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EDITORIAL NOTE

The Editorial Board of International Journal of Law & Management Studies (IJLMS) is pleased to bring forth the fifth issue of the journal with the hope that the experience would be enriching for the readers. Over its past issues, the journal has strived to contribute to the academic discourse surrounding critical legal issues in the world by publishing articles by both students and established scholars. The scope and extent of International Journal of Law & Management Studies is not limited to commercial laws and includes within its ambit laws that directly or indirectly impact the socio-economic framework of the country which is a big determinant of investments in the country. Governance and related matters have also been a point of focus of the Editorial Board of the Journal. Governance, being the prerogative of the Legislature and the Parliament is fundamental to the growth of a country. However, when civil rights and liberties are at stake owing to disregard and the apathetic attitude shown by Legislature in law-making, Executive in its implementation, Judiciary, being the last resort for the citizenry, acts as the engine of social welfare.

Today, as judicial activism is becoming the vanishing point of Separation of Powers, we at International Journal of Law & Management Studies (IJLMS) take a step back to assess the crucial role that Indian Judiciary has been playing in evolution of law through interpretation and construction. Therefore, in recognition of the same, we are pleased to announce the forthcoming 1st IJLMS Judgment Writing Competition, which shall be an attempt towards inculcating the spirit of justice and righteous decision making while emphasizing the role that judges play in the society.

Editor-in-Chief

A Comparative Analysis of Existing Regimes in India, the United States and United Kingdom in relation to Waiver of Moral Rights

Vishesh Mehrotra *

ABSTRACT

This paper evaluates one of the most debated issues in the field of Copyright Law in India, that being waiver of Moral rights. Moral rights are granted to an author on his creative work, independent of the economic and ownership rights subsisting in the property and hence, the right should be in the nature of an inalienable right. Over the recent past, there has been increasing trends of waiver of Moral rights in countries around the globe in order to augment the economic exploitability of the author's work. Over exploitation of Moral rights by the author, whether fitting or not limits the economic exploitability of the work. In India, however, the position still remains unsettled since judicial pronouncements have been not entirely clear and may be interpreted to support both sides of the coin. While on the one hand, voluntary nature of contractual agreements have been given prominence, in certain cases, the Moral rights have been compared to fundamental right which cannot be waived. There also appears an apparent contrast between the intention of the legislature and that of the judicial system with regards to the same. While the legislature has adopted a restricted approach in granting and expanding the Moral rights of an author, the judiciary has publicized a more author-centric view.

INTRODUCTION

Moral rights have traditionally being an aspect of copyright that seeks to guard the non-economic spiritual interests of an author's work. Developing countries have generally considered Moral rights to be an instrument of both commercial and cultural regulation who also emphasize the cultural benefits that may be achieved through effectual copyright policies.

Moral rights of performers were clearly set out under Article 54 of the WIPO Performances and Phonograms Treaty (hereinafter, WPPT). They were incorporated in the Berne Convention, 1928 under Article 6*bis* and basically envisaged two fundamental rights of authors as well as performers, being the right of attribution and the right of paternity. Moral rights of authors are based on two

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ideas, being that they are a reputational or symbolic currency and that they are also structured on an egocentric individualism.²

In India, s. 57 of the Copyright Act, 1957 deals with Moral rights of an author and provides for right of paternity and right of integrity to an author. The right of paternity enunciates that an author can claim authorship of his work when his work is addressed to the public. The right of integrity provides that an author has the right to prevent distortion and mutilation of his work and protects its integrity. This paper deals with the situation whether these moral rights may be waived or not in extant regimes subsistent in the United States of America, the United Kingdom and India.

METHODOLOGY

The researcher has adopted a combination of doctrinal and comparative mode of research where information has been gathered from secondary sources like books, journals, articles and web sources. A comparative approach has been adopted keeping in mind the existing law followed in the U.K. and the U.S. in comparison with the law in India.

The first part deals with a comparative analysis of the existing regimes in the US, UK and India in relation to waiver of moral rights.

The second part elucidates on the enforcement of moral rights post the expiry of the period of copyright in relation to the Subramania Bharati case.

OBSERVATIONS

PART-I

The Universal Declaration on Human Rights enunciates the right of protection to the authors of any moral or material interests arising out of literary, scientific or artistic production.³ The Berne Convention⁴, to which 160 countries are parties, also provides that an author would have right to claim authorship of his work and to raise objections against any distortion or mutilation of his work. Such rights originate from within the personality of the author and hence, are in the nature

²Dr. Martin Paul Eve, *What's So Moral About The "Moral Rights" Of Copyright For Academics*, THE LINCOLN REPOSITORY (Aug. 20, 2016), <http://eprints.lincoln.ac.uk/14840/2/Moral.pdf>.

³UNIVERSAL DECLARATION OF HUMAN RIGHTS, 1948, ARTICLE 27(2).

⁴BERNE CONVENTION, 1971, ARTICLE 6bis(1).

of personal rights.⁵ These rights are representative of social values and are established on the conviction that artistic creations are more than something, than an effort to earn livelihood.⁶ Moral rights of an author thus, are said to persist even after alienation with his economic rights in relation to the work.

The implication of this doctrine of moral rights puts forth that the creator of a work cannot estrange his moral rights, whether by way of a sale, transfer or an endeavor to abandon the rights altogether.⁷ The rationale behind such a deduction is that external circumstances such as mere possession or ownership do not alter the innate quality of relationship between the author's work and the author himself.⁸ But the presence of these moral rights raises pertinent questions as to whether there exist certain mechanisms to limit the exploitability by the true owner after the work has been assigned⁹; the answer to this question has been to allow waiver of moral rights, either completely or partially, in certain countries.

On the other hand it can also be argued that today's world is one of great inequality where the bargaining powers of the parties are generally unmatched.¹⁰ Hence, waivers of moral rights, in this regard, will also cause certain practical issues such as in case of countries like the U.K. and Canada, which allow for complete waiver of moral rights in publication contracts.¹¹ Similarly, countries like Germany have found a way out to this deadlock by allowing waiver of moral rights only in certain circumstances where waiver seems reasonable, while promoting equality of bargaining powers between the publishers and the authors.¹²

§ 57 of the Copyright Act, 1957 provides for inalienable moral rights of authors in the form of right of attribution and right of integrity in India. The law of Copyright in India was thus, brought in consonance with Article 6bis Berne Convention, 1971.¹³ The inalienability of this right is further supported by clause (2) of the provision, which provides that the right to claim authorship of the

⁵*Supra* Note 1.

⁶Mira T. Sunadara Rajan, *Moral Rights In Developing Countries: The Example Of India*, 8 JOURNAL OF INTELLECTUAL PROPERTY RIGHTS 384 (2003).

⁷MIRA T SUNDARA RAJAN, *MORAL RIGHTS* (1st ed., Oxford University Press 2011).

⁸Thomas F. Cotter, *Pragmatism, Economics, And The Droit Moral* 76 NORTH CAROLINA LAW REVIEW 6 (1997).

⁹Mike Holderness, *Moral Rights and Authors' Rights: The Keys to The Information Age* 1 JOURNAL OF INFORMATION TECHNOLOGY AND LAW (1998).

¹⁰JOHN D. MCCAMUS, *THE LAW OF CONTRACTS* (1st ed., Irwin Law Publications).

¹¹*Supra* Note 6.

¹²PAUL GOLDSTEIN AND P. B. HUGENHOLTZ, *INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND Practice* (3rd ed., Oxford University Press 2010).

¹³Dr. Navdeep Kour Sasan, *TRIPS and Copyright Protection in India: An Overview*, 1 INDIAN JOURNAL OF RESEARCH (2012).

creation can also be exercised by the legal heirs of the author.¹⁴ The rationale behind the subsistence of moral rights was discussed by Justice Pradeep Nandrajog in the leading case of *Amar Nath Sehgal v. Union of India* that “...*Moral Rights of the author are the soul of his works. The author has a right to preserve, protect and nurture his creations through his moral rights...*”¹⁵ Also, it is not necessary that the copyright relating to the work must be vesting in the author; the moral rights through them will continue to subsist even after the copyright has been assigned fully or partially.¹⁶

It is amply clear that the special rights of the authors cannot be assigned to a third party, the question but remains whether waiver of such rights can be permissible under the Indian Law. In this regard, it would be apt to look at the judicial interpretation since; the bare provision of the act is silent on the same aspect.¹⁷ In *Centrotrade Minerals and Metal. Inc. v. Hindustan Copper Limited*¹⁸, it was held that in situations where a legal right is involved, it is well within a person’s prerogative to waive his right. Such waiver is permissible even when a benefit is being conferred by the operation of law. The Court however, also pointed out that such waiver is not permissible in case it is against or public policy and that any “...*contract between the parties must be in obedience to law and not in derogation thereof...*”¹⁹ But the applicability of this judgment in the realm of copyright is debatable since, the case was decided in a non-copyright context.

In the recently decided case of *Sartaj Singh Pannu v. Gurbani Media Pvt. Ltd. And Ors.*,²⁰ the Delhi High Court has held that as long as it is proved that a waiver was voluntary in nature, it cannot be considered as opposed to public policy. In the instant case, Pannu, claimed to be the sole director of a film and sought orders restraining the Respondents to release the film without giving him due credit. On the other hand, the agreement signed between the Petitioner and the Respondents vested in the respondent all economic as well as moral rights with regard to the film, thus relinquishing the Petitioner’s claim. Another important aspect involved was that it could not be proved to the satisfaction of the Court that a director is an author under the meaning of § 57 of the Act. Hence, with regard to the validity of waivers, the decision does not provide a definitive

¹⁴THE COPYRIGHT ACT, 1957 § 57(2).

¹⁵*Amar Nath Sehgal v Union of India*, [2005] Del, 30 PTC (Del).

¹⁶*Smt Mannu Bhandari v Kala Vikash Pictures Pvt Ltd and Anr.*, [1987] Del, AIR (Del).

¹⁷*Supra* Note 5.

¹⁸*Centrotrade Minerals and Metal. Inc. v. Hindustan Copper Limited*, [2006] SC, 11 SCC (SC).

¹⁹*Ibid.*

²⁰*Sartaj Singh Pannu v. Gurbani Media Pvt. Ltd. And Ors.*, [2014] Del, (Del).

stand since, the director itself could not be considered as an author, which is an essential presupposition under § 57. Although the judgment is vague in the sense that a director generally may not be considered as an author as per the Act itself, it may be used to support a general proposition that waiver of moral rights is permissible.²¹

On the other hand, cases have come to the fore which put forth that an author's moral rights will have precedence over any contractual obligations entered into by the author.²² In the case of *Mannu Bhandari v. Kala Vikash Pictures Pvt. Ltd. and Anr.*, the Court discussed the scope of § 57 of the Act and laid down that a contract provision has to be read subject to the same provision i.e. a contractual agreement cannot override the special rights granted to an author under § 57. The case involved claims of the writer against distortion and mutilation of the novel 'Aap ka Bunty' against makers of the film 'Samay ki Dhara' (an adaption of the above novel). The Court favored the rights vested to the authors under § 57 and said that the provision does not merely protect the author or artist alone, but also encourages enrichment of the culture.²³ The Court while perpetuating moral rights of the authors, also pointed out that the same cannot be claimed after the expiry of the period of copyright.

Another landmark case which discussed the issue of moral rights at length was the case of *Amar Nath Sehgal v. Union of India*. The plaintiff, Amar Nath Sehgal, a world renowned artist assigned his copyright over a sculptor to the Union of India, which he was asked to prepare as a decorative sculpture for "Vigyan Bhawan" in the year 1957. The cause of action arose in the year 1979, when the Government of India removed the sculpture from "Vigyan Bhawan" and put the sculpture in the Government's storeroom. Subsequent to this, a suit was instituted against the Union of India for violation of moral rights of Amar Nath Sehgal under § 57 of the Act. It was contended that the right of integrity was violated by destruction of the said sculptor, which was ultimately upheld by the Court. The Court enhanced the scope of moral rights of an author by adding the dimension of obliteration of cultural heritage of the nation. The Court also affirmed the decision given in the case of *Mannu Bhandari v. Kala Vikash Pvt. Ltd. And Anr.*²⁴, in which Court adjudged the prominence of § 57 of the Act over any contractual provisions. The Courts have thus,

²¹Nandita Saikia, *Indian Copyright: Getting Moral Rights Waived*, COPYRIGHT LAW MATTERS (Aug. 20, 2016), <http://copyright.lawmatters.in/2010/07/getting-moral-rights-waived.html>.

²²*Mannu Bhandari v. Kala Vikash Pictures Pvt. Ltd. and Anr.*, [1987] Del, 13 AIR (Del).

²³JATINDRA KUMAR DAS, *LAW OF COPYRIGHT* (1st ed., PHI Learning Pvt. Ltd 2015).

²⁴*Supra* Note 21.

adopted an author-centric approach wherein moral rights are given superiority over any other contract. Thus, from the interpretations adopted by the Courts it can be said that moral rights have been considered akin to those of fundamental rights; since, the same right has also been provided for in The Universal Declaration on Human Rights²⁵.

Amar Nath Sehgal's case also affirmed the decision given in *Vishaka v. State of Rajasthan*²⁶, wherein it was held that in case the municipal law is silent on an issue, it is permitted that provisions of international treaties and covenants can be taken relating to such issue. The first international treaty which recognized the concept of moral rights was The Rome Act of 1928²⁷, followed by various others such as the Berne Convention and the Universal Declaration on Human Rights. These treaties also provide for moral rights as an inherent part of an author's work.

The United States of America has on the other hand adopted a monist approach trying to support public good by confining itself to granting mostly economic benefits to creative efforts, rather than moral rights or benefits.²⁸ The priority of the U.S. Copyright law is thus public dissemination of an author's work rather than protection of artist's own personality.²⁹ But in the light of criticism from other signatories to the Berne Convention, the U.S. passed the Berne Convention Implementation Act, 1988 (BCIA). But it was provided in it that specific legislative enactments would be essential for the application of the Convention.³⁰ Taking advantage of this, the right of integrity and attribution was expressly waived off and hence, artists could not bring action to guard their moral rights under the Convention. Despite this, atleast 14 states had their independent laws granting moral rights i.e. mostly the right of attribution and paternity.

In response to such state laws, the Visual Artists Rights Act, 1990 (VARA) was brought into force. The Act while providing certain rights in relation to moral rights also allowed for waiver of the same under § 106A(e)(1) of the same. The provision provided that moral rights of an artist

²⁵ROBIN RAMCHARAN, INTERNATIONAL INTELLECTUAL PROPERTY LAW AND HUMAN SECURITY (2nd ed., TMC Asser Press 2013).

²⁶*Vishaka v State of Rajasthan*, [1997] SC, 7 (SC).

²⁷Stephanie C. Ardito, *Legal Issues - Moral Rights For Authors And Artists*, INFOTODAY (Aug. 24, 2016), <http://www.infotoday.com/it/jan02/ardito.htm>.

²⁸Monica E. Antezana, *The European Union Internet Copyright Directive as Even More than It Envisions: Toward a Supra-EU Harmonization of Copyright Policy and Theory*, 26 BOSTON COLLEGE INTERNATIONAL AND COMPARATIVE LAW REVIEW 424 (2003).

²⁹Robert C. Bird and Lucille M. Ponte, *Protecting Moral Rights in the United States and the United Kingdom: Challenges and Opportunities under the U.K.'s New Performances Regulations*, 24 BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL 213 (2006).

³⁰Holland, *Moral Rights Protection in the United States and the Effect of the Family Entertainment and Copyright Act of 2005 on U.S. International Obligations*, 39 Vanderbilt Journal of Transnational Law 231 (2006).

can be waived if the agreement to the same is in writing and also recognizes the work in question and its decided uses.³¹ From a bird's eye view, the U.S. have been trying to evade the implementation of the Berne Convention and in relation to rights relating to the personality of an author, the main reason behind that to ensure widest dissemination of information as possible without any possible restrictions.

Similar to the U.S., U.K. recognized the concept of moral rights in the legal sense after a long period of time in 1928, when the Article 6*bis* of the Berne Convention was adopted.³² Even after the adoption of the Berne Convention, the right of attribution or prevention of misattribution was not available until the Copyright Act, 1956.³³ The Copyright, Designs and Patent Act, 1988 (CDPA) was subsequently enacted keeping pace with the contemporary developments, which recognized moral rights independently. But even this act was far from without limitations, since it permitted for waiver of moral rights.³⁴ It allowed for informal waiver by way of an estoppel or any general contract under § 87(2) of the Act.³⁵ It is thus absurd when the right in itself is considered inalienable i.e. non-transferrable or non-assignable, but the same is allowed to be given up altogether.³⁶ Hence, it can be noticed that both in the U.S. as well the U.K. the very concept of moral rights was opposed to from the beginning and hence, the current law has transformed into one which although confers moral rights, also permits the waiver of the same. In today's world where a dearth or lack of parity exists in the bargaining powers of the parties, allowing for waiver of moral rights might as well nullify the entire purpose of existence of moral rights.

PART-II

The concept of moral rights can be guided either of the two schools of thought in different regimes across the world, namely *iusnaturalism* and *utilitarianism*. The theory of *iusnaturalism*, which was upheld by renowned German philosopher Immanuel Kant in 1785, puts forth that the creative work

³¹VISUAL ARTISTS RIGHTS ACT, 1990 § 106A(e)(1).

³²Sheila J. McCartney, *Moral Rights Under the United Kingdom's Copyright, Designs and Patents Act of 1988*, 15 COLUMBIA VLA JOURNAL OF LAW & THE ARTS 210 (1991).

³³Elaine B. Gin, *International Copyright Law: Beyond the WIPO & TRIPS Debate*, 86 JOURNAL OF THE PATENT AND TRADEMARK OFFICE SOCIETY 768 (2004).

³⁴Jennifer B. Pfeffer, *The Costs and Legal Impracticalities Facing Implementation of the European Union's Droit de Suite Directive in the United Kingdom*, 24 NORTHWESTERN JOURNAL OF INTERNATIONAL LAW & BUSINESS 552 (2004).

³⁵Gerald Dworkin, *The Moral Right of the Author: Moral Rights and the Common Law Countries*, 19 COLUMBIA JOURNAL OF LAW & THE ARTS 246 (1995).

³⁶CATHERINE COLSTON AND KIRSTY MIDDLETON, MODERN INTELLECTUAL PROPERTY LAW (2nd ed., Cavendish Publishing 2005).

of an author are essentially an extension of his individuality and character, and are in essence therefore, personality rights of an author.³⁷ This theory of personhood links the work of the author to his identity and hence, such works should never be completely separated from the authors of such work.³⁸ It seeks to protect the author itself, as well as the material goods emerging from their intellect and creative qualifications.³⁹

On the other hand *utilitarianism*, as J.S. Mill (1873) understands puts forth that law is reasonable and justifiable when it sanctions the general happiness of the society as a whole. Hence, copyright should be operated in such a manner as to encourage the general happiness, by making available the creative works throughout the society.⁴⁰ This proposition has been adopted in various legislations across the world, affirming that an author's right is akin to the positive law rights bestowed to a society, and the benefits granted to the author are limited by attaining the general happiness of the society.⁴¹

France adopted the concept of *iusnaturalism* in the form of *droit moral*, a French word manifesting that moral rights are converse of the economic benefits granted to an author, and hence both should exist independent to each other⁴²; by this way the French gave prominence to moral rights of the creator of a work. The existing regime in France declares moral rights to be in alienable and perpetual and which can be enforced even subsequent to the expiration of the term of copyright.⁴³ The *utilitarianism* approach of the U.S., on the other hand, can be derived from Art. 1, section 8⁴⁴ of the Constitution, which promotes societal benefit even by limiting the author's rights when required, as long the same results in progress. The same is based on the proposition that authors should derive motivation from the fact that their work will be promoted in the public at large and

³⁷Amparo Muñoz Ferriol, *Bases Biológicas de la Ética de Popper: Entre el Iusnaturalismo y el Positivismo*, 35 QUADERNS DE FILOSOFIA I CIÈNCIA 159 (2005).

³⁸Linda L. Lacey, *Of Bread And Roses And Copyrights*, 6 Duke Law Journal 1532 (1989).

³⁹Dane Joseph Weber, *A Critique Of Intellectual Property Rights* (Sept. 10, 2016), <http://dane.weber.org/concept/thesis.html>.

⁴⁰Elizabeth S. Anderson, *John Stuart Mill and Experiments in Living*, 102 THE UNIVERSITY OF CHICAGO PRESS 4 (1991).

⁴¹Gloria Maria Dominguez, *Effective Protection Of Moral Rights In Authors Rights Systems Over Copyright Systems*, (Sept. 8, 2016), www.etd.ceu.hu/2012/dominguez_gloria.pdf.

⁴²Cyrill P. Rigamonti, *The Conceptual Transformation of Moral Rights*, 55 AMERICAN JOURNAL OF COMPARATIVE LAW 67 (2008).

⁴³FRENCH COPYRIGHT ACT, 1957 ARTICLE 6; See also Manu Chaturvedi, *Moral Rights In India: A Call For Holistic Review*, 4 INDIAN JOURNAL OF INTELLECTUAL PROPERTY LAW 52 (2011).

⁴⁴THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1789 ARTICLE 1 § 8.

will be widely circulated.⁴⁵ Hence, emerging literature seems to depict an intrinsic duality, wherein copyright regimes across the world has been divided depending upon the nature and extent of moral rights to be extended to authors. Most of the countries have put into practice an author-centric approach, while fewer countries such as the U.S. and the U.K. have adopted the society-centric approach.

In India, the judicial interpretation of § 57 of the Act has been liberal to ensure the moral rights of the authors similar to that of the French regime which has positioned moral rights as perpetual and inalienable. But the Indian legislature has consistently attempted to corrode away the wide interpretation being applied by the judiciary. As an illustration, the legislature in 1984 amended the Copyright Act to restrict the enforcement of moral rights only till the subsistence of the copyright; prior to this amendment, interpretation of moral rights could have resulted in it outliving the period of the copyright.⁴⁶ The amendment was brought forth, even when the Berne Convention provided for existence of moral rights post expiry of the term of the copyright.⁴⁷

It should also be kept in consideration that both moral and economic rights exist independent of each other, and while economic rights may be curbed in order to ensure proper dissemination and prevent monopolies, no such drawback exists with moral rights. Moral rights only look to protect the personality rights of the original author. These rights are akin to personal rights which as per Kant, cannot be alienated.⁴⁸ It is also argued that such rights may be considered to the status of Fundamental Rights to which no time restrictions may be imposed for enforcement of the rights.⁴⁹ Another instance, which supports the aforementioned propositions, was the case of Subramania Bharati.

C Subramania Bharati was a poet whose poetry, several of which was relating to India's independence gained extreme popularity and recognition among the people of the country, largely post his demise in the year 1921.⁵⁰ The Tamil Government, subsequently after independence purchased and nationalized the works of the poet with the novel object of promoting the creativity

⁴⁵Carl H. Settlemeyer III, *Between Thought and Possession: Artists' "Moral Rights" and Public Access to Creative Works*, 81 Georgetown Law Journal 2291 (1993).

⁴⁶*Supra* Note 42.

⁴⁷BERNE CONVENTION, 1971 ARTICLE 6bis.

⁴⁸Lior Zemer, *THE IDEA OF AUTHORSHIP IN COPYRIGHT* (3rd ed., Ashgate Publishing 2007).

⁴⁹Mrinalini Kochupillai, *Moral Rights Under Copyright Laws: A Peep Into Policy- Part I*, SPICY IP (Sept. 14, 2016), <http://spicyipindia.blogspot.com/2007/12/moral-rights-under-copyright-lawspeep.html>.

⁵⁰Mira T Sundara Rajan, *Moral Rights in the Public Domain: Copyright Matters in the Works of Indian National Poet C Subramania Bharati*, Singapore Journal of Legal Studies 175 (2001).

of the author. 60 years post independence, it was observed that Bharati's work, which was made publicly available to the public, was mutilated and distorted by instances wherein Bharati was not accorded as the author or places where the literature in his works were altered or modified.⁵¹ Further, due to the limitation period as envisaged under § 57 in enforcement of moral rights of an author, the representatives and legal heirs of Bharati had no recourse to seek redress.

CONCLUSION

According to Mira T Sundara Rajan, Professor of Law at the University of British Columbia, the idea of waiver of moral rights can be upheld in the Indian context, if the same is satisfies the criteria of reasonableness.⁵² It implies that a blanket waiver may not be upheld especially when the circumstances suggest a lack of parity in bargaining power of the parties. Hence, on one side is the free dissemination of creative information to the public without any restriction who also argue that when converting a work from one medium to another—such as an adoption of a novel to produce a film—some changes are bound to occur, and hence they should not be held liable for it. On the other side is the right of the authors to prevent any unlawful use of their creative intellect in a manner which is prejudicial to their reputation or honour.

It is true that the trend suggests that the Indian Judiciary has adopted a more author-centric approach by interpreting the moral rights of an author in its widest amplitude. As regards waiver of the same, prominence has been given to § 57 of the Act over any contractual provision. Thus a blanket waiver foregoing all of the moral rights may not be allowed, but the same may be permitted if it can be proved to the satisfaction of the Court that the waiver is reasonable. The onus of proving the reasonableness of the waiver should lie on the person asserting the validity of the waiver.

§ 36 of the Copyright Amendment Act of 2012 seeks to redress this problem by omitting the use of the words “...which is done before the expiration of the term of copyright...”⁵³ in the Act. The implication of this extremely imperative amendment is that the right of distortion can be enforced by an author even subsequent to the expiry of copyright and not only during the period when the

⁵¹Mira T Sundara Rajan, *The Lessons of the Past: C Subramania Bharati and the Nationalisation of Copyright*, 6 Scripted Issue 2 (2009).

⁵²*Supra* Note 50.

⁵³THE COPYRIGHT ACT, 1957 § 57.

copyright subsists.⁵⁴ This is indeed a sign of positive intent shown by the legislature towards moral rights unlike the trend of generally curbing those rights.

⁵⁴Nishith Desai Advocates, *Copyright Amendment Bill, 2012 Receives Indian Parliament's Assent*, (Sept. 16, 2016), [http://www.nishithdesai.com/fileadmin/user_upload/Html/IP/Copy right%20Amendment%20Bill%202012.pdf](http://www.nishithdesai.com/fileadmin/user_upload/Html/IP/Copy%20right%20Amendment%20Bill%202012.pdf).

A Detailed Analysis of the Investigation Provisions of the Ugandan Companies Act 2012

Rukundo Solomon*

ABSTRACT

The investigative provisions of the Companies Act 2012 of Uganda have come been recommended as a suitable means of regulating the activities of companies to ensure compliance with the Act and to combat fraud and minority oppression. However, no detailed study of these provisions has been done yet. This paper is the first attempt at a complete analysis of these investigation provisions analysing their origins, delineating their scope and assessing their effectiveness in the overall company law regime.

INTRODUCTION

Although under the Companies Act shareholders have been vested with a number of rights that are meant to afford them protection, shareholders are often ill-equipped to exercise effective control over company affairs and, particularly in companies where there is a considerable separation between management and ownership. In such companies' shareholders are usually sleeping and passive members leaving the day to day affairs to be managed by its board of directors to the exclusion of a predominant majority of shareholders. This situation leads to potential abuse of power by the persons in control of the company affairs. It is this potential abuse that necessitates the involvement of the Companies Registrar in the company's affairs through its investigatory powers conferred under the Companies Act. 'Investigation' as used in the Act is a form of a deep probe into the affairs of a company. It is meant to be a fact finding exercise. The nature of the powers of investigation conferred under the Act suggest that the main objective of investigation is to collect evidence and to see if any illegal acts or offences are disclosed and then decide the action to be taken. The expression also includes investigation of all its business affairs—profits and losses, assets including goodwill, contracts and transactions, investments and other property interests and control of subsidiary companies too. In *Bank of Rajasthan Ltd vs Rajasthan Breweries Ltd & Ors*⁵⁶ the bank sought an order directing investigation into the affairs of the company on the ground that the business of the company was conducted for a fraudulent and unlawful purpose with intent to defraud the public. The court held that an order of investigation is not an end in itself

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⁵⁶ (2007) 140 Com Cases 622 (CLB)

but rather it is only a means to find out the full facts of the acts complained of. It is nothing but an exploratory measure to be proved or disproved with reference to the facts later on ascertained.

INVESTIGATION BY THE REGISTRAR

Under section 172, where the registrar has reasonable cause to believe that the Companies Act is not being complied with or that a document submitted does not disclose a full and fair statement of the matters to which it relates, the registrar may, by a written order, call on the company to produce all or any of the books or to furnish in writing such information as the registrar may specify. The scope of the enquiry contemplated by this section is clear; wherever the Registrar has reason to believe that the affairs of the company are not properly carried on he is empowered to make an enquiry into the said affairs.⁵⁷ An investigation under this section can also be undertaken under court orders as was seen in *Re Tankhill Properties Ltd*⁵⁸ where, in a minority shareholder petition for winding up of the company, the court ordered that the registrar investigate the affairs of the company.

Upon receipt of the order from the registrar, it shall be the duty of all past and present company officers to produce the books or furnish the information or explanation so far as lies within their power.⁵⁹ An 'officer' is defined in the Act as including a director, manager or secretary.⁶⁰ The use of the word 'includes' suggests that the definition of officer is not restrictive.⁶¹ In *Centenary Development Bank vs Jurua Issa*⁶² a bank branch manager was held to be an officer of the company for purposes of receiving company summons. Even officers who have since left the company can be required to furnish the registrar with documents or information regarding the company in the investigation.⁶³ This is necessary as a former company officer may have information that is useful to the investigation. Any officer who refuses or neglects to comply with the registrar's order is liable to imprisonment of one year or a fine not exceeding one 2000,000 shillings (USD 600).⁶⁴ If

⁵⁷ *Re Standards Brand Ltd* (1980) 50 Com Cases 75

⁵⁸ [2013] Ugcommc 67

⁵⁹ Section 172(3)

⁶⁰ Section 2

⁶¹ V.C.R.A.C. Crabbe, *Understanding Statutes*, Cavendish Publishing Limited, UK, 1994, p 22

⁶² HCCA No 0010 of 2013; However, see *Re Vic Groves & Co Ltd* [1964] 2 All ER 839 where it was held that one of 32 divisional managers were not an officer of the company for purposes of swearing the affidavit supporting the winding up petition.

