Parliament has passed a law to deal with this threat in the workplace. The law passed is known as the “2013 Act sexual harassment of women at work (prevention, prohibition and rehabilitation)”. The Act enters into force on 9 December 2013 established.²⁵³

Highlights of the legislation are:

- All employed women (directly and indirectly) will be protected by law.
- Applies to all jobs, units, branches, institutions, etc. of each organization.
- Sexual harassment includes one or more of the following actions or behaviors (directly or implicitly):
 1. body contact and progress; or
 2. A requirement or requirement for sexual favors ; or
 3. Delivering sexually colored remarks; or
 4. Display of pornography; or
 5. Any other physical behavior, verbal or nonverbal unwanted sexual.

All companies and organizations have no choice but to create the internal complaints committee as prescribed by law. The law does not apply to the aspect of compliance with male employees and businesses can improve the existing law and internal complaints committee for male employees also receive complaints about sexual harassment in the workplace.²⁵⁴

It is outside the scope of this editorial to bring all aspects of the law, it is an attempt to educate readers on gender issues and understand what sexual harassment. I am convinced that awareness of gender

²⁵³ *10 things to know about law relating to sexual harassment at workplace*, INDIA TV NEWS DESK, (Sept.17, 2016) available at <http://www.indiatvnews.com/news/india/10-things-to-know-about-law-relating-to-sexual-harassment-at-wor-30985.html> (last visited on Oct. 19,2016).

²⁵⁴ *Id.*

issues falls within the broader framework of the Organization's "Diversity Initiative". The Co.'s efforts to create a safe working environment for the workers who work with dignity and respect.²⁵⁵

II India Inc. introduces Gender Neutral Policy

India Inc. develops and becomes sensitive to gender, the male model of ambition is gradually a quiet funeral. Most organizations have begun to operate on a neutral gender policy, the assessment is based on results rather than on the ability of an employee to establish long hours with a high mobility factor. Traditionally these have been a positive tendency to male employees to penalize women.²⁵⁶

Similarly, employees are based on years of experience and success that take maternity leave are now back with compensation to work not the year they completed. After their return from maternity leave, most organizations rate the time spent at work rather than the number of months they've been looking for.²⁵⁷

The concept of a neutral sex policy pursues accelerated. Although a larger number of companies will put pressure on the initiative of diversity at all levels, which will focus on more women who are aiming to correct the efforts to correct the gender balance is currently in the system. Cecy Kuruvilla , global director (leadership development/diversity), Sodexo Remote Sites & Asia-Australia (AMECAA) said that that he believes that the purported "male model" is hyped and undoubtedly not one that caters the reason of most corporations' business outcomes. We have sufficient instances of businesses being performed on the "male model" deteriorating in times of marketplace difficulty and not capable to reflect back fruitfully In fact, more and more men are in search of life and work ,are unbolt to the view of a plan that caters both genders opportunities to balance work and personal/family life.²⁵⁸

In Sodexo, initiatives to ensure the participation of disadvantaged groups in the end for all employees are beneficial. For example, Sodexo mentoring and flexible initiatives, both designed to meet the needs of women, were later proven to be beneficial to both sexes.²⁵⁹

Experts in the field of recruitment advise companies to adopt neutral policies. Tulika Tripathi, MD, Page Group, India, a specialized personnel service provider said that as companies strive to improve diversity at different levels, it is imperative that they adopt neutral gender policy in the form of odds without neutral bias and non-positive discrimination.²⁶⁰

She also mentioned that traditionally, unconsciously, organizations have defined a "male model", followed by ambition by any time / everywhere, that is, high mobility and the ability to work long. A gender approach would measure the outcome of the results rather than in hours or mobility. Similarly,

²⁵⁵REINING IN SEXUAL HARASSMENT AT THE WORKPLACE IN INDIA, A SURVEY BY FRAUD INVESTIGATION & DISPUTE SERVICES, available at <http://www.ey.com/Publication/vwLUAssets/ey-reining-in-sexual-harassment-at-the-workplace-fids-survey-2015/%24FILE/ey-reining-in-sexual-harassment-at-the-workplace-fids-survey-2015.pdf>.(last visited on Oct.20,2016).

²⁵⁶Policy against sexual harassment at the workplace, GUIDELINES FOR NATIONAL INSTITUTE OF ADVANCED STUDIES (NIAS) BANGALORE, INDIA, available at <http://nias.res.in/sites/default/files/Policy-against-Sexual-Harassment-at-the-Workplace.pdf>(last visited on Oct.22,2016).

²⁵⁷ *Supra* note 2

²⁵⁸Vivian Giang, *What it's like to be young, gender neutral and in the job market*, THE FORTUNE,(Oct.20,2015)available at <http://fortune.com/2015/10/20/gender-neutral-fluid-job> (last visited on Oct.25,2016).

²⁵⁹*Creating a Gender-Neutral Workplace*, ONE HOUR TRANSLATION, available at <https://www.onehourtranslation.com/translation/blog/creating-gender-neutral-workplace> (last visited on Oct.25, 2016).

²⁶⁰Kimberly Gardiner, *Redefining Gender in the Workplace Through Communications*, APCO WORLDWIDE, March 7,2016,available at <http://www.apcoworldwide.com/blog/detail/apcoforum/2016/03/08/redefining-gender-in-the-workplace-through-communications> (last visited on Oct. 22,2016).

a gender-specific model does not define career paths as linear but interruptions of career. Consequently, this model is compared with the reference personnel that the reference employee is returning after a break, based on years of experience / benefits, rather than looking at the year in the crowd they have graduated.²⁶¹

Sriharsha Achar , chief people officer, Apollo Munich Health Insurance also remarked that at Apollo Munich, female employees in parental leave can expect a higher degree in the investigation period based on their performance during the evaluation period. The system of performance appraisal is transparent to reward performance, based on the delivered results, not spent time workplace outdoors or outdoors.²⁶²

In fact, this year during the evaluation process, after the positive feedback from their immediate managers Report, some of the women before were promoted to the next year in our management hierarch and also that Over the past 12 months, Apollo Munich Health Insurance has received several women employees who have been paid more than six months' wages and extended maternity leave (unpaid) with their newborns. After returning to work, there was no hesitation on the part of the administration to replace them in their previous contributions.²⁶³

Gender neutrality describes the idea that companies should avoid differing according to sex people die in order to avoid discrimination. In today's corporate culture, where more and more women are competing in the workplace with recommendation: your male colleagues compete against each other, it is imperative that companies follow the principle in spirit and letters of this as it is in the industry does not matter for the gender agreed that the other. ²⁶⁴

Sodexo has found that company, one way of change in the mentality to train, the complete in your hope and the fashion for gender equality to die, the gender equality and variety than a good business practice also top talents retain both sex.²⁶⁵

2.1 Parameter to ensure Gender Neutrality in Indian Companies

The World Economic Forum (WEF) recently conducted a first-ever study covering the world's largest employers in 20 countries and benchmarked them against gender equality policies. The results published in WEF's "Corporate Gender Gap Report 2010" revealed that India has the lowest percentage of women employees (23 percent). This figure indicates that corporate India still has a long way to go in improving its gender equity standards.²⁶⁶

Some companies are in the front row in terms of gender equality in India however. NASSCOM has launched a "Gender Integration Award" for companies to promote the leadership and development of women. Infosys Technologies was one of the outstanding winners of this award in recent years. In

²⁶¹Lyn zimmer, *Tokenism and Women in the Workplace: The Limits of Gender-Neutral Theory*, available at https://www.jstor.org/stable/800667?seq=1#page_scan_tab_contents, (last visited on Oct.25, 2016).

²⁶² *Supra* note 10

²⁶³*Parameters to assess gender equity practices in Indian companies*, PAYCHECK.IN, available at <http://www.paycheck.in/main/career-tips/women-paycheck/articles/parameters-to-assess-gender-equity-practices-in-indian-companies> (last visited on Oct. 30, 2016).

²⁶⁴ *Id.*

²⁶⁵ Namrata Singh, *India Inc goes for gender-neutral policy*, TIMES OF INDIA(BUSSINESS) available at <http://timesofindia.indiatimes.com/business/india-business/India-Inc-goes-for-gender-neutral-policy/articleshow/17211821.cms>(last visited on Oct.29,2016).

²⁶⁶Ephrat Livni, *Gender Neutral Pronouns in the Workplace: A Legal Overview*, FINDLAW, available at http://blogs.findlaw.com/law_and_life/2015/12/gender-neutral-pronouns-in-the-workplace-a-legal-overview.html/(last visited on Oct.30,2016).