⁶³ Section 172(3)

⁶⁴ Section 172(4)

after examination of the books or information or explanation the registrar is of the opinion that an unsatisfactory state of affairs is disclosed or that a full and fair statement has not been disclosed the registrar shall report the circumstances of the case in writing to court.⁶⁵

INSPECTION

Section 173 caters for a scenario where members of the company are the ones who initiate the investigation. The registrar may appoint inspectors to investigate the affairs of a company for a company having a share capital on the application either of not less than 200 members or of members holding not less than one-tenth of the shares issued⁶⁶ or in the case of a company not having a share capital, on the application of not less than one-fifth in number of the persons on the company's register of members.⁶⁷ This section provides a form of protection for minority shareholders⁶⁸ however, the requirement of 200 members means that the section will mainly apply to public companies.⁶⁹

The section requires that the application be made by 'members' of the company. Section 47(1) of the Companies Act gives a definition of a member which covers two categories of persons: those who subscribed to the memorandum of the company and those who subsequently agreed to become members of the company and whose names are entered on the company's register of members.⁷⁰ This provision has the advantage of certainty as it can be more readily determined who is a member of the company. Issues arise however where for one reason or another a person has been kept off the register. In such a case a person can and should bring an action for rectification of the register pursuant to section 125 of the Act before applying under section 173. In a situation where the company has a large number of members an investigation is unlikely to be instigated simply on the basis of allegations made by one shareholder even when the stringent conditions have been met because the power to appoint an inspector to investigate the affairs of a company has to be exercised by the registrar after a proper preliminary scrutiny.⁷¹

⁶⁵ Section 172(5)

⁶⁶ Section 173(1)(a)

⁶⁷ Section 173(1)(b)

⁶⁸ *Re St Piran Ltd* [1981] 3 All ER 270

⁶⁹ Section 5 of the Companies Act limits the number of members in a private company to one hundred, not including persons who are employed by the company and persons who, have been formerly employed by the company.

⁷⁰ *Re Allied Food Products Ltd* [1978] HCB 294; *Olive Kigongo vs Mosa Courts Apartment Ltd Company Cause No 01 of 2015*

⁷¹ *Sri Ramdas Motor Transport Ltd. vs Tadi Adhinarayana Reddy* (1997) 90 Com Cases 383 (SC)

The application shall be supported by such evidence as the registrar may require. The evidence presented must be compelling as an investigation may seriously damage a company and should not be ordered without proper material being presented.⁷² The registrar may also require the applicants to give security for payment of the cost of the investigation.⁷³ The expenses of and incidental to an investigation shall be paid by the person who applied for the investigation who may recover the expenses from the company.⁷⁴

The power conferred on the Registrar under this section is a discretionary power⁷⁵ therefore the members cannot demand the appointment of inspectors' *ex debito justitiae*. The applicants who make out a case may yet be denied the remedy on a number of grounds depending on the facts and circumstances of each case as made out in the evidence put forward.⁷⁶ From the section it is clear that the Legislature considered that investigation into the affairs of a company is a very serious matter and it should not be ordered except on good grounds. The power has been conferred on the Registrar on the faith that it will be exercised in a reasonable manner. The Registrar is presumed to be an expert in company law matters. Therefore, the standard that is prescribed is not the standard required of an ordinary citizen but that of an expert. If court comes to the conclusion that no reasonable authority would have passed the order on the material before it, then the same is liable to be struck down.⁷⁷

Applications under this section hardly ever occur.⁷⁸ This is due not only to the fact that before appointing under this section the registrar may require applicants to give security to the amount of 20,000,000 shillings (USD 6,000) for payment of the costs of the investigation⁷⁹ but also because the application has to be supported by evidence that the applicants have good reason for the

⁷² Sri Ramdas Motor Transport Ltd. vs Tadi Adhinarayana Reddy (1997) 90 Com Cases 383 (SC)

⁷³ Section 173(2)

⁷⁴ Section 179(1)

⁷⁵ Section 173(1) states that the Registrar 'may appoint one or more competent inspectors'

⁷⁶ *Atuzarirwe v The Registration Services Bureau & 3 Ors* (MISC. CAUSE NO. 249 OF 2013) [2014] UGHCCD 137 (16 October 2014)

⁷⁷ *Rohtas Industries vs S.D. Agarwal and Ors* AIR 1969 SC 707, 1969 39 CompCas 781 SC

⁷⁸ Paul Davies, *Gower and Davies' Principles of Modern Company Law*, Sweet & Maxwell (7th Ed), 2003, p 471

⁷⁹ Section 172(2); The majority of companies in Uganda are small and medium sized enterprises (SMEs) for which USD 6000 would be too much: A Micro Enterprise is defined as an enterprise employing maximum 4 people with total assets of maximum Ugandan Shillings 12 million (About USD 3600). A Small Enterprise is defined as an enterprise employing maximum 50 people with total assets of maximum Ugandan Shillings 360 million (USD 10,000). A Medium Enterprise is defined as an enterprise employing more than 50 people with total assets of more than Ugandan Shillings 360 million: Uganda Investment Authority, *Small and Medium Sized Enterprises Business Guide*, March 2008, Available at http://www.iceida.is/media/pdf/SME_GUIDE_FINAL_COPY.pdf Accessed on 09/06/2016

application.⁸⁰ With regard to the condition as to the holding of one-tenth of the shares issued, it may operate to the disadvantage of the shareholders, particularly in the case of large companies where there may be general grievance against the management of the company but it may nevertheless be an extremely difficult practice to obtain the agreement of the holders of 10% of the shares because there are many hundreds of them scattered all over the country.⁸¹

Members whose applications are rejected or who are otherwise aggrieved by a decision of the registrar under this section may appeal to court.⁸² In *Re Eryeza Bwambale & Co Ltd*⁸³ the minority shareholders asked the court to appoint inspectors to investigate the company's affairs. The applicants claimed, inter alia, that the second respondent, who held the majority of the shares in the company, was dictatorial and had not given them sufficient information about the company's affairs; and that the company had failed to declare a dividend. It was held that an application for appointment of inspectors was not the appropriate remedy where the applicants complained that they were being oppressed or that the company had unreasonably refused to declare a dividend. Provided the information required to be given in or with the accounts, or otherwise by law, was given the withholding of information would not usually be sufficient grounds to appoint investigators.

INVESTIGATION OF A COMPANY'S AFFAIRS IN OTHER CASES

1. Investigation on Special Resolution

Section 174 caters for a scenario where the majority shareholders wish for the company's affairs to be investigated. The section provides that the Registrar shall appoint inspectors to investigate the affairs of a company and to report thereon in such manner as the registrar directs, if the company by special resolution declares that its affairs ought to be investigated by an inspector appointed by the registrar.⁸⁴ Unlike section 173 which is discretionary, the Registrar is bound to appoint an Inspector if the company passes the special resolution⁸⁵ or the court by order declares

⁸⁰ Paul Davies, *Gower and Davies' Principles of Modern Company Law*, Sweet & Maxwell (7th Ed), 2003, p 471

⁸¹ *Report of the Company Law Committee 1952 (Bhabha Committee Report)*, Government of India Press, 1952, Para 188

⁸² Section 173(3)

⁸³ [1969] 1 EA 430

⁸⁴ Section 174(a)

⁸⁵ Section 174 (a)

that that the affairs of the company ought to be investigated.⁸⁶ In *R vs Board of Trade, ex parte St Martin Preserving Co Ltd*⁸⁷ the company's receiver was refusing to share any information regarding the company's transactions during insolvency. The applicant company held an Extraordinary General Meeting at which a special resolution was passed declaring that its affairs ought to be investigated by an inspector appointed under the equivalent of s 174 of the Companies Act. Court held that the Board of Trade were bound to appoint an inspector, and the order of mandamus, should issue.

The 'affairs of a company' in section 174(a) of the Companies Act includes its goodwill, its profits and losses, and its contracts and assets including all its investment or other property interests and its control of a subsidiary company; and transactions of a receiver and manager of a company are its affairs within the enactment.⁸⁸

2. Investigation in Other cases

Under section 174(b), the Registrar has discretion to appoint inspectors, if it appears that:

that the company's business is being conducted for a fraudulent or unlawful purpose or in a manner oppressive of any part of its members;

that persons concerned with its formation or the management of its affairs have in connection with formation or management been guilty of fraud;

that its members have not been given all the information which they might reasonably expect; or

that it is desirable to do so.

A prima facie case is needed for investigation to be carried out.⁸⁹ No investigation can be ordered under section 174 merely because a shareholder feels aggrieved about the manner in which the company's business is being carried on.⁹⁰ The Registrar should be satisfied that there are sufficient materials to show that affairs of the Company are such that an investigation is necessary under

⁸⁶ Rohtas Industries vs S.D. Agarwal and Ors AIR 1969 SC 707, 1969 39 CompCas 781 SC

⁸⁷ [1964] 2 All ER 561

⁸⁸ Re BSB Holdings Ltd [1996] 1 BCLC 155; Re a company (No 002470 of 1988), ex parte Nicholas (1992) BCC 895; Re a company (No 001761 of 1986) [1987] BCLC 141

⁸⁹ *Re Miles Aircraft Ltd* (1948) W. N. 178

⁹⁰ *V.A. Sumathy and another vs Digvijay Chit Fund (P) Ltd* ILR 1980 (2) Kerala 426

section 174 of the Companies Act.⁹¹ The investigation under s 174(b) is of a fact-finding nature but yet the risk is that the appointment of an Inspector is likely to receive much press publicity as a result of which the reputation and prospects of the company may be adversely affected. It should not therefore be ordered except on satisfactory grounds.⁹²

The decision of the Registrar to appoint inspectors under section 174 (b) is simply an administrative decision the effect of which is to set in train an investigation at which those involved would have an opportunity of stating their case.⁹³ There is therefore nothing in the rules of natural justice which requires him to give the company an opportunity of stating its case before he made his decision to set up the investigation. The only requirement is that he should make his decision in good faith and there was no evidence to suggest that he had not done so.⁹⁴ In *New Central Jute Mills Co. Ltd. vs Deputy Secretary*⁹⁵ the Registrar chose to investigate a company on suspicion of employing an obliging auditor. This was held to be a prima facie ground for investigation. It was further held that an order of the Registrar under section 174(b) is certainly not justiciable, if the order has been made by the appropriate authority bona fide and reasonably, even though the reasons may not fully appeal to a court of law. The court further held that it may not also be necessary for the Registrar to recite his or her reasoning when making an order under section 174(b). However, when the exercise of the power is challenged as actuated by malice in law, before a Court of law, justification for the exercise of the power must be given. If court comes to the conclusion that no reasonable authority would have passed the order on the material before it, then it is liable to be struck down. The existence of the circumstances in the section is a condition precedent for the Registrar to form the required opinion and, if the existence of those conditions is challenged, the courts are entitled to examine whether those circumstances were existing when the order was made. The existence of the circumstances in question is open to judicial review though the opinion formed by the Registrar is not amenable to review by the courts.⁹⁶ Though the power under section 174(b) is a discretionary power and the formation of opinion by the Registrar is a purely subjective process and such an opinion cannot be challenged in a court on the ground of

⁹¹ *Premier Plantations Limited vs M.Ebrahimkutti and others* ILR 2002 (2) Kerala 209

⁹² *Rohtas Industries vs S.D. Agarwal and Ors* AIR 1969 SC 707, 1969 39 CompCas 781 SC

⁹³ *Norwest Holst Ltd vs Secretary of State for Trade* [1978] 3 All ER 280

⁹⁴ *Norwest Holst Ltd vs Secretary of State for Trade* [1978] 3 All ER 280

⁹⁵ AIR 1966 Cal 151

⁹⁶ *Rohtas Industries vs S.D. Agarwal and Ors* AIR 1969 SC 707, 1969 39 CompCas 781 SC

propriety, reasonableness or sufficiency, the authority concerned is nevertheless required to arrive at such an opinion from objective circumstances suggesting the conclusion set out in sub-clauses (i), (ii) and (iii) of s 174(b) and the expression "circumstances suggesting" cannot support the construction that even the existence of circumstances is a matter of subjective opinion.⁹⁷ In *Bank of Rajasthan Ltd vs Rajasthan Breweries Ltd & Ors*⁹⁸ court held that the discretionary power of the Registrar has to be exercised in good faith. Unless proper grounds exist for investigation of the affairs of the company, investigation cannot be ordered.

3. Investigation Expenses

The Companies Act provides that the expenses of an investigation are to be defrayed by the Registrar however the following persons shall be liable to repay the registrar:⁹⁹

any person who is convicted on a prosecution as a result of the investigation or who is ordered to pay damages or restore any property in proceedings;

anybody corporate in whose name proceedings are brought; and

unless as a result of the investigation a prosecution is instituted by the DPP:

any company dealt with by the report, where the inspector was appointed otherwise than under section 174(b) shall be liable; and

the applicants for the investigation, where the inspector was appointed under section 173 shall be liable.

Any costs or expenses incurred by the registrar in or in connection with proceedings brought by virtue of section 178(7) shall be treated as expenses of the investigation. There is no limit to the amount of such expenses, provided that they are all of and incidental to the investigation.¹⁰⁰

THE SCOPE OF INVESTIGATIONS

Under sections 173 and 174, the investigation begins broadly with a view to examine the management of the affairs of the company to find out whether any irregularities have been

⁹⁷ *Barium Chemicals and Another vs Company Law Board and another* (1966) Supp SCR 311

⁹⁸ (2007) 140 Com Cases 622 (CLB)

⁹⁹ Section 179(2)

¹⁰⁰ *United Rubber Estates Ltd vs Cradock (No 4)* [1969] 3 All ER 96

committed or not. An inspector is appointed only to investigate the affairs of a company and to make a report. The investigation is no more than the work of a fact finding commission. Investigation into affairs of a company means investigation of all its business affairs — profits and losses, assets including goodwill, contracts and transactions, investments and other property interests and control of subsidiary companies. Furthermore, the Act does not fix any time limit on the investigation. Inspectors would be expected to be chartered accountants or similarly qualified personnel capable of doing a forensic audit of the company's books. The inspectors are not bound to show the people interviewed a draft of the parts of their report referring to them, so long as they have had a fair opportunity of answering any criticisms of their conduct.¹⁰¹ The process of inspection is undoubtedly an inquisitorial one. However, since the aim of the inspection is to establish facts, rather than to determine legal rights, the process has been characterised as administrative, rather than judicial, so that inspectors are obliged to act fairly but are not subject to the full requirements of natural justice¹⁰². In *Al-Fayed vs UK*¹⁰³ the issue was whether similar provisions in the English Companies Act infringed on the rights of the individuals involved to a fair trial. It was held that whilst the inspectors were accorded broad freedom in reporting on the affairs of public companies, the performance of their investigative functions was attended by considerable safeguards intended to ensure a fair procedure and the reliability of findings of fact. The applicants were given every reasonable opportunity to respond to the allegations made against them. The court could not therefore find that, in the exercise of their responsibility of regulating the conduct of the affairs of public companies, the national authorities exceeded their margin of appreciation. Court concluded that the investigation is not a trial so the right to fair trial did not apply.

Where an inspector thinks it necessary to investigate the company's subsidiary or holding company he or she may do so.¹⁰⁴

CONDUCT OF THE INVESTIGATION

1. Production of documents and evidence on investigation

¹⁰¹ Paul Davies, *Gower and Davies' Principles of Modern Company Law*, Sweet & Maxwell (7th Ed), 2003, p 474

¹⁰² *Ibid*

¹⁰³ [1994] 18 EHRR 393

¹⁰⁴ Section 175

Under section 176, it shall be the duty of all officers and agents of the company to produce to any inspector all books and documents relating to the company which are in their custody or power and otherwise to give to the inspectors all assistance which they are reasonably able to give. This provision is wide as it includes ‘agents of the company’. The word ‘agent’ is not defined and therefore the ordinary meaning of the word is to be used.¹⁰⁵ The Contracts Act 2010 defines an “agent” as a person employed by a principal to do any act for that principal or to represent the principal in dealing with a third person.¹⁰⁶ In this instance the principal is the company. The existence of an agency relationship is a question of fact.¹⁰⁷ A person is only an agent when he acts as representative of the company in business negotiations, that is to say, in the creation, modification, or termination of contractual obligations between it and the third persons. Representative character and derivative authority are the distinguishing features of an agent.¹⁰⁸ In *Shah v Attorney-General Uganda*¹⁰⁹ it was held that a shareholder is not automatically an agent of the company. In *Petrocity Enterprises (U) Ltd v Security Group (U) Ltd*¹¹⁰ the company accountant who was simply an employee was held to be a company agent for purposes of signing a contract. It was held that even if he did not have the express authority to sign, given his position in the company and nature of the format in which the service order contracts were made, it was reasonable to find he had the apparent or ostensible authority to sign the contracts. In *First Energy (UK) Ltd v Hungarian International Bank Ltd* it was held that a bank manager was a company agent and able to bind the company.¹¹¹ Therefore anyone who has acted on behalf of the company including regular employees may be called upon to produce books and documents. Section 2 of the Companies Act defines ‘book’ as including accounts, deeds, writings and documents. The principle of *ejusdem generis* has to be applied in deciding as to the type of books and documents inspecting officers were entitled to inspect.¹¹² Where any officer or agent of the company refuses

¹⁰⁵ *Lwanga v Uganda Electricity Board* (Civil Suit No. 124 Of 2003) [2013] UGHCCD 28 (25 February 2013)

¹⁰⁶ Section 118 of the Contracts Act 2010

¹⁰⁷ *Branwhite vs Worcester Works Finance Ltd* [1968] 2 All ER 104

¹⁰⁸ *Krishna Bhatta and Ors. v Mundila Ganapathi Bhatta* AIR 1955 Mad 648

¹⁰⁹ [1969] 1 EA 261

¹¹⁰ HCT - 00 - CC - CS - 869 – 2004

¹¹¹ [1993] BCLC 1409; However, see *British Bank of the Middle East v Sun Life Assurance Company of Canada* [1983] 2 Lloyd’s Rep 9 (HL) where an insurance company’s branch manager was held not to be capable of binding it.

¹¹² *Karuppunni (CV) vs Joint Director, Inspection Company Law Board* (1986) 59 Com Cases 814 (Ker)

to produce to any inspector any book or document with respect to the affairs of the company, the offender may be punished in the same manner as if he had been guilty of contempt of court.¹¹³

2. Examination on Oath

An inspector may examine any company officers or agents on oath.¹¹⁴ Only information given on oath is admissible in the Inspector's report. Information communicated informally cannot be used.¹¹⁵ The object of the examination is merely to recover information as to the company's affairs and it is in no sense a judicial proceeding for the purpose of trial of an offence.¹¹⁶ Any would be defamatory words spoken during the examination are similar to those spoken in judicial hearings and covered by absolute privilege.¹¹⁷ The functions of the Inspector have been held to be analogous to the functions of an Inspector of Police who goes out to investigate a crime and the powers conferred upon an Inspector to search, seize and examine witnesses are equated with facilities for investigation enjoyed by an Inspector of Police under the Code of Criminal Procedure.¹¹⁸

Any officer or agent of the company who refuses to answer any question with respect to the affairs of the company be punished in the same manner as if he had been guilty of contempt of court.¹¹⁹ In *Re Gaumont-British Picture Corp'n Ltd*¹²⁰ a shorthand writer was present to take a note of the proceedings for the inspector's use, in an examination of a director. The director objected to his presence and refused to answer any questions while he remained, on the ground that under the section there was no authority for the presence of a shorthand writer. It was held that the presence of the shorthand writer was reasonably necessary to enable the inspector properly to carry out his duties under the Act. The managing director was, therefore, not justified in refusing to answer questions, and was in effect guilty of contempt of court.

One cannot refuse to answer the questions simply because the inspector's report may theoretically prejudice legal proceedings in another jurisdiction. In *Re Pergamon Press Ltd*¹²¹ the respondents, all of whom were either past or present directors of the company intimated that they were not

¹¹³ Section 176(3)

¹¹⁴ Section 176(2)

¹¹⁵ *Karak Rubber Co Ltd vs Burden* [1971] 3 All ER 1118

¹¹⁶ *Hearts of Oak Assurance Co. v Attorney General* [1932] A.C. 392 (Canada)

¹¹⁷ *O'Connor v Waldron* [1932] S.C.R. 183

¹¹⁸ *Comibatore Spinning and Weaving Co. Ltd v M.S. Srinivasan* AIR 1959 Mad 229

¹¹⁹ Section 176(3)

¹²⁰ [1940] 2 All ER 415

¹²¹ [1970] 2 All ER 449

prepared to answer the inspectors' questions, unless the inspectors gave them certain assurances to ensure that any report made by the inspectors would not prejudice them in the legal proceedings pending in another jurisdiction. Court held that it could, if it thought fit, punish any offender, who had refused to answer questions as if he had been guilty of contempt of court. The respondents were not justified in their refusing to answer the inspectors' questions, because the matters raised by the respondents were hypothetical and they might never have arisen.

Exceptions can however be made in extreme cases. In *Re an inquiry into Mirror Group Newspapers plc*¹²² it was held that inspectors could not place demands on persons that were unreasonable, whether as to the time they had to expend or the expense they had to incur in preparation for the questions or in any other respect. The court, bearing in mind the interrogations that the applicant had already undergone held that the potential burden that the questioning might place on him risked going beyond that which an unrepresented individual could reasonably be required to accept. Accordingly, court held that until steps were taken by the inspectors to reduce that burden, his refusal to answer questions did not constitute a breach of his statutory obligations the equivalent of section 176.

The inspectors are under no obligation to inform the person being examined of any findings critical of that person that they may get from examining other people or documents. In *Maxwell v Department of Trade and Industry*¹²³ the plaintiff, a chairman and chief executive of a public company, was among those who gave evidence to the inspectors. He claimed that he was entitled to know the criticisms that the inspectors would make about him prior to their report. Court held that a clear distinction was to be drawn between an inquiry based on a charge or accusation and one such as that on which the inspectors had been engaged in which they were asked to establish what had happened and, in the course of so doing, to form certain views or conclusions. Having heard the evidence and reached their conclusions the inspectors were under no obligation to put to a witness such of those conclusions as might be critical of him. All that was necessary was that the inspectors should put to the witness the points that they proposed to consider when he or she first came to give evidence. Once the inspectors had heard the evidence they were entitled to come to the final conclusions which would be embodied in their report. The inspectors had conducted the

¹²² [1999] 1 BCLC 690

¹²³ [1974] 2 All ER 122

enquiry fairly; the fact that certain matters of detail had not been put to the plaintiff when he was giving evidence was not a ground for impugning the report.

Where an inspector thinks it necessary that a person whom he has no power to examine on oath should be examined, he or she may apply to the court and the court may if it thinks fit order that person to attend and be examined on oath before it.¹²⁴

3. Exception for advocates and bankers

Section 184 saves the Advocate-Client privilege and Banker-Customer confidentiality holding that the proceedings shall not require disclosure by an advocate of any privileged communication; or by a company's bankers of any information of their customers other than the company. The Advocate-Client privilege rule is well established in Uganda.¹²⁵ This rule is based on the idea that it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers and that he should be able to share any relevant thing with him without fear that it would prejudice him.¹²⁶

It has also been held that Inspectors owe no duty to those from whom they obtain information or documents that might inhibit them in the use of that information or those documents for the purposes of their statutory inquiry.¹²⁷ They have no legal obligation to such persons to insist on confidentiality undertakings being given by others before whom, for the purposes of their inquiry, they wished to put the material, since confidentiality could be protected simply by making the confidential character of the information and documents known.¹²⁸

INSPECTOR'S REPORT

Under section 177, an inspector may and if directed by the registrar, shall make interim reports and on the conclusion of the investigation a final report to the registrar. The registrar shall forward a copy of report to the company and if the registrar thinks fit to any member of the company.¹²⁹

¹²⁴ Sections 176(4)-(7)

¹²⁵ Section 125 of the Evidence Act Cap 6 and Regulation 7 of The Advocates (Professional Conduct) Regulations SI 267—2

¹²⁶ *Anderson v Bank of British Columbia* (1876), 2 Ch. D. 644 (C.A.), at p. 649; *W v Egddell* [1990] 1 All E.R. 835; *Smith v Jones* [1999] 3 LRC 414 (Canada); *R v McClure* [2001] 4 LRC 632 (Canada)

¹²⁷ *Re an inquiry into Mirror Group Newspapers plc* [1999] 1 BCLC 690

¹²⁸ *Re an inquiry into Mirror Group Newspapers plc* [1999] 1 BCLC 690

¹²⁹ Section 177

Procedural fairness or the rules of natural justice apply to the conduct of investigations at least where a report is to be published¹³⁰ but the content of the obligation of fairness is limited.¹³¹ The need to put intended criticisms to witnesses and give them an opportunity to respond will inevitably lead to delay in completing any reports but a consideration of those witnesses' responses serves the useful function of enabling the investigators to correct any errors they may otherwise make in their conclusions and this step is also an important procedural safeguard for the rights of the individual.¹³² Thus, someone who may be criticised is entitled to know the gist of the criticism and have an opportunity to make a written rebuttal but the person is not, for example, entitled to demand to cross-examine anyone who may have given evidence adverse to the criticised person's version of events.¹³³ For 'public interest' reasons, the policy in the UK is for the investigating authority to publish the reports at its discretion. The publication is delayed only in cases where a criminal investigation had begun before completion of the report and would be hindered by publication.¹³⁴ Such a policy is recommended for Uganda. In *Al-Fayed v UK*¹³⁵ the three applicants, acquired ownership of the House of Fraser plc. Inspectors were appointed to investigate the takeover. The report concluded the applicants had dishonestly misrepresented their origins, wealth, business interests and resources to the Office of Fair Trading and had submitted false evidence to the inspectors. The DPP announced that there was insufficient evidence to bring a criminal prosecution. The report was then published and its findings were widely reported. The applicants claimed it seriously damaged their personal and commercial reputations. It was held that the functions performed by the inspectors were essentially investigative. The inspectors did not adjudicate, either in form or in substance. They did not make a legal determination as to criminal or civil liability concerning the Fayed brothers, and in particular concerning the latter's civil right to honour and reputation. The risk of some uncompensated damage to reputation was inevitable if independent investigators such as those in the present case were to have the necessary freedom to report without fear.

¹³⁰ *Re Pergamon Press Ltd* [1970] 2 All ER 449

¹³¹ Andrew Lidbetter, *Company Investigations by The DTI*, p 312, John De Lacy (Ed), *Reform in UK Company Law*, Routledge-Cavendish, UK, 2002

¹³² *Ibid*

¹³³ *Ibid*

¹³⁴ *Ibid* p 327

¹³⁵ [1994] 18 EHRR 393

The word "may" in s 178(b) gives the Registrar liberty to prescribe the manner in which the report is to be made out.¹³⁶ This is so, because the Registrar may require report of a particular type in a particular case and may call upon the Inspector to produce one.¹³⁷ The non-specification of the manner in which to report is not fatal to the appointment of an Inspector. Inspectors can be changed mid-way the inspection or another can be appointed to continue with the original one mid-way.¹³⁸ The nature of work to be done by the Inspector is not such as cannot be partly delegated or shared or left to a successor. An Inspector is not a disciplinary authority or even an authority competent to give a judgment. The scheme of the Act indicates that the fact finding commission may be carried on by "any Inspector" appointed under section 174 not necessarily by the Inspector or Inspectors, who was or were first appointed.¹³⁹

Inspector's Report to be Evidence

Under section 180, a copy of any report of the inspector authenticated by the seal of the company whose affairs he or she has investigated shall be admissible in any legal proceedings as evidence of the opinion of the inspector in relation to any matter contained in the report. This report is simply an opinion by the Inspector and may be accepted or rejected.¹⁴⁰ The company, against which an adverse opinion is formed, may always condemn the opinion as a bad opinion, if further steps be sought to be taken against the company on the basis of such opinion.¹⁴¹ Although a report of inspectors is hearsay evidence, it was not ordinary hearsay evidence because the inspectors act in a statutory fact-finding capacity and are only appointed where there are facts about some aspect of the company's activities which are not readily available and appear to the Registrar to be a need for an inquiry.¹⁴² Since one reasons for appointing inspectors is to protect the interests of minority it would defeat the object of the inspectors' inquiry if a minority shareholder who wished to petition could not rely on the inspectors' report.¹⁴³ A contributory is also entitled to rely on a report of inspectors to support a petition for the winding up of that company.¹⁴⁴ In *Re Rex Williams*

¹³⁶*New Central Jute Mills Co. Ltd. vs Deputy Secretary* AIR 1966 Cal 151

¹³⁷ *New Central Jute Mills Co. Ltd. vs Deputy Secretary* AIR 1966 Cal 151

¹³⁸ *New Central Jute Mills Co. Ltd. vs Deputy Secretary* AIR 1966 Cal 151

¹³⁹ *New Central Jute Mills Co. Ltd. vs Deputy Secretary* AIR 1966 Cal 151

¹⁴⁰ *New Central Jute Mills Co. Ltd. vs Deputy Secretary* AIR 1966 Cal 151

¹⁴¹ *New Central Jute Mills Co. Ltd. vs Deputy Secretary* AIR 1966 Cal 151

¹⁴² *Re St Piran Ltd* [1981] 3 All ER 270

¹⁴³ *Re St Piran Ltd* [1981] 3 All ER 270

¹⁴⁴ *Re St Piran Ltd* [1981] 3 All ER 270

*Leisure plc*¹⁴⁵ it was held that evidence in the form of third party statements obtained by the Registrar when investigating the company's affairs to determine whether it was expedient in the public interest to wind up the company was admissible in disqualification proceedings. The court went on to state that whether hearsay evidence which was untested by cross-examination of the informant might be insufficient to satisfy the burden of proving that a director was unfit against opposing evidence would depend on the circumstances of the particular case, and the fact that the Registrar might need to reinforce his case by affidavits from the appropriate informants was no reason why their hearsay evidence obtained under section 176 should be inadmissible in disqualification proceedings. Similarly, in *Re Travel & Holiday Clubs, Ltd*¹⁴⁶ the inspectors had made a final report from which it appeared expedient to present a petition for winding up. It was held that the court was entitled to look at the inspector's report and, being satisfied from the report, in the absence of any evidence to the contrary adduced by the company, that, on the basis of the findings in the report, the company was insolvent and that it was just and equitable for it to be wound up, the court would make the winding-up order sought.

FOLLOW UP ACTION ON THE INSPECTOR'S REPORT

Once an investigation has been completed various follow-up actions are available:

1. Criminal proceedings on an inspector's report

Where from the inspector's report any person has committed an offence for which he is criminally liable, the registrar shall forward copies of the report to the DPP. The DPP may institute proceedings accordingly. All officers and agents of the company, past and present other than the defendant in the proceedings, shall give the DPP all assistance in connection with the prosecution which they are reasonably able to give.¹⁴⁷

The DPP can prosecute for offences under the Companies Act or those under the Penal Code relating to companies.¹⁴⁸ One controversial area is the infringement of the right to a fair trial guaranteed under the Constitution¹⁴⁹ as the inspector's report will contain information given by

¹⁴⁵ [1994] 4 All ER 27

¹⁴⁶ [1967] 2 All ER 606

¹⁴⁷ Section 178(1-3)

¹⁴⁸ Ss 3(a), 323 and 324 of the Penal Code Act Cap 120

¹⁴⁹ Article 28(11) of the Constitution of Uganda 1995

the accused during the investigation. Indeed it has been held that evidence given to inspectors under threat of compulsion cannot normally be used in subsequent criminal proceedings against those investigated, on the grounds that this would infringe their privilege against self-incrimination.¹⁵⁰ In earlier UK decisions¹⁵¹ it had been held that a person possessing relevant information was not entitled to invoke the common law privilege against self-incrimination in an investigation however this was overturned by the European Court of Human Rights.¹⁵²

In *Saunders v United Kingdom*¹⁵³ the applicant was a director and CEO of G Plc. Inspectors were appointed to investigate G. Under the CA answers given by a person in the course of such inquiries could be used in evidence against him, and a refusal to co-operate with the inspectors could result in a finding of contempt of court. The applicant was interviewed by the inspectors and was subsequently charged. In the course of the applicant's trial, transcripts of those interviews were used by the prosecution to establish his involvement and to refute his own evidence. He complained that the use at his trial of statements had deprived him of a fair hearing. It was held that such an infringement of the applicant's right not to incriminate himself could not be justified either by the complexity of corporate fraud or by the vital public interest in the investigation thereof, and it followed that there had been a violation of his right to a fair trial. In *Vaidyanathan vs The Sib Divisional Magistrate, Erode and others*¹⁵⁴ the Registrar of Companies addressed a letter to the Inspector General of Police stating that there was prima facie a good case for police investigation of offences under the Penal Code. The letter of the Registrar was treated as a complaint and it was registered by the police. The then Managing Director filed Petition seeking to restrain the investigation of the case by the police contending that the equivalent of section 178 of the Companies Act, would be a bar to the investigation by the police. It was held that the Companies Act imposes no bar to the initiation of proceedings in a criminal Court even with reference to acts committed in relation to the affairs of a company, if those acts amount to offences like those punishable under the Penal Code. Section 178(1) is only an enabling provision. By itself section 178(1) does not divest a police officer of the jurisdiction conferred upon him either under

¹⁵⁰ *IJL vs United Kingdom* (2001) 33 EHRR 11

¹⁵¹ *Re London United Investments plc* [1992] 2 All ER 842; *London and County Securities Ltd and others vs Nicholson* [1980] 3 All ER 861;

¹⁵² *Saunders vs United Kingdom* [1998] 1 BCLC 362

¹⁵³ [1998] 1 BCLC 362

¹⁵⁴ A.I.R. 1957 Madras 65

the Penal Code. In *R vs Cheltenham Justices, ex parte Secretary of State for Trade*¹⁵⁵ T, an inspector, carried out an investigation. Transcripts of the sworn evidence of witnesses at the investigation were made, and each witness was given a copy of the transcript of his evidence. T made a report which resulted in the respondent, a director of the company, who had been a witness at the investigation, being charged with a number of criminal offences. For the purpose of his defence the respondent requested the Department of Trade to let him have copies of the transcripts of evidence of all the witnesses other than himself, and copies of correspondence put before the inspectors. It was held that the evidence required to be produced by the witness summons on its face would not be admissible evidence at the respondent's trial since it was required only for use in cross-examination at the trial, to contradict statements a witness might make by reference to what he had said previously at the investigation. The evidence could not therefore be material evidence in the trial. In *Raja Narayanlal Bansilal vs Maneck Phiroz Mistry and Another*¹⁵⁶ a director had been given notice by the Inspector that he would be examined and he petitioned court claiming that the powers of the Inspector contravened the equivalent of Article 28(11) of the Ugandan Constitution as he would be compelled to give evidence against himself. It was held that a formal accusation relating to the commission of an offence, which would normally lead to prosecution must have been levelled against the party who is being compelled to give evidence against himself for the Article of the Constitution to apply. The investigation carried on by the inspectors is no more than the work of a fact-finding commission. As a result of the investigation made by the inspectors' offences may be discovered but the fact that a prosecution may ultimately be launched will not retrospectively change the complexion or character of the proceedings held by the inspector. At the commencement of the enquiry and indeed throughout its proceedings there is no accused person, no accuser and no accusation against anyone that he has committed an offence. A general enquiry and investigation into the affairs of the company cannot be regarded as an investigation which starts with an accusation contemplated in the Constitution.

2. Winding Up on Application by Attorney General

Where, in the case of anybody corporate it appears to the Attorney General from the Inspectors Report that it is expedient to wind up he may present a petition for it to be so wound up if the court

¹⁵⁵ [1977] 1 All ER 460

¹⁵⁶ 1961 AIR 29, 1961 SCR (1) 417

thinks it just and equitable or a petition under section 250 or both.¹⁵⁷ Even if on the report of inspectors it appears to the Attorney General that the proceedings for winding up ought to be brought on just and equitable grounds the Attorney General should not take any steps if the court is already seized of proceedings to wind up the company.¹⁵⁸

In *Re S B a Properties Ltd*¹⁵⁹ a petition was presented pursuant to the equivalent of section 178(5) of the CA for the compulsory winding-up of a company. The petition was based on a report which the Board of Trade obtained from an inspector appointed under section 174 of the Act, in which it was found that a sum of £44,600 had been taken from the resources of the company. It was held that under the equivalent of section 178(5) the court could treat an inspector's report, not as evidence in the ordinary sense, but as material on which, if it were not challenged, the court could make a winding-up order on the ground that it was just and equitable to do so, and, as the circumstances appearing from the inspector's report in the present case showed were ample to justify the making of a winding-up order, the court would make the order sought.

3. Attorney General Commencing civil proceedings in company's name

Where from the inspector's report it appears to the Attorney General that proceedings ought in the public interest to be brought by anybody corporate for the recovery of damages in respect of any fraud, misfeasance or other misconduct in connection with the promotion or formation of that body corporate or the management of its affairs or for the recovery of any property of the body corporate which has been misapplied or wrongfully retained, the Attorney General may bring proceedings for that purpose in the name of the body corporate.¹⁶⁰

4. Order on application of the registrar

Where in the case of any company the registrar has received a report under section 177 and it appears to him that its affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members or some parts thereof generally or that any actual or proposed act or omission of the company including an act or omission on its behalf is or would be

¹⁵⁷ Section 178(5)

¹⁵⁸ *Mool Chand Gupta vs Jaganath Gupta & Co (P) Ltd* AIR 1979 SC 1038

¹⁵⁹ [1967] 2 All ER 615

¹⁶⁰ Section 178(6)

so prejudicial, the registrar may personally in addition to or instead of presenting a petition for the winding up of the company, apply to the court by petition due to the unfair prejudice.¹⁶¹

5. Commencing directors' disqualification proceedings

Under section 199, a person shall be disqualified from acting as a director for a period of three years if he or she fails to;

1. keep proper accounting records;
2. prepare and file accounts;
3. send returns to registrar;
4. file tax returns and pay tax; or
5. allows a company to trade while insolvent

A person disqualified as a director shall not be or act as a director of, or influence the running of, or be involved in the formation of, any company.

Under section 201, court may restrain a person from being appointed director without leave for 5 years where he is convicted of an offence connected with promotion, formation or management or in the course of winding up it appears that he has committed an offence under the Act; or has otherwise committed any fraud in relation to or of any breach of his duty to the company.

INVESTIGATION OF OWNERSHIP OF A COMPANY

The registrar may, on his own motion or on application by shareholders in the same proportion as that required under section 173, appoint inspectors to investigate the membership of any company. The registrar may require the applicants give sufficient security for the costs of the investigation. Sections, 175 to 177 apply with the necessary modifications.¹⁶² Where there is good reason to investigate the ownership of a company but it is unnecessary to appoint an inspector the registrar may require any person interested in shares or debentures to give him any information as to

¹⁶¹ Section 249

¹⁶² Section 181

interests in those shares or debentures. A person who fails to give or knowingly gives false information commits an offence.¹⁶³

Where there is difficulty in finding out the relevant facts about any shares due mainly to the unwillingness of the persons concerned to assist the investigation the registrar may by order direct that the shares shall until further order be subject to the following restrictions:¹⁶⁴

1. any transfer of those shares shall be void;
2. no voting rights shall be exercisable in respect of those shares;
3. no further shares shall be issued in right of those shares under any offer made to their holder; or
4. except in a liquidation, no payment shall be made on those shares.

A person who knowingly exercises any prohibited right to any shares subject to the restrictions or being the holder of any such shares, fails to notify of their being subject to the restrictions commits an offence.

In order to prevent the misuse of corporate vehicles for illicit purposes, it is essential that the authorities have the capacity to obtain, on a timely basis, information on the beneficial ownership and control of corporate vehicles. “Beneficial ownership” here refers to ultimate beneficial ownership or interest by a natural person. In some situations, uncovering the beneficial owner may involve piercing through various intermediary entities and/or individuals until the true owner who is a natural person is found.¹⁶⁵ In *Re Geers Gross plc*¹⁶⁶ E entered into an agreement with GG, a publicly quoted company, not to acquire more than 20% of its share capital. GG suspected that E might have breached the agreement by using nominee companies, and obtained an order imposing restrictions on the transfer of a block of 450,000 shares (i.e. about 3% of GG’s share capital) which was held by a nominee company on behalf of a Swiss bank. The bank refused to disclose the names of its clients who had bought the shares. Subsequently the nominee company and the bank applied for an order lifting the restriction on transfer in order to allow the sale of 410,000 shares in the stock market and the completion of the sale of 40,000 shares which had already been contracted

¹⁶³ Section 182

¹⁶⁴ Section 183

¹⁶⁵ OECD, *Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes*, OECD Publications Service, 2001, p 14

¹⁶⁶ [1988] 1 All ER 224

to be sold. It was held that since a public company had a prima facie unqualified right to know who were the real owners of its voting shares the court could take into account whether there had been a failure to disclose relevant facts about the shares. Since GG would be less able to determine the beneficial ownership of the shares and whether He had breached the agreement once the shares were sold, the applicants' failure to disclose the identity of the owners of the shares was sufficient reason for the court to refuse to give approval to the sale of the shares, notwithstanding that innocent purchasers of the shares might be deprived of the benefit of ownership for an indefinite period. In *Re Lonrho plc (No 3)*¹⁶⁷ Lonrho plc (the company) served notices on the respondents requiring the respondents to disclose information relating to their interests in the company's shares. The initial answers of the respondents were incorrect. The company sought an order to subject the respondents' shares to restrictions. The respondents were willing to give an undertaking to the court that they would not dispose of the shares or of any interest in the shares pending an investigation of the matter at a full hearing and argued that therefore no order should be imposed. It was held that on the facts the court had jurisdiction to make an order but it was not required to do so. Given the serious nature of the consequences of restrictions, that on the facts any such restrictions would prejudice the interests of third party banks, that there was no reason for assuming that the respondents were not now correctly disclosing the ownership of the beneficial interest in the shares, and finally that the respondents were willing to give an undertaking not to dispose of the shares or of any interest in the shares, the court would not make the order.

¹⁶⁷ [1989] BCLC 480

An Analysis in Regard to Peaceful Industrial Relations

Prof. R. K. Patni* & Dr. C. P. Gupta**

INTRODUCTION

Rapid industrial development and attainment of economic self-reliance are the two major tasks which the country among others has set out to accomplish. The key to achieve these objectives is increased production. Output cannot be increased unless there is effective co-operation between labour and management at all levels. The way of ensuring this is to satisfy their social and psychological need besides economic ones. Workers' participation in management is one of the most significant modes of resolving industrial conflicts and encouraging among workers a sense of belongingness in establishment where they work. It affords due recognition to the workers and enables them to contribute their best in all round prosperity of the country in general and industrial prosperity in particular. Moreover, India which has launched a vast programme of industrialization, the need for workers 'participation is all the more important. It is in recognition of these needs that under the Second, Third, Fifth and Seventh plans specific measures have been suggested for after the constitutional Amendment the Central Government expressed its intention to amend the 1975 scheme and to provide for effective participation of workers in production processes and accordingly amended the scheme in January 1977.

The Second Five Year Plan in India considered that increased association of labour with management would help towards the successful implementation of various plan projects and, therefore, recommended the provision of councils of management consisting of management, technicians and workers in large establishment in organized industries.

The Third Five Year Plan recommended the setting up of JMCs in all industrial undertakings found suitable for the purpose, so that, in due course, the scheme might become a normal feature of the industrial system. The essential features of the scheme for Joint Management Councils in India have been: (i) The Council has been entitled to be consulted on certain specified matters; (ii) In some others, the management has been expected to share information with the Council; and (iii)

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In a set of functions, administrative responsibilities have to be given to it. As regards the functions of the Councils.¹⁶⁹

WORKERS PARTICIPATION IN MANAGEMENT

The methods or forms of workers' participation in management vary from dusty. to Industry and country to country depending upon the system of the economy, the style to management, the subjects or areas in which participation may be sought and the pattern of labour-management relations. The various methods in which workers may participate in management are joint consultation, collective bargaining, joint decision-making and information sharing. Workers' participation in management has been considered by ILO primarily in connection with consultation and cooperation between employers and workers at the level oi' the undertaking. The most common method of workers' participation in management viewed as a system of Labour Management Consult¹⁷⁰.

Participation and co-operation is through special bodies variously denominated as joint production committee works committees, works councils, management councils, etc. Another method is through workers' representation in the directorate or board of management of the enterprise. In Great Britain, Sweden, Poland, etc., there is joint consultation model of participation, the management taking the final decisions but allowing the representatives of workers to express their views before a decision is arrived at. Joint consultative Committees are the means used for the purpose. In the United States, the form of workers' participation is that of union management co-operation which operates through collective bargaining agreements. The to-determination Scheme' in the coal mining and steel industries in West Germany and the 'Joint management Plan' In Israel approximate to the joint decision making model of participative management, the means used are 'co-determination committees' and 'works councils'. In France and Belgium, joint works councils for participation have been set-up according to statutory provisions. Yugoslavia (before Its break-up) provide the example of 'Workers' Control Model' where State Industrial units were run by the employees themselves under a scheme called 'Self-Management or Auto Management Scheme' which operated with the help of an elected council and management board. It has, however, been pointed out that isolated Instances of every model may be found in every country.'6

¹⁶⁹ V.G. Mehta's Labour Participation in Management

¹⁷⁰ K.C. Alexander's, "Workers Participation in Management" The Economic Times (1971)

In India, the form of participation is one of “co-operative or joint management. Entailing a tempering of managerial power but not altering basically the social system of productive Industrial relations.”

Broadly speaking, schemes of workers’ participation in management are based on mutual agreements between employers and workers in certain countries and on legal sanction in others. The scope of the schemes, voluntary or statutory, as indicated earlier, varies from country to country and even from establishment to establishment. While consultation is the foundation of most schemes, direct participation or control by workers is not general and is sometimes even rejected by workers themselves.

ORIENTATION OUTLOOK AND LABOUR MANAGEMENT

For the proper functioning the steps would be (1) There should be adequate delegation of powers to the joint committees within the framework set out at different levels failing which their functioning would not be effective and the decisions arrived at will not find implementation. The decisions may be subjected to review at a higher level, If necessary, only in exceptional circumstances. (ii) It is necessary to bring about an¹⁷¹ orientation of outlook of both labour and management in order to make participation elective and purposeful. A systemic educational programme campaign would be necessary for workers as well as middle and higher levels of management. (iii) as regards the manner of representation of workers on these committees, in units having only one union or a recognized union, the representatives should be nominated by the union and further that they should be from within the enterprise and out of those directly involved in the process of production. In units having a multiplicity of unions, the senior most experienced and efficient workers should be nominated.

CENTRAL GOVERNMENT POLICY AT THE ENTERPRISE LEVEL

It has been the policy of the Government of India that the enterprise level worker’s participation in management should become an integral part of the industrial relations system of the country. The two voluntary schemes of workers’ participation in management (viz, the scheme introduced in the year 1975) covering industrial enterprise in private, public and cooperative sectors including

¹⁷¹Pylee, M.V.: Workers Participation in Management: Myth and Reality, 1975

departmentally run units in manufacturing and mining Industries and the other schemes Introduced in 1977 in commercial and service organizations have been reviewed from time to time. In the light of such reviews taken and experience gained so far, the Government introduced a new comprehensive scheme of workers' participation in the central public sector undertakings in December, 1983. The scheme envisages workers' participation in management at the shop-floor and the plant-level at all the central public undertakings. The scheme also provides for participation at the level of Board of Directors in selected central public sector undertakings. The scheme has also been recommended to the State Government for introduction to the State public sector undertakings. The private sector undertakings are to be advised to adopt the scheme.

It cannot be denied that cooperation between labour and management become effective only if the parties are genuinely believe in trust and recognition. Faith in the bonfires of the other party is the sine qua non of effective cooperation. If there is a lurking suspicion in the of either party that the approach of the other is only a ruse to extract compromises in its own interests, all attempts at co-operation must fail. Similarly, there must be implicit trust in the information supplied by one party or in the promises made by the other. Finally, there must be full recognition of the rights and claims of both the parties.

DUTY BASED CONSCIOUSNESS

Workers should no doubt be conscious of their own rights but emphasis must also be laid on the responsibilities and duties which partnership in industry entails. Besides, Workers' participation cannot be effective unless the state of labour-management relations in the establishment is healthy and there is adequate machinery for collective bargaining. The success of both participation and collective bargaining depends on the existence of a strong and united trade union movement of workers. If this essential pre-requisite is wanting. All talk of participation so the like will have little meaning¹⁷². Thus, it is only when trade unions have of unity and self-reliance that they can become effective whether it for a collective bargaining or for participation. Further, if labour is anxious to take an intelligent and effective part in management, an essential prerequisite is the acquisition of the necessary technical and expert knowledge required for the purpose labour will, no doubt, have to engage experts, but that will suffice. The ranks of labour must themselves

¹⁷²Kesar, IP the System of workers Participation in Management in India, India Journal of Social Work.

throw up a number of knowledge able persons who will form the backbone of any scheme of participation. Hence the seed for intensive as well as specialized education of workers is very great. Obviously, therefore, the scheme of worker's participation in management is not a plan of action to be considered in isolation. Workers will have to be educated to have adequate knowledge about production planning and increased productivity. This naturally calls for a complete re-orientation of the Workers' Education Scheme in force. The employers on their part must be willing to part with vital information pertaining to their concern so as to take the workers in the new roles which the workers and employers are expected to play are certainly challenging but not beyond achievement. Hasty and premature attempts to impose the scheme of worker's participation as such may lead confusion. We should first carefully prepare the ground before launching upon the scheme with pace so that real success may be achieved without any apprehension or difficulty.

CONCLUSION

The relative success as regard the industrial growth and harmony particular needs to be given effect are: -

1. Workers' participation has suffered largely at the hands of employers who felt, and probably still feel, that such a move will take away from them their right to manage- To some extent this is supported by largescale Government interference, issuing decrees, enticing acts, and formulating legislative bodies. Voluntary implementation of the concept of participation by employers has been rare, except may be in Sweden where the concept of workers' participation has been relatively successful.
2. Because of this attitude of employers, information sharing has not been liberal. Workers' representatives have often not been informed about manpower and production schedules, creating an attitude of indifference and even hostility among the representatives.
3. Many studies have pointed out the role conflict the most of the representatives have faced in mixed boards and committees. The conflicts arose because very often representatives were forced to adopt the company view on some matter that contrasted with the wider Interest of workers. This not only created a conflict of Interest among these representatives but very often generated a crisis of confidence among electors.

4. Unlike the stated aims of participation, in most cases, Joint boards, councils, etc. find themselves dealing with personnel and welfare matter rather than with production and efficiency. This, to a large extent has been responsible for the dissatisfaction of employers whose concerns rest relatively more with production and efficiency.
5. In some cases, studies have found very little evidence of active communication and feedback between the electors and their representatives. Lack blame can be assigned to the representatives themselves ill-equipped to Judge what should be communicated and partly to the multiplicity of unions, especially in the Indian context.
6. Finally, it has been found the level at which workers' participation is operationalized influences its success or failure. For example the democratic sharing of power at lower grades of industrial workers has been found to be effective because it furthers the ends of both employers and employees. While applying the aforementioned factors to judge the success or failure in industrial democracy, it should be remembered that each country and each organization has a unique culture of its own. Self-determination, so much valued by Americans, is not shared by workers in South America. In some ways, Germans cohere in groups only if they are led by a leader, while the informal group is the norm in USA. Thus there seems to be no reason to expect that the consequences of participation will be universal, although cross cultural work is scarce.

Can the Supreme Court ‘control’ the Board for Control of Cricket in India (BCCI)? Examining the case of Judicial Overreach

Tejas Popat*

ABSTRACT

Oft-christened as the most powerful judicial body in the world,¹⁷⁴ the Indian Supreme Court does in fact, exercise a wide range of powers. In this exercise it has been hailed as the guardian of liberties and rights. But, it has not had an unblemished record. Sometimes, it had its share of disappointment.¹⁷⁵ Initially a conservative institution, it would change that perception in the years to come. With the Court relaxing strict ‘black letter’ norms and expanding its jurisdiction, issues of public importance came knocking on the doors of the Supreme Court. The Court would not disappoint. But, somewhere, in the pomposity, the imaginary line of restraint blurred, and the Court has come to decide matters where there existed no statute,¹⁷⁶ no guideline only ideas of justice and fairness. One such instance is the recent case of the BCCI, where the Supreme Court has taken the body which had an undisputed unchecked monopoly over Indian Cricket to task. This shall form the subject matter of my paper. In ‘Part I’ I describe the genesis of the controversy and track the developments in the court. ‘Part II’ shall deal with whether the Supreme Court could at all issue directions as it has. For this we shall survey the expansive jurisdiction of the Court. In ‘Part III’ I shall analyze the viability of the exercise of such power, notwithstanding valid jurisdiction and conclude that it doesn’t set a healthy precedent and why restraint in such cases would be necessary.

I. THE CONTROVERSY.

‘Supreme Court to BCCI: You are incapable of transparency’ read the headline of a news report.¹⁷⁷ Other leading news portals had similar stories to tell.¹⁷⁸ These were signs of a doom. How did the cookie

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¹⁷⁴ Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, Third World Legal Studies, 1985, Vol. 4 Article 6, p. 115.

¹⁷⁵ See eg. Additional District Magistrate, Jabalpur v. Shivakant Shukla, (1976) 2 SCC 521.

¹⁷⁶ See eg. Vishaka v. The State of Rajasthan, (1997) 6 SCC 241.

¹⁷⁷ India Today, *Supreme Court to BCCI: You are incapable of transparency*, 3rd May, 2016, available at, <http://indiatoday.intoday.in/ip12016/story/supreme-court-to-bcci-you-are-incapable-of-transparency/1/658276.html>, last seen on 25th May, 2016 at 7.58 pm.

¹⁷⁸ Times of India, *BCCI incapable of transparency: Supreme Court*, 4th May, 2016, available at, <http://timesofindia.indiatimes.com/top-stories/BCCI-incapable-of-transparency-Supreme-Court/articleshow/52101756.cms>, last seen on 25th May at 8.04 pm; NDTV Sports, *BCCI Constitution incapable of achieving transparency*, 3rd May, 2016, available at, <http://sports.ndtv.com/cricket/news/258107-bcci-constitution-incapable-of-achieving-transparency-supreme-court> last seen on 25th May at 8.07 pm.

crumble for a body that had monopolized cricket administration in the country for more than 80 years,¹⁷⁹ as the BCCI did? It all started with the unwillingness of the BCCI to abide by a ‘commonsensical order’¹⁸⁰ of the Bombay High Court in a PIL.¹⁸¹ That order, directed the BCCI to follow a principle of natural justice, that, one cannot be a judge in his own cause. However, it would appeal against the judgment in the Supreme Court. It was then that the Supreme Court appointed the committee headed by Justice Mudgal to investigate the allegations of match-fixing in the IPL. Interestingly, the Bombay High Court had refused to step in and constitute a probe committee. That, it said, was the prerogative of the BCCI. The High Court exercised such restraint despite the fact that it had itself declared the previous committee constituted by the BCCI as illegal. Subsequently, the Supreme Court appointed another committee giving it the mandate among other things to ‘reform’¹⁸² the BCCI giving it wide terms of reference. In the meanwhile, BCCI’s reputation had plummeted to an all-time low because of its un-gentlemanly behavior and this committee was readily welcome by the fans and fraternity alike. This saga has led to a debate as to the whether the Supreme Court was justified in intervening in the functioning of a private body under the garb of public interest. This seemingly vexed question is the subject matter of enquiry in the following sections of the paper.

II. COURTS AND THE ‘STATE’ OF BCCI.

The Supreme Court of Indian first opened its doors on 28th January 1950. On this solemn occasion, the six judges set out to chart out a course for the nation. They had been endowed with extensive powers by the founding fathers. It is this jurisdiction of the Court, which we shall survey to find justification for the courts directives in the BCCI case.

The Court has wide Original and Appellate jurisdiction. This gives the power to hear appeal from all the 24 high courts in the country and also cases involving important questions of law.¹⁸³ It is also the court of first instance. This Original Jurisdiction vests in it the power to hear cases in instances of disputes

¹⁷⁹ See for History of Cricket Administration in India, available at <http://www.bcci.tv/about/2016/history>, last seen on 30th May, 2016 at 11.19 am.

¹⁸⁰ Outlook, *A Long Arm Swing*, Alok Prasanna Kumar, Volume LVI No. 20 May, 2016, available at <http://www.outlookindia.com/magazine/story/a-long-arm-swing/297147>, last seen on 25th May, 2016 at 8.12 pm.

¹⁸¹ Cricket Association of Bihar v. The Board for Control of Cricket in India, Public Interest Litigation No. 55 of 2013 in the High Court of Judicature at Bombay, available at <https://indiankanoon.org/doc/18374303/>, last seen on 26th May, 2016 at 9.02 am.

¹⁸² Board for Control of Cricket in India v. Cricket Association of Bihar and Ors. Civil Appeal No. 4235 of 2014, Supreme Court of India, ¶ 110, available at http://supremecourtindia.nic.in/FileServer/2015-01-22_1421928541.pdf, last seen on 27th May, 2016 at 9.19 am. Committee comprising of (Retd.) Hon’ble Mr. Justice R.M Lodha- Chairman, (Retd.) Hon’ble Mr. Justice Ashok Bhan- Member, (Retd.) Hon’ble Mr. Justice R.V. Raveendran- Member.

¹⁸³ Article 132, Article 133, Article 134, Constitution of India, available at <http://lawmin.nic.in/olwing/coi/coi-english/coi-4March2016.pdf>, last seen on 30th May, 2016 at 11.28 am.

between states and the Centre or among the states.¹⁸⁴ The validity of constitutional amendments has to be adjudged by the Supreme Court as a part of its original jurisdiction. The power to hear Special Leave Petitions under Article 136, borrowed from the Privy Council is widely used nowadays.¹⁸⁵ While these powers deal with specific and defined subject matters, the power under Article 142 may be justly defined as an extraordinary. It enables the Supreme Court to do 'complete justice' in any case before it. The framers thus intended the Supreme Court of India to be powerful and wield its power to meet the ends of justice.

Until recently, BCCI which is a body registered Tamil Nadu Societies Registration Act has been a private body with unchecked autonomy in its functioning. While it is, in its form a private body, it has been controlled the game of cricket in India. It selects the Indian Cricket Team, manages players, coaches, umpires and other staff related to the game apart from organizing international matches and domestic tournaments. This mandate gives its functioning a role of a public body. In the recent instance, the Supreme Court choose to intervene in the matters of the functioning and internal administration of the BCCI. What would then enable the highest court to interfere in the functioning of a private body? It was the 'public functions' test first enunciate by Mathews J. in *Sukhdev Singh v. Bhagatram Sardar*.¹⁸⁶

The current case is not BCCI's first brush with the law and courts. It has been involved in multiple cases where one of the prime question before the Court was whether it would be akin to a 'state' body like that of the government or a statutory institution. Way back in 1989, in *Mohinder Amarnath's*¹⁸⁷ case it was held by the Delhi High Court that the BCCI was not an instrumentality of a state. More than a decade later in *Ajay Jadeja v. The Union of India*,¹⁸⁸ the Delhi High Court held that a writ under Article 226 would be maintainable against the BCCI because of the nature of the functions it partakes. In 2004, in the case of *Rahul Mehra v. The Union of India*,¹⁸⁹ the Delhi High Court upheld the view of the bench in *Ajay Jadeja's* case. However, it added a caveat. It said that the High Court would not have *carte blanche* powers to entertain a writ against the BCCI. It would only be able review only such cases where issues of public law arose. Further, it was of the opinion that restraint should be exercised by the High Court in exercising its power to issue writs.

¹⁸⁴ Ibid, Article 131.

¹⁸⁵ Arthad Kurlekar and Jaymini Vyas, *Special Leave Petitions, An Impediment to Justice: Need for Structural Changes to Ensure Efficient Time Allocation of the Court*, Nirma University Law Journal, Volume 3 Issue 2, January 2014, available at, <http://www.manupatra.co.in/newsline/articles/Upload/23DCCFF6-CEA5-4494-9877-40F3C2ABD219.pdf>, last seen on 28th May, 2016, at 6.44 pm.

¹⁸⁶ Sukhdev Singh and Ors. v. Bhagatram Sardar and Ors, (1975) ILLJ 399 SC.

¹⁸⁷ Mohinder Amarnath and Others v. The Board for Control of Cricket in India, Delhi High Court, CW.NO.632/89.

¹⁸⁸ 95 (2002) DLT 14.

¹⁸⁹ 114 (2004) DLT 323.

These were pronouncements from the High Courts. It was unlikely that the Supreme Court would not hear a case of a similar nature. Before the occasion arrived, in the case of *Netaji Cricket Club*¹⁹⁰ the Court commenting upon the virtually monopolistic nature of the Board asserted that the doctrine of fairness shall be the anvil upon which the decisions of the Board should be effected.