2009, companies such as IBM, Daksh, Hytech Professionals India Ltd. Integra Software Services (P) Ltd. were awarded by NASSCOM.²⁶⁷

The main parameter of gender equality is to examine the proportion of women working in a particular company. In India, this figure is still low, as indicated in the survey of the GEF. This figure is somehow a true indicator of the extent to which a company is actively pursuing a neutral recruitment process with respect to gender in different categories and workstations.²⁶⁸

In addition to the gross share of women employed, it is equally important to assess company policy on the promotion of women to higher positions. This can be determined by analyzing data about the company's employees to determine the proportion of women employed at the lower level or workstations at the reception, the proportion of women employed in middle management positions, and the proportion of women employed to determine as a senior and executive in the company.²⁶⁹

The company policy on benefits for women, such as transport facilities, maternity leave, health insurance, child care facilities and support for the education of children is another indicator of a neutral approach to gender perspective. These are specific incentives directed at the welfare of women within an organization. Some Indian companies, especially in the IT, pharmaceutical and manufacturing sectors, are at the forefront in this regard. These companies buy maternity insurance coverage for their female employees, which is a new trend that shows an increased awareness of women's employees in the organization.²⁷⁰

Another important point of reference for gender justice policy is explicit and vigorous company against sexual harassment and the safety of women. This is an area where workers have long been used in countries like India. It takes an organizational sensitivity to face these questions of effectiveness in the field of the field, despite the constitutional laws against exploitation.²⁷¹

“Forum for Women in Leadership” to promote a forum for the best business practices for women in the workplace is a quick overview which is the seriously lacking Indian companies in the implementation of best practices. Also, many companies with high growth and public sector organizations “Navratna” lacking focus on gender equality in the workplace.²⁷²

There is an urgent need to take self-observation on a part of the Indian companies that evaluate their culture and internal procedures based on these parameters and take corrective actions as needed. In addition, the government and social organizations must show more recognition to organizations that take an initiative and take concrete action to follow best practices for fairness between the sexes in the workplace.²⁷³

²⁶⁷ *Supra* note 12

²⁶⁸ *Policy on preventing sexual and gender-based harassment*, OHRC, available at <http://www.ohrc.on.ca/en/policy-preventing-sexual-and-gender-based-harassment> (last visited on Oct.27, 2016).

²⁶⁹ Bhavneet Vohra, *is sexual harassment at workplace gender-specific*, LAW FARM II, available at <http://lawfarm.in/blogs/is-sexual-harassment-at-workplace-gender-specific> (last visited on Oct.26, 2016).

²⁷⁰ U.S. Equal Employment Opportunity Commission, *Sex Based Determination*, available at https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm (last visited on Oct.27, 2016).

²⁷¹ Rahul Bajaj, *Why did India end up with an anti-sexual harassment law that is not gender neutral*, I P LEADERS available at <http://blog.ipleaders.in/why-did-india-end-up-with-an-anti-sexual-harassment-law-that-is-not-gender-neutral> (last visited on 31 Oct.2016)

²⁷² India Scores low on gender equality, BUSSINESS LINE: THE HINDU, (march 8,2016) available at <http://www.thehindubusinessline.com/todays-paper/tp-economy/article987908.ece> (last visited on Oct.28,2016).

²⁷³ *Id.*

III Gender specificity of the Sexual Harassment law

As the name of the Act itself specifies- The Sexual Harassment of women at workplace, 2013 protects women employees from sexual harassment that is perpetrated by the male employees who are working at that workplace. There is no law made by the Parliament of India to protect the males who are subject to harassment perpetrated by females or males. Absence of the gender neutral laws is the basic criticism of this act as it does not take into consideration the issue like gender based discrimination and gender equality at workplaces.²⁷⁴

This is a violation of the Article 14 and Article 15 of the Constitution of India. There are several cases of assault and humiliation of men by women. So it is necessary for the enactment of gender neutral laws that protect the interest of both the genders. Since our law grants many benefits to the women and places them often at a higher pedestal which often lead to negative results as the women start misusing the law for their personal gains and benefits. Due to this there is always an apprehension and fear in the minds of men as the Sexual Harassment law is fully capable to destroy and hamper the long build goodwill and reputation of men by ill willed women. However, law has made certain provisions which enable to prevent the misuse of the Act by ill willed women that is embedded in the Section 14 of the Act: Punishment for false and malicious complaint and false evidence.²⁷⁵

The Act on Sexual Harassment was adopted to protect the interest of women and to ensure equality in society guaranteed under Articles 14 and 15 of the Constitution of India. Moreover, Article 21 of the Constitution also grants the right to life and dignity²⁷⁶.

Although some people think that the concept of sexual harassment is not based on sex or gender, but it is linked to dominance, power and power. But the main thing we must ensure that in women, men should also be covered under the protection from harassment according to the law.²⁷⁷

IV CONCLUSION

The EEOC applies a variety of federal laws that prohibit discrimination on grounds of race, color, sex, religion, nationality, age, disability and genetic information as well as retaliation for protected activities. The interpretations made by the Commission of these laws apply to its decision and its implementation in the public and private sector. Discrimination on the basis of gender equals the unequal treatment of working conditions, wages, recruitment, benefits, actions and bonuses. It is illegal to use different criteria for men and women. For many, it is now clear at least in theory, though not always in practice.

²⁷⁴ *Supra* note 17

²⁷⁵ Jules Halpern Associates, *Creating a Gender Neutral Workplace*, (Aug.30,2007)available at <https://www.halpernadvisors.com/creating-a-gender-neutral-workplace>(last visited on Oct.25,2016).

²⁷⁷*Supra* note 5

INCORPORATING THE ALTERNATIVE DISPUTE RESOLUTION (ADR) IN CRIMINAL CASES IN BANGLADESH: CHALLENGES AND SUGGESTIONS

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Abstract

Access to justice is a sine qua non for every country. The legal system of every country should be framed in such a way that every citizen can enter into access to justice. Access to justice is only possible where every citizen can go to the court and take necessary action and remedy against the sufferings. The Constitution of Bangladesh under article 27 says that every citizen is equal in the eye of Law and article guarantees that everyone has the right to protection of law. The people of this country is poor but the litigation cost and other harassment in the court do not encourage the people to go to court specially for the poor. But ADR is an instrument which may ensure the access to justice as it is low costly and no harassment. The ADR in civil litigation has been introduced in but in criminal cases it is yet to introduce like in civil matters. Section 345 of the Code of Criminal Procedure 1898 has given a scope of introducing ADR in criminal matter at large.

Key words: ADR, Justice, Criminal justice, Criminal cases, Challenges and Recommendation

I Introduction

Alternative Dispute Resolution (ADR) is an expression which is by and large used in civil suits and proceedings. Like many other countries Bangladesh has also embodied this process in civil litigation system. With regard to criminal litigation the implementation of the process of ADR has been advocated by many sectors of Bangladesh. However, criminal justice system of Bangladesh is adversarial in nature that indicates that the whole process is to be held in a challenge between two parties one of whom is State and the other is accused of crime. In Criminal Justice System, there is no retrospective operation of Criminal law. Constitution of Bangladesh also ensures that no person shall be convicted to any offence which is not in force at the time of the commission of the act.²⁷⁸ It is a general rule that Penal enactments are to be interpreted strictly and not extended beyond their clear meaning. A penal Statute must be construed according to its plain, natural and grammatical meaning. Special criminal law prevails over the general criminal law.²⁷⁹ Thus ADR is hardly used in criminal justice system in Bangladesh.

There are arguments both for and against with regard to ADR in criminal cases. The Indian Supreme Court in Murlidhar Meghraj Loyat v. State of Maharashtra observed that although in civil suits we find compromises actually encouraged as a more satisfactory method of settling disputes between individuals, such mechanism of compromise seems dissolute in criminal cases. This is because crimes are against the state and the "State" can never compromise. It must enforce the law. Therefore, open methods of concession are impossible in criminal litigation. In spite of the above objections with regard to ADR, in criminal cases, plea bargaining has been adopted in India like UK, USA, Canada and European country and this has been taken as a treatment of the problem overcrowded jails, overburdened courts, abnormal delivery disposal of trials and appeals and finally high rates of acquittal the end of long awaited trial. Before going to discuss the justification objects of ADR in criminal cases it would be helpful for reedit to discuss the types and meaning of ADR in criminal litigation.

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²⁷⁸ Article 35(1) of the Constitution of the Peoples Republic of Bangladesh

²⁷⁹ Akhtaruzzaman Md. Interpretation of Statute and general Clauses Act, Dhaka, 2010.

II Concept of ADR and Its Possibility in Bangladesh

The ADR consists of three distinct words which are “Alternative, Dispute and Resolution. “The general meaning of Alternative is available as another possibility, choice, different, other, another, second, possible, substitute, replacement. But in the context of ADR it is tricky to mean the Alternative as many jurists have tried to give another name. For example, someone tried to say it as appropriate instead of alternative. According to Karl Mackie; “What is alternative depends on the traditional.”²⁸⁰ Nonetheless it is an alternative to litigation²⁸¹.

Generally Alternative Dispute Resolution is Also known as 'ADR' it is the methods by which legal conflicts and disputes are resolved privately and other than through litigation in the public courts.²⁸² Alternative Dispute Resolution ("ADR") refers to any means of settling disputes outside of the courtroom. ADR typically includes early neutral evaluation, negotiation, conciliation, mediation and arbitration.²⁸³ In another words, a type of dispute resolution that seeks to limit the costs of litigation by using alternative, often out-of-court means, such as arbitration, conciliation and summary possession proceedings. Alternative dispute resolution options are voluntary, and often involve a neutral third party to make decisions. In Bangladesh perspective ADR means a process of dispute settlement outside the formal judicial system where the parties represent themselves personally or through their representatives and try to resolve the dispute through a process of mutual compromise.²⁸⁴

It has been argued that conferencing attempts to reconcile apparently conflicting objectives: victim empowerment and support versus offender empowerment and support; flexibility of outcomes in order to meet the needs of the offender versus accountability and punishment of the offender; informal consensus based decision-making versus equity and proportionality of outcomes.²⁸⁵ It is also suggested that there is little evidence to show that reconciliation of the offender with the victim and the community endures beyond the conferencing process.²⁸⁶

It has also been questioned whether there is a criminological basis for the introduction of ADR in criminal justice processes. It is argued that there are factors specific to the criminal context which renders ADR techniques unlikely to succeed. Firstly, it is argued that victim-offender mediation is likely to be highly emotionally charged, and that mediation can only be successful where there is a moderate level of conflict. Second, it is argued that there is no true ‘dispute’ which can be resolved the dispute occurred in the past and entirely on the offender’s terms. Hence there may not be sufficient motivation to reach an agreement. Further, the offender may feel pressured to reach an agreement, rather than genuinely seeking to repair the harm done.²⁸⁷ Other criticisms include that ADR is usually seen as appropriate where the parties have an ongoing relationship (which provides a significant motivation to achieve reconciliation), which is not usually the case with victim offender mediations.