The first of case before the Supreme Court as regard the inclusion of BCCI as a state body was *Zee Telefilms*.¹⁹¹ A Constitution Bench of the Supreme Court was convened. It was a petition filed under Article 32 of the Constitution of India. Well founded in law, is the position that a petition under Article 32 is maintainable only against a state instrumentality. In this case, it was held that the BCCI is not a state in terms of Article 12 and also as per the three tier test laid down in the seminal case of *Pradeep Kumar Biswas*.¹⁹² But, as the court emphatically stated ‘there is always a just remedy for a violation of a right.’¹⁹³ The remedy qua bodies like the BCCI, the court stated would be through Article 226 of the Constitution of India. Such bodies which may be private in form but public in their functioning do play an important role and assume the nature of having ‘public duties’¹⁹⁴ and hence cannot be out of the reach of the Court’s writ jurisdiction. This was not a unanimous decision of the Constitution Bench. Sinha J. penned the dissenting opinion. There he was of the opinion that the BCCI is a state within the meaning of Article 12. This is he explained, would not by and in itself mean that the tests of Article 14 and Article 15 be applicable to the decisions of the Board. The Board would be a state in cases where its actions would concurrently affect the fundamental rights of the players and other affected persons. Further advocating a stringent review mechanism, Sinha J. said that it cannot be denied that the BCCI would also exercise functions which were not public in nature. There would be instances of policy questions which could not be brought under the rigours of the writ jurisdiction.¹⁹⁵ Hence only such cases where the body exercises its power in course of fulfillment of its public duties would a writ be issued by the courts.

In the instant case, Thakur J. placed reliance on the case of *Zee Telefilms* to allow for a review of the actions of the BCCI. The court placed it on the same pedestal as a state body.¹⁹⁶ While, the opinion of the courts seem to be overwhelmingly in favour of amenability of BCCI’s actions under the writ jurisdiction it is equally necessary to draw a line of distinction when we examine the present controversy. This distinction and its consequence shall form part of the discussion of the next section of the paper.

¹⁹⁰ Board for Control of Cricket in India v. Netaji Cricket Club, (2005) 4 SCC 741.

¹⁹¹ *Zee Telefilms and Anr v. The Union of India and Others*, (2005) 4 SCC 649.

¹⁹² *Pradeep Kumar Biswas v. The Indian Institute of Chemical Biology*, (2002) 5 SCC 111.

¹⁹³ *Supra* 17 at ¶ 31, Hegde J.

¹⁹⁴ *Ibid*.

¹⁹⁵ *Supra* 17 at ¶ 303, Sinha J.

¹⁹⁶ *Supra* 9 at ¶ 30.

III. THE SUPREME COURT OVERSTEPPING.

The directions issued by the Supreme Court to constitute a committee of retired Judges to investigate into the match fixing allegations and subsequently to reform the functioning of the BCCI did create ripples. It was a radical step taken by the Supreme Court. As we have seen, the Court can sit in judgment over actions of the BCCI. However, this has been qualified by the 'public functions' test. Therefore, I shall now describe as to how this test would not allow for an intervention and why restraint would be an appropriate course for the courts.

The PIL which was filed in the Bombay High Court among other things challenged an amendment made in the Rules and Regulations of the BCCI. It also involved questions of a committee being illegally appointed to review allegations of match fixing. The Bombay High Court did declare the committee to be illegal but refused to constitute a committee in its place. The Petitioners did appeal this in the Supreme Court. The very limited ground of appeal was that the High Court ought to have by itself appointed a committee of High Court judges. The Supreme Court did do so by consent of the parties.¹⁹⁷ The Committee headed by Justice Mudgal was appointed to enquire into allegations of match fixing. The committee found Gurunath Meiyappan and Raj Kundra guilty of match fixing.¹⁹⁸ In its judgment, the Supreme Court appointed the committee headed by Justice Lodha to determine the quantum of punishment to be awarded to them. Also in its terms of reference, was to recommend any changes that need to be made in the practice and procedures of the BCCI.

The Lodha Committee report has comprehensively dealt with the structure and the functioning of the BCCI and has made recommendations. These recommendations envision a BCCI which would be accountable and transparent. While these recommendations may be laudable and may be for the better, the scope of this paper is not to examine the merits of those recommendations. It is restricted to determine if such a committee could at all have been constituted and if so the binding nature of such recommendations.

If we were to contrast English law¹⁹⁹ to that in Scotland, New Zealand and Canada, all common law countries, a trend emerges to disallow a review by the courts of actions of sporting bodies. This was noted by the Delhi High Court in *Ajay Jadeja's* case.²⁰⁰ However, in India, the case law as regard judicial review in case of BCCI has been settled. The courts would be able to intervene as it exercises 'public functions'.

¹⁹⁷ Supra 9 at ¶ 10.

¹⁹⁸ Report of the Justice Mudgal IPL Probe Committee 2014, available at http://static.espnricinfo.com/db/DOWNLOAD/100/0127/JUSTICE_MUDGAL_IPL_PROBE_COMMITTEE_REPORT_final_feb_9.pdf, last seen on 30th May, 2016 at 12.23 pm.

¹⁹⁹ R. v. Jockey Club ex p. Massingbred -Mundy (1993) 2 All ER 207, following Law v. National Greyhound Racing Club Ltd. [1983] 1 WLR 1302.

²⁰⁰ Supra 15 at ¶ 28.

This cannot however, be interpreted to mean that any action of the BCCI shall be deemed to be akin to a State action and hence amenable to writ jurisdiction. This would render the essence of the 'public functions' test nugatory. The essence being that, the courts sphere of interference should be limited to only those functions which are public functions and not to include within its ambit all the functions of the body which in general exercises public functions. Illustratively, as BCCI is a body with public functions, not every action of the BCCI would be amenable to review. There would be a *de facto* embargo on the subject matter that can be reviewed. Hence, as a necessary corollary, those functions of the BCCI which would have no nexus to its public nature of functioning should *de facto* be excluded completely from the purview of judicial review. It would be 'quantum leap'²⁰¹ to include all actions within the purview of judicial review. As it was rightly noted in *Zee Telefilms*²⁰² that matters of policy shall be left solely to respective body or organization and the judiciary should not be allowed to sit in review over such actions. The Supreme Court laid down the law in this regard in the case of *Guruvayoor Devaswom Managing Committee and Anr v. C.K. Rajan and Ors.*²⁰³ Hence it would not be apposite for a court to interfere in those matters which are to be left solely to the discretion

It therefore becomes necessary to analyze the Supreme Court's directives in this regard. The Supreme Court, gave the Justice Lodha committee the task of suggesting reforms to the BCCI. The comprehensive report of the committee suggested sweeping changes in the structure, functioning and internal management of the board. Among the many recommendations are changes in the tenure of the President, imposing age limits, changes in the financial assistance given by the BCCI to its associate boards and members.²⁰⁴ These changes are unquestionably related to the functioning of the board over which the board itself should have discretion. However, the Supreme Court described them as 'straightforward, rational and understandable'.²⁰⁵ The Supreme Court did not relent and stated that if the BCCI found the same to be difficult to implement, the Court would direct the Lodha Committee to 'steer' the BCCI.²⁰⁶ It must be clarified that the recommendations are not binding on the BCCI unless the Court issues an order to that effect. But with the recent developments and the inclination of the Court to implement the recommendations

²⁰¹ Henry Wade, Administrative Law, 8th Edition, pg. 633-634, Oxford University Press.

²⁰² Supra 17 at ¶ 303, Sinha J.

²⁰³ (2003) 7 SCC 546.

²⁰⁴ Report of the Supreme Court Committee on Reforms in Cricket, available at http://www.thehindu.com/multimedia/archive/02682/volume_cover1_2682991a.pdf, last seen on 30th May, 2016 at 11.53 am. Committee comprising of (Retd.) Hon'ble Mr. Justice R.M Lodha- Chairman, (Retd.) Hon'ble Mr. Justice Ashok Bhan- Member, (Retd.) Hon'ble Mr. Justice R.V. Raveendran- Member.

²⁰⁵ The Indian Express, *Supreme Court tells BCCI: Fall in line, Lodha Panel Report deserves respect*, 5th February, 2016, available at <http://indianexpress.com/article/sports/cricket/supreme-court-gets-stern-with-bcci-asks-it-to-implement-lodha-panel-recommendations/>, last seen on 30th May, 2016 at 11.56 am.

²⁰⁶ The Hindu, *Accept Lodha Report, fall in line: SC tells BCCI*, 4th February, 2016, last seen on 30th May, 2016 at 11.58 am.

in *toto*, an order might be issued. It is this exercise of power which would result in the Judiciary overstepping its sphere of review. While the constitution of the committee was in itself a step in the wrong direction, it would have to be seen if the Court is willing to mitigate that by not issuing an order giving the recommendations a binding nature.

The delirious effect of issuing such an order would be to open for the Courts a window through which practically any private institution or body probably having little to do with the interest of the public at large would be subject to the courts review mechanism. The immediate effect of this is that the 64 bodies or federations in charge of various sports bodies are in effect amenable to the courts view in matters of internal management, organizational structure and management of resources. Not only would this act as bad precedent in law but also open up floodgates of litigation that shall add to the already burdened judiciary. Hence it is necessary for the greater good that the Courts tread such a path with caution and restraint.

IV. CONCLUSION

I have attempted to deal elaborately with the powers and jurisdiction of the Supreme Court as well as the opinion of the courts in case of amenability of the actions of the BCCI to judicial review. While the 'public function' test was used to determine that the BCCI should be brought within the purview of writ jurisdiction, I have proposed a strict use of the same test to ensure that institutions and bodies like the BCCI do not lose their autonomy. Therefore, while aware of the fact that some functions of the BCCI are of public nature, judicial review of such actions may be permitted. However, the Courts shall exercise restraint and dwell no further. This would enable the institutions to have their independence and also ensure that any egregious arbitrariness or maladies do not permeate their activities and functioning. In conclusion, while the Supreme Court might have acted for the public good, it should tread cautiously and should exercise its most powerful weapon of 'judgment' wisely.

Corporate Social Responsibility

Diwanshi Rohatgi* and Neha**

ABSTRACT

Corporate social responsibility has been titled under many names like strategic philanthropy, corporate citizenship, social responsibility etc. Each of them carries with a certain perspective on the role of business in society regardless of insignia, for now the dominant paradigm underlying corporate social responsibility or CSR is centralized on the idea of creating “shared value.” This means that the purpose of any corporate body is to coin value for its shareholders in such a way that it also coins value for society. Hence, the corporate houses undertake the responsibility in order to increase social welfare. Being a part of society they are accountable for the impact of their own activities on customer, suppliers, employees, shareholders, communities at large and other stakeholders. Corporate Social Responsibility is becoming an increasingly important activity to businesses nationally and internationally. Corporations practice different forms of social responsibility; some of them have incorporated social responsibilities as core of their operation. As globalisation accelerates and large corporations serve as global providers, corporations have progressively recognised the benefits of providing CSR programs for success of their business.

The predominant view concerning business responsibility is the promotion and serving of interests of the shareholders. This notion underwent a change, now, the term corporate responsibility describes a corporation’s engagement with stakeholders rather than shareholders alone for long term value creation. In order that a corporation to survive and be profitable it must engage in doing CSR.

This paper attempts to present a conceptual view of CSR in India by touching its evolution, discussing its need, examining different types of responsibilities towards stakeholders, exploring its various dimensions (models) as explained by few well-known authorities, the relevant provisions of Companies Act 2013 as well as the companies (CSR policy) rules 2014 and lastly arguments in favour of or against CSR.

KEYWORDS: - Corporate social responsibility, Companies Act, Companies (CSR policy) Rules, Dimensions, Evolution, Forms, Globalisation, Shared value and Stakeholders.

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CORPORATE SOCIAL RESPONSIBILITY

People create business organisations to leverage their collective resources in pursuit of common goals. As they pursue these goals, they interact with all the things external to business organisation. Business organisations can be classified as profit-making, government or non-profit making. Profit making organisations seeks gain for their owners, government exist to define the rules and structure of society within which all organisations must operate and non- profit making organisations emerge to do a social good. These forms of organisations perform their roles with the help of society from where they get their inputs i.e., raw materials, labour, capital, machines, power, water etc. in order to run a business. Society provides these resources with their own expectation to get something in return from these organisations like good quality goods and services to consumers, return on financial investment to shareholders, payment of taxes to the government, fair wages to employee's etc. Therefore, we can make out from this unspoken contact between business and the society within which they operate, making them responsible towards the society to undertake those activities which will increase social welfare. The role of business in society is not only confined to wealth maximisation but also to serve the needs of society to the satisfaction of society.²⁰⁸ This is commonly known as corporate social responsibility. ***It is an obligation of a business organisation to pursue those objectives and to take those actions, decisions and policies which are consistent with the objective and values of the society***²⁰⁹. This concept is entwined with the moral code of conduct and ethics. It deals with the performance by any organisations towards the society, primarily done in good faith for the upliftment and development of society.²¹⁰ Corporate Social responsibility is a term whose meaning varies from continent to continent, country to country and company to company.²¹¹ The entire concept of corporate social responsibility can be discerned from the three words- “corporate” “social” and “responsibility”²¹² these terms are often misinterpreted, for some people the word “social” means

²⁰⁸Thomes M. Jones and Will Felps, *Shareholder Wealth Maximisation and Social welfare: A Utilitarian Critique*, (Sept. 25,2016) <http://crossmarksupport.crossref.org/wp-content/uploads/2013/04/beq.pdf>.

²⁰⁹Defined by Bowen (1953)

²¹⁰Niall Fitzgerald KBE and Mandy Cormack, *The role of Business in society*, (Sept. 25,2016), https://www.hks.harvard.edu/mrcbg/CSRI/research/publications/report_12_CGI%20Role%20of%20Business%20in%20Society%20Report%20FINAL%2010-03-06.pdf.

²¹¹Amit Mohan Meharia, *Evolution of Corporate Social Responsibility*, (Sept. 25,2016), <http://www.mcolegals.in/Evolution%20of%20Corporate%20Social%20Responsibility%20in%20India.pdf>.

²¹²Jan Jonker Marco de witte, *Management Models for Corporate Social Responsibility*, (Sept. 25,2016) http://www.untagsmd.ac.id/files/Perpustakaan_Digital_1/CORPORATE%20SOCIAL%20RESPONSIBILITY%20%20Management_Models_for_Corporate_Social_Responsibility.pdf.

social issues like health, education, security etc. i.e., issues generally under the responsibility of the government and for some people who correctly define social as a reference to society including the planet and the environment.²¹³ Society in its widest sense includes all the stakeholders, defined as group or individuals who can affect or is affected by the achievement of the organisation's objectives.²¹⁴ They are divided into 4 parts-

- Primary social stakeholders - Stakeholders are customers, employees, and suppliers, board of directors, owners, and shareholders. They get benefits from a well run business but are also harmed by organisation's mishap.
- Secondary social stakeholders- Government agencies, regulation agencies, trade unions, labour unions, political groups, social groups, and the media.
- Primary non-social stakeholders- Natural environment, future generations and non-human species.
- Secondary non- social stakeholders- Environment interest group, animal welfare organizations.²¹⁵

Responsibility means accountability for corporate actions i.e., they are responsible for the impact of their own actions.²¹⁶ Corporations are responsible towards their employees, the most important stakeholder in any organisation, by being responsible to them corporation strengthens its internal marketing system, human relation, cooperation and they are able to retain their talented employees by looking into the employees welfare which can be achieved by way of rewarding them for their work. Similarly, the fundamental duty of any corporation is to deliver non-hazardous and safe goods to consumers. They should also ensure holistic sustainable development of the environment, community and ecology. Moreover, they are required to observe rules and regulations framed by the government. Corporation must do away with corrupt practices by paying taxes on time thereby,

²¹³ Marcello Palazzi & George Stracher, *Corporate Social Responsibility and Business Success*, (Sept. 25, 2016), http://bahai-library.com/palazzi_starcher_social_responsibility

²¹⁴ R. Edward Freeman & John McVea, *A Stakeholder approach to strategic management*, (Sept. 25, 2016), <http://www.valuewalk.com/wp-content/uploads/2016/05/SSRN-id263511.pdf>

²¹⁵ *Stakeholder and Corporate Social Responsibility*, (sept. 25, 2016), <http://www.saylor.org/site/wp-content/uploads/2013/09/Saylor.orgs-Stakeholders-and-CSR.pdf>.

²¹⁶ Constantina Bichta, *Corporate Social Responsibility: A role in government policy and regulation?* (Sept. 25, 2016), http://www.bath.ac.uk/management/crri/pubpdf/Research_Reports/16_Bichta.pdf.

creates goodwill or faith in the minds of public. CSR ensures the success of the business by inclusion of social and environmental considerations into corporate operations.²¹⁷

THEORIES OF CORPORATE SOCIAL RESPONSIBILITY

- **Utilitarian Theory-** Utilitarianism is a philosophical thought which was defined by Bentham as maximizing the utility or happiness of the greatest possible number of people.²¹⁸ Applying this theory in business management it would mean that corporation serves as a part of the economic system in which the function is mechanical, traditionally known as maximisation of profits for shareholders.²¹⁹
- **Managerial Theory-** This theory suggests that everything external to the corporation is taken into account for organizational decision making. This theory is divided into three parts-
 1. Corporate social performance, it basically measures the contribution the social variable makes to economic performance of corporations.
 2. Social accountability, auditing and reporting, it means that a corporation accounts for its own action.
 3. Social responsibility for multinationals, it is the responsibility of managers to define useful tools about the CSR for MNCs to survive in foreign countries.²²⁰
- **Relational Theory-** It states that CSR emerges as an interaction between business and society. Corporations have fiduciary duties towards all the stakeholders. This theory has four sub-divisions: business and society, stakeholder approach, corporate citizenship and

²¹⁷B N Ghosh, Business Environment, (Oxford University Press)

²¹⁸ Utilitarianism: the greatest good for greatest number, (Sept. 25,2016), <https://www.probe.org/utilitarianism-the-greatest-good-for-the-greatest-number/>

²¹⁹ Zachary Cheers, *The Corporate Social Responsibility Debate*, (Sept 25, 2016), <http://digitalcommons.liberty.edu/cgi/viewcontent.cgi?article=1229&context=honors>

²²⁰Maimunah Ismail, *Corporate Social Responsibility and its Role in Community Development: An International perspective*, (Sept. 25,2016), http://www.sosyalarastirmalar.com/cilt2/sayi9pdf/ismail_maimunah.pdf.

theory of social contract.²²¹ The founder of *stakeholder approach* is Freeman, according to him, it is about groups and individuals who can affect and can be affected by the organisation, and managerial behaviour taken in response to those groups and individuals.²²² *Corporate governance* deals with management of multinational corporations operating in different countries. To be a global citizen corporate should adhere to the basic values of every country in which they operate. *Social contract theory* basically means that social contract which exists between corporation and society helps in defining what is right to do in society and what not.²²³

NEED FOR CORPORATE SOCIAL RESPONSIBILITY

CSR is important as it influences all aspects of a company's operation. It can help in improving the public image of the corporations and can be helpful to create considerable goodwill.²²⁴ For example, consumers want to buy products from companies they trust, suppliers want to form business partnerships with companies they can rely on, employees want to work for companies they respect, large investment funds want to support companies that they perceive to be socially responsible, and non-profit organisations also want to work together with the companies seeking practical solutions to common goals. Satisfying each of these stakeholder groups allow the companies to maximize their commitments to their owners, who benefit most when all these groups needs are being met.²²⁵ It is crucial to success because it gives companies a mission and strategy around which multiple constituents drum up. The business can succeed by balancing the conflicting interests of multiple stakeholders.

CSR is regarded as a sort of investment yielding a steady rate of return for all the time to come. It creates a better understanding between employees and the company and can helpful in maintaining

²²¹Three Theories of corporate Social Responsibility, (Sept 25, 2016), <http://2012books.lardbucket.org/books/business-ethics/s17-02-three-theories-of-corporate-so.html>.

²²²Charles Fontaine, Antoine Haarman & Stefan Schmid, *The stakeholder Theories*, (Sept 25, 2016), <http://www.martonomily.com/sites/default/files/attach/Stakeholders%20theory.pdf>.

²²³Jeremy Bradley, *Social Contract theories in Business*, (Sept. 25, 2016), <http://smallbusiness.chron.com/social-contract-theories-business-59955.html>.

²²⁴Archie B. Carroll & Kareem M. Shabana, *The Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice*, (Sept. 25, 2016), <http://f2.washington.edu/fm/sites/default/files/Business%20Case%20for%20CSR%20Review%20of%20Concepts,%20Research%20and%20Practice.pdf>.

²²⁵*A Guide to corporate Social Responsibility*, (Sept. 25, 2016), http://www.ecrc.org.eg/Uploads/documents/Articles_A%20guide%20to%20corporate%20social%20responsibility.pdf.

the industrial peace and tranquillity. CSR is based on an ethical grounding. Society gets direct or indirect benefit as a result of social commitment of corporations in community development.²²⁶

Social responsibility of business can hope to create a pollution free corporate environment and its way of internalizing the negatives externalities. These externalities imply harmful effects produced by some companies. For example – a river side company may contaminate the river by throwing waste in it, as a result water will be undrinkable and fish may die. This will decrease the supply of fish and can increase its market price. This will be a social cost which may be absorbed by company. This is called internalization of negative externalities. However this is possible for environment friendly manufacturing companies. CSR is all about business, government and civil society association with the bottom line is the achievement of win-win situation among the three entities.²²⁷

HISTORY OF CORPORATE SOCIAL RESPONSIBILITY

*A shift from “wealth maximisation” to “profit optimisation”*²²⁸ – The main aim of capitalist economy is to maximise profit. But the recent concept which has evolved is co-operational capitalism, this concept concentrates on profit motive, also incorporates the essence of cooperation, accountability and values in social context for long run business success. The corporate house should ensure holistic development of society along with its profit- making objective; this can be achieved by doing CSR.²²⁹

In India, the term CSR has evolved through different phases, the first phase is recognised for its charity and philanthropic nature.²³⁰ CSR was shaped by family values, traditions, culture and religion, and industrialisation. Businessmen used to spend their wealth on building temples and religious institutions. They helped the poor and hungry people during famine by providing foods from their godowns. The pioneer of industrialisation during pre-independence era like TATA,

²²⁶Legal and general group, (Sept. 25, 2016), <http://csr.legalandgeneralgroup.com/csr/governance-and-policies/ethics-principles.html>.

²²⁷Sendil Mourougan, *Corporate Social Responsibility for sustainable business*, (Sept.25,2016), <http://iosrjournals.org/iosr-jbm/papers/Vol17-issue5/Version-1/L0175194106.pdf>.

²²⁸Sonia Aggarwal, *Corporate Social Responsibility*, (Sept. 25, 2016), <https://www.ijsr.net/archive/v5i1/NOV153197.pdf>.

²²⁹ Scott Cooney, *Adam Smith, Milton Friedman and the Corporate social Responsibility of Business*, (Sept. 25,2016), <http://www.triplepundit.com/2012/08/adam-smith-milton-friedman-social-responsibility-of-business/>

²³⁰Janalakshmi, *Evolution of CSR in India*, (sept.25,2016), http://www.janalakshmi.com/wp-content/uploads/evolution_of_csr_in_india.pdf.

BIRLA, GODREJ, etc. promoted the concept of setting up charitable foundations, educational institutions, and healthcare institutions for community development. Tata was first to establish labour welfare practices even before they were made as statutory law. Social welfare was driven by political motives.²³¹

Second phase was during the independence movement; Mahatma Gandhi introduced the concept of “trusteeship” under which rich industrialist should spend their wealth for the benefit of marginalised sections of society. He asked them to set up trust for colleges, and research and training institutions, rural development, women empowerment etc.²³²

In the third phase i.e., immediately after independence, the role of Indian state in community development was expanded. There was an emergence of public sector undertaking to ensure fair distribution of wealth in society. The policy of License raj and high taxes created a restriction on a private sector which resulted in corporate malpractice which finally led to drafting of suitable legislations on corporate governance, labour, and environment issue. The public sector was effective only to limited extent. Later on, there was a shift from public sector to private sector. Private sectors were also involved in the socio- economic development of the country.²³³

In last phase, CSR was characterised as sustainable business strategy. Introduction of liberalisation, privatisation and globalisation helped in eliminating the control and restrictions on private sectors which led to boom in country’s economic growth and development by the remarkable increase in industrial growth, making it possible to contribute more towards social responsibility. Corporation now operates in a global business environment, not only there are many laws and regulations to understand but many more social norms and culture subtleties to navigate.

²³¹Anekshan, *Guide on Corporate Social Responsibility (CSR) Audit*, (Sept.25,2016), <http://www.anekshan.com/resources/corporate.pdf>.

²³²Dr. Dipak Bhamare & Prof. Archana Patil, *Impact of Corporate Social Responsibility Activities of the Company On Consumer Purchase Decision in Indian Market*, (Sept. 25,2016), <http://www.nevillewadia.com/images/Cronicle2016/4.pdf>.

²³³ L. Suresh Mallya, *Successful Entrepreneur of Indian origin: A case study*, (Sept. 25,2016), http://www.drmgrdu.ac.in/Thesis_doc/Documents/Suresh%20Mallaya%20Ph.d%20Thesis/final.pdf.

INDIAN COMPANIES ACT 2013 AND CSR

Corporate social responsibility is not a new concept²³⁴; the voluntary action of companies now became mandatory requirement. Ministry of corporate affairs has recently notified section 135 of the companies act 2013 along with Companies (corporate social responsibility policy) rules, 2014 for CSR.²³⁵

Section 135 of Companies Act 2013 states that companies whether private limited or public limited, listed or unlisted to spend certain minimum amount on CSR activities. This provision applies to companies which have had a net profit of Rs. 5 crore or more or net worth of Rs.500 crore or more or a turnover of Rs.1000 crore or more in any financial year. Those companies must spend a minimum of 2% of the average net profit made during three immediately preceding financial years (sub-section (5)).²³⁶

Once a company meets the net profit, net worth or turnover criteria specified in the Act then it has to form CSR committee. The Board's report under sub section (2) of section 134 should disclose the *composition of CSR Committee*.²³⁷

The Committee consist of 3 or more members from the directors of Company Board, out of which one member has to be independent director, they meet twice in the year to discuss and review the CSR activities and policy. An unlisted or private limited company is exempted from having an independent director in the CSR committee. A private limited company may have only 2 member directors in the committee. A foreign company may have only 2 member directors; one of them should be resident in India. The committee will formulate and recommend a CSR policy for a company. Company, then, implementation of policy (sub-section (3)).

Board of company shall after taking into account the recommendations given by CSR committee, approve the CSR policy for the company and disclose the content of such policy in its report and

²³⁴CSR in India, (Sept, 25,2016), <http://www.nalcoindia.com/NALCO-FOUNDATION.pdf>.

²³⁵The Institute of Company Secretaries, Corporate social Responsibility, (Sept. 25, 2016), <https://www.icsi.edu/WebModules/CompaniesAct2013/CSR%20Final%2002022015.pdf>.

²³⁶ Satish Y. Deodhar, *India's Mandatory CSR, Process of Compliance and Channels of Spending*, (Sept. 25, 2016), <http://www.iimahd.ernet.in/assets/snippets/workingpaperpdf/16048663442015-05-01.pdf>.

²³⁷ Ms. Vanya Rakesh, *Corporate social Responsibility under Companies Act 2013*, (Sept. 25, 2016), <http://journal.lawmantra.co.in/?p=163>.

also on the company's website. It shall also ensure that activities included in CSR policy of the company are carried by the company (sub-section (4)).

Rule 8 of CSR rules provides that companies on which CSR rules are applicable on or after 1 April 2014 shall be required to incorporate in its Board's report an annual report on CSR containing certain particulars-

- The composition of CSR committee
- Outline of CSR policy, indicating the activities to be undertaken by company.
- Average net profit of company for past 3 financial years
- Expenditure to be incurred in carrying CSR activities (2% of net profit for a last 3 financial year)
- Detail of CSR spent during financial year.
- In case the company fails to devote 2% of its net profit of last 3 financial year in doing CSR has to specify reasons thereof.²³⁸

Rule 3(2) of Corporate social responsibility rules 2014, provides that if a company cease to be a company covered under section 135 (1) of the companies Act 2013 for the 3 consecutive financial year shall not require to form a committee and comply with the provision of companies act i.e. section 135 sub section (2) to (5) till the time it meets the eligibility criteria laid down in section 135(1).

CSR ACTIVITIES

CSR rules 2014 recognizes that corporation should carry any social activities such as eradicating hunger, abject poverty, promoting preventive healthcare and sanitation, promoting education, generating employment, empowering women, reducing gender equality and inequalities faced by socially and economically backward community, creating hostel for women or orphans, setting up old age homes, reducing child mortality rate, providing good hospitals and dispensary facilities, blood donation camps, awareness programmes, ensuring environment sustainability, ecological balance, protecting flora and fauna, conservation of natural resources, to combat with human immunodeficiency virus or AIDS, creating employment enhancing vocational skills, setting up

²³⁸*Corporate Social Responsibility*, (Sept. 25, 2016), <http://finance.bih.nic.in/Documents/CSR-Policy.pdf>.

public libraries, measures for the benefits of Armed forces, protection of national heritage, art and culture, training to promote rural sports, slum area development, contribution to the prime minister's national relief fund or any other fund set up by central government for socio-economic development and relief and welfare of schedule caste, schedule tribes, other backward areas or rural development projects etc.²³⁹

TYPES OF SOCIAL RESPONSIBILITIES CARRIED OUT BY ENTERPRISES

Social responsibility works at different levels and towards varied categories of stakeholders. On the basis of these we come across the following types of responsibilities.

Responsibility towards Society as a Whole

The organization ensures an all-round sustainable development of the society which encompasses the community and the ecological system. An overall social welfare would then lead to the development of social capital or community assets.²⁴⁰ Arising out of their social responsibility towards the community and public at large, businessmen are expected to maintain a balance between the needs of business and the requirements of society. In general, business should be so managed as to make the public good become the private good of the enterprise rather than the old doctrine that "what is good for the business is good for the society".

The social responsibility of business firms should be reflected in their policies with respect to environmental protection, pollution control, conservation of natural resources, rural development, setting up industrial units in the backward regions, employment of the socially handicapped and weaker sections of the community, and providing relief to victims of natural calamities.

Responsibility towards Employees

As regards responsibility towards employees, the major issues governing the employer-employee relationship pertain to wages and salaries, superior-subordinate relations and employee welfare.

²³⁹CSR policy, (Sept.25,2016), <http://www.alstrongindia.com/csr-policy>.

²⁴⁰B.N. GHOSH, BUSINESS ENVIRONMENT, 137 (1st ed. 2015).