²⁸⁰ Mackie, Karl J, A hand book of dispute resolution: ADR in action Routledge, London1991

²⁸¹ Ahmed Dr Julfikur, principles of alternative dispute resolution

²⁸² Samad Md. Atickus, A Text Book on ADR & Legal Aid, National Law Publications, First edition, 2013, p.185

²⁸³ S.R. Dr. Myneni, Alternative Dispute Resolution, Asia Law House, Hyderabad, Second edition, 2012, p.10

²⁸⁴ Akhtaruzzaman Md, Concept and Laws on Alternative Dispute Resolution and Legal Aid, Shabdakoli Printers, Fourth edition, 2011, p.09

²⁸⁵ M Carroll, ‘Implementational Issues: Considering the Options for Victoria’ in C Alder and J Wundersitz (eds), Family conferencing and juvenile justice: the way forward or misplaced optimism? (1994) 167, 176.

²⁸⁶ Ibid 177

²⁸⁷ S Kift, ‘Victims and Offenders: Beyond the Mediation Paradigm?’ (1996) Australian Dispute Resolution Journal 1, 79.

The balancing of rights of both offenders and victims is clearly a challenge facing those contemplating the use of ADR in a criminal context. While an attempt to balance rights has been a driving force behind the implementation of such schemes, concern has arisen as to whether the interests of both parties can be reconciled. It is important to recognize that conferencing does not operate in a vacuum, and that power imbalances can easily be reflected in the conferencing setting, despite all attempts in preparation to minimize them. Large scale inequalities cannot be dealt with immediately by preparation in relatively small-scale conferencing. While conferencing may serve an educative and normative function in the long term, in the immediacy of the conference setting, it may be impossible to achieve the desired balance. The ability to balance rights is an important factor when deciding whether conferencing is appropriate.²⁸⁸

ADR under Criminal Procedure Code 1898: ADR has not been yet widely introduced in criminal justice system. Section 345 of the Code of Criminal Procedure enacts provision for compromise between the adversary parties to a little extent. Besides this The Village Court Act 2006²⁸⁹ and the Conciliation of the Dispute (Municipal Area) Board 2004 deal to dispose of some petty criminal offences by compromise. The Criminal Court has no other alternatives but to acquit the offenders if compromise petition is submitted in case of compoundable offences.²⁹⁰ As it is existed in section 345, the opportunity of ADR in criminal cases should be increased by widening the scope of section 345 of CrPC of Bangladesh. It is needed to widen the ambit of compoundable offences may have the adverse effect on the public peace and tranquility. The success of the ADR will ensure the peace in society.

Compounding means compromise or amicable settlement. Generally, a criminal act in which a person agrees not to report the occurrence of a crime or not to prosecute a criminal offender in exchange for money or other consideration is called compounding offences. On the other hand, it can be said that compoundable offences are those which can be compromised by the parties to the dispute. The permission of the Court is not necessary. Note that the aggrieved party or the victim may compound an offence. Not even the public prosecutor has the power to compound an offence.²⁹¹ Offences which may lawfully be compounded are mentioned in section 345 of the CrPC. An offence created by a Special Law is not compoundable. The Court cannot allow compounding of an offence which is not compoundable under Section 345. Compoundable offence may be of two types: a. compounding with the permission of the Court; b. compounding without the permission of the court.

At any stage of Criminal Proceeding the parties may take initiative to submit deed of compromise and even in appellate stage it can be submit before the Court. The order is discharge of the accused when the deed is filed before framing of charge whereas the accused is to be acquitted if the compromised deed is submitted after framing of charge whereas the accused is to be acquitted if the compromised deed is submitted after framing of charge. Before pronouncement of judgment compromise deed can be filed.²⁹² The Pakistan Supreme Court permits submission of deed of compromise after serving the conviction and acquit the accused in appellate stage.²⁹³ But when the lower Courts record is called for under section 435 of the Code of Criminal Procedure, Magistrate cannot permit the parties to submit compromise deed.

²⁸⁸ This is particularly relevant to a consideration of whether conferencing is appropriate for cases involving offences such as sexual assault or domestic violence.

²⁸⁹ Akhtaruzzaman Md, Concept and Laws on Alternative Dispute Resolution and Legal Aid, Shabdakoli Printers, Fourth edition, 2011, p.173

²⁹⁰ Akhtaruzzaman Md, Concept and Laws on Alternative Dispute Resolution and Legal Aid, Shabdakoli Printers, Fourth edition, 2011, p.32

²⁹¹ Rediff O & A, "Meaning of Compounding Offences

²⁹² Akhtaruzzaman Md, Conflict Resolution: Introducing ADR in Criminal Justice Administration in Bangladesh, Journal of 10th Human Rights Summer School (ELCOP), 2009.

²⁹³ PLD (1980) SC161.

Section 345 (1) provides the list of offences which can be compounded without the permission of court; Section 345 (2) provides the list of offences which can be compounded only with the permission of the Court. Penal Code, 1860 covers wide range of offences, defining the offences and the provisions of punishment. Whereas the Code of Criminal Procedure prescribes the procedure to try the offences compoundable can also be compromised outside the court. Main object of compounding is to maintain peace in the society. But all kinds of offences are not compoundable, basically in case of heinous offences. Except the offences mentioned in the column of section 345 of the Code of Criminal Procedure cannot be compounded, such as murder, rape, kidnapping, dacoity, smuggling, abduction etc. there are some broad rules of compounding the offences in Bangladesh under its CrPC. These are:

Compounding of Abetment of Offences: When any offence is compoundable under section 345 of Cr.P.C, the abetment of such offence or an attempt to commit such offence (when such attempt is itself an offence) may be compounded in like manner.²⁹⁴

Person Competent to Compound: When the person who would otherwise be competent to compound an offence under section 345 of Cr.P.C is (under the age of eighteen years or is) an idiot or a lunatic, any person competent to contract on his behalf may (with the permission of the Court) compound such offence.²⁹⁵

No Composition in Some Case: When the accused has been sent for trial or when he has been convicted and an appeal is pending, no composition for the offence shall be allowed without the leave of the Court to which he is sent or the case may be, before which the appeal is to be heard.²⁹⁶

Direction of High Court Division to Compound Cases: The High Court Division acting in the exercise of its power of revision under section 439 (and a court of session so acting under section 439A) may allow any person to compound any offence which he is competent to compound under section 345 of CrPC.²⁹⁷

Acquittal of the accused: The composition of an offence under section 345 of Cr.P.C shall have the effect of an acquittal of the accused with whom the offence has been compounded.

No Compounding except Section 345: No offence shall be compounded except as provided by section 345 of Cr.P.C.²⁹⁸

ADR in criminal cases under the Conciliation of the Dispute (Municipal Area) Board 2004: The Conciliation of Disputes (municipal Areas) Board Act, 2004 prescribes different proceedings of solving disputes in the Municipal Areas. It includes a new process of solving the disputes which develops the ADR system in Bangladesh. Section 3 of the Conciliation of Disputes (Municipal Areas) Board Act, 2004 says about the Board of Conciliation of Disputes. Section 5 of the Act enumerates a list of several offences which may be tried by the Board. The Board established under this act has the jurisdiction to try any suit relating to any matter or offence stated in the schedule, if the offence is committed in the municipal area for which the Board has been established or the cause of dispute arises regarding that matter; in such case it is irrelevant whether any party lives outside the area concerned, or both the parties of the suit resides generally in that municipal area. This Act is passed to give the power to the local authority to settle the tiny disputes of civil and criminal in nature.

Part I of the Schedule provides for a list of the criminal cases

- a. Offence committed under section 323, 426 or 447, 143, 147, 141 where the member of an unlawful assembly is not more than ten of the Penal code 1860.

²⁹⁴ Section 345(3) of the Cr.P.C, 1898

²⁹⁵ Section 345(4) of the Cr.P.C, 1898.

²⁹⁶ Section 345(5) of the Cr.P.C, 1898

²⁹⁷ Section 345(5A) of the Cr.P.C, 1898

²⁹⁸ Section 345(7) of the Cr.P.C, 1898

- b. Offence committed under section 160, 334, 341, 342, 352, 358, 504, 506 (first part), 508, 509 and 510 of the Penal Code 1860.
- c. Offence committed under section 379, 380, and 381 when the offence is related to cattle and the value is less than 25000 Taka.
- d. Offence committed under section 379, 380, and 381 when the offence is related to other property and the value is less than 25000 Taka.
- e. Offence under section 403,406,417 and 420 of the Penal Code 1860 and if the value is highest 25000, taka,
- f. Offence under 427 of the penal code when the property value is maximum 25000 taka
- g. Offence under428 and 429 of the penal code when the property value is maximum 25000 taka
- h. Offence under section 24,26,27 of the Cattle Trespass Act1871
- i. Abetment to or assistance to the abovementioned offence

For the trial or settlement of the offences or subjects mentioned in the schedule under this Act, concerned person having writing in the *Bangla* on white paper which shall be duly signed or thumb impressed may file an application to the Board and in such application the following information shall be cited:

- a. Name and address of the member nominated by the applicant.
- b. Name and address of each defendant.
- c. A copy of each application for serving upon the defendant.²⁹⁹

after that the filed application shall be examined by the Paruoshava officer assigned by the board and if it is found that the case is tribal by the board then he will register that case in the specify register book and if is found that the case is not tribal by the board he will return that application having mentioned the cause for that.³⁰⁰ If an application is returned, the applicant may place it again before the chairman for consideration and according to the decision of the chairman, the necessary action may be taken against that application.³⁰¹

ADR in the criminal cases under the Village Court Act 2006: The importance of village court is remarkable from the very beginning of the criminal justice In Bangladesh. The underlined principle behind the village court was that the common men would get the benefit of justice through informal and inexpensive court within short period of time. The latest legal framework "The Village Courts Act, 2006" upgraded from the Village Courts Ordinance of 1976 is in place to address the access to justice issue for the village poor, marginalized, women, children and the vulnerable groups and thus reducing the pressure from the formal courts, ensuring rule of law and eventually establish good governance. The village courts are easy to access with minimal or no cost and do not have the stigma of the formal courts as UP chairmen and other members are not only known but also close to them.³⁰²Village courts have other major positive and differentiating traits like its reconciliatory power, transparency and availability of evidence and proximity of place of occurrence.³⁰³A Village Court shall be constituted and shall have jurisdiction to try a case only when the parties to the dispute ordinarily reside within the limits of the union in which the offence has been committed or the cause of action has arisen.³⁰⁴

If the disputants are residing in two different Union Parishads, then the Village Court shall be constituted in the Union where the Offence has been committed or the cause of action has been arisen. In that case each party shall have the authority to send their nominated

²⁹⁹ section 8 (1) of the conciliation of dispute (municipal Areas) Board Act, 2004

³⁰⁰ section 8(2) of the conciliation of dispute (municipal Areas) Board Act, 2004

³⁰¹ section 8(3) of the conciliation of dispute (municipal Areas) Board Act, 2004

³⁰² *ibid*

³⁰³ *ibid*

³⁰⁴ Section 6(1) of the village Court Act2006

representative to the Village court.³⁰⁵ The Village Court Act, 2006 has empowered two kinds of jurisdiction that is civil and criminal jurisdiction in the schedule of the Act. Part I of the Schedule provides for a list of the criminal cases which a Village Court can deal with. Followings are the list of cases:

- a. Offence committed under section 323, 426 or 447, 143, 147, 141 where the member of an unlawful assembly is not more than ten of the Penal code 1860.
- b. Offence committed under section 160, 334, 341, 342, 352, 358, 504, 506 (first part), 508, 509 and 510 of the Penal Code 1860.
- c. Offence committed under section 379, 380, and 381 when the offence is related to cattle and the value is less than 25000 Taka.
- d. Offence committed under section 379, 380, and 381 when the offence is related to other property and the value is less than 25000 Taka.
- e. Offence under section 403,406,417 and 420 of the Penal Code 1860 and if the value is highest 25000, taka,
- f. Offence under 427 of the penal code when the property value is maximum 25000 taka
- g. Offence under428 and 429 of the penal code when the property value is maximum 25000 taka
- h. Offence under section 24,26,27 of the Cattle Trespass Act1871
- i. Abetment to or assistance to the abovementioned offence.

III Guiding Principles in Compromise of Criminal Cases and its Advantages

No compromise can be made before charge sheet is submitted. Following points should be kept in mind while compromising an offence:

1. The compromise proceeding should be guided by legal process and no legal provisions shall be hampered by compromise.
2. Patience hearing should be given to both the parties.
3. Conciliator should not impose any decision over the parties.
4. Extra benefit should not be given to any parties.
5. No one should be declared guilty or convicted in conciliation proceeding.
6. Equality should be ensured in case of male and female.
7. Deed of compromise should be in written form.
8. Copy of the deed of Compromise should be provided both the parties.³⁰⁶

The main advantage of ADR is that like the normal court system it does not consume huge time which helps to resolve the dispute speedily and cheaply. The method of ADR contains the following typical advantages:

- 1) It is cost effective and produces quicker resolution of dispute.
- 2) It facilitates the maintenance if continued relationship between the parties even after the settlement or at least the period the settlement is attempted.
- 3) Increase control over the process and the outcome.
- 4) Increase satisfaction of the disputants.
- 5) Improve Attorney-client relationship
- 6) ADR supports Court Reform Ensure justice for disadvantaged group.
- 7) Higher abidance leads to a permanent resolution of conflicts.
- 8) In rural areas, the court is a taboo for women, ADR process ensure privacy.
- 9) That means it is a confidential process.

³⁰⁵ Section 6(2) of the village Court Act 2006

³⁰⁶Akhtaruzzaman Md, Conflict Resolution: Introducing ADR in Criminal Justice Administration in Bangladesh, Journal of 10th Human Rights Summer School (ELCOP), 2009.

10) ADR is a consensual process to enhance social harmony.

11) There is no scope for bias or corruption

IV The challenges to incorporate the ADR in the criminal proceedings in Bangladesh

Though ADR process is very easy, simple and effective way of dissolving the dispute between the parties, yet it is not fully introduced in the criminal cases. There are multiple reasons behind it for not to develop in the criminal matters. Among them some of the barriers are listed here.

Cooperation of the Lawyers: Lawyer community may be against the introduction of ADR because they feel it will eat their share of pie. One of the main causes of delay in disposal of cases lies in dilatory tactics played by lawyer by way of seeking repeated time petitions. A successful mediation lawyer will always attract new clients wanting to try mediation who would otherwise have shunned the court.

Resistance from the bar: In some jurisdictions, members of the bar resist the use of ADR or simply do not encourage their clients to use ADR for appropriate cases. Part of this resistance results from a lack of knowledge about ADR processes. For instance, some attorneys do not understand a significant difference between mediation and arbitration-the role of the neutral. Mediation involves a third-party neutral (the mediator) facilitating a negotiated agreement between the parties, whereas in arbitration, an arbitrator is empowered to make a final and often binding decision.³⁰⁷

Lack of public awareness: In many areas of the country, the general public is not aware of ADR and, therefore, litigants must rely upon their attorneys to recommend its use. Those who do use ADR may not understand the process, for example, expecting the mediator to "decide" the case or otherwise have the same authority as a judge. These litigants may be dissatisfied with the process because it did not meet their expectations.³⁰⁸

Need for program evaluation: Court ADR programs often conduct evaluations to monitor program quality and demonstrate that the program is meeting court-established goals, which vary from court to court and typically include reducing dockets, saving transaction costs, saving time, providing litigants with more options, and increasing client satisfaction.³⁰⁹

Correction of Legal Shortcomings: ADR provisions incorporated by the Code of Civil Procedure (Amendment) Act, 2003, It seems that before incorporating the provisions of ADR in the CPC in 2003. Proper attention was not given to the existing provisions in laws in neighboring countries. The success of ADR is being blockade by these shortcomings and the govt. should consider these shortcomings as soon as possible.

Risks to quality control: In a time of too few resources, especially to fund ADR administrators, many court programs struggle with the need to ensure the quality of services and to enforce ethical rules for neutrals and attorney representatives. While some courts have staff neutrals, many courts rely upon a panel of outside neutrals to provide dispute resolution services. Depending upon the court, these neutrals may be paid or may be pro bono volunteers. Several programs report that one disastrous mediation can become a legend and sour the legal community against the use of mediation in general. Program administrators try to avoid such legends and maintain a program's reputation for quality services by taking steps to appoint and retain only well-qualified mediators for the court's panel. These steps include establishing qualifications for panel membership, requiring advanced training, interviewing the mediators,

³⁰⁷ 33McAdoo, B., and A. Hinshaw, "The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri," 67 Missouri Law Review 473, 2002

³⁰⁸ 34Ibid-32

³⁰⁹ Wissler, R. L. "The Effectiveness of Court-Connected Dispute Resolution in Civil Cases," 22 Conflict Resolution Quarterly 55, 2004

soliciting participant evaluations through questionnaires, and observing mediation sessions³¹⁰.