It is the responsibility of management to provide for fair wages to workers based on the principal of adequacy, equity and human dignity.²⁴¹

Maintaining a harmonious relationship between superiors and subordinates and providing for welfare amenities for employees are also the responsibilities of management. There are specific laws in India governing factory employment under which provision of satisfactory working conditions for safety, health and hygiene, medical facilities, canteen, leave and retirement benefits are obligations on the part of employer. There are other laws as well providing for the security of workers against the contingencies of sickness, maternity, employment injury and death, provident fund and pension for employees. However, employee welfare cannot be viewed within the narrow limits of legal requirement. Employee welfare is best secured if the management accepts the obligation to secure and maintain a contented work force, and the employees have the opportunity of developing their potential abilities and enhancing their efficiencies through training and education. By being responsible towards the employees, a firm strengthens its internal marketing system, human relations and cooperation, retains its own talent and human capital.

Responsibility towards Consumers

Consumer interests are generally expected to be taken care of in a competitive market through forces of demand and supply. However, perfect competition does not actually prevail in all product markets. Consumers are also victims of unfair trade practices and unethical conduct of business. Consumer protection has, thus, been sought through legislation, and non-government organizations (NGOs) which have enlarged their activities for upholding consumer interests.

These compulsions are avoidable if management assumes the responsibility of satisfying consumer needs and desists from hoarding, profiteering, creating artificial scarcity, as also false, misleading and exaggerated advertisements. Besides, it would be in the long-run interest of business if goods of appropriate standard and quality are available to consumers in adequate quantities and at reasonable prices.²⁴²

²⁴¹D K Sinha, *Forms and Dimensions of Corporate Social Responsibility (CSR)*, <http://www.yourarticlelibrary.com/business/forms-and-dimensions-of-corporate-social-responsibility-csr/41243/> (last visited Sept. 28, 2016).

²⁴²D K Sinha, *Forms and Dimensions of Corporate Social Responsibility (CSR)*, <http://www.yourarticlelibrary.com/business/forms-and-dimensions-of-corporate-social-responsibility-csr/41243/> (last visited Sept. 28, 2016).

Every business is obligated to deliver non-hazardous and safe goods to its consumers. In addition, firms must ensure satisfactory after-sales services as well as maintain consumer grievance cell for speedy redressal if and when the need arises.

Responsibility towards Government

Social responsibility of business towards government requires that the business will conduct its affairs by a proper observance of rules and regulations and pay all taxes and other dues honestly and the management will desist from corrupting public servants or the democratic process for selfish ends, and no attempt will be made to secure political support by money or patronage. Private-Public partnership is very much in vogue nowadays.²⁴³ Businesses are supposed to ensure social development not just for securing international business agreements, but also for the development of their own countries. Organizations must try to promote technical research and development for the overall upliftment of the nation.

Responsibility towards Shareholders

It is the primary obligation of every business to see that the owners or shareholders get a fair rate of dividend or fair return on capital invested. This is a legitimate expectation of owners from business. Naturally the expectations have to be reasonable and consistent with the risks associated with the investment. Owners also expect economic and political security of the capital invested. If such security is not ensured, the inevitable consequence is withdrawal of capital and search for alternative channels other than business. An organization must endeavor to maintain its goodwill and faith in the shareholder's mind through good conduct by maintaining transparency and accountability of its financial statements.

Environmental Responsibility

Environmental sustainability initiatives enacted by businesses generally focus on two main areas: limiting pollution and reducing greenhouse gases. As the awareness of environmental issues grows, businesses that take steps to reduce air, land and water pollution can increase their standing as good corporate citizens while also benefiting society as a whole. For example, Cisco Systems, a multinational technology company, has taken a variety of steps to reduce its carbon footprint, including the installation of photovoltaic systems at production facilities and developing platforms that allow employees to work from remote locations rather than commuting to the office.²⁴⁴

²⁴³B.N. GHOSH, BUSINESS ENVIRONMENT, 137 (1st ed. 2015).

²⁴⁴Scott Krohn, *Four Types of Corporate Social Responsibility*, http://www.ehow.com/info_8117691_four-types-corporate-social-responsibility.html (last visited Sept. 26, 2016).

Apart from the types discussed above, there is one system of categorization which is highly accepted by organizational researchers today, the one called 'Four-Part Model of Corporate Social Responsibility' as proposed by Archie Carroll and refined later by Carroll and Buchholtz.

Let us discuss, in brief, each of these four responsibilities in succession.

Philanthropic Initiatives

Philanthropic initiatives include the donation of time, money or resources to charities and organizations at local, national or international levels. These donations can be directed to a variety of worthy causes including human rights, national disaster relief, clean water and education programs in underdeveloped countries. For example, Microsoft co-founder Bill Gates has donated billions of dollars to the Bill and Melinda Gates Foundation, which supports numerous causes including education, the eradication of malaria and agricultural development.

Ethical Business Practices

The primary focus on ethics is to provide fair labor practices for businesses' employees as well as the employees of their suppliers. Fair business practices for employees include equal pay for equal work and living wage compensation initiatives. Ethical labor practices for suppliers include the use of products that have been certified as meeting fair trade standards. For example, Ben and Jerry's Ice Cream uses fair trade-certified ingredients like sugar, cocoa, vanilla, coffee and bananas.²⁴⁵

Economic Responsibility

Economic responsibility focuses on practices that facilitate the long-term growth of the business, while also meeting the standards set for ethical, environmental and philanthropic practices. By balancing economic decisions with their overall effects on society, businesses can improve their operations while also engaging in sustainable practices. An example of economic responsibility is when a company modifies its manufacturing processes to include recycled products, which could benefit the company by potentially lowering the cost of materials and also benefit society by consuming fewer resources.

²⁴⁵Scott Krohn, *Four Types of Corporate Social Responsibility*, http://www.ehow.com/info_8117691_four-types-corporate-social-responsibility.html (last visited Sept. 26, 2016).

Legal Responsibility

The legal responsibility of business corporations demands that businesses abide by the law of land and play by the rule of the game. Abiding by laws is the prerequisite for any corporation to be socially responsible. Corporate history is replete with instances where violation of laws disallowed corporations to run any longer. Enron, Union Carbide, Global Trust Bank, etc. are some of such illustrative corporate cases of social rejection and boycott.

MODELS OF SOCIAL RESPONSIBILITY OF BUSINESS

Various forms of social responsibility of business have been stressed upon and explained by various authorities. The researcher has attempted to briefly delineate a few well-known models.

Freidman Model

Milton Friedman proposed a guiding principle for business ethics in a New York Times article, provocatively titled: “The social responsibility of business is to increase its profits.”²⁴⁶

... there is one and only one social responsibility of business to use its resources and engage in activities designed to increase its profits so long as it stays in the rules of the game, which is to say, engages in open and free competition, without deception or fraud.

Socially responsible activities conducted by a corporation are, according to Friedman, distorting economic freedom because shareholders are not able to decide how their money will be spent. Friedman thus argues that corporations should focus on those activities that are causally related to company profit, effectively excluding charitable activities that do not directly generate revenue.

²⁴⁷

Friedman does not proclaim that directors can act in any way to maximize profit as they have to abide by the law and follow ethical custom.

Friedman’s view is akin to social Darwinism, applying the survival of the fittest principle to the market to ensure the best of all possible outcomes. Fried-man equates being the fittest as being the

²⁴⁶The Lucid Manager, *Milton Friedman on Social Corporate Responsibility* <http://lucidmanager.org/essays/milton-friedman/> (last visited Sept. 26, 2016).

²⁴⁷Omnex, *Corporate Social Responsibility (CSR)* <http://www.omnex.com/sustainability/csr.html> (last visited Sept. 26, 2016).

corporation with the highest return to shareholders. When the issue of an electric company that cut supply to a customer for non-payment upon which the customer died as a consequence was presented to Friedman, he applied the Kantian view (Immanuel Kant's deonticism says that the primary duty of an individual is to perform his own professional obligations as ordained by God.²⁴⁸) to justify their actions. He argued that a utility company that does not cut off electricity to non-paying customers will not survive as there is no reason for customers to pay their bills. In Friedman's view, disconnecting non-paying customers has to be regarded as a universal maxim, regardless of the specific outcomes. He considers this as ethical because the directors have a moral duty to ensure the survival of the corporation.

Carroll Model

A.B. Carroll formulated the most popular model of social responsibility. According to him, CSR will be accepted by business people if the entire range of business responsibilities is included. He suggests that there are four kinds of social responsibilities that form total CSR, namely: economic, legal, ethical and philanthropic. They might be illustrated as a pyramid.

- **Economic Responsibilities.** When we look back in the past, the profit motive was the primary incentive for entrepreneurship. However, at some point, as Carroll notices "the idea of the profit motive got transformed into a notion of maximum profits, and has been an enduring value ever since". The economic responsibility of the firm is the primary one, all other business responsibilities are predicated upon it.
- **Legal Responsibilities.** Business is not allowed to operate only according to the profit motive; at the same time, it is obliged to comply with the laws and regulations formulated by the government. Companies are expected to realize their economic missions within the framework of the law.
- **Ethical Responsibilities.** Economic and legal responsibilities, described above, embody ethical norms about fairness and justice, however, "ethical responsibilities embrace those activities and practices that are expected or prohibited by the society even though they are not codified into law". As Carroll points out: "ethical responsibilities embody those standards, norms or expectations that reflect a concern for what consumers, employees,

²⁴⁸B.N. GHOSH, BUSINESS ENVIRONMENT, 138 (1st ed. 2015).

shareholders, and the community regard as fair, just, or in keeping with the respect or protection of stakeholders' moral rights.”

- **Philanthropic Responsibilities.** If companies respond to society's expectation, that is, they are good corporate citizens, it means that they behave philanthropically. This involves active engagement in acts and programs promoting human welfare and goodwill. Contributions to the arts, education, and community are good examples of philanthropy.²⁴⁹

Ackerman Model

Robert Ackerman, as one of the first suggested that responsiveness, not responsibility, should be the goal of the corporate social endeavors. He described four phases through which companies commonly pass in developing a response to social issues.

Project Identification - In phase one, a corporation's top managers find out about an existing problem. At this stage, no one asks the company to deal with it. The chief executive officer only acknowledges the problem by making a written or oral statement of the company's policy toward it.²⁵⁰

Project study - In phase two, the company hires staff specialists or engages outside consultants to study the problem and to suggest ways of dealing with it. Up to this point, the company has limited itself to declaring its intentions and formulating its plans.

Project Implementation - Phase three is implementation. The company now integrates the policy into its ongoing operations. Unfortunately, implementation often comes slowly – often only after the government or public opinion forces the company to act. By that time, the company has lost all the initiative.²⁵¹

²⁴⁹Soboń Janusz and Wołowiec Tomasz, *Corporate Social Responsibility As A New Ethical Management Formula* (Sept. 26, 2016), http://irbis-nbuv.gov.ua/cgi-bin/irbis_nbuv/cgiirbis_64.exe?C21COM=2&I21DBN=UJRN&P21DBN=UJRN&IMAGE_FILE_DOWNLOAD=1&Image_file_name=PDF/vamcudu_2010_2_7.pdf

²⁵⁰Vousconsultez, *Corporate Social Responsibility as an Organizational and Managerial Challenge: The Forgotten Legacy of the Corporate Social Responsiveness Movement*, <https://www.cairn.info/revue-management-2011-4-page-222.htm> (last visited Sept. 26, 2016).

²⁵¹*Id* at 10.

Project Evaluation – This stage involves the evaluation of what is gained and lost (cost). It is absolutely necessary to know the requirements of the society for making such an evaluation. The social needs, problems and issues are tried to be solved within the given time frame.²⁵²

Environmental Integrity and Community Health Model

This model is proposed by Redman (2005) of the USA. Corporate contribution towards environmental integrity & human health entails greater expansion opportunities.²⁵³ Healthy people can work more & earn more which in turn would increase consumer spending which would lead to increased profits thereby leading to a higher return on investment. CSR is beneficial for the corporate sector. CSR in a particular form is welcome.

Stockholders and Stakeholders Model

According to Buono and Nichols (1990), there are two different dimensions of any corporate house.²⁵⁴

Economic stockholders – Their orientation is defined by productivism and philanthropy. Productivists believe that the only mission of a firm is to maximize the profit. Philanthropists are people who entertain the stockholders. They believe that CSR is dominated by moral obligations & not self-interest.²⁵⁵

Social stakeholders – Their orientation is defined by progressivism and ethical idealism. Progressivists believe that the corporate behavior is basically motivated by self-interest & should have ability to transform the society for good. Ethical Idealism is concerned with sharing of corporate profits for humanitarian activities.²⁵⁶

Corporate Citizenship Model

In the corporate citizenship model, the fulfillment of certain social duties or obligations is an important criterion. A corporate citizen cannot dismiss the importance of social responsibility of business under any situation. According to Carroll (1999), CC (Corporate Citizenship) is an

²⁵²B.N. GHOSH, BUSINESS ENVIRONMENT, 140 (1st ed. 2015).

²⁵³Kanchan Damithendra, Corporate Social Responsibility, <https://www.casrilanka.com/casl/images/stories/EDBA/lecture%2010-csr.pdf>

²⁵⁴B.N. GHOSH, BUSINESS ENVIRONMENT, 140 (1st ed. 2015).

²⁵⁵*Id* at 14.

extension to a lineage of work in conceptualizing the role of business in society in the management literature, a lineage most notably dominated by the notion of corporate social responsibility (CSR).²⁵⁷ To be a corporate citizen, a corporate firm has to satisfy four conditions: Consistently satisfactory, sustainable economic performance, ethical actions and behavior. A particular firm's commitment to corporate citizenship requires the fulfillment of certain social responsibility.²⁵⁸

The Ghosh Model

B N Ghosh's model suggests that in the process of acceptance and implementation of social responsibility of business, there are five stages that are significant for the social responsibility of business project;

- Stage 1 - Ethical rooting and financial capability to permit acceptance of social responsibility of business.
- Stage 2 – Identification of social responsibility of business project.
- Stage 3 – Policy design and operational decisions.
- Stage 4 – Implementation of the social responsibility of business project.
- Stage 5 – Social auditing and evaluation of the project.

CSR STRATEGY AND STRATEGIC CSR

A strategy, in the usual meaning of the term, implies something that is planned, preconceived and deliberate. So a CSR strategy, just like another other strategy (like a marketing strategy) is a series of deliberate stages intended to achieve a particular outcome or strategic end. In contrast, a company that does not have a CSR strategy might appoint someone to achieve CSR outcomes as part of their job but then provide no overall framework or guidance for the CSR investment. CSR, in such a situation, would not be planned at all, but just 'done' by someone, perhaps on the basis of solicitations of the jobholder's own views of which causes are the most deserving. So to have a CSR strategy involves making choices. It might be decided, for example, to pursue some CSR activities but not others and to support some causes but not others. Once these decisions have been

²⁵⁸Kanchan Damithendra, Corporate Social Responsibility,
<https://www.casrilanka.com/casl/images/stories/EDBA/lecture%2010-csr.pdf>

made, the person or people responsible for implementing CSR strategy will have a basis for CSR decisions. This is a **CSR strategy**.²⁵⁹

One reason why companies might have a CSR strategy in place is to ensure that CSR is not undertaken based on the personal views of the CSR person or department, or on the basis of any persuasive causes who convince the company to support their particular viewpoint. Given that CSR usually costs the company money, many companies feel that they need to in some way reflect the values and beliefs of the company's owners, the shareholders, in CSR matters. This brings us onto the subject of **strategic CSR**.

So what is Strategic Corporate Social Responsibility? By taking a strategic approach, companies can determine what activities they have the resources to devote to being socially responsible and can choose that which will strengthen their competitive advantage. By planning out CSR as part of a company's over-all plan, organizations can ensure that profits and increasing shareholder value don't overshadow the need to behave ethically to their stakeholders.²⁶⁰ Strategic CSR provides companies with solutions for;

- Balancing the creating of economic value with that of societal value
- How to manage their stakeholder relationships (especially those with competing values)
- Identifying and responding to threats and opportunities facing their stakeholders
- Developing sustainable business practices
- Deciding the organization's capacity for philanthropic activities

David Chandler believes that strategic CSR is related to, but is fundamentally different from, concepts such as sustainability and business ethics. While sustainability focuses on resource utilization and ecological preservation, and business ethics seeks to construct normative prescriptions of right and wrong, strategic CSR is grounded in the day-to-day operations of the firm. As such, strategic CSR is central to the firm's value creating activities.

That is, in a dynamic business environment defined by the actions and decisions of the firm's broad set of stakeholders, value is optimized when stakeholders convey and enforce their needs, while

²⁵⁹ Think Ahead, *CSR STRATEGY AND STRATEGIC CSR*<http://www.accaglobal.com/za/en/student/exam-support-resources/professional-exams-study-resources/p1/technical-articles/csr.html>

²⁶⁰On Strategy, *Strategic Corporate Social Responsibility*, <http://onstrategyhq.com/resources/strategic-corporate-social-responsibility/>

the firm responds to those evolving needs. Thus, these economic and social exchanges are essentially interactions formed around the collective set of values prevalent in society at any given point in time. These values determine the decisions we make and, as a direct result, the success or failure of for-profit firms.

The concept of strategic CSR draws on what we know about economic exchange and human psychology to explain how markets work and how value is created. Understanding these processes allows managers to build a strategic competitive advantage for the firm. As such, strategic CSR will increasingly become central to business success in the twenty-first century.

In short, understanding, adopting, and implementing strategic CSR is the source of sustainable value creation for business in the twenty-first century.²⁶¹

ARGUMENTS FOR & AGAINST CORPORATE SOCIAL RESPONSIBILITY

Corporate social responsibility, or CSR, includes engaging in community activities, volunteering and giving back to society. Arguments for CSR center on the brand-building benefits and the positive engagement with various corporate stakeholders. Detractors point out that CSR is expensive and distracting and may backfire when it's disingenuous.²⁶²

Arguments for Corporate Social Responsibility

- *Better Brand Image and Reputation* - According to the International Institute for Sustainable Development, a company who adopts a business model involving corporate social responsibility is able to develop a better image for its brands and a more positive company reputation. The image of the company and its products are improved because consumers believe the company to be ethically responsible in creating products with only quality materials and using manufacturing techniques which don't pose a threat to the environment.
- *Increased Worker Productivity* - Corporate social responsibility places an emphasis on taking care of workers in the form of competitive wages and helpful benefits like health care and retirement plans. This leads to increased worker productivity because the

²⁶¹CRME, "What is Strategic CSR?" by David Chandler, <http://responsiblemanagement.net/what-is-strategic-csr-by-david-chandler/>

²⁶² Neil Kokemuller, *Arguments for & Against Corporate Social Responsibility* http://www.ehow.com/list_7594756_arguments-against-corporate-social-responsibility.html

employee feels the company cares and supports them and they in turn work harder. The company isn't viewed as the villain in a corporate social responsibility model but the helping hand.

- *Greater Customer Loyalty* - Consumers like to purchase quality products for a fair price. A business that uses corporate social responsibility can build customer loyalty on the strengths of how its products are made and the ingredients which go into them. According to Santa Clara University's Markkula Center for Applied Ethics, an example of this form of brand loyalty is found in the organic food industry where companies readily tell consumers what's in the product to show consumers the quality ingredients and health benefits of buying from them.
- *Lower Regulatory Oversight* - A company that deals with the environment and its business matters in an ethical, responsible way ultimately nets less government oversight than a company looking to shave the edges of what's legal. This leads to a lower chance of expensive fines and sanctions by federal and state regulatory agencies. State and federal government officials may even seek out a company with a socially responsible reputation for opinions on shaping policy in the company's field.²⁶³

Arguments Against Corporate Social Responsibility

- *Shareholder Interests* - Corporate social responsibility often requires changes to a number of processes, as well as increased reporting. In many cases, businesses hire additional personnel to manage CSR initiatives. These actions come at a cost, and opponents point out that the money spent on CSR comes directly from shareholders' pockets. Former investment banker and current Tulane University professor Elaine Sternberg, one of the most vocal opponents of the effects of CSR on shareholder profits, points out that CSR initiatives incur great cost with little measurable return.
- *Corporate Reputation* - While many businesses undertake CSR initiatives with the intent of bolstering their public images, these initiatives can sometimes require a company to release information that has an opposite effect. In 2003, for example, Coca-Cola released a damaging report about chemicals found in its products as part of its CSR initiative. This report had an immediate short-term negative effects on the company's revenue, according

²⁶³Jonathan Lister, *What Are the Benefits of Corporate Social Responsibility to a Company?* http://www.ehow.com/info_7757292_benefits-corporate-social-responsibility-company.html

to a peer-reviewed article published in the Utrecht Law Review, with sales dropping 40 percent in the two-week period following the report.

- *Customer Cynicism* - Some businesses recognize that socially responsible behavior has a positive effect on their customers' opinions of the organization. After years of hearing how their favorite businesses care about society and the environment, but seeing little obvious involvement from these organizations, many customers have grown cynical of CSR reports. According to business watchdog agency CorporateWatch.org, consumers often see CSR announcements as little more than PR initiatives. For this reason, businesses often face a considerable obstacle convincing their customers that their actions match their stated intentions.
- *Competitive Disadvantages* - Corporate social responsibility projects and initiatives require a shift in thinking for many businesses, and some CSR processes can make the business more cumbersome to operate. Wal-Mart subjects its suppliers to strict regulations on product quality and employee working conditions, for example, which add production time and increase overhead for the suppliers. Their competitors, meanwhile, can operate at lower costs and turn out products more quickly.²⁶⁴

²⁶⁴Keith Evans, *What Are the Disadvantages of Corporate Social Responsibility?* http://www.ehow.com/info_8031857_disadvantages-corporate-social-responsibility.html

Cyber Laws and Social Media

Ashwin Kumar B.R.*

ABSTRACT

The children from the age as early as 8 years use the social media, often ignoring the minimum age limit prescribed i.e. 18 years, Social Media vehicles such as Facebook, Twitter, and Instagram etc. are very popular.²⁶⁶ This makes the parents of the children unaware of the activities of their kids' and the kids very obviously hide these potentially unsavoury activities from their parents. There are lot of cyber crimes happening through the social media, which, most countries are unable to stop or to bring any remedy to the crimes, despite their best efforts. The criminals don't only try to bring down the image of the person but also threaten or bring the credibility and social standing of that person down in the eyes of the society. The youngsters, men and women who are mostly the vulnerable section for such activities are driven into taking the extreme step i.e. suicide, mainly because of the shame and embarrassment they would face when their parents and friends come to know of such activities. In this paper, the topics covered are mainly cyber law in connection with social media, different kinds of cyber crimes and the effect on a person who has been a victim, the driving force behind the minors to sign up as members of social media.

INTRODUCTION

Abacus, which is thought to be the first computer; it is there since 3500 B.C. in India, Japan and China. The first ever computer was invented by Charles Babbage from that time onwards it's become an era of new modernization to the world of computers. The first ever cyber crime was recorded in the year 1820 in France²⁶⁷. In 1990's less than 1, 00,000 people used the World Wide Web whereas now a day's more than 5 billion people are logged on to the internet. The crimes are no longer limited to conventional but it has also extended to the cyber space. The difference between the conventional crime and the cyber crime is that in conventional crime the criminal can do a crime even though he has no knowledge about the method to do, whereas in cyber crime the

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²⁶⁶ Mail online, by daily mail reporter 'more than half of children use social media by the age of 10', published on 6th February 2014, updated on 19th November 2014, accessed on 25th September 2016.

<http://www.dailymail.co.uk/news/article-2552658/More-half-children-use-social-media-age-10-Facebook-popular-site-youngsters-join.html>.

²⁶⁷ Evolution of Cyber Crime, posted on November 2012 by Get Hacking Security, accessed on 26th September 2016. <http://www.gethackingsecurity.com/evolution-of-cybercrime/>

criminal has to be a professional in computer to do a crime through computer or any electronic devices like hacking, e-mail spoofing, cyber stalking and so on. The word “Cyber Crime” has nowhere been defined in any act or legislation in Indian Parliament. It has been defined in UN

(a) “Cybercrime in a narrow sense (computer crime): Any illegal behaviour directed by means of electronic operations that target the security of computer systems and the data processed by them”

(b) “Cybercrime in a broader sense (computer related crime): Any illegal behaviour committed by means of, or in a relation to, a computer system or network, including such crimes as illegal possession [and] offering or distributing information by means of a computer system or network”.²⁶⁸

The earliest mode of communication dates back to 550 BC by the mode of letter, which is still in use even date when the person who is not used to email or has no knowledge of computer. With the invention of super computers the engineers was looking for providing more networks between the people and gave rise to internet. In 1997, the first social media six degrees, and in 1999 the blog was a sensation which is popular throughout the world even now, in 2006 Facebook and Twitter were launched, now a days there are lot of social networking sites which can enable the person to get in touch with other person without any hassle.²⁶⁹

CYBER LAW IN CONNECTION WITH SOCIAL MEDIA

Cyber law or internet law is the law which is related to the internet and less distinctive from intellectual property law or contract law²⁷⁰. Pavan Duggal gave the definition of the term Cyber Laws as follows: Cyber law is a generic term, which refers to all the legal and regulatory aspects of Internet and the World Wide Web (WWW). Anything concerned with or related to or emanating from any legal aspects or issues concerning any activity of netizens and others, in cyberspace comes within the ambit of cyber law²⁷¹.

²⁶⁸ United Nations definition, posted on July -27-2009, by Ankit Mathur, accessed on 27th September 2016. <http://cyber-law-web.blogspot.in/2009/07/united-nations-definition-of-cybercrime.html>.

²⁶⁹ Complete history of social media then and now, posted on May-8th-2013 by Drew Hendricks, accessed on 27th-September-2016. <http://smallbiztrends.com/2013/05/the-complete-history-of-social-media-infographic.html>

²⁷⁰ Legal aspect of computing, accessed on 29th September 2016, https://en.wikipedia.org/wiki/Legal_aspects_of_computing

²⁷¹ Pavan Duggal, published in the year 1996, accessed on 29th September 2016, <http://cyberlaws.net/cyber-law/>

According to the definition, we can come to know the connection between cyber law and social media. Social media is used through the internet and computer or laptop or mobile or tablet and any other electronic item which uses internet as a source to communicate with other person. Few examples of using of internet are as follows

- ‘X’ has a mobile and logs on to Facebook using the Wi-Fi through the mobile, this is considered as using of internet through mobile.
- ‘Y’ through his laptop uses Gmail to send a mail this is also considered as a way of using internet.

Cyber Crime may say to be those species of which, the kind is the conventional crime. Any criminal activity which uses a computer as an instrument, target or a means of for perpetuating further crimes come within the ambit of cyber crime²⁷².

Social networks such as Facebook, Twitter, LinkedIn and many other social networking sites have become the platform for the criminals; these social networks have become ubiquitous, and help us in connecting to family and friends, get jobs and many other things.

An example for a cyber attack: “Newscaster” or “Charming Kitten” cyber-attack, which made headlines. The attack, according to a report by threat intelligence provider iSight partners, originated in Iran and targeted primarily senior U.S. military and diplomatic personnel, congressional personnel, Washington D.C. journalists, think tanks, defence contractors, and United States allies overseas. This state-sponsored attack used fake personas on social networking sites (e.g., Facebook, LinkedIn, Twitter, Google+) to establish trust relationships that were later exploited to distribute malware designed to steal passwords and sensitive information. Based on the findings, the attack managed to go undetected from at least 2011, and some malware continues to go undetected by many signature-based security tools²⁷³.

DIFFERENT KINDS OF CYBER CRIME:

The kinds of cyber crime are as follows:

²⁷² Cyber Crime by Parthasarathi, accessed on 30th September 2016, http://www.naavi.org/pati/pati_cybercrimes_dec03.htmhttp://www.naavi.org/pati/pati_cybercrimes_dec03.htm

²⁷³ The next big cyber crime vector: Social Media, posted by Torsten George, on December 1 2014, accessed on 30th September 2016, <http://www.securityweek.com/next-big-cybercrime-vector-social-media>

- Hacking
- Virus, Trojans and Worms
- Cyber Pornography
- Cyber Stalking
- Cyber Terrorism
- Cyber Crime related to Finance
- Cyber Crime with Mobile and Wireless Technology
- Phishing
- E-mail bombing
- E-mail spoofing
- Salami attacks
- Logic Bombs
- Internet Time thefts
- Web Jacking²⁷⁴

NOTE: Topics relating to cyber law and social media are explained below

HACKING:

‘Hacking’ means unauthorized access to a computer system. It has been defined under **Section 66** Of the I.T Act 2000, as follows: “Whoever with the intent to cause or knowing that he is likely to cause wrongful loss or damage to the public or any person destroys or deletes or alters any information residing in a computer resource or diminishes its value or utility or affects it injuriously by any means commits hacking”

VIRUS, TROJANS AND WORMS:

A computer virus is a programme which is designed to replicate and spread generally with the victim being oblivious to its existence. They spread by attaching themselves to the programmes like word processor or they attach themselves to the boot sector.²⁷⁵

CYBER STALKING:

²⁷⁴ Dr. R.K. Chaubey, Introduction to Cyber Crime and Cyber Law, published by Kamal Law House, Kolkata, 2008 edn, Chapter 1, pg 143-163.

Stalking in general means harassing or threatening behaviour which an individual exhibit towards the other. Cyber stalking does not involve physical contact it may create a misperception like a physical stalking.

DIFFERENT KINDS OF CYBER STALKING:

- E-mail Stalking: Most of the common form of stalking in the physical world involves telephoning; sending mail, and actual surveillance, cyberstalking can take many forms. An example of E-mail stalking is

In a case prosecuted in Australia, a women received e-mail correspondence that began politely, but then became more threatening once she sought to end the communications. She ultimately received death threats from the offender and threat to “have her pack-raped, videotaped and uploaded on internet.”²⁷⁶

- Internet Stalking: As stalking in physical world, are confined to one medium, stalkers can more comprehensively use the internet in order to slander and endanger their victims.
- Computer Stalking: The individual can directly connect with their targets as soon as the targets computer is switched on.
Example: A women received a message stating “I’m going to get you”, the interloper then opened the women’s CD-ROM drive in order to prove he had control of her computer²⁷⁷.

TYPES OF CYBER STALKERS:

- Simple Obsessional: These cases typically involve a victim and a perpetrator who have a prior relationship; this poses most threat to the victim. The motivation behind is to re-enter the relationship, or revenge aimed at making the life of the former intimate uncomfortable through the inducement of fear.
- Love Obsessional: The most common type of person who follows celebrities, is familiar to ‘obsessed fan syndrome’.

²⁷⁶ Keim, T.2000, “cyberstalk Charge Looms”, courier Mail, 27th April 2000.