Lack of funding: Most courts struggle to maintain and increase their bud get to provide ADR services. Court ADR programs have to compete for their funding with other traditional court services, a competition that ADR programs often lose, particularly in recent years when state and federal budgets for nonessential programs have been slashed. Courts have experimented with a number of funding options, including filing fees, user fees, and certification fees but the funding for many programs remains uncertain.³¹¹

Retaining mediations core values: Many proponents of mediation in the courts hoped that mediation would provide a positive alternative to an adversarial, formal, and potentially alienating justice system. However, some ADR programs have evolved to incorporate many of the adversarial elements they were intended to avoid. Experts are concerned that in some courts, mediation has come to look more like settlement conferences, which tend to emphasize settlement rather than provide litigants the opportunity to work together to resolve the dispute.³¹²

Requiring good faith: Court rules in some states require that parties "mediate in good faith." Court programs have grappled with how to administer these rules, and courts have grappled with how to interpret good-faith requirements. Experts recommend programs be designed with stakeholder input to prevent problems with a good-faith requirement.³¹³

V Suggestions and Concluding Observations

The Appellate Division of the Supreme Court has opined to encourage to ADR in the Md. Joynal and others vs Md. Rustom Ali Miah and Others in the way that, "the law encourages settlement of dispute either by Panchayet or by Arbitration or by way of compromise and if it is a criminal offence, the offence can be compounded within the limit of the section 345 of the Cr.P.C."³¹⁴ However, to introduce the ADR in the criminal cases the following matters should be taken into the considerations.

³¹⁰Ibid

³¹¹Skove, A. E. State Appropriations and Other Funding Sources for Court-Connected ADR. Williamsburg, VA: National Center for State Courts, 1998

³¹² Senft, L. P., and C. A. Savage, "ADR in the Courts: Progress, Problems, and Possibilities," 108 Penn State Law Review 327, 2003

³¹³ Lande, J. "Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs," 50 UCLA Law Review 69, 2004

³¹⁴ 36 DLR(AD) 240, 245

Distinctive Experiences of Women in Armed Conflict: An Assessment of International Humanitarian Law

*Ms. Ruchi Lal**

“Who can sum up all the ills the women of a nation suffer from war? They have all of the misery and none of the glory.”

—Elizabeth Cady Stanton

ABSTRACT

This article aims to consider the range of ways in which women experience armed conflict, to outline the general and specific protections available to them in international humanitarian law and to assess the adequacy of international humanitarian law in protecting them. The reader should be aware that international humanitarian law applies only to situations of armed conflict, either national or international. In other situations, national law, human rights and refugee law will be applicable.

Keywords *Women, Armed conflict, International humanitarian law*

I INTRODUCTION

Domestic and international wars are not an invention of the 20th Century. War is a mistake that has been happening since eternity. However, the 20th Century has been one of the most tragic periods in the history of human kind. The two World Wars and the holocaust of the World War II, led to innumerable losses to human lives. But it was also the 20th and 21st Century that saw other conflicts such as Mexican Revolution, the Spanish Civil War, the Chinese Revolution, Soviet Revolution, Korea, Vietnam, Central America’s conflicts, the Balkan War, Gulf War, U.S war of terror upon Afghanistan, Civil Wars in Iraq, Libya and Syria amongst others.

In this journey through the violent history of the 20th and 21st Century it will be realized immediately that most of the conflicts are internal- fought within a country between different ethnic or political groups of the same nationality either for the control of resources, territories or population. But whether the violence is internal or cross-border, civilians are caught in the firing line either as a part of a deliberate strategy or because of their proximity to the fighting zone. In recent years, much attention has been given by the international organizations, NGOs, academicians and media to the sexual violence inflicted upon women in armed conflict as well as upon the protection accorded to them under international humanitarian law. However, women are not a homogeneous group, and they experience war in numerous ways- as victims, combatants or promoters of peace. War can affect women in the form of violence, fear, loss of loved ones, sexual violence, abandonment, detention, displacement, physical injury and sometimes death. Further, women are increasingly taking part in wars as combatants. This article aims in the first part to reflect upon the different ways in which women experience armed conflict and in the second part, focus will be on the protection provided to women facing war in international humanitarian law and the inadequacies therein.

II Women as Members of Armed Forces

Traditional roles of man and woman have changed, both in times of war and in times of peace. Not only men participate in armed conflicts but there is enough evidence to show that in recent years women have become more actively involved in hostilities. It was the Second World War that highlighted their role in the German and the British forces and since then,

women have assumed a much greater role and are more frequently joining the forces either voluntarily or forcefully. To illustrate the point few examples can be given like in the United States military, 14 percent of active duty personnel are women, there was also presence of women fighters in the World War II, Korean War, the Vietnam War, the Afghan War and many others.³¹⁵ Women have been particularly active in non-state armed groups. In Nepal, for example, women make up about one-third of the Maoist fighting forces. Likewise, it is estimated that up to one third of the fighting forces of the Liberation Tigers of Tamil Eelam (LTTE) involved in the civil war in Sri Lanka were women. They were also an important part of the Sudan People's Liberation Army during the first and the second Sudanese civil war and estimates put women at between 10-30 percent of the fighting forces in the Sierra Leone conflict.³¹⁶

Women as combatants can be extremely useful to an armed group. They are considered to be preferred choices when it comes to infiltration, strike missions or to act as suicide bombers because of three reasons- first, women are less suspicious, second there is an assumption that women are harmless, and thirdly, in conservative societies like Middle East and South Asia, there is a hesitation to search the body of the women.

It is important to look at the reasons why women take up arms. Some of them are recruited by the regular armed forces of their country while others join the armed forces or groups for their own protection. Then there are women who join the forces for social standing, political reasons, to gain equal status with men or simply because their husband is already a combatant.

Women can also be the victim of forced recruitment wherein they are made members of the armed forces or groups against their will. A woman from Sierra Leone recounts how she was forced to fight. *"I was abducted and forced to leave school. Anyone who refused to join had their hands amputated. Since I was among the few women who could read or write, I was forced to join the armed opposition group. In the rebel camp, there was a lot of harassment and sexual abuse. Hostile attitude towards women were very common."*³¹⁷

Forced recruitment is one of the tools used by the armed force create terror amongst civilians. Often the abducted women are turned into hardened criminals by forcing them to commit monstrous acts. In some armed groups, the first assignment given to the abducted women is to attack her own villagers or family member so that she cannot go back to her family or village in future. Further women abducted by the armed forces do not always join the forces rather they may end up as cooks, cleaners and in some cases even sex slaves. Many of them develop addiction to drugs and alcohol, and can also become a victim of various diseases.

At the end of the hostilities, woman combatant often find it impossible to return to the civil society. Unlike men for whom military service is generally a source of pride, women are traditionally believed to be unsuited for such a role and thus risk marginalization. If the female fighters are girls, they face additional problems when the conflict ends like loss of their families, no support system, and little preparation for adult responsibilities.

2.1. Women as Victims of Sexual Violence in Armed Conflict

One of the most obvious examples of victimization of women in armed conflict is their vulnerability to sexual assault and rape. The term "violence against women" is defined in the

³¹⁵ Laura Sjoberg, "Women Fighters and the Beautiful Soul Narrative", 92(877) *International Review of Red Cross* 58 (2010).

³¹⁶ M.Haeri and N. Puechguirbal, "From Helplessness to agency: Examining the Plurality of Women's Experience in Armed Conflict", 92(877) *International Review of Red Cross*, 110 (2010).

³¹⁷ Ibid.

Beijing Platform for Action as “any act of gender based violence that results in, or is likely to result in, physical, sexual, or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life...”³¹⁸ Violations such as rape, enforced prostitution, sexual slavery, enforced impregnation and termination of pregnancy are not only a heinous attacks against the life and physical sanctity of a woman but also has tremendous everlasting psychological impacts.

The violations of women in war attracted international attention in 1623-24 with the publication of Hugo Grotius’s seminal work, *De Jure Belli ac Pacis*. According to him the rights of non-combatants should be protected and he urged that rape “should not go unpunished any more in war than in peace”. His work not only represents a milestone but was linked to the growing recognition in the Middle Ages that war related violence against women is a crime and fell into the category of impermissible conduct”.

Sexual violence in armed conflicts cuts across all cultural boundaries. Evidence of rape as military strategy in wars dated back to the ancient Greeks, Romans, and Hebrews. Ancient literature explicitly refers to rape and seizure of women in order to become wives, servants, slaves, and concubines.³¹⁹ In India, marauding armies had frequently taken advantage of women in the course of their military conquests. Hence giving rise to the practice of Jauhar (mass immolation) among Rajput women in Rajasthan when attacked and threatened by marauding armies.³²⁰ Very little has changed over the years and it appears that rape has assumed the characteristic of a method of warfare with the systematic aim of targeting the civilian population and the destruction of its culture and morale. It is used as a form of torture, to injure, to extract information, to degrade and intimidate, and as punishment for actual or alleged actions. It has also been used as a means of “ethnically cleansing” an area, of spreading fear and compelling people to leave an area, and through widespread and systematic rape and forced impregnation aimed at destroying the identity of an ethnic group.

Rape as a weapon of war serves the following purposes:

- Women are often raped to humiliate the men to whom they are related.
- In societies where ethnicity is inherited through the male line, “enemy” women are raped and forced to bear children.
- Women are kidnapped and used as sexual slaves to service troops, as well as to cook for them and carry their loads from camp to camp.

Women are subjected to mistreatment by all participants in armed conflict: by “friendly” and “enemy” forces, by civilian and military personnel, including United Nations peacekeeping forces, who are entrusted with the task of protecting women. Examples of sexual violence against women in armed conflict can be seen in the practices of forced prostitution in the Second World War. During the Asia Pacific War (1931-45), the Japanese government forced

³¹⁸ Judith G.Gardam and Michelle J.Jarvis, *Women, Armed Conflict and International Law*, Kluwer Law International, The Hague 9(2001).

³¹⁹ M.Raiqul Islam, “The Culpability Of Gender-Based Terrorism In International Humanitarian Law: The Rape Of Women In Armed Conflict” , VI *ISIL Yearbook of International Humanitarian And Refugee Law* 88(2006).

³²⁰ In 1303, the Delhi Sultan Ala-ud-din Khilji had besieged the city of Chittorgarh in order to get Padmini, the wife of Maharaja Ratan Singh. At this time 13,000 women to escape sexual assault and rape by the marauding armies performed *jauhar* by throwing themselves in the funeral pyre. In 1567, Emperor Akbar besieged the city and over 30,000 were killed. The women of the city performed *jauhar*.

up to 200,000 Korean, Taiwanese, Indonesian, and other young Asian women to work as so-called comfort women, providing sexual services for the armed forces of Imperial Japan. In former Yugoslavia, it was revealed that military brothels had been set up in some Bosnian Serb controlled areas in which, mainly, Bosnian muslim had been repeatedly raped so that they can give birth to Serb children. It is estimated that as many as 20,000 Bosnian women- including girls as young as six years and women as old as 80 years were raped by the Bosnian Serbs during the war.³²¹In Vietnam, Mozambique, Afghanistan and Somalia conflict also there are evidences of use of sexual violence against women.

It is not possible to give exact estimates as to the number of victims of sexual violence, as not all victims survive and the majority of victims will never report the violations against them. Further sexual crimes are subjects people are often uncomfortable discussing in private, much less in public. Consequently, people remain ignorant of a woman's victimization, believing that she was a "willing party", in fact when she was a victim. Numerous studies show that law enforcement agents do not properly question victims but rather treat them as criminals, when they should be pursuing the perpetrators who have exploited the victim.³²²

Survivors of rape or sexual violence may face further problems such as ostracism or retribution .This is especially the case in very traditional or patriarchal communities, where importance is placed on the purity and chastity of women; unmarried women and girls may no longer be considered worthy of marriage by their families and community and married women may be rejected by their husbands and families³²³. Furthermore, survivors of sexual violence in some societies may also risk being accused of adultery, prostitution or bringing dishonor on the family – and these are seen as crimes, which may be punishable by imprisonment and/or the death penalty. In addition to causing personal physical and mental suffering, rape may be perceived to bring dishonor to the woman and result in marginalization of both her and her family. Its systematic use can result in the destruction of the social fabric of the persecuted group. For the fear of stigma or reprisals, most rape victim keep quiet because of which they cannot receive adequate medical services in emergencies. Rape is rarely addressed openly, as sex is often a taboo subject and the scars maybe outwardly invisible. All these factors can make it very difficult for the humanitarian workers to access and assist these hidden victims.

2.2. Women in Detention

It is estimated that women constitute only 2 to 9 percent of the prison population around the world. The number of women held in relation to armed conflict is even lower.³²⁴ While there are fewer women than men in detention, there conditions are no better. All prisoners must cope with separation from their family and friends, but women maybe particularly affected. Women's prisons are rare. Many women therefore end up far from their families and from the court responsible for their trial. Alternatively, female detainees maybe held in same prisons as men, which can have a negative impact on them. Their access to fresh air maybe compromised if the courtyard is common since mixing with men would put them at risk and also may not be permitted for cultural reasons. Similarly, women often remain locked in their cells if prison corridors are common to both sexes. If all detainees share the same sanitary facilities, female prisoners are vulnerable to sexual abuse from male prisoners, guards and

³²¹ Charlotte Lindsey, *Women and War- An Overview* ,in Larry Maybee and Benarji Chakka, *International Humanitarian Law – A Reader for South Asia*, ICRC, 260 (2007).

³²² Nancy Ely Raphael' *Gender Exploitation*, in *Traditions, Values, And Humanitarian Action*, Forham University Press and The Centre for International Health And Cooperation, New York, 244(2003).

³²³ E.Josse, "They Came with Two Gun: The Consequences of Sexual Violence for the Mental Health of Women in Armed Conflict", 91 *International Review of Red Cross*, ICRC 180(2010).

³²⁴ Julie Ashdown and Mel James, "Women in Detention", 92 (877) *International Review of Red Cross*, ICRC 127 (2010).

prison management. Further women detained with small children have particularly requirements, including separate quarters, which may not be available at all.

During arrest procedures or while in detention, women may be subjected to various forms of degrading treatment, such as humiliating body searches. The absence of female guards in particular can lead to sexual harassment and violence.³²⁵ Female detainees have specific health and hygiene needs. Pregnant women and nursing mothers require dietary supplements and appropriate pre and post natal care. All women in detention need regular medical checkups, including gynecological care. However, this is rarely available.³²⁶

Women prisoners also suffer from isolation. They generally receive fewer visitors than men because families tend to regard their detention as more shameful. Visitors are essential for a detainee's psychological well-being and are a way to obtain food, medicine and other necessities when resources are scarce and adequate supplies are not being supplied by the authorities. Females without a support system may turn to transactional sex and are at a high risk of sexual exploitation, risking disease, HIV infection and pregnancy. Lack of family contact can also compound any already existing psychological problem, making reintegration into the society even more difficult after release.

In certain countries women need a male guarantor to be released; hence, when a woman reaches the end of her sentence and no male relative comes to collect her, she will remain behind bars. Some women become victims of honor killings after their release, as families often assume that a woman has been raped in prison.

2.3. Women as Victims of Displacement

The most common consequence of armed conflict is displacement. Even though displacement is gender neutral in principle, women and children constitute majority of the world's refugees and displaced persons. Being brutally uprooted from their homes and livelihoods, women often find themselves living in difficult conditions with inadequate access to food, water, shelter, medical facilities etc.

Manja Oumar, a Mutur villager in eastern Sri Lanka, recounts how she fled her home when the 20 year conflict between the Tamil militia and government forces descended on her village.

"We had no alternative but to flee Mutur; there were explosions everywhere. We had abandon everything, and during to the south we did not eat for six days. My husband was stopped by a group of men while we were trying to escape from Mutur. I screamed at them but they beat me, my children and the other women who were with us. I lost my husband, and we arrived here with nothing."³²⁷

In order to survive, displaced women often have to travel long distances in search of essential supplies for themselves as well as their families. During this search, women risk being sexually assaulted or suffer injury in the ongoing armed conflict. Further in the chaos and panic of displacement, families become separated. This creates number of problems for women and exposes them to various hazards. Many don't have the necessary personal documentation

³²⁵ Michelo Hansungule, *Protection Of Civilians, Wounded, Sick and Shipwrecked, Prisoners of War*, in Md. Jahid Hossain Bhuijam, Prof. Louise Doswald Beck and Prof. Azizur Rahman Chowdhury (eds), *International Humanitarian Law- An Anthology* 132(Lexis Nexis, 2009).

³²⁶ Ibid.

³²⁷ Supra note 8.

required to cross various check points as well as international borders. In such a situation they may be stopped, harassed or subjected to humiliating body searches.

In camps for displaced persons also women frequently experience violence and abuse at the hands of warring parties, civilians and sometimes even the peacekeepers. Without a viable social or economic support network and often without male protection, displaced women are highly vulnerable to violence. In the Maela camp for internally displaced persons from the Rift Valley, Kenya, women were frequently raped by security personnel when they left camp in search for food or for work as day laborers. One woman reported, *“even though we knew this was likely to happen, we continued to do this work because our children were hungry and we had no choice.”*³²⁸ Displaced women in camps need privacy in order to maintain their safety, dignity, personal health and hygiene. Their particular needs must be taken into consideration in the design and implementation of programs and accommodation in camps. Health care provided must include reproductive healthcare. Such fundamental requirements as the fact that pregnant women need access to health services and food assistance adapted to their needs should never be neglected.

The second part of the article deals with the protection provided in international humanitarian law to women as combatants, victims of sexual violence, as detainees and also when they are in detention. However, international humanitarian law is not the only body of law applicable to situations of armed conflict; human rights law is also applicable.

III Protection to Women in International Humanitarian Law

International humanitarian law contains a legal framework which provides protection to females faced with war at two levels, firstly “general protection” which is available to both men and women and secondly “special protection” to take care of their special needs as women. These two protections are enshrined in the four Geneva Conventions of 1949 for the protection of victims of war and their two Additional Protocols of 1977.

3.1. International Humanitarian Law on Women as Combatants

When women take direct part in hostilities, they no longer enjoy the same protection as international humanitarian law provides to civilians. Female combatants must comply with the rules of international humanitarian law like any other combatant and respect and protect persons who are no longer taking part in hostilities. They will be accountable for any violations they commit in the same way as their male counterparts. With respect to the protection of women combatant, international humanitarian law contains the principle of non-discrimination which requires parties to a conflict to afford the same treatment and protection to everyone without distinction.³²⁹ That women are to be afforded equal protection to men is also expressly spelled out in GC III, Article 14, which provides that “women shall (...) in all cases benefit by treatment as favorable as that granted to men”. Non-discrimination provisions are also set out in common Article 3 GCs; Articles 88 (2) and (3) GC III; Articles 27 and 98 GC IV; Articles 9 and 75 AP I and Articles 2 and 4 AP II.³³⁰

International humanitarian law provides crucial protection for women who are actively participating in hostilities by limiting the right of parties to a conflict to choose means and methods of warfare. International humanitarian law prohibits the use of weapons, projectiles and materials causing superfluous injury or unnecessary sufferings.³³¹

³²⁸ Charlotte Lindsey, *Women Facing War*, 156 (ICRC, 2001).