²⁷⁷ Karp, H. 2000, “Angels Online”, readers Digest, pp. 34-40

- False Victimization: It accuses person either real or imaginary of stalking to foster sympathy and support from those around them.²⁷⁸

CASES ON CYBER STALKING:

A case in which a cyber stalker hacked the email accounts of female stars such as Scarlett Johansson and Christina Aguilera has been sent down for 10 years.²⁷⁹

A case in Delhi where a person asked her to marry him, with threatening messages, she filed a case in Delhi police station, after she withdrew the complaint he created a fake account and posted photos stating that she's his wife²⁸⁰.

EFFECT OF A PERSON WHO HAS BEEN VICTIM:

The effect of a person who has been victimized on social media depends on the degree of the crime and on what basis the criminal has targeted that person. A criminal may target a person on numerous bases such as revenge, hatred, threaten the victim and so on. There are some effects where a victim may take the extreme step of suicide or some may get into depression or some may lose the faith of their relatives and friends it all depends on the way the accused has victimized. Some examples of what are the consequences when the victim has been targeted are below:

- 'X', who has been targeted by 'Y', by hacking the Facebook account, sends obscene messages to all his friends in the account, 'Z', who is one of the friend in 'X' spreads the message to who all he knows, 'X', after knowing this puts status saying someone had hacked the account and sent the messages.
- In recent case A student hanged herself after she was tagged in a post where obscene pictures was there, since her parents had given a complaint and the police didn't take any

²⁷⁸ Dr, R.K. Chaubey, Introduction to Cyber Crime and Cyber law, Chap 5, page 356-368, 2008 edn, published by Kamal Law House, Kolkata

²⁷⁹ Cyber Stalker is sent down for 10 years, accessed on 30th September 2016, <http://www.theinquirer.net/inquirer/news/2232751/celebrity-cyber-stalker-is-sent-down-for-10-years>.

²⁸⁰ DU law student filed with cyber stalking, accessed on 30th September 2016, <http://timesofindia.indiatimes.com/city/delhi/DU-law-student-charged-with-cyber-stalking/articleshow/8917937.cms>

action against them, she committed suicide because she lost her public image, and her parents came to know about it.²⁸¹

WHAT IS THE DRIVING FORCE FOR THE CHILDREN TO SIGN UP FOR SOCIAL MEDIA?

Over a decade the technology has increased and has become the driving force for the children to sign up as members of social media. The children are growing up where the technology, mobile has become more advanced than in the ages of our parents or grand-parents ages. Technology has increasingly seen as a powerful development in global level to hit the child and youth focused to target global education. Charles Kenny says “This technology was not developed as a development tool, yet has become one of the greatest a vehicle for a change”.²⁸²

According to me, the driving force for children to sign up to social medias are because, many of the parents, have bought their children mobiles or even laptops at the age of 12 years (approximately), due to various reasons, for example when the parents go to work, their children who are alone at home, if the children are going to be late or have tuitions they can inform their parents where they are. When the children see their siblings using social media and they ask what exactly it is and how it works and for what purpose is it, when they come to know it is used for making friends, even if the siblings or any family member doesn't tell the exact thing, their friends will tell, so this will make the children tempted to sign up thinking that he/she is the only person not on social media whereas their friends all are there on social media. They try to sign up using their original date of birth, when it doesn't, the very next day the children go and ask their friends how did they sign up, from there on the children learn to give fake date of birth, because of this there are many youngsters who have been targeted by the criminals to take the advantage especially when the criminals come to know that if they target that child they might get money from them. On social media there are some advertisements which show pornographic ads and which tempt the children to check what it is and this also gives the way for children to watch online porn.

²⁸¹ Salem, women commits suicide after facing sexual harassment on Facebook, published by Ani, on July 28 2016, accessed on September 2016, <http://indianexpress.com/article/india/india-news-india/salem-woman-commits-suicide-after-facing-sexual-harassment-on-facebook-2879990/>

²⁸² Technology can empower the children in developing countries, by Annie Kelly, published on June 2013, accessed on 30th September 2016, <https://www.theguardian.com/sustainable-business/technology-empower-children-developing-countries>

CONCLUSION

In the modern world it is essential for the members of the social media to know how to combat the crimes made through the online and not to take extreme steps without taking the help of the friends and the family members even though if it is a crime which is not committed by you. The technology has advanced so much that everywhere in the world from different age group is signed up on social media on different social networks. Most of the countries are unable to stop the crimes related to cyber. I think the social networking sites owners have to cross check the age of the members of their social media so that it would not bring the minors to sign up using fake date of birth.

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International Commercial Arbitration – The Race

-Shuchita Choudhry* and Tejasv Anand**

ABSTRACT:

“An ounce of mediation is worth a pound of arbitration and a ton of litigation!” — Joseph Grynbaum

The above quote glorifies the importance of alternative dispute mechanisms. But in the case of commercial disputes the alternative dispute settlement procedures are even more important and in the case of international commercial disputes they are more of a need than an option. The most desirable system for the settlement of international disputes is the system of arbitration. But, to solve complicated matters under commercial disputes a pro-active system with experts is need of the hour. India has one of the world's biggest business players and so facilitating the International Commercial Arbitration will bring a humungous rise in making India an even more desirable destination for business investors. The paper, thus, touches upon the implications and developments in the International Commercial Arbitration along with the current global trends. The paper aims to decipher the changes and developments in the Indian Law to cope up with the international standards of Arbitration. The paper expresses a roadmap for India to become a global arbitration hub and the steps taken by the nation to achieve them. The paper ultimately seeks to incorporate the advancements in the growing arena of technology and its implication on the Arbitration mechanism.

INTRODUCTION

Growing complexities of modern commercial transactions in the wake of the globalization of economy necessitated an effective redressal mechanism for speedy settlement of domestic as well as international commercial disputes. In order to ensure an uninterrupted flow of trade and commerce, there must be a regulatory framework for arbitration domestically as well as internationally. This need leads to the growth of international commercial arbitration which has been accepted by the commercial world as an appropriate and a preferred system of settlement of trade disputes.

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The paper aims at the analysis of the development of International Commercial Dispute Settlement Regulatory Framework, the changing trends in the preferred seat of arbitration by contesting nations, progressive steps by India to advance its status as an arbitration hub and to decipher the law as amended by the legislature. Before late 19th century, the law was insufficient in recognising and giving effect to the decision of arbitrators as they were held on ad hoc²⁸⁴ basis. There existed a significant national court intervention, corollary to which, there was no international regulation for arbitration. In the beginning of 20th century, the maturity of modern international practice began, however, it reflected the approach of national laws and there was a reluctance to recognize that the commercial sector was agreeing to resort to arbitration. Courts saw arbitration as its rival. With the expansion of world trade, an international arbitration law was of paramount importance and in furtherance of which, two Hague conventions were concluded in 1899 and 1907, both titled "The Hague convention for the pacific settlement of international disputes". The objective was to promote best efforts for friendly settlement of international disputes and sought to establish a permanent court of arbitration accessible to all. Furthermore, To voice their concerns, the world's business community, established the international chamber of commerce (ICC) in 1919, which created its own court of international arbitration providing for a neutral system of arbitration for the settlement of commercial disputes between parties from different countries. The ICC extensively promoted the need for international regulations to uphold and support the arbitration process. In 1923, Geneva protocol on arbitration clauses and in 1927, Geneva Convention on the execution of foreign awards was adopted and aimed at international recognition of arbitration agreements and awards. The aforementioned instruments were entirely superseded by the New York Convention²⁸⁵ which set standards for a successful arbitration process. The convention was signed by 130 countries and received wide international acceptance. A series of bilateral and multilateral conventions followed the New York convention.

Following the success of the New York convention, United Nations was a major influence in 1960's. Economic Commissions for Asia, Europe, and the Far East developed special arbitration rules and procedures called the UNECE²⁸⁶ and ECAFE²⁸⁷. These rules were superseded by the

²⁸⁴ "The Ad hoc arbitration is agreed to and arranged by the parties themselves without recourse to an arbitral institution." RUSSELL ON ARBITRATION 29 (22nd ed. 2003)

²⁸⁵ Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by United Nations diplomatic conference in 1958.

²⁸⁶ United Nations Economic Commission for Europe established in 1947.

²⁸⁷ Economic Commission for Asia and the Far East established in 1947.

UNCITRAL Arbitration Rules.²⁸⁸The UNCITRAL rules were autonomous and suitable for all kinds of arbitration and in every part of the world and thus received global recognition. The rules deal with numerous aspects of arbitration right from formation of the tribunal to rendering of the award and envisage guidelines and a flexible procedure for smooth proceedings. While maturing, it was realized that there was a dire need of uniformity and commonly accepted standards for international arbitration. The benchmark event pertaining to this was the introduction of the UNCITRAL model law on arbitration in 1985²⁸⁹, a step forward with New York convention and UNCITRAL rules. The UNCITRAL model law provides for special procedural regime for international commercial arbitration, important definitions, scope of application, Delimitation of court assistance and supervision, Arbitration agreement, composition and jurisdiction of the arbitral tribunal, Conduct of arbitral proceedings, making of award and Recognition and enforcement of awards.²⁹⁰

INTERNATIONAL COMMERCIAL ARBITRATION: AN OVERVIEW

According to Article 1(1), the UNCITRAL model Law applies to international commercial arbitration, subject to any agreement in force between contesting states. Arbitration means the “The process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined judicially and with binding effect by the application of law by one or more persons(the arbitral tribunal) instead of be a court of law.”²⁹¹

According to Article 2(a) of UNCITRAL Model Law, “Arbitration is the means by which the parties to the dispute get the matter settled through the intervention of an agreed third person.”

Article 1(3) of UNICTRAL model law provides that arbitration is international if:

- (a) The parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
- (b) One of the following places is situated outside the State in which the parties have their places of business:

²⁸⁸ Adopted by the United Nations General Assembly on 15th December, 1976.

²⁸⁹ Adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985.

²⁹⁰ Explanatory note by the UNCITRAL secretariat on the Model Law on International Commercial Arbitration.

²⁹¹ HALSBURY LAWS OF ENGLAND 601, 322 (Butterworth, 4th ed.1991).

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) The parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

Thus, the “international” criterion in “international commercial arbitration” required to be fulfilled is usually based on the two determinants viz., *nature of dispute* and *parties to the dispute*.

The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.²⁹² In Indian context, while Construing the expression “commercial” in Section 2 of the Arbitration and conciliation Act, 1996, it has to be borne in mind that the Act is formulated and designed to subserve the cause of facilitating international trade and promotion thereof by providing speedy settlement of disputes arising in such trade through arbitration and any expression or phrase occurring therein should receive a liberal construction”.²⁹³

SEAT OF ARBITRATION: RELEVANCE AND TRENDS

Appointing the seat of arbitration is one of the essential elements of an effective international commercial agreement for arbitration amongst others such as rules of procedure and appointment of arbitrators. The “seat” of the arbitration, in core, is the legal jurisdiction to the arbitration. The determination of seat of arbitration is significant as it determines the procedure and rules which administer the arbitration. However, it is to be distinguished from the venue in which hearings may be held. It is not essential for the seat of arbitration and the venue of the arbitration to be the same

²⁹² Explanation to Article 1(3) UNCITRAL Model Law.

²⁹³ R.M. Investment and Trading Co. Ltd. V. Boeing Company, AIR 1994 SC 1136; See also Renusagar Power Co. Ltd. V. General Electric Co., AIR 1985 SC 1156; Koach Navigation V. Co. HINDUSTAN Petroleum, AIR 1989 SC 232.

location. Even though hearings may take place during the course of the arbitration in several different countries, the chosen seat of arbitration stands unmoved. The parties shall keep two important issues in consideration, Firstly, the seat shall be in most cases be vested in a state that is a party to the New York Convention, and Secondly, the state with the seat shall have a well – developed law and body of arbitration, experienced courts, developed infrastructure and shall have continuing support and respect for international arbitration agreements and awards.

As a rule, arbitration is neutral in nature and allows the parties to operate the arbitration process by agreement to resolve disputes, international arbitration often requires national court's assistance to effectively function. The New York convention makes available a legal framework to national courts of contracting states in order to review, recognize and enforce agreements and awards.

By citing the authority to arbitrate in a state which is a party to the Convention, the parties warrant that they shall obtain the protections of the Convention in relation to the aid of the local courts in recognition and enforcement of the arbitration agreement, the arbitral process, and any arbitral award.

Article 20 of the UNCITRAL model law on arbitration supplies the provision for place of arbitration as:

(1) The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(2) Notwithstanding the provisions of paragraph (1) of this Article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

The conduct of international arbitration in New York²⁹⁴ in 2013 by providing world class infrastructure, developing programmes and materials on international arbitration and supporting dialogue, discussion, and debate to keep New York at the forefront of international arbitration among the legal, judicial, academic and business communities. In spite of these advancements, there is a slow yet growing shift towards other centres for arbitration which are trying to match the expectations of arbitration's users in the world. However, in recent years, there has been an

²⁹⁴ *About NYIAC*, NEW YORK INTERNATIONAL ARBITRATION CENTRE (2016), <http://nyiac.org/about/>

expansion and growth in the list of states being preferred for the site of arbitration. Although the big four remain active and attractive, several other centres have proven to be successful and secure seats for resolving international commercial disputes specifically because of adoption of UNCITRAL model law, the framing of efficient domestic law and its proficient implementation. As a result of which parties have a greater number of choices and flexibility to choose their safe seat.

Singapore, Paris, Hong Kong, Geneva and Dubai are growing as popular seats of arbitrations, in addition to the customary France, Switzerland, the United Kingdom and the United States. Also According to a Survey²⁹⁵, nearly one-third of the respondents (30%) favoured London as their preferred seat, amongst Geneva, Paris, Tokyo, Singapore and New York. They also referred to a number of other seats, "suggesting that *parties may be progressively more looking further than the 'traditional' seats of arbitration*". The mounting recognition of these seats is a well-known trend but this comes with new challenges to all users of arbitration. For a comprehensive understanding, it is important to appreciate the factors behind this changing trend.

Singapore is one of the leading jurisdictions in Asia with a reputed record of enforcement of arbitral awards. Its position as an arbitration seat is heightened in the past five years by the unmatched economic growth, developed financial market, visible transparency, low level of corruption and its ranking as the most neutral place in the world to do business with. Recent welcome steps by Singapore include the establishment of The Singapore International Commercial Court (SICC) in 2015 with significant features such as jurisdiction to adjudicate upon matters that can be heard by the Singapore High Court in its Original Civil Jurisdiction, power to join third party to action facilitating foreign legal representation, confidentiality of proceedings and right to appeal against the awards made by SICC to Singapore Supreme Court. 2014 saw the inception of The Singapore International Mediation Centre, an independent, not-for-profit institution that aims to provide world-class mediation services and products targeted at the needs of parties in cross-border commercial disputes. The opening of Maxwell Chambers in 2010 providing best-of-class hearing facilities and support services has also been highly accommodating²⁹⁶. Singapore's competitiveness as a leading arbitration centre was further

²⁹⁵ Queen Mary University of London and White & Case LLP, *2010 International Arbitration Survey: Choices in International Arbitration*, 19 (2010).

²⁹⁶ *Profile*, MAXWELL CHAMBERS, <http://www.maxwell-chambers.com/profile>.

fortified by its recent amendments to its arbitral law, the most recent amendment in 2010 substantiating that Singapore courts have the power to grant interim relief in aid of foreign-seated international arbitrations and revisions to the Singapore international arbitration centre (SIAC) Rules. The fifth version of the Rules entered into force on 1 April 2013 established the SIAC Court of Arbitration.²⁹⁷The ICC 2012 Report tells that Singapore was the fifth most frequently selected seat for ICC arbitrations in 2012.²⁹⁸

The triumvirate of dispute resolution institutions at the heart of Singapore helps establish itself as the centre for dispute resolution in Asia.

In addition to this, in early 2013, SIAC chose to open its first overseas office in Mumbai with a view to further awareness in India and the region about international arbitration as a workable dispute resolution option for Indian parties and foreign parties entering into commercial relationships with Indian parties; promoting Singapore as a logical destination for international arbitration and increasing awareness about institutional arbitration at SIAC.

Hong Kong is a leading financial and business centre of the world with one of the efficient judiciaries in the world, Hong Kong has a UNCITRAL-based international arbitration law, experienced impartial well-trained and experienced local lawyers. Its arbitration framework includes the recent the Arbitration Ordinance, effective as of 1 June 2011 providing for facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense, non-interference by courts , implementation of the agreement with Macao for the enforcement and recognition of arbitral awards , an emergency arbitration procedure and extending the application of the UNCITRAL Model Law to all arbitrations in Hong Kong.²⁹⁹In furtherance, the Hong Kong international arbitration centre rules were also amended in 2013.This reflects Hong Kong's willingness to change and maintain competitiveness.

²⁹⁷ See, e.g., *SIAC's New Governance Structure and Revised Rules of Arbitration*, SINGAPORE INTERNATIONAL ARBITRATION CENTRE (April 1, 2013), http://www.siac.org.sg/index.php?option=com_content&view=article&id=429:siacs-new-governance-structure-and-revisedrules-of-arbitration-&catid=1:latest-news&Itemid=50 ; G. Born, *New Rules at the Singapore International Arbitration Centre*.

²⁹⁸ Queen Mary University of London and White & Case LLP, *2010 International Arbitration Survey: Choices in International Arbitration*, 23 (2010).

²⁹⁹ *Government Legislation*,

[http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/C05151C760F783AD482577D900541075/\\$FILE/CAP_609_e_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/C05151C760F783AD482577D900541075/$FILE/CAP_609_e_b5.pdf)

Dubai's arbitration law is entirely a foundation upon the UNCITRAL Model Law. Dubai became a party to the New York Convention in 2006 which applies fully to the Dubai International Financial Centre DIFC. A significant recent development has been the establishment of the DIFC-LCIA arbitration centre on 2008. It's a joint venture of between the DIFC and the London Court of International Arbitration (LCIA), one of the leading players in the arbitration world to deal with arbitration and mediation matters arising in Dubai.

INDIAN ARBITRATION LAW

In India, the first consolidated legislation was the Arbitration Act, 1940 based on the (English) Arbitration Act, 1934. The Act, however, did not deal with the Enforcement of foreign awards and on account of such insufficiency; the legislature passed the Arbitration (Protocol and Convention) Act, 1937 to confer with the Geneva Convention and New York Convention. But, the working of the 1940 Act, which dealt with domestic arbitrations, was far from satisfactory.³⁰⁰ The Extract from the following landmark judgement expresses the anguish of the Hon'ble Supreme Court of India;

*"The way in which the proceedings under the Act are conducted and without exception challenged in Courts has made Lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the proceedings under that Act have become highly technical accompanied by unending prolixity, at every stage providing a legal trap to the unwary."*³⁰¹

Further, in the early 1990's the Economy of India underwent a significant policy shift and a model of economic reform namely LPG (Liberalization, Privatization and Globalization) Model was adopted. These economic reforms facilitated a phenomenal increase in international trade and foreign Investments. The Indian legislature then realized a need for an amendment to the existing Arbitration Act, but since only a few amendments were not sufficient, the Arbitration Act, 1940 was repealed and Arbitration and Conciliation Act, 1996 (hereinafter "the Act") was enacted on the foundation of the UNCITRAL Model law. The primary objective of the Act was to consolidate and amend the law relating domestic arbitration, international commercial arbitration and

³⁰⁰ Law Commission Report No. 246, *Amendment to the Arbitration and Conciliation Act 1996*, 1 (2014).

³⁰¹ D.A. Desai J. in *Guru Nanak Foundation v Rattan Singh*, (1981) 4 SCC 634.

enforcement of foreign arbitral awards.³⁰² The first chief amendment in the Act was proposed after persistence of the 176th Law Commission Report in the form of Arbitration and Conciliation (Amendment) Bill, 2001 and a committee³⁰³ was formed to perform a depth study of the recommendations made in the report. However, on the recommendations of the Standing Committee on Personnel, Public Grievance, Law and Justice the Amendment bill was withdrawn. With the preceding developments in the Arbitration Law of India, this is evident that the primary role of all the amendments and the 1996 Act was to promote International Arbitration. The rapid development of International Commercial Arbitration has forced national legal systems not only to tolerate international commercial arbitration, but also to provide for favourable, legal regimes within it can flourish.³⁰⁴ To facilitate the Commercial demands of the country and to make India a preferred seat of Arbitration, Arbitration (Amendment) of 2015 was passed by the legislature.

INDIA AS A SEAT OF ARBITRATION

The Indian Council of Arbitration recommends to all parties desirous of making reference to arbitration by the Indian Council of Arbitration, the use of the following arbitration clause in writing in their contracts:

*"Any dispute or difference whatsoever arising between the parties out of or relating to the construction, meaning, scope, operation or effect of this contract or the validity or the breach thereof shall be settled by arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration and the award made in pursuance thereof shall be binding on the parties."*³⁰⁵

CHANGES BROUGHT BY THE 2015 AMENDMENT

A substantial number of changes were made by the 2015 Amendment with reference to the International Commercial Arbitration. They are mentioned and their implication is explained as

³⁰² The Long Title of "The Arbitration and Conciliation Act, 1996"

³⁰³ Dr. Justice B.P Saraf Committee on Arbitration submitted on 31st January, 2005.

³⁰⁴ Speech of Hon'ble Mr. Justice Vijender Jain, Chief Justice, Punjab & Haryana High Court, Chandigarh (India) at Mauritius on 03.06.2008 on Key Issues on "INTERNATIONAL ARBITRATION".

³⁰⁵ ICA Commercial Arbitration, Conciliation & Maritime Arbitration Clauses (2016), <http://www.icaindia.co.in/icaarbitrationclause.pdf>

follows:

- The first and the foremost amendment is in Section 2 (1) (e) (ii). The Act by way of this amendment has made High Court as the exclusive forum for reliefs under the Act, which was earlier the Principal Civil Court. By way of this amendment, the legislature seeks to minimize the role of the lower judiciary in the Arbitration procedure. The change is though a welcome change for the companies but the making the High Court as the Court of the first instance may pose problems for the Respective high courts with the increase in litigation.
- The Amendment deletes the term “a company” from section 2 (1) (f) (iii). The Act by way of this Amendment seeks to incorporate the Hon’ble Supreme Court’s Decision³⁰⁶ holding that in the case of a company, if the place of incorporation were India, central management and control would be not relevant in determining whether it was an international commercial arbitration. That criterion has now been restricted to an association or body of individuals, and has ceased to exist in the case of a company.
- The Amendment also enhances the territorial applicability of the Act by way of inserting a proviso under Section 2(2) of the Act. The amendment provides for provisions for interim measures and taking the assistance of the court in seeking evidence even if the arbitration is seated outside India.³⁰⁷
- The Amendment also seeks to recognize the Electronic Communication as a means to enter into an Arbitration Agreement. The amendment seeks to align the Act with the existing Judicial Pronouncements³⁰⁸.
- The Amendment also adds Fifth Schedule corresponding to Section 12 (1)(b) of the Act. The said provision of the Act deals with Grounds of Challenge in the Appointment of Arbitrator. The said schedule elaborates the grounds, which give rise to justifiable doubts as to the independence or impartiality of arbitrators. The provision would be helpful in building trust amongst various parties. This Amendment is inspired by the International Bar Association Guidelines on Conflicts of Interest in International Arbitration (“IBA Guidelines”).³⁰⁹
- The Amendment also adds the Seventh Schedule corresponding to Section 12(5) of the Act. The Schedule specifies the categories of relationships that shall be ineligible to be any express agreement in writing. Before the said amendment the only restriction the Supreme Court put on this was that the said

³⁰⁶ TDM Infrastructure Pvt. Ltd. vs. UE Development India Pvt. Ltd., (2008) 14 SCC 271.

³⁰⁷ The amendment not only enhances the scope of the Act but also endeavours to set to rest the controversy caused by the decisions in Bhatia International v. Bulk Trading SA, (2002) 4 SCC 105; Bharat Aluminium co. v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552.

³⁰⁸ Shakti Bhog Foods Ltd. vs. Kola Shipping Ltd., (2009) 2 SCC 134; Trimex International FZE Ltd. vs. Vedanta Aluminium Ltd., (2010) 3 SCC 1; In both of the above cases it was held that electronic communication would constitute an agreement in writing under section 7.

³⁰⁹ India is one of the first countries to adopt the guidelines by the IBA and incorporate the same into its domestic law. The contents of the Fifth Schedule incorporate the Red and Orange lists of the IBA Guidelines.

employee should not be involved in the contract in question in the case of *Indian Oil Corporation Ltd. v. Raja Transport Pvt. Ltd.*³¹⁰. This Amendment is also inspired by the IBA Guidelines³¹¹.

▪ The Amendment inserts a proviso in Section 24 and provides for imposing of costs for seeking frivolous adjournments. It is another attempt to ensure that the arbitral proceedings are concluded expeditiously.

ROLE OF TECHNOLOGY

The last decade has seen major developments in the field of technology and the commercial dispute settlement systems is not untouched by these developments. India has tremendously accepted the idea of online dispute resolution. Online dispute resolution is the use of electronic means of communication in order to conduct arbitration proceedings. Similar to the traditional offline arbitration, online arbitration involves three stages that are the arbitration agreement, proceedings and award. The arbitration agreement shall be signed by the parties and intention should be of the settlement of disputes and be binding by the decision of the arbitral tribunal. Section 7 of the Indian Arbitration & Conciliation Act, 1996 parallel to the UNCITRAL Model Law lays down the definition of the arbitration agreement and makes it mandatory for it to be in writing and includes 'exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement 'apart from 'a document signed by the parties 'and 'an exchange of statements of claim & defence.'

For the purpose of online arbitration in e-contracts, it is important to consider section 4 of information technology act, 2008 which reads as, "where any law provides that information or any other matter shall be in writing or in the typewritten or printed form, then notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is –

- a. Rendered or made available in an electronic form
- b. Accessible so as to be usable for a subsequent reference

Thus, it is comprehensible that online arbitration clauses in e-contracts and other arbitration agreements are admissible in India. Section 31 of the Indian arbitration and conciliation act, 1996

³¹⁰ (2009) 8 SCC 520

³¹¹ The Seventh Schedule incorporates the provisions of the waivable and non-waivable Red List of the IBA Guidelines.

shall be read in reference to the admissibility of an arbitral award. Provision of section 31 lays down the content and forms of an arbitral award as –

- a. An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal”
- b. After an arbitral award has been made, a signed copy shall be delivered to each party.
- c. The arbitral award shall state the reasons upon which it is based
- d. the arbitral award shall state its date and the place of arbitration

As mentioned earlier, it's difficult to decide on a seat of arbitration in online contracts. Article 20 of the Indian arbitration and conciliation act, 1996 requires the parties to determine a place of arbitration, failing which, the arbitral tribunal decides it. Consequently if in an online arbitration proceeding, no place of arbitration is cited, any award made cannot be enforced under the act. In a case where the place of arbitration has been decided, there is ambiguity in fulfilment of conditions mentioned in section 31 of Indian arbitration and conciliation act, 1996, the one requiring the arbitral award to be in writing and signed by the arbitrator. In order to remove this doubt, section 4 and 15 of the information technology act, 2000 shall be discussed. According to section 4 of the said act, electronic documents so fulfil the criteria of being in writing. Sec 15 of the information technology act, 2000 explains secure electronic signature. e-signatures encrypt and secure a message or document in such a manner which stops the alteration of its contents without previous decryption and subsequent re-encryption. as a result, they carry the same power as handwritten documents with regards to authenticity and integrity. An electronic signature helps in recognizing the sole user of the document. Therefore, it can be concluded that even if an award is digitally or electronically signed by the arbitrator, it is said to be signed by him within the meaning of section 31 of the arbitration and conciliation act, 1996.

However, India is yet to react to the concept of “smart contracts”. Smart contracts are computing programs that robotically self-execute the terms of a contract following the performance of certain conditions. These forms of contracts represent a digital evolution in contracts. They are written and coded in a way that no party controls its operation. This form of contract is gaining popularity in various parts of the globe and with the growth of concepts like Crypto currencies the developments expected are ineffable. With the development of Smart Contracts the inclusion of arbitration clause in smart contracts would be indispensable in near future. India aims to be a global arbitration hub and thus, recognition of such technological advancements would help in achieving its aim.

CONCLUSION

The Supreme Court rendered a landmark decision in, *Enercon (India) Ltd. & Ors. v. Enercon GmbH & Anr*³¹² “affirming the pro-arbitration outlook the Indian courts have developed in the past few years.” This judgment is a progressive step in the right direction to bring Indian arbitration law in consonance with international jurisprudence and will aid India in being perceived as an arbitration-friendly jurisdiction. The positive attitude of the Judiciary is one of the prerequisites to make India an Arbitration and a preferred seat of Arbitration.

India’s legislature’s ambition to titivate its arbitration landscape and transform it into global arbitration hub is still on its journey. With effort to inculcate global practices and keeping with international standards, India still lacks in a strong institutional framework in our opinion. The road to the end is not that smooth and swift because of still existing lacunae’s. Firstly, The Law Commission in its 246th Report had recommended an amendment to Section 16, to expand the jurisdiction of the arbitrator to adjudicate on matters relating to fraud and criminality. The Act, however, has omitted this provision and this may give Courts the opportunity to restrain arbitrators from hearing cases where serious criminality or fraud is involved. This may lead to delay in the arbitration process because of various frivolous criminal complaints with intent to delay the proceedings. Secondly, The Law Commission in its 246th Report had recommended express provisions relating to the orders by emergency arbitrators³¹³ but the act has omitted this provision. Various fellow nations, however, do have the provision for emergency arbitration and the Indian legislatures shall have considered these suggestions. Thirdly, Section 29A of the amendment was introduced to reduce delays and protracted timelines. The Section provides that the tribunal must pass an arbitral award within twelve months from the date the tribunal entered reference with the option of further extending the time limit by 6 months if the parties agree to an extension mutually.