³²⁹ Articles 12 GC I and GC II.

³³⁰ Geoffery Best, *War and Law Since 1945*, 115 (Clarendon Press, Oxford, 1997).

³³¹ Articles 35 and 36 AP I.

Protection for combatants is also provided by the rules governing methods of warfare. These rules include the prohibition on attacking enemies who have surrendered or who have shown their intention of doing so or who have parachuted from aircraft in distress, the prohibition on declaring that no quarter shall be given, and the rules prohibiting perfidy.³³²

Finally, international humanitarian law requires wounded, sick, shipwrecked and captured combatants to be treated humanely even when they are in the hands of the adversary. In brief, such persons must be protected against all acts of violence and, if put on trial, are entitled to fundamental judicial guarantees.³³³The first three Geneva Conventions are devoted to such persons and contain numerous provisions granting additional specific protection to women for example women be accommodated in separate dormitories from men³³⁴; that they be provided with separate sanitary facilities; and that, if undergoing penal and disciplinary punishments, they be held in quarters separate from men and under the immediate supervision of women.³³⁵

3.2. International Humanitarian Law on Sexual Violence in Armed Conflict

The first attempt at the international level to codify the rules of war with respect to rape came in the form of Lieber Code of 1863. The code used during the American civil war designated rape as a war crime that called for capital punishment. Thereafter a number of international conventions dealing with humanitarian treatment to civilians in armed conflicts provide explicit and implicit protection against rape. Some of the international conventions dealing with sexual violence and forming part of humanitarian law are discussed below.

1. *The Hague Convention of 1907*- Article 46 of the convention implicitly prohibits rape by stating that “family honor and rights, the lives of persons...must be protected”. The expression “family honor” here may be construed to include the right of women to be protected rape, forced prostitution, and other violent sexual abuses. This provision gives the impression that rape is stigmatized because it is an intrusion against a woman’s “honor” rather than attacks against her physical and psychological well-being.

2. *The Genocide Convention of 1948* -The Genocide Convention of 1948 recognizes genocide as crime in international law. The convention defines genocide as “acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group.”³³⁶Some of such acts are:

- (a) Causing serious bodily or mental harm to members of the group;
- (b) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (c) Imposing measures intended to prevent births within the group;

Mass rapes in armed conflicts are usually committed against a national, ethnic, racial or religious group. For example, Bosnian women and girls were routinely assaulted in the

³³² Articles 41-42, 40 and 37 AP I.

³³³ Article 12 GC I, Article 12 GC II and Article 14 GC III.

³³⁴ Article 25(4)) GC III.

³³⁵ Article 29(2), Articles 97 and 108 AND Article 75(5) AP I and Article 5(2)(a) AP II.

³³⁶ Article II, Geneva convention of 1948.

presence of family members or in public, as a part of a systematic strategy of ethnic cleansing. Women were forcibly impregnated, i.e. raped till they became pregnant and held in “rape camps” until the pregnancy was too advanced to be terminated. The Rwanda genocide in 1994 is also a horrific example of sexual violence used as a tool of ethnic cleansing strategy, whereby Tutsi women were primarily targeted because of both their gender and ethnicity. Forms of sexual violence included rape, sexual slavery, forced incest, deliberate HIV transmission, forced impregnation and genital mutilation.³³⁷

The Republic of Bosnia-Herzegovina filed an application on 28th March, 1993 before the International Court of Justice (ICJ) alleging violation of the Genocide Convention by the Republic of Yugoslavia. The ICJ implicitly endorsed the nexus between genocide and rape while issuing provisional ruling in 1993 on Serbian acts against Bosnia. The International Criminal Tribunal for Rwanda (ICTR) has explicitly recognized the linkage between genocide and systematic rapes in the *Prosecutor V. Akayesu* in 1998 when it held that “in societies where the membership of the group is determined by the identity of the father, rapes where the victim is made pregnant with the intention that she gives birth to a child who does not belong to her mother’s group are measures intended to prevent births within the group and, thus, genocide.”³³⁸

3. The Geneva Convention and Two Additional Protocols -Article 3 common to all four Geneva Conventions does not mention rape per se but forbids “violence to life and persons...cruel treatment and torture” and outrages upon personal dignity, in particular degrading and inhuman treatment” against persons not taking part in hostilities. These word in Article 3 of the Convention can be interpreted to cover prohibition of rape in armed conflicts not of an international character. Further, Article 27 of the Fourth Geneva Convention provides that “women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault”. While Article 27 of GC IV is implicitly phrased in terms of protection from sexual violence, Additional Protocol I expressly lay down a prohibition on such acts. Article 75 on fundamental guarantees – addressed to both military agents and civilians – prohibits “outrages against personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault”,³³⁹ while Article 76, which deals specifically with the protection of women, states that “women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault”.³⁴⁰ Sexual violence is also expressly referred to in the provisions granting special protection to children, which provide that “children shall be the object of special respect and shall be protected against any form of indecent assault”.³⁴¹

Additional Protocol II repeats the prohibition of “outrages against personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault”.³⁴² In addition to these express rules, a prohibition on sexual violence is implicit in the provisions of international humanitarian law which prohibit violence to life, including cruel treatment and torture and outrages upon personal dignity and which are applicable in both international and non-international armed conflicts.³⁴³

³³⁷ Supra note 2.

³³⁸ Judgement No. ICTR-96-4-T, 2 September 1998, p 597-98

³³⁹ Article 75 (2)(b) AP I.

³⁴⁰ Article 76 (1) AP I.

³⁴¹ Article 77 (1) AP I.

³⁴² Article 4 (2) (e) AP II

³⁴³ For example, Article 75 (2) AP I and Article 4 (2) (a) AP II.

Under the Statute of International Criminal Court, rape and other forms of sexual violence constituting a violation of Geneva Conventions are war crimes when committed in international or non international armed conflict. It is not necessary to determine that sexual violence takes place systematically or on a wide scale to prosecute the perpetrators for war crimes, even a single act of rape is enough. When committed as a part of widespread or systematic attack against the civilian population, acts of sexual violence may also be prosecuted as crimes against humanity, regardless of whether they take place in times of war or peace.³⁴⁴

That rape is a criminal offence is widely recognized and accepted in international humanitarian law. Yet the charging of crime of rape remains an issue due to legal and extra-legal factors. The Geneva Convention rarely refers to rape and sexual violence directly and they have to be implicitly read into the provisions to term them as a war crime. Their articulation of rape as a crime in terms of “outrages upon the personal dignity” or “honor” does not reflect the physical and psychological suffering that women endure as a result of rape. Moreover, it tends to perpetuate the stereotype notion of rape by casting on the victim instead of the rapist.³⁴⁵

3.3. International Humanitarian Law on Women in Detention

As mentioned earlier, international humanitarian law provides general protection to women equal to that of men as well as special protection. Women are protected as members of the armed forces when captured and detained by the enemy, and as members of the civilian population if they are detained. But the law has also recognized the need to give women special protection according to their specific needs.

In international armed conflicts, women who have taken an active part in hostilities as members of the armed forces are protected, if captured, by the third Geneva Convention which deals with Treatment of Prisoners of War. Article 13 and 14 of the Convention elaborates the principle that POWs shall be treated humanely in all circumstances. Special protection is also provided to the female POWs by the third Geneva Convention. Article 14 (2) of the Convention stipulates that “women shall be treated with all the regard due to their sex”. This is followed by a number of provisions which expressly refer to the conditions of detention for women in prisoner-of-war camps, such as the obligation to provide separate dormitories for women and men,³⁴⁶ separate sanitary conveniences,³⁴⁷ and separate quarters under the supervision of women in the event of punishment.³⁴⁸ The principle of specific treatment for women is now also reflected in Article 75(5) of Additional Protocol I, which provides that in all circumstances there must be separate confinement of women from men and that there should be direct supervision of women detainees by women.³⁴⁹

Women as members of the civilian population can be interned by a party to an international armed conflict if “the security of the detaining power makes it absolutely necessary”.³⁵⁰ The fourth Geneva Convention which deals with the Protection of Civilian Persons in Time of War

³⁴⁴ Article 7 and Article 8 of the Statute of Rome 1998.

³⁴⁵ Supra note 5.

³⁴⁶ Article 25(4) of Third Geneva Convention related to Treatment of Prisoners of War.

³⁴⁷ Article 29(2) of GC III.

³⁴⁸ Articles 97 and 108 of GC III.

³⁴⁹ Articles 97 and 108, AP I.

³⁵⁰ Article 42 of GC IV related to the Protection of Civilian Persons in Time of War.

and Additional Protocol I contain a number of special provisions on the internment of women.³⁵¹

Moreover, the Convention lays down special provisions for interned or detained pregnant women and mothers of small children. It stipulates that the cases of pregnant women and mothers with dependent infants who are detained or interned must be considered with the utmost priority,³⁵² and maternity cases must be “admitted to any institution where adequate treatment can be given”.³⁵³

International law on non-international armed conflicts does not define captured combatants as prisoners of war. However, women who have taken an active part in the hostilities and are captured by the enemy are entitled to the fundamental guarantees afforded by Article 3 common to the Geneva Conventions and by Article 4 of 1977 Additional Protocol II. Women are entitled to the same protection as men, but they also have a right to special treatment. Protocol II provides for special treatment of women who are arrested, detained or interned in relation to the hostilities. In such cases, “except when men and women of a family are accommodated together, women shall be held in quarters separated from those of men and shall be under the immediate supervision of women”.³⁵⁴ Women members of the civilian population who are interned by a party to a non-international armed conflict are also protected by Articles 4, 5 and 6 of Protocol II.

Specific additional protections provided to women in detention:

- The cases of detained or interned pregnant women and maternity cases be heard with the utmost priority and that during hostilities the parties to the conflict endeavor to conclude agreements for the release, repatriation and return to places of residence or to a neutral country of pregnant women and of mothers with infants and small children;³⁵⁵
- Interned women be searched only by female guards;³⁵⁶
- Interned expectant and nursing mothers be given additional food in proportion to their physiological needs; that interned maternity cases be admitted to institutions where they can receive adequate treatment; and that interned maternity cases not be transferred if the journey would be seriously detrimental to their health;³⁵⁷
- Due account be taken of people’s sex in the context of disciplinary punishment for detained and interned persons and in the utilization of the labor of prisoners of war.³⁵⁸

Further there is also a provision which prohibits the execution of the death penalty on pregnant women or mothers with dependent infants.³⁵⁹

There are three sets of provisions that deal with the issue of displacement in international humanitarian law.

³⁵¹ Article 91(2) of GC IV.

³⁵² Article 76(2) of AP I.

³⁵³ Article 91(2) of GC IV.

³⁵⁴ Article 5(2) (a) AP II.

³⁵⁵ Article 132 GC IV and Article 76 (2) AP I.

³⁵⁶ Article 97(4) GC IV.

³⁵⁷ Articles 89, 91 and 127 GC IV.

³⁵⁸ Article 88 GC III, Article 119 GC IV and Article 49 GC III respectively.

³⁵⁹ Article 76(3) AP I and Article 6(4) AP II.

3.4 International Humanitarian Law on Displaced Women

There are three sets of provisions dealing with the issue of displacement in international humanitarian law.

3.4.1 *Prohibition of arbitrary displacement*

International humanitarian law contains a number of provisions which expressly address the issue of displacement of the civilian population.

In case of international armed conflicts, IHL incorporates the provision that parties to a conflict are prohibited from forcibly moving civilian populations during conflicts. This is a manifestation of the principle that the civilian population must be spared as much as possible from the effect of hostilities. The Fourth Geneva Convention contains a wide prohibition of individual or mass forcible transfers, both within the occupied territory and beyond its borders, either into the territory of the occupying State or, as is more often the case in practice, into third States.³⁶⁰ There is a limited exception to this rule which permits an Occupying Power to “evacuate” the inhabitants of a particular area if this is necessary either for the security of the civilian population or for imperative military reasons. Displacements in such circumstances would not be considered arbitrary. Even then, however, the evacuation should not involve the displacement of protected persons outside the occupied territory unless this is impossible for material reasons.

Displaced persons must be transferred back to their homes as soon as the hostilities in the area in question have ceased.³⁶¹

In case of a non-international armed conflicts the basic prohibition on displacing the civilian population is reiterated in Additional Protocol II, which prohibits forced movements of civilians both within a country and across a border.³⁶²

3.4.2 *Safeguards once displacement has occurred*

Article 49 of The Fourth Geneva Convention lays down basic conditions for evacuations. The safeguards relate principally to the conditions in which the displacement has to be carried out, and to the requirement that, during displacement, persons be provided with appropriate accommodation and that families should not be separated. Additional Protocol II lays down similar basic conditions for evacuations in non-international armed conflicts.³⁶³ Although both provisions relate to “lawful” displacements for reasons of security or imperative military necessity, these conditions are applicable *a fortiori* in situations of “unlawful” displacement. It is essential to mention here that as international humanitarian law is applicable only in situations of armed conflict, displaced persons will be entitled to such protection if they are displaced within a State that is experiencing an armed conflict – whether international or non-international – or if they are displaced across a border into a State that is also experiencing an armed conflict – again, international or non-international. The protection afforded by international humanitarian law will not, however, be available if the State to which they are transferred is not experiencing an armed conflict. In such cases the displaced persons will have to rely on human rights law or refugee law.

³⁶⁰ Article 49 GC IV.

³⁶¹ Ibid.

³⁶² Article 17 AP II.

³⁶³ Ibid.

3.4.3 Right to Return

The Fourth Geneva Convention provides that evacuated persons must be transferred back to their homes as soon as hostilities in the area have ceased. This rule relates to "lawful displacements", i.e. evacuations for reasons of security or imperative military necessity which, according to the same provision, should be carried out within the borders of the occupied territory. However as the rule does envisage the possibility of evacuations into third States in exceptional situations, this right of return is also applicable to persons who have been displaced across a border. As the provision in question relates to "lawful displacements", a right to return would be applicable *a fortiori* following unlawful displacements.

With respect to women who are victims of displacement it is important to note the following points:

- a) Women need to be protected from arbitrary or forced displacement, so that they can remain within their communities and with their families. However, if for security or other reasons they decide that they have to leave their homes, they should be able to do so and not be prevented by a party to the conflict. Women should be fully respected and protected while displaced.
- b) Women need to be included in the planning, implementation and evaluation of programs to ensure that those programs meet their actual needs and support their existing coping mechanisms.
- c) Displaced women need privacy in order to maintain their security, dignity and personal health and hygiene. Their particular needs must be taken fully into consideration in the design and implementation of programs in camps.
- d) Displaced women should have the possibility of sending their children to school as soon as the prevailing situation permits, so that their children can receive an appropriate education.
- e) If women are displaced, they risk being separated from their family members and need help in restoring contact and being reunited.

IV Conclusion

International humanitarian law (IHL) contains general provisions protecting all civilians and a number of provisions affording women "special protection" during armed conflict. Forty-three provisions of the Geneva Conventions and Protocols specifically deal with women and the effects of armed conflict. However, they all deal with women in their relationships with others, not as individuals in their own right. Nineteen are, in fact, designed to protect children. Those that deal with sexual offenses are couched in terms of offences against women's honor. Women's honor, as dealt with in IHL, is construed solely on the basis of certain sexual attributes, the characterizing features of which are what is seen as important to men, namely the chastity and modesty of women. In contrast, the honor of men is a much more complex concept in IHL, encompassing both mind and bodily attributes. Further the provisions dealing with women are presented as less important than others. They are drafted in different language than the provisions protecting combatants and civilians generally, using the concept of "protection" rather than prohibition. Their breach, moreover, is not treated as serious and they are not considered "grave breaches" of the Conventions and, until recently, no attempt had been made to enforce these rules, despite widespread breaches.

IHL fails to take account of women as subjects in their own right. It takes the experience of men as the starting point. In a world where women are not equals of men, a general category of rules based on the experience of men cannot respond to their situation. Armed conflict affects men and women in fundamentally different ways, and laws that take the experience

of men as the norm against which to construct the rules are unjust. Women may already receive special protection under IHL-for example when they are pregnant or prisoners of war but these rules relate only to the sexual and reproductive aspects of women but not as an individual.

From above it becomes imperative that the rules of IHL are re-examined, re evaluated and accordingly amended to adequately address the inherent discriminatory operation of the provisions. Another plausible approach is to encourage a reinterpretation of the existing provisions of IHL to take into account the gender perspectives and incorporate developing norms on violence against women during armed conflict. Further, an initiative must be undertaken by the state parties to the Geneva Conventions and Protocols for the better dissemination of the rules relating to women. Dissemination of rules relating to IHL is also a treaty obligation of these states.³⁶⁴

The full implementation of IHL must become a reality and the prime responsibility for achieving this rests with the parties to an armed conflict. They must obey the rules and take necessary action so that no violations take place and they must bring the perpetrators to justice if war crimes against women are committed. Ultimately, the relevance and credibility of IHL will depend not only on the better implementation of the existing law, but also on significant innovation designed to address the emerging IHL issues.³⁶⁵

Another controversial issue is the angelic vision of women facing war. History shows that women have taken part in armed conflict since ancient times but still the instinct to harm other human beings remains the prerogative of men. In recent past also there have been incidences which demonstrate that even women are capable of committing heinous crimes. For example the Iraq Prison abuse scandal at Abu Ghraib shows that women can also, without any constraint or weigh on their conscience commit torture and also derive perverse pleasure in doing so. Similarly, the fact that there are women amongst the suicide bombers who blow themselves up in Iraq, Chechnya and elsewhere show that they are more willing to become the vectors of indiscriminate violence. This fact is further reiterated by the participation of female soldiers, such as in the Sierra Leone Civil War, in the massacre of civilians.

The fact is that that the war and the violence associated with it is no longer a gender related issue and it is essential that aggression should be regarded as human rather than a male activity. The changing social position of men and women as well as the changing nature of armed conflict result in the need to reflect upon the principles and specific elements of international humanitarian law. All the efforts must be focused to build a new world characterized by equality between men and women of all ethnic groups, social and economic classes and countries of origin. Only in this way we will have a fairer, more equal and less violent society wherein, women are not treated as objects but as subjects entitled to fundamental human right of dignified co-existence.

³⁶⁴ Article 83, AP I.

³⁶⁵ Kenneth Watkin, *21st Century Conflict and IHL: Status Quo or Change?* in Michael Schmitt and Jdena Pejic (eds), *International Law and Armed Conflict; Exploring the Faultlines*, 226 (Martime Nijhoff Publishers, 2007).