³¹² (2014) 5 SCC 1

³¹³ An emergency arbitration is one in which an arbitrator is appointed to deal with requests for urgent interim relief, such as an interim injunction, before the main tribunal is constituted. Emergency arbitrator provisions have been introduced into most of the major arbitration rules as a means for parties to apply for interim relief without having to go to a national court, or having to wait until the main tribunal is appointed. Currently, the SIAC, the International Centre for Dispute Resolution, the International Chamber of Commerce, the Hong Kong International Arbitration Centre, the Stockholm Chamber of Commerce and the Swiss Chambers' Arbitration Institution provide for emergency arbitration in their rules, among other institutions. **Ashurst Singapore**, May 2014

However, after the expiry of 18 months the parties seeking further extension would have to approach the court which may order an extension if the terms and conditions so allow. The provision, thus contemplates that in absence of such extension, the mandate of the tribunal will be vitiated immediately and the court would then appoint a new tribunal. The Arbitrations that come before tribunal are different in terms of complexities and generalizing the time limit may lead to more harm than good. Furthermore, the power of reduction of arbitrator's fee by the court is like a Sword of Damocles, which may force the tribunal to rush through the proceedings without going to each and every aspect of the case. Fourthly, The Amendment has expanded the scope of Section 17 of the act as it reads, “a party may, during the arbitral proceedings or any time after making the award” apply for interim measures. But, Section 32 is not amended in its conformity and thus according to it the mandate the tribunal shall terminate with the termination of arbitral proceeding. The conflict is a legislative mistake and such mistakes should be avoided to match the global standards. And lastly, The Amendment though contemplates the time limit for making an award but does not fix any timeline for enforcement of award under Section 36 of the Act. Against the backdrop of the *White Industries* decision³¹⁴ this omission is egregious.

³¹⁴ India was held to be in breach of its BIT obligations for the failure of its courts to enforce a foreign arbitration award within a reasonable timeframe.

REMOTENESS OF DAMAGES IN CONTRACTS: A RE-EXAMINATION OF TACIT AGREEMENT APPROACH

Tanuj Dayal* and Tishta Tandon**

ABSTRACT

Contemporary developments in UK have once again drawn the attention of scholars and jurists to the previously discredited tacit agreement test. This paper would attempt to assess the basic tenets of the agreement approach to assessing remoteness of damages in contracts and outline its applicability (or lack thereof) in Common Law countries, Civil Law jurisdictions and International Commercial Law principles. Academics and judges who support the application of assumption of risk theory assert that the theory should be reconsidered as present commercial transactions warrant its application, especially in some exceptional circumstances. This research paper highlights the current position of law in UK, wherein two-limb test remains the general principle of remoteness and tacit agreement approach is recognized only in exceptional cases. The paper concludes by tracing the applicability of tacit agreement test in India and tries to establish its authority as a persuasive principle that can be resorted to in exceptional cases.

Keywords- assumption of risk, contracts, damages, remoteness, tacit agreement.

A breach of contract can lead to multiple consequences. So, when the parties have not stipulated the damages they are entitled to in the event of a breach, it is essential to limit the liability of the defaulting party. The doctrine of remoteness of damage was developed in recognition of this need in the case of *Hadley v. Baxendale*³¹⁶, wherein the court laid down two rules for assessing the recoverable damages. The first rule or “limb” pertains to the losses arising in the “usual course of things” that is, naturally occurring consequences of the breach that a reasonable man could foresee. The second “limb” provides for losses that could be contemplated by the parties while entering into the contract and special circumstances, if any, were known and communicated. The first test is an objective test as the emphasis is on the chain of causation and proximate consequences resulting from the breach. On the other hand, the second test is the subjective test as focus is on

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³¹⁶ [1854] EWHC J70

common understanding of the parties during formation of contract as to the scope and extent of their mutual rights and liabilities in the event of a breach. In general terms, it can be said that the promisor implicitly accepts responsibility for the usual consequences of the breach of promise while the promisee implicitly accepts the risk of any unusual consequence.

TRACING APPLICATION OF TACIT AGREEMENT TEST IN U.K.

In modern economic relationships, availability of clear and transparent rules of measuring contract damages can serve as an effective instrument in providing stability to a very rapidly changing world of complex commercial transactions. Commercial relations that are exposed to a variety of risks can become more predictable by virtue of such clarity in assessment of damages and contracts can develop into nearly perfect instruments in the allocation of risks.³¹⁷ If the likelihood of a particular risk is known, then a party could get an insurance to cover that risk. On the other hand, if there is uncertainty regarding allocation of risk it can lead to duplicate insurance, which would be economically insufficient.³¹⁸ Therefore, it would be appropriate to state that adequate solutions in the area of limiting damages are extremely vital and a test for remoteness, though historically accepted as good law, might need to be modified, while taking certain contemporary situations into consideration.

Origin and Judicial Interpretation of the Agreement Approach

One alternative that the Courts in England and elsewhere have applied in this regard is the tacit agreement approach. The assumption of risk view or the agreement approach was at its height in the late nineteenth and early twentieth centuries, championed by Sir James Shaw Willes in England and Oliver Wendell Holmes, Jr. in the US.³¹⁹ Justice Willes put the view in the following terms in the *Nettleship* case: “the mere fact of knowledge cannot increase the liability. The knowledge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special

³¹⁷ DJAKHONGIR SAIDOV & RALPH CUNNINGTON (EDS.), CONTRACT DAMAGES 247 (2008).

³¹⁸ JILL POOLE, TEXTBOOK ON CONTRACT LAW (9th ed. 2008)

³¹⁹ Adam Kramer, *An Agreement-Centred Approach to Remoteness and Contract Damages*, in COMPARATIVE REMEDIES FOR BREACH OF CONTRACT 267 (N Cohen & E McKendrick 2005).

condition attached to it.”³²⁰ Lord Justice Asquith appeared to support the *Nettleship* view in the *Victoria Laundry*³²¹ case, but Lord Upjohn in *The Heron II*,³²² expressly stated that mere knowledge and foresight is adequate, rejecting the understanding that responsibility must be assessed as well. Though actually it was a narrower form of the assumption of risk theory (requiring that the assumption of responsibility be an actual term of the contract) that had been rejected, this dictum has been taken as laying to rest the *Nettleship* approach.

In order to comprehensively reject the agreement approach, it is essential to examine and trace the roots of this approach to limiting damages. In *Hadley v. Baxendale*, Baron Alderson did not deliberate whether mere foreseeability of a loss was enough for promisor accountability, as the loss in that case was held not to be foreseeable. Soon after the decision, however, John Mayne raised this issue: “But it may be asked with great deference, whether the mere fact of such consequences being communicated to the other party will be sufficient, without going on to show that he was told that he would be held answerable for them, and consented to undertake such a liability?”³²³ GH Trietel also observed that the defendant’s liability should be limited by the risks that he may supposed to have agreed to undertake.³²⁴ Cartwright, in his reconsideration of remoteness of damages observed that, “in contract the defendant consents to be bound to an agreement which contains within it a particular balance of risks and rewards: in consequence, the limit to the losses for which he is responsible is set by reference to what he can be taken to have accepted at the time of concluding the agreement.”³²⁵

Reconsideration of the Tacit Agreement Test

One of the scholars who has been credited with resurrection of the assumption of risk theory, and whose writings heavily influenced the judgement in *The Achilles*³²⁶ case is Adam Kramer. He

³²⁰ British Columbia and Vancouver’s Island Spar, Lumber, and Saw-Mill Co v. *Nettleship*, (1868) LR 3 CP 499.

³²¹ *Victoria Laundry (Windsor) v. Newman Industries*, (1949) 2 KB 528, 538–9.

³²² 7 (1969) 1 AC 350, 422.

³²³ JD MAYNE, A TREATISE ON THE LAW OF DAMAGES 8 (1856).

³²⁴ GH TRIETEL, REMEDIES FOR BREACH OF CONTRACT: A COMPARATIVE ACCOUNT 158 (1988).

³²⁵ J Cartwright, *Remoteness of Damage in Contract and Tort: A Reconsideration* 53 Cambridge L. J. 488, 505 (1996).

³²⁶ *Transfield Shipping Inc v. Mercator Shipping Inc* (‘The Achilles’), (2008) UKHL 48

proposed implied assumption of risk as having some role to play while recovering damages and based his argument on the contention that foreseeability may not be a sufficient test.³²⁷ Kramer asserted that the foreseeability requirement is a “rule of thumb” and not a strict rule to be applied for efficiency, fairness, et al. It should be used merely as a framework to understand the intention of the parties and what was agreed between them. This line of analysis is essentially the tacit agreement theory of remoteness, which had been partially discredited in the 20th century. Times have changed and existing principles and rules are directed towards discovering the implicit allocation of risk/responsibility in contracts and this necessitates the revival of this approach.

Kramer contended that the scope of responsibility for breach of contract is implicitly determined by the contract itself, which can be interpreted by looking at the factual situation and the apparent intention through the lens of the objective test and the usual common sense principles. The promisee is not like the potential victim of a tort. He has not had the transaction imposed upon him but has instead entered into it voluntarily. The allocation of responsibility is made by the parties to a contract with full knowledge of the possibility of breach and with full opportunities for disclosure and negotiation, unlike most torts wherein the allocation is made by society with no awareness, input or control on the victim’s part.³²⁸ So, Kramer bases his argument on the fact that there is no reason to be harsh to the promisor as the rules of transaction are being determined voluntarily by the parties themselves. Especially in commercial cases, wherein the intent is to earn profit and maintain the business, we can convincingly say that the promisor does not plan to assume unforeseeable losses. The circumstances of the deal, particularly the magnitude of the price and what insurance could have been available at what cost, are relevant in determining what responsibility the promisor reasonably appears to have intended to assume.³²⁹ Moreover, the party that can most easily or economically deflect the consequences can be presumed to have taken liability for them. This is also Posner’s understanding of the remoteness rule,³³⁰ based on efficiency and most effective sharing of risk. Cost-minimisation can also be discerned as a reason for applying

³²⁷ *Supra* note 3

³²⁸ *Ibid.*

³²⁹ *Ibid.*

³³⁰ R POSNER, ECONOMIC ANALYSIS OF THE LAW 140–1 (5th ed. 1998).

the tacit agreement rule that is based on intent of parties (implicit) rather than explicit terms of the contract.

Circumstances That Warrant Application Of This Theory

The type of contract (carriage, sale of goods, insurance etc.) is significant for determining the type of damages that may be awarded. Certain businesses are governed by norms, which cannot be easily generalised. These norms must be taken to have applicability to a contract, with regard to the circumstances. The inference of assumption of responsibility from mere foreseeability is not justified in the following circumstances (as have been pointed out by Kramer):

- i) Where the promisor has no alternative but to enter the contract, entering the contract does not indicate a voluntary assumption of the risk of foreseeable losses. For instance, this may happen in cases of economic duress.
- ii) If the consequences of breach are harsh, as weighed against the gains received by the promisor under the contract, it will sometimes not be reasonable to deduce that the promisor assumed the risk of such consequences merely from his foresight of such outcomes. Where the consequences may be foreseeable but unlikely, more than mere foresight may be required to infer an assumption of risk like in the case of the stoppage of a whole factory for want of machinery or raw materials (as occurred in both *Hadley v. Baxendale* and *Nettleship*). The example Kramer cites is quite interesting. He says, if I tell my taxi driver that I will miss the opportunity of making a profit of £1 million if I fail to reach an appointment on time, his acceptance of me as a passenger should not lead to the inference that he accepts the risk although things would be different if I upped the fare to 1,00,000.
- iii) Where the promisor has been communicated information that renders losses foreseeable, it may not be reasonable to infer that promisor has implicitly accepted liability for losses where the

communication of the information was casual,³³¹ fortuitous,³³² or from someone other than the claimant³³³ or to an employee who, in commercial reality plays no part in negotiations or decisions.

Kramer also added a caveat to these conditions by stating clearly that in perhaps majority of situations, foreseeability of loss will be sufficient for the promisee to infer that the risk of loss was assumed by the promisor. However, we need to appreciate the fundamental principle, according to which remoteness is dependent upon assumption of risk, with foresight important only in indicating an apparent assumption of risk.

McGregor has also stated that mere contemplation of damages from special circumstances is inadequate and the parties must further intend that the promisor is taking the risk of being responsible for such consequences, should they arise.³³⁴ The House of Lords in *The Achilleas* judgement described assumption of risk as not being an external rule of law imposed upon the parties,³³⁵ instead being agreement-centred and so requiring the court to look at the “presumed intentions”, “common intention” and “shared understanding” of the parties.³³⁶ The court must ask “whether the parties must be assumed to have contracted with each other on the basis that the (defendants) were assuming responsibility for the consequences of that event”³³⁷ and thus identify the “common expectation, objectively assessed, on the basis of which the parties are entering into their contract”³³⁸ i.e. what the parties would “reasonably have considered the extent of the liability they were undertaking”.³³⁹ So then it becomes relevant to ask what has been the “normal expectation of parties to such contracts” in a particular market. Accordingly, the majority in this case held that although still relevant, foreseeability of a loss is not sufficient for establishing that the loss is not too remote and consequently recoverable.³⁴⁰ Lord Hoffman, whilst recognising that the orthodox approach will be applicable in the “great majority of cases”, nevertheless considered

³³¹ SMITH, THE LAW OF CONTRACT 222 (4th ed. 2002).

³³² E MCKENDRICK, CONTRACT LAW: TEXT, CASES, AND MATERIALS 1061 (2003).

³³³ HG BEALE (ed.), CHITTY ON CONTRACTS (29th ed. 2004).

³³⁴ H MCGREGOR, MCGREGOR ON DAMAGES 6-176 (17th ed. 2003).

³³⁵ Lord Hoffmann in *Transfield Shipping Inc v. Mercator Shipping Inc* (‘The Achilleas’) (2008) UKHL 48 ¶ 9.

³³⁶ *Ibid.* ¶¶ 12, 24, 36, 69 and 84.

³³⁷ Lord Hope, *Ibid.* ¶ 30.

³³⁸ Lord Walker, *Ibid.* ¶ 78.

³³⁹ Lord Hoffmann, *Ibid.* ¶ 23.

³⁴⁰ *Ibid.* ¶¶ 9, 17, 21, 32, 36 and 84.

that it may not be sufficient in cases "in which the context, surrounding circumstances or general understanding in the relevant market shows that a party would not reasonably have been regarded as assuming responsibility for such losses".³⁴¹

The Achilleas judgement also referred to the case of *South Australia Asset Management Corp v. York Montague Ltd., (SAAMCO)*³⁴² wherein it was held that even if foreseeable and natural, a loss may be unrecoverable and the House of Lords had relied on the agreement-centred approach of an impliedly restricted assumption of responsibility. Lord Hoffmann had termed it as "scope of duty" of the defendant in SAAMCO. However, he has correctly referred to this assumption of responsibility as the "extent of liability" principle in the *Achilleas*.

Baroness Hale touted this principle as "an interesting but novel dimension" to the way in which the question of remoteness of damage has been dealt with in contract law. She further stated that the question of assumption of risk depends upon a wider range of factors and value judgments and it may bring more clarity in the market in question, but it could also leave scope for controversies in other contractual contexts. Dissenting opinions given by the minority in *The Achilleas* judgement expressed similar concerns and so the law regarding remoteness applicable in U.K. became obscure.

Rule of Remoteness Applicable in UK

Justice Hamblen in *Sylvia Shipping Co Ltd v. Progress Bulk Carriers Ltd.*³⁴³ cleared the ambiguity and confusion with regard to the applicable test of remoteness. He cited with approval Cooke J in *Classic Maritime Inc v. Lion Diversified Holdings Berhad*,³⁴⁴ where His Lordship had said he would be "highly surprised" if *The Achilleas* established a new test for the recoverability of damages for breach of contract. Justice Hamblen said, "The orthodox approach remains the general test of remoteness applicable in the great majority of cases. However, there may be unusual cases, such as *The Achilleas* itself, in which the context, surrounding circumstances or general

³⁴¹ *Ibid.* ¶ 9.

³⁴² (1997) 1 A.C. 191 HL.

³⁴³ (2010) 2 Lloyds Rep 81.

³⁴⁴ (2010) 1 Lloyds Rep 59.

understanding in the relevant market make it necessary specifically to consider whether there has been an assumption of responsibility. This is most likely to be in those relatively rare cases where the application of the general test leads or may lead to an unquantifiable, unpredictable, uncontrollable or disproportionate liability or where there is clear evidence that such a liability would be contrary to market understanding and expectations.” This is consistent with the judgment of Lord Hoffman in *The Achilleas*, in which he makes it clear that the orthodox approach is the "prima facie" rule which will apply in the "great majority of cases" and that "cases of departure from the ordinary foreseeability rule based on individual circumstances will be unusual".³⁴⁵

Even in cases where terms of the contract clearly stipulate assumption of risk by one party for any loss occurring thereto, regard must be paid to the principles of reasonability and public policy in the particular circumstances of a case before holding such a clause as valid. So the law in England seems to be settled with regard to the question of remoteness of damages in contracts, with the agreement centred approach being used in exceptional cases that warrant such an approach and the two limb test being applied in the majority of cases otherwise.

RECOGNITION OF TACIT AGREEMENT TEST IN OTHER COMMON LAW COUNTRIES

Despite recent conflicting opinions and judgements on limitation rule for damages in contracts, modern judges and textbooks give little attention to the assumption of risk view, and base remoteness squarely on foreseeability and knowledge. In common law countries like the U.S., Canada and Australia, courts have generally followed the rules of *Hadley v. Baxendale*. Section 351 of the Second Restatement of the Law of Contracts in U.S. lays down that “damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.”³⁴⁶ Section 2-715 of the UCC stipulates payment for “any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know.”³⁴⁷ Modern commercial transactions resemble very little to the

³⁴⁵ *Supra* note 19

³⁴⁶ GREGORY KLASS, CONTRACT LAW IN THE USA 219 (2010).

³⁴⁷ *Id.*

economic situations existing at the time when the fundamental concepts about damages in contracts emerged, either as positive or case law. Hence, for some time, courts in U.S. experimented with a narrower test of tacit-agreement, holding that the defendant must have tacitly assumed responsibility and the plaintiff needs to prove more than mere knowledge on the part of the defendant that a breach of contract will entail certain damages.³⁴⁸ However, most contemporary authorities including the drafters of the Second Restatement and the UCC today reject this test.³⁴⁹ Nevertheless, it seems that there is some American support for this test at the federal level³⁵⁰ and in South Africa the tacit agreement approach is good law even now.³⁵¹

REMOTENESS PRINCIPLES IN CIVIL LAW

Principles of remoteness of damages as applied in Common Law countries are said to have had their origins in Rome.³⁵² Foreseeability test found its way to the French Civil Code as Article 1150 that limits damages to those foreseen at the time of contracting when there is no ill will in default on obligation. In Civil Law systems influenced by the French Civil Code, foreseeability requirement is the rule, like in Italy (Article 1225) and Belgium (Article 1150). In some Civil Law countries like Germany, Austria and Switzerland, this requirement is non-existent.³⁵³ A recent codification of civil law in Quebec has repeated the rule of limiting damages for breach of contract as had been formulated in the French Civil Code about 200 years earlier.³⁵⁴ Article 613 of the Quebec Civil Code has combined the foreseeability and directness tests and it provides that the debtor is liable only for damages that were foreseen or foreseeable at the time when the obligation was contracted.³⁵⁵ Damages are limited to losses that are an immediate and direct consequence of non-performance.

³⁴⁸ Reynolds Healthcare Services, Inc. v. HMNH Inc., 217 S.W.3d 797, 804 (Ark. 2005).

³⁴⁹ *Supra* note 31.

³⁵⁰ Wells Fargo Bank v. United States, (1995) 33 Fed Cl 233, 242–4.

³⁵¹ JW WESSEL, WESSEL'S LAW OF CONTRACT IN SOUTH AFRICA (Johannesburg, Hortors Ltd, 1937), 3256, 3266.

³⁵² WR Barnes, *Hadley v. Baxendale and Other Common Law Borrowings from the Civil Law*, 11 Texas Wesleyan LR 637 (2005).

³⁵³ *Supra* note 2

³⁵⁴ *Ibid.*

³⁵⁵ *Id.*

Most commentators of Civil Law principles agree that the foreseeability required is essentially objectively assessed, in the sense that the party claiming damages need only prove that the defaulting party was objectively in a position to foresee such loss.³⁵⁶ Civil Law, therefore, requires no more than foreseeability and that is adjudged from the standpoint of the party in breach, not according to reasonable contemplation of both parties, as is the principle in Common Law.³⁵⁷ Foreseeability requirement of Civil Law is hence not identical to the *Hadley* rule, as has been erroneously held by some US courts.³⁵⁸ But the principle of damages in UCC can be said to have been influenced by the Civil Law rule.

REMOTENESS IN INTERNATIONAL COMMERCIAL PRINCIPLES

If one looks at international commercial rules or norms, the tacit agreement of assumption of responsibility approach cannot be observed to have been applied clearly. According to Article 74 of the Vienna Convention on Contracts for The International Sale of Goods (CISG), "Damages for breach of contract by one party consist of a sum equal to the loss including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract." CISG limits damage recovery to possible consequences as compared to probable results of the breach in Common Law systems. This implies that the defaulting party is liable for a greater range of consequential damages in CISG than Common Law or under UCC. In the case of *Macromex S.r.l. v. Globex International Inc.*,³⁵⁹ Article 74 was in question and it was held that it imposes liability for damages suffered as a consequence of the particularly identified breach, "with foreseeable damages... simply as a cap on actual damages."

This provision of CISG has been formulated in an attempt to produce a unified solution based on a pragmatic approach. The drafters' view seems to be that the foreseeability test is the most popular and suitable method of limiting damages. Principle of limitation of recoverable harm in

³⁵⁶ *Ibid.*

³⁵⁷ *Ibid.*

³⁵⁸ Tee Vee Tunes, Inc et al v. Gerhard Schubert GmbH, (2006).

³⁵⁹ 2008 WL 1752530 (S.D. NY 2008)

UNIDROIT Principles 2010, Article 7.4.4 has been adopted from Article 74, CISG and it further stipulates that the requirement of foreseeability must be seen in consonance with that of certainty of harm. However, the UNIDROIT principle also gives a wide measure of discretion to the judge in assessing foreseeability by terming it as a flexible concept. So, even principles of international commercial contracts leave room for applicability of tacit agreement test, which can be read into the provisions by allowing scope for discretion that can be used by the judges in case of such exceptional circumstances.

ASSUMPTION OF RISK THEORY IN INDIA

A cursory glance over the Indian Contract Act would reveal that the legislatures of India have embodied 'remoteness of damage' in Section 73. This section is in consonance with the rule laid down in *Hadley v. Baxendale*. The Supreme Court has held that the rule applicable in India and English Common Law is the same and it is based on the principle of equity of restoring aggrieved party (as far as monetary compensation can do) to the same position had the contract been fulfilled.³⁶⁰

The question that requires consideration is whether the present rule should be modified to include acceptance of risk in case of unusual damage. This modification has not been overtly stated in the Act but authorities, such as Pollock & Mulla, have pondered over this issue. They explicate that in a situation where an unusual loss has occurred, mere knowledge of risk at the time of contracting by both parties is not enough and the defendant should also have accepted such a risk. The defendant will be liable only if after gaining knowledge of some special circumstance, a reasonable man would have assumed such a risk. Mulla further states that communication of special circumstances by the plaintiff to the defendant is vital and therefore, casual communication by a stranger regarding the same will not make the defendant liable in case loss occurs. So, one can conclude that the authorities in India have also accepted Kramer's contentions to some extent.

The Indian Contract Act in its illustration (1) to Section 73 highlights a situation where A, a builder, is contracted by B to build a house and A knows that once the house is built, B would rent it to C.

³⁶⁰ Pannalal Jankidas v. Mohanlal, AIR 1951 SC 144.

A, however, constructs the house in such a bad shape that it falls down before the completion of the project. B is forced to rebuild the house, he loses out on rent and has to even pay compensation to C for breach of contract. In this situation, A will be held responsible for all three losses incurred by B. This is because the situation is such that A had the knowledge about the contract between B and C and he acted upon this knowledge while constructing the house, indicating thereby that he had assumed the risk arising out of such a contract. Even though there is no explicit mention of knowledge and assumption of risk in the Section 73, it can be easily inferred by reading it with this illustration. This illustration can also be juxtaposed with the case *Narain Das v. Basant Lal*,³⁶¹ where the vendee entered into a contract to pay off the vendor's creditor, but was unaware of an agreement between the vendor and creditor whereby the vendor would be entitled to a partial remission of the debt in case it is paid within a specified time. The vendee got delayed in repayment. The vendor in this case was not held liable for the loss of remission as he had no knowledge of such an agreement and therefore could not have accepted to bear the loss of said remission.³⁶²

So far as the applicability of the assumption of risk view in India is concerned, some cases can be said to have referred to or relied upon this principle implicitly. The Calcutta High Court in its decision in the case of *Indian General Navigation and Railway Co. v. Eastern Assam Co. Ltd*³⁶³ held that a party would only be liable for the probable circumstances, which may arise due to a breach of the contract. The court further stated that if the defendant had entered into the contract that was contingent on special circumstances and accepted those circumstances as conditions for the performance of the contract, then he would be liable for the special losses that arise out of the breach. By studying this statement carefully, one would notice that the court has mentioned that the special circumstances have to be 'accepted' by the party entering into the contract. By bringing in the element of acceptance of responsibility, the ruling of the Calcutta High Court seems to be in tune with the reasoning used in *The Achilleas* case.

³⁶¹ 18 I.C. 449.

³⁶² SANJIVA ROW'S COMMENTARY ON THE INDIAN CONTRACT ACT 1071 (11th ed. 2009).

³⁶³ AIR 1921 Cal 315.

In some cases it is essential for the courts to examine the intention of the parties and the nature of their agreement before assessing damages. One such instance is the case of *Dominion of India v. All India Reporter Ltd.*³⁶⁴ in which A sent a set of books to himself by railway. When the consignment arrived, he found that 3 volumes were missing and this rendered the whole set useless. A sued the railway for cost of the whole set but the court held that since the railway company was unaware of the importance of each volume, they could not have assumed the responsibility for the loss of value of the whole set and so they can be held liable only for the value of the books lost. Had the company known about this unusual circumstance regarding the consignment, they might have been held liable for the value of the whole set.

Remoteness of damage is contingent upon the facts and circumstances of each case and therefore, law can only play the role of a guide by means of general principles.³⁶⁵ It may not be feasible to apply the rule as proposed by *The Achilleas* case in every situation, but in cases where there are certain exceptional circumstances, this rule of acceptance of responsibility may be applied in Indian cases as well.

CONCLUDING REMARKS

Recent judgements like the *Achilleas* in UK have created ambiguity regarding appropriate test to be applied while limiting damages payable by the defaulting party. The debate over the modification or replacement of the two-limb test has more or less been concluded by Justice Hamblen in the *Sylvia Shipping* case and British jurists have decided that the tacit agreement approach should only be applicable in exceptional cases.

In Civil Law countries, no discernible evidence can be found of application of agreement approach to remoteness in contracts and main reliance is on foreseeability, directness and certainty tests

³⁶⁴ AIR 1952 Nag 32.

³⁶⁵ POLLOCK AND MULLA, INDIAN CONTRACT AND SPECIFIC RELIEF ACT 1539 (13th ed. 2008).

while computing damages for breach. However, international principles of commercial contract (UNIDROIT) leave scope for its application as discretionary power is given to the judge.

By having taken a global perspective on assumption of risk theory, we conclude that the principle of tacit agreement has a persuasive value in India, especially in exceptional cases, where circumstances warrant its application.

Should Corporate Social Responsibility be made Regulatory

Deepali Singh* and Shreya Shikha**

Successful people have a social responsibility to make the world a better place and not just take from it

- Carrie Underwood

A business organization today is judged by criteria which are very different from those of half a century ago. It has not only to be efficient to satisfy the industrialist by earning him more profits or satisfy the investors and the financier by paying them more dividend and interest; it has also to be conscious of its wider social responsibilities.

Social responsibility is a nebulous idea and hence is defined in various ways. Adolph Berle³⁶⁷ has defined social responsibility as the manager's responsiveness to public consensus. This means that there cannot be the same set of social responsibilities applicable to all countries in all times. These would be determined in each case by the customs, religious, traditions, level of industrialization and a host of other norms and standards about which there is a public consensus at any given time in a given society.

According to Keith Davis,³⁶⁸ the term "social responsibility" refers to two types of business obligations, viz., (a) the socio-economic obligation, and (b) the socio-human obligation.

The socio-economic obligation of every business is to see that the economic consequences of its actions do not adversely affect public welfare. This includes obligations to promote employment opportunities to maintain competition, to curb inflation, etc. the socio-human obligation of every business is to nurture and develop human values (such as morale, cooperation, motivation and self-realization in work).

Every business firm is part of a total economic and political system and not an island without foreign relations. It is at the centre of a network of relationships to persons, groups and things. The

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³⁶⁷ Adolph A. Berle, *The American Economic Republic* (N.Y.: Harcourt Brace and World, 1963).

³⁶⁸ Keith Davis, "The meaning and scope of social responsibility" in Joseph W. McGuire, ed., *Contemporary Management Issues and Viewpoints* (Englewood Cliff, N.J.: Prentice-Hall, 1974).

businessman should, therefore, consider the impact of his employees, investors, consumers, the government and the general public. His task is to mediate among these interests, to ensure that each gets a square deal and that nobody's interests are unduly sacrificed to those others.

ORIGIN AND GROWTH OF THE CONCEPT

Although the subject "social responsibilities of business" in its present form and content has gained popular attention in recent years only, its origin can be traced back to the evolution of the concept of a welfare state.

As the pace of industrialization quickened, employers become more and more concerned with the loss of productive efficiency due to avoidable sickness or accident or to stoppages of work due to bad personal relationships. This gave rise to the idea of a welfare state which was further strengthened by the growth of democracy and of respect for human dignity during the last 150 years. Any extension of democracy has always produced an extension of popular education. As soon as the newly enfranchised are in a position to make their demands effectively felt, what they ask of their governments is social security, protection against the cruel hazards of life and help for the destitute. Accordingly, as the electorate widens, so the rules have to provide as a political necessity, provisions for the aged ,compensation for disablement at work, relief during sickness and unemployment and wage legislation.

The framework of a welfare state and with it the concept of social responsibility have thus come to stay in many countries of the world.

The changing image of business in recent years has lent further support to the idea of the social responsibility. Some public opinion polls of the 1960s and 1970s in the United States have left the businessman disenchanted. These polls have revealed that the businessman is viewed as an individual who does not care for others, who ignores social problems, who preys upon the population ,who exploits labor and who is a selfish money grabber. On the other hand, until these opinions were unveiled, the businessman in America believed that others viewed him as he viewed himself – as a practical down-to-earth, hardworking broad-minded, progressive, interesting, and a competitive free-enterprise. He believed that all others in society looked up to him as a self-sacrificing community leader, pillar of society, generous to a fault, great supporter of education,

patron of the arts, and in short, the salt of the earth. Indeed the businessman- in the pre-poll days- thought of himself as a happy mix between Plato, Gandhi, and Churchill. This poll was an eye-opener. Businessman class started re-evaluating the strategies to change this perception. This results in advent of a totally different era both for consumers and producers. Consumers started getting more benefits as producers look after their satisfaction level by offering them more. Companies started dealing with the societal problems. It increases their product reputation in the market as they getting support from the consumers for their societal works.

The advent of scientific inventions and the dominance of democratic forms of governance in most parts of the world have led to the exponential growth of the middle class all over the world. There are many companies in the world whose annual sales are more than the gross National Products (GNPs) of many countries For e.g; The total annual revenue receipt of the retail chain; Wal-Mart, is greater than the economies of all but 30 of the world's nations. In India, revenue receipts of many companies is more than the annual receipts of many smaller states, e.g; Reliance Industries Limited.

These companies control a larger part of earth's resources, the price of which is paid in the forms of sacrifices by different sections of society. On the other hand, governments are redefining their roles and are limiting themselves to governance and facilitation. This development is sometimes dubbed as symbolizing a shift from state-centered polity to market-centered polity.

In the new, envisaged scenario, the private sector would increase its role in the economy, while the government would take care of services such as basic education, public health an basic medical care. As success brings with it responsibility, the growing size and clout of corporate houses has led to growing expectations as also to a growing need for regulations. The reason why CSR has assumed so much importance today is 'because corporate houses intervene in so many areas of social life, they must be responsible towards society and environment'.

DIFFERENT VIEWS ON SOCIAL RESPONSIBILITY

There are four different views on the social responsibility of business. These are as under:

Communist View: This view advocates the imposition of social responsibilities on business through the instrumentality of the state. Communist hold that free industrial civilization is not good

because its value are of the wrong order. Business has been concerned only with material gain. Economic expediency is taken to be the sole criteria of decision. Therefore, business is evil. Compromise is impossible between the church and the idolatry of wealth which is the practical religion of capitalist societies. Because of this immorality of business standards, this view advocates an imposition of social responsibilities through legislation or force.

Capitalist View: This view holds that economic expediency alone is a just standard for business decisions and that business has an unbridled and an uncontrolled right to make money free from all sorts of social responsibilities. It is argued that by maximizing its profit objective, business gratifies its personal desires and at the same time satisfies the needs of society. Therefore, business should not have any responsibility beyond obeying certain legal codes in achieving its goals. Welfare of society is not the corporation's business. Its business is to make money. If business once begin to serve the public, it will never be able to serve enough. Levitt³⁶⁹ in a powerful attack on social responsibility of businessmen points out that if business assumes a large measure of social responsibility for employee welfare, it will lead to a sort of neofeudalism with all its paternalistic and autocratic ills. The result would be socially less desirable than in the days before businessmen were concerned with social responsibility. Milton Friedman³⁷⁰, who won a Nobel Prize in 1976, holds the view that business should go on with the business of producing goods and services efficiently and leave the solution of social problems to government agencies and concerned individuals. In short, managers should focus on what they know best how to make a profit.

Pragmatic View: This view acknowledges the importance of profits but simultaneously stresses the need for social responsibility. It holds that a company cannot make a social contribution if it is not profitable. Profits are the test of the efficient functioning of a business enterprise. A sick and bankrupt organization is a social liability and can hardly contribute in the area of social responsibility. Hence a businessman's first responsibility. Hence a businessman's first responsibility is to keep his business solvent. But he must also voluntarily assume social responsibilities beyond the legal minimum. This can be done at three levels. At the first level, the manager goes beyond the legal minimum and caters also to public expectations- moving as the

³⁶⁹ Theodore Levitt, The Dangers of Social Responsibility (Harvard Business Review, Sept.-Oct. 1958).

³⁷⁰ Milton Friedman, "The social responsibility of business is to increase its profits", New York Times Magazine, Sept.13.1970.

winds of public opinion blow. At the second level, he anticipates public expectations and acts accordingly. At the third and highest level, he creates new public expectations by voluntarily setting and following the loftiest standards of moral and social responsibility.

Trusteeship View: This view advocates the retention for personal use of so much as is necessary for an honorable livelihood, no better than that enjoyed by million others; and the utilization of the rest for the welfare of the community. The trusteeship slogan is *enjoy thy wealth by renouncing it*. Earn your crores by all means but understand that your wealth is not yours; it belongs to the people.

Social responsibility is an important feature of every business in the modern times. Economic criteria alone cannot justify the existence of business organizations. Social, moral and ethical aspects of business decisions are as economic aspects to judge the success of a business firm. A socially responsible firm not only meets the needs of the society but also enhances its goodwill and creates a long; term and sustainable market for its products.

For a long time in the past, profit maximization was viewed as the sole business objective but this view no more holds good. If companies want to survive and maintain their growth in the market, if they want to become market leaders, they have to sacrifice part of their profits in favor of groups other than owners. This outlook of business recognizes the concept of social responsibility. The concept of social responsibility entails the business organization's obligations to look after the interests of the society beyond the limits of their economic interests.

“CSR is the continuing commitment by the business to behave ethically and contribute to economic development, while improving the quality of the life of the workforce and their families as well as of the local community and society at large”.

CSR should be core concern for all companies and part of each company's operations. CSR focuses on the three dimensions of value creation; profit people and planet. Companies should make all efforts to promote CSR throughout the value-creation chain as they are a part of it. They should take responsibility for the social economic and ecological consequences of their actions and also engage in dialogues with all those who are involved in these dimensions. Dialogues with stakeholders help them identify the social and environmental impacts of their actions. Companies should frame policies and objectives on the basis of these dialogues. CSR encompasses an

organization's commitment to behave in an economically and environmentally sustainable manner, while honoring interests of direct stakeholders.

NATURE OF SOCIAL RESPONSIBILITY

The nature of social responsibility can be understood as follows:

1. Focus on business firms: Though both business and non-business organization should be responsible toward society, the focus is more on business firms to look after social interests.
2. It deals with moral issues: Companies have specific policies and programme to look after interests of their employees and other stakeholders. These programmes are devised from the need to do what is right and just for the society as a whole.
3. It is commensurate with the objective of profit maximization: Social goals are discharged by organizations which are economically sound. A financially unviable enterprise cannot look after interests of the society. In fact, costs of social responsibility are passed to consumers in the form of increased prices of goods and services.
4. It is a pervasive activity: Social responsibility is not just the obligation of top level managers. Managers at all levels are involved in discharging of social responsibilities.
5. It is a continuing activity: Social responsibility is not catering to the interests of society once or twice. It is important for organizations to continuously engage in social issues if they want to survive and grow in the long-run. The economic and the social issues go hand in hand.

Principles

In introducing CSR, companies must adhere to the following principles

1. Supply chain responsibilities: A company's social responsibilities should cover all those with whom companies come in contact, irrespective of the relationship (formal or informal), product or service, or geographic location. These may include suppliers, contractors, alliances etc. Companies must do everything they can in promoting CSR practices throughout their chain of operation.
2. Stakeholder involvement: Companies must be ready to engage in dialogues with stakeholders (workers, suppliers, local population, consumers, social organisations, public

authorities etc.). This will help them know the concerns of stakeholders regarding consequences of company behaviour. There should be ongoing exchange of information between company and its stakeholders regarding company's CSR policies where companies arrive at a mutually accepted agreement about company norms, values, rights and obligations.

3. Transparency and reporting: Companies must be transparent and open with respect to their policies and social conduct. Reporting requires companies to inform stakeholder about the effects of their conduct and the consequences of these effects on other stakeholders. Information can be made available to stakeholders through (a) regular public reports, (b) assessment reports, annual reports and meetings, (c) publication of data and consultation.
4. Independent verification: Companies must verify, that is, internally monitor its CSR policies, quality of its reports and management systems and processes. This verification should be carried out by organizations that are not linked to the companies and have full trust of shareholders involved. Outcome of the verification procedures should be made public in a proper manner.

In a country like India, which is highly populous and poor (actually, the country is rich in natural resources and has a highly knowledgeable populace, but the people living in it are poor due to a gap between the rich and the poor-a gap which is increasing day by day, leading to new types of social problems), and which is aiming at achieving a consistent growth rate of 7 per cent and above, CSR is something that needs to be ingrained in the very blood of policy makers. This growth rate of more than 7 per cent cannot be achieved without rapid industrialization, which means the creation of not only factories but also of new townships, road, power plants, dams, mines, theatres, and so on. People en masse are relocated from one place to another, first to make land available for these developments, and then in the forms of white/blue collar workers to work in these factories. This leaves us with the question- whose development does this entail, for whom is it meant and at whose cost?

Despite speedy economic development strong business fundamentals and the bullish trend in the stock market, the human development indicators, i.e., poverty, illiteracy and infant mortality in the country, continue to cut a sorry picture. It is the duty of those who claim all the credit for development to devise and design mechanisms such that the people do not feel cheated and happily

come forward to offer sacrifices. This can happen only when business consider CSR expenses as amongst their mainstream expenses. All this calls for extensive dialogue and persuasion, leading to changed mindsets among the corporate houses.

The very important question that arose now is-‘what should be the goal of development and at what cost’. The example of China answers to this question to some extent. China has succeeded in lifting 250 million people out of poverty over the past 25 years. However, during the same period, inequalities have doubled. China Human Development Report (CHDR) finds that the gap between those who have been left behind is generally widening, and such inequality is most drastic between religions, urban and rural areas, and between genders and different population groups.

The situation is not very different in India either. The gap between the rich and the poor has widened during the last 50 years, thereby greatly endangering the country’s social, economic and political stability. A number of Indian billionaires are entering the list every years like never before on the other hand children are dying due to malnourishment every year.

When we talk of growth and catching up with the West, we must be aware that, in the end, only a small proportion of the Indian population will enjoy Western standards of living and high consumption. We need to copy the West in terms of increasing both production and productivity, but not consumption. We need to evolve location-specific and environment-friendly strategies of rural industrialization and urbanization in our quest for sustainable and equitable development. **‘The need of the day is to ensure that we take the less fortunate Indians along with us. It is not sufficient if Indian is everywhere outside India, it has to be everywhere within India,’** says Mr. N.R.Narayana Murty, Chief Mentor, Infosys.³⁷¹

The government alone can’t take all the initiatives to alleviate the miseries of the people and to provide them with all the amenities. Therefore, the corporate sector must step in to assist the government till India becomes a truly welfare state. The government has its limitations while the local administration is overwhelmed with routine governance issues. The government is well aware of this fact. Businesses with their professional experience can contribute significantly to the nation’s development.

³⁷¹ Partnership Summit, 2007 organized by CII,Banglore,19 January 2007.

If we have a narrow understanding of the CSR concept, and are able to link it to charity for the poor, it does not require any special skills, and anyone, be it a finance professional or an engineer or a human resources (HR) expert, can spend the money. But this is neither reality nor objective. The issue is much larger than it appears. For any business, effective CSR extends in scope from being emotionally and culturally sensitive, to identifying the target project and ensuring ultimate delivery, and in the process, touching the lives of several persons, male and female, young and poor, who must feel that they are part of the process.

Although economic considerations constitute the main driving factor in business activity, there is growing resistance against the conventional view that business is chiefly a means for only improving the economic condition of an individual or a group of individuals.

The KPMG International Survey of Corporate Responsibility Reporting, 2005 (www.kpmg.com) has identified the following drivers of corporate responsibility in order of their importance:

- (a) Economic considerations
- (b) Ethical considerations
- (c) Innovation and learning
- (d) Employee motivation
- (e) Risk management or risk reduction
- (f) Access to capital or increased shareholder value
- (g) Reputation or brand
- (h) Improvement in market position (market share)
- (i) Strengthen supplier relationship
- (j) Cost saving
- (k) Improved relationships with governmental authorities
- (l) Other factors

India has a number of companies with long traditions of philanthropic and community programmes. As Indian companies grow global, in many corporate houses ownership is becoming distinctive from management. This coupled with other socio-economic, regulatory pressures has resulted in a shift from corporate philanthropy to corporate social investment (CSI). The term CSI

is often used to describe a company's investment in a range of community activities. It includes, but goes beyond, the concept of corporate philanthropy.

India leads in CSR spending growth in recent few years. The reporting of corporate social responsibility (CSR) spending is growing faster in India than anywhere else in the world.³⁷² PSU'S spent over Rs 2400 cr in CSR in 2014-15. According to a record 116 central public sector enterprises have spent an amount of Rs 2447.59 crore on Corporate Social Responsibility (CSR) activity in 2014-2015.³⁷³

Few examples that show that companies are taking CSR very seriously are discussed below:

Azim Premji Foundation Run by the Wipro Chairman, Azim Premji, and the Foundation is working to provide elementary schooling to thousands of underprivileged children. It has partnered with the government and is making efforts to strengthen the education delivery system and building capacity across government organizations through structuring and training. The Foundation became operational in 2001, and roped in over 250 professionals and 1,100 paid volunteers to realise the vision of elementary education in India. The Foundation is currently engaged with over 14,000 schools in partnership with governments of 15 Indian states.

Microsoft Corporation (India) Microsoft has designed a focused programme, 'Project Shikha, to deliver affordable software solutions, comprehensive training and curriculum leadership to students and teachers in government schools. Under the programme, the company aims to 'accelerate IT literacy for over 200,000 school teachers and 10 million students within five years.

Recently Reliance Industries shelled out Rs 760.58 crore on CSR followed by ONGC (Rs 495.23 crore), Infosys (Rs 239.54 crore) and TCS (219 crore)³⁷⁴.

Governments are also taking certain steps to encourage companies participations in CSR. The new Companies Act mandates every company with a net worth of Rs 100 crore to set aside minimum 2% of their 3-year average annual net profit for CSR activities³⁷⁵. The Corporate Affairs Ministry, which is implementing the Companies Act, is in the process of making amendments to AOC-4

³⁷² <http://economictimes.indiatimes.com/topic/CSR> 28 Feb, 2016

³⁷³ <http://economictimes.indiatimes.com/topic/CSR> 10 Mar, 2016

³⁷⁴ <http://economictimes.indiatimes.com/topic/CSR> 26 Feb, 2016

³⁷⁵ <http://economictimes.indiatimes.com/topic/CSR> 19 Jul, 2016

XBRL form –which is used to submit annual financial statements.³⁷⁶ An industry seeks government incentives for investing 2% of CSR fund towards skilling youth.³⁷⁷ Under the Companies Act, 2013, certain classes of profitable entities are required to shell out at least 2% of their three-year average annual net profit towards CSR activities.³⁷⁸ These all assents to the bright future of CSR in India.

CONCLUSION AND SUGGESTIONS

Corporate Social Responsibility is about giving back to Society the business of a company, its priorities, direction of development, philosophy, policies, all is guided by its objectives. Business is an economic institution that operates in social system. It influences various elements in society and is, in turn, influenced by them. The social system is influenced by the way the business carries its activities. A business enterprise must, therefore, correspond to the social environment in which it operates. Traditionally, business referred to institution which carried economic or commercial activities to make profits. Profits were viewed as objectives of business. Objectives are the specific, measurable ends towards which business activities are directed. Objectives determine where business units want to go. Business objectives are the intended goals that prescribe definite scope and suggest direction to the planning efforts of an enterprise. In the past, profit maximization was the basic objective of every firm. The modern thinkers however, view profit maximization as a secondary business objective. The objectives are economic and non-economic. The economic objectives are profit maximization, increase in productivity, optimum allocation of resources, customer creation and innovation. The non-economic objectives are organic (survival, growth, goodwill, resources), human (effective utilization of manpower, development of human resource, participation in management, satisfaction of human beings, training and motivation), social (customer satisfaction, remove social problems, fair trade practices and employment opportunities) and national (development of backward areas, generation small enterprises) of export surplus, research and development, provide social justice and development of small enterprises.

³⁷⁶ <http://economictimes.indiatimes.com/topic/CSR> 15 Aug, 2016

³⁷⁷ <http://economictimes.indiatimes.com/topic/CSR> 15 Sep, 2016

³⁷⁸ <http://economictimes.indiatimes.com/topic/CSR> 29 May, 2016

Arguments for and Against Corporate Social Responsibility

1960S and 1970s Were the years of social awareness and social changes that affected business organizations in many ways• There were concerns about civil rights for minorities, equal rights for women, protection of physical environment, safety and health at the work place and a number of other consumer issues that brought changes in the business environment. CSR came to be defined as responsibilities that go beyond production and sale of goods and services for profit. CSR is an ethical concept. It deals with social dimensions of business that promote activities to improve the quality of social life. It deals with social problems that business organizations need to solve. However, there are arguments, both in favour and against the concept of CSR. These are discussed below:

Arguments in favour of CSR

The following arguments are offered in favors of corporate social responsibility:

1. Long run survival of business concerns: Firms that assume social responsibilities may suffer losses in the short-run but fulfilling social obligations is certainly beneficial for long-run survival of the firms. The short-term costs are, therefore, viewed as investments for long-run profitability.
2. Profitable for the business concerns: Assuming social responsibility is necessary and helpful for long-run survival of business firms. This makes the firm profitable in the, long-run.
3. Moral and social commitment: Business organizations operate in the social environment and, therefore, should be morally committed to the interest of the society`, A plant whose manufacturing activities result in toxic wastes should be morally committed to dispose of the waste to avoid environmental pollution.

Arguments against CSR

The concept of corporate social responsibility has been criticized on the following grounds

- 1 Business is an economic activity It is argued by the opponents of social responsibility that basic function of a business enterprise is to look into economic viability of its operations. It is for the Government to look after interests of the society. The prime responsibility of assuming social responsibility should, therefore, be of the Government and not business enterprises.

2. Quantification of social benefits: What measures social responsibility and to what extent should a business enterprise be engaged in it, what amount of resources should be committed to social values, whose interest should hold priority over others (share-holders should be preferred over suppliers or vice versa) and numerous other questions are open to subjective considerations, which make social responsibility a difficult task to be assumed.

3. Cost-benefit analysis: Any social-benefit programme where initial costs exceed the benefits may not be taken up by business enterprises even in the short-run.

Should Corporate Social Responsibility (SR) be Regulatory?

It is generally believed that social responsibility is voluntary and is in response to market based drivers. It does not relate to legal obligations. Most of the companies also want it to be voluntary. This, however, goes against the concept of corporate accountability which demands that SR should be regulatory, that are often considered as exclusive, one is adopted the other is excluded. These should not be considered so. They are both options that eradicate bad corporate behavior, that is, socially irresponsible behavior. They should encourage socially responsible behavior. In South Africa, though SR is voluntary, there are laws relating to black economic empowerment (BEE) shaping the national SR agenda. State plays an important role in enforcing SR among companies. In India, ISO 14001 requires companies to comply with the Central Pollution Control Board's (regulatory) standards. This is in addition to companies meeting buyers' requirements voluntarily. It, therefore, does not really matter whether SR demands on companies are regulatory or voluntary. Whatever the case, assuming SR requires that companies must integrate a host of social, environmental and economic issues into its management and take note of interests of its stakeholders. While companies in America and Europe are pressurized by stakeholders to adopt CSR practices, the Indian companies do not face any such pressure. They assume SR initiatives are despite the fact that companies in India are not legally bound to formally report CSR activities. Today, there is great stakeholder awareness of corporate, ethical, social and environmental behavior. There is direct stakeholder pressure, peer pressure, investor pressure and pressure from world forces such as globalization and liberalization and increased sense of SR amongst companies. There is constant 'withdrawal' of government and increased interest amongst companies in assuming CSR initiatives. Management schools are developing modules and programmes to build deep sense of corporate responsibility, many more Institutes of Management

in India are making Endeavour to define and produce good corporate citizens in terms of management practices. Ethical business practices have assumed more importance than Government intervention. Some of the concerns of corporate world-wide are environmental protection, transparency amongst stakeholders, education, health, employee welfare activities and compliance with legal requirements. There is so much that companies are doing voluntarily that making CSR regulatory will not improve the matter any further. The Strategic Advisory Group (SAG), however, emphasizes that there should be relationship between economic, environmental and social aspects and impacts of organizations' activities and SR should take a balanced approach for organizations to consider all these issues. Whatever the approach, voluntary or regulatory, they should develop an international standard for SR on which countries can develop their own, consistent and comparable standards. Each country should run its own multi-stakeholder consultation process and adapt the international standards to its domestic context to best meet its SR requirements. Many social activists are demanding that CSR should be made regulatory. It should include specific targets that should be measured every year. So far, CSR is mandatory only in France. It is required that there should be call to action and not merely lip service to the idea of being a good corporate citizen by making donations or setting up institutions like old age homes etc. They believe that corporate should assume greater responsibility for their policies and practices. They must report not only their positive contributions to society but also report why their social actions have not been fully taken care of.

The Role and Regulation of Stock Market System in India

- Prof. Sujata Roy*

ABSTRACT

The research paper basically assesses the role and importance of securities market system in a growing economy. The paper endeavors to answer the research question, as to whether for a developing economy it is essential to have a strong and a well developed securities market system or is it sufficient to simply put in place, a strong and well developed banking institution. The paper also tries to assess what role does regulatory framework plays in India to foster and cater to the objectives of securities market system in India. The researcher while researching on the topic identified that there are economies that are more bank-based like Japan and Germany are strong economies of the world and also economies that are more market based like UK and USA have flourished equally well. The researcher therefore argues in her paper that for a developing economy like India it would be ideal that the banking system and the securities market system must complement each other for a balanced growth. This is particularly advantageous for a developing country like India because a well developed banking and capital market system will encourage investors to save more since the system would provide more investment opportunities to the investors that are tailor made to suit the economic aspirations of the investors.

On an analysis of the available literature on the subject and the topic, the researcher reached a conclusion that a balanced and inclusive growth of an economy is possible where both the banking and the securities market system go hand-in-hand esp. for a developing economy like India. This is particularly so because in a nation like India where income inequalities/ wealth gap is huge more avenues for investments must be made available to the investing public to reduce the income gap among masses.

Keywords: Securities Market, Financial Systems, Bank-based Economy, Market-based Economy etc.

INTRODUCTION

Financial system in a country plays an active role in developing and shaping an economy. They are one of the most significant institutional and functional medium to realize the economic goals of a nation. This is so because every modern economy is based on a sound financial system which helps in production, capital formation and economic growth by encouraging saving habits, mobilizing idle savings from common households and other segments and allocating these savings

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into more productive usage such as trade, commerce, manufacture etc. Savings, finance and investment are the three inter-related components of financial system which covers both credit and cash transactions.

Until the 1990s, the Indian Financial system was primarily restricted to channeling resources from surplus to deficit sectors. The system performed this function reasonably well but also suffered from various limitations as well. It is only in the era of post 1991 that Indian economy started witnessing major reforms coupled with economic transformation on account of the process of Liberalization, Privatization and Globalization (LPG) move adopted by the then Government of India, leading to the massive opening up of the economy to foreign players in a phased manner.³⁸⁰ Also it was during this era that the long-term securities market regulated by The Securities and Exchange Board of India (SEBI)³⁸¹ emerged as a major source of finance for trade and industry in India.

It has been argued that liberalization helps improving the functioning of financial systems by increasing the availability of funds from more sources and avenues than what a closed domestic market may offer to the entrepreneurs.³⁸² It offers a more diversified portfolio for raising finance and leads to diversification of widespread risks across countries. **The R I Mackinnon and E S Shaw's 'complementarity' theory in Economics** strongly advocated in favour of financial liberalization and against '**financial repression**' as was being practiced by various governments of sovereign states in those days i.e. during 1960s and before. Their thesis was published in 1973. **Though the Mackinnon-Shaw theory have been criticized and challenged by other economists on various grounds, but the same was subsequently adopted and endorsed by renowned financial institutions including the World Bank and IMF (International Monetary**

³⁸⁰ Saha Siddhartha Sankar, *Capital Markets and Securities Law*; Taxmann Publications (P.) Ltd.; ISBN 978-93-5071-719-6; Dr. Saha Siddhartha Sankar is a senior faculty at the Department of Commerce (Accounting and Finance), Saint Xavier's College (Autonomous), University of Calcutta, Kolkata India.

³⁸¹ The Securities and Exchange Board of India i.e. SEBI is the regulator for long-term securities market in India. It was established as a separate regulator vide The Securities and Exchange Board of India Act, 1992; url : <http://www.sebi.gov.in/sebiweb/> accessed on the 26th of Jan. 2016

³⁸² Dr. Gemech Firdu and Professor Struthers John, *The Mckinnon-Shaw Hypothesis: Thirty Years on: A Review of Recent Developments in Financial Liberalization Theory*, Dr. Gemech and Prof. Struthers belong to the Paisley Business School, Division of Economics and Enterprise, University of Paisley, Scotland, This paper was Paper presented at Development Studies Association (DSA) Annual Conference on "Globalisation and Development", Glasgow, Scotland, September 2003. The article is available at file:///C:/Documents%20and%20Settings/user/Desktop/SEBI/articles/Mackinnon%20shaw%20financial%20liberalization.pdf accessed last on 20th of Dec. 2015

Fund) during the era of late 1970s and 1980s.³⁸³ Financial liberalization in 1970s was largely characterized by opening of capital account, removing financial repression and also removing restrictions on foreign ownership of domestic property by countries. By early 1970s the financial sectors of most developed economies of the world were already considerably liberalized, while in most developing economies the financial sector has been highly repressed or controlled by the government. It was being argued that financial liberalization, mainly in the domestic financial sector, increases growth rates of those economic sectors that are heavily dependent on external sources of finances compared to other sectors that are not much dependent on external finances.³⁸⁴ This happens because financial liberalization policy if adopted by an economy lowers the cost of borrowing from abroad or outside sources.

The liberalization process has been continuous and gradual in most regions across the world, and most countries adopted a phased liberalization process, except the Latin American countries, where an important reversal in liberalization policies of the Latin American countries was observed in the 1980s.³⁸⁵ At the beginning of the 1970s liberalization was rapid in Latin American countries. This was mainly driven by the southern cone countries, which had engaged in laissez-faire financial policies that mainly supported unrestricted participation both by private and public bodies in financial markets without any kind of direct governmental control over the operations of a free market and its functioning by the governments of these countries. In other words, the Latin American countries did not try to regulate their financial markets initially and as a result there was no intervention or interferences by way of regulatory measures undertaken by the governments of these Latin American countries to regulate the functioning of the financial markets in their individual jurisdictions. As a result, the natural outcome of this unfettered financial market operations pointed out by Díaz-Alejandro (1985) led to massive bankruptcies and a generalized financial crisis throughout the region.³⁸⁶ It is in the backdrop of these financial bankruptcies and

³⁸³ Khan Ashfaq H and Hasan Lubna; *Financial Liberalisation, Savings and Economic Development in Pakistan*; available at http://biblioteca2012.hegoa.efaber.net/system/ebooks/6092/original/Financial_Liberalization__Savings__and_Economic_Development_in_Pakistan.pdf accessed on the 20th of Dec. 2015. Khan Ashfaq H and Hasan Lubna belonged to the Pakistan Institute of Development Economics.

³⁸⁴ Galindo Arturo, Micco Alejandro, Ordonez Guillermo; *Financial Liberalization and Growth: Empirical Evidence*; available at http://siteresources.worldbank.org/INTFR/Resources/financial_liberalization_version23.pdf accessed on the 20th of Dec. 2015. Galindo Arturo, Micco Alejandro, Ordonez Guillermo belonged to the Inter-American Development Bank.

³⁸⁵ Ibid

³⁸⁶ Ibid

crisis that the Latin American countries learnt an important lesson and abandoned laissez-faire practices, introducing stricter regulations and imposing restrictions to their financial systems. This came with a scheme of massive nationalization of the banking sector.³⁸⁷ Later, at the beginning of the 1990s, Latin America engaged once again in the liberalization strategy. The main difference with respect to the previous wave of liberalization that started in 1970s and the later wave of liberalization that started in 1990s was the implementation of regulatory and supervisory mechanisms to avoid the previous types of financial sector crisis. Following this world phenomenon, many developing economies of the world (including India, Pakistan and Bangladesh) started adopting the process of financial liberalization.³⁸⁸ However, there were also other intervening factors and circumstances that led to the liberalization of the Indian markets post 1991.

Financial transactions are dealt with by cash payment as well as the issue of negotiable instruments like cheque, bills of exchanges, hundies etc. The negotiable instruments are regulated by The Negotiable Instruments Act, 1881 in India.³⁸⁹ Recently, The Negotiable Instruments Act, 1881 underwent a major amendment³⁹⁰ in 2015 vide which the section 6 of the said Act of 1881 (which defines and explains the term ‘cheque’) has been amended to include and add **‘a cheque in electronic form’** within its definition. This has been done by way of providing an explanation to the existing definition of ‘cheque’ under the legislation and aligning the same with the Information Technology Act, 2000.³⁹¹ This amendment is perceived to promote financial transparency (as the transfer of funds by using electronic cheques would be electronically recorded) and add flexibility to ensure speedy, easier and faster mode of fund transfer by the users of bank accounts. In order to facilitate the usage of this new process or it’s like (that aim at revolutionizing banking services

³⁸⁷ Supra FN 4

³⁸⁸ Supra FN 3

³⁸⁹ The Negotiable Instruments Act, 1881 has undergone some major amendments in the far end of Dec. 2015 vide the enactment of The Negotiable Instruments (Amendment) Act, 2015 (Act No. 26 of 2015). The pdf form of The Negotiable Instruments (Amendment) Act, 2015 is also available at <http://www.prindia.org/uploads/media/Negotiable%20instrument/Negotiable%20Instruments%20Act,%202015.pdf> accessed on the 23rd of Jan. 2016. The Amendment Act repealed the then existing The Negotiable Instruments (Amendment) Second Ordinance, 2015.

³⁹⁰ Ibid

³⁹¹ The Information Technology Act, 2000 is the law governing and regulating electronic communications and facilitating e-commerce transactions between the parties in India. This legislation has been enacted by the Indian Legislature in furtherance of India’s international obligations and commitment to enact laws fostering United Nations Model law on Electronic Commerce. A text of this legislation is also available at http://www.dot.gov.in/sites/default/files/itbill2000_0.pdf accessed on 23rd of Jan, 2015.

in India), the banking and the financial institutions have to make some institutional arrangements to support the new system of usage electronic cheques by its customer/ account-holders so their customers do not suffer a comparative disadvantage in fund transfer process. Thus financial system may also be referred to as a set of inter-connected institutional arrangements that channel and mobilize funds or financial resources from the units generating surplus income and allocate them to those that are in dire need of it, especially to those who have comparatively more productive usage for the otherwise idle financial surpluses in an economy.

The efficiency with which a financial system allocates the surplus financial resources to various profitable or productive ventures in an economy is a major determining factor for the speedy growth of the economy. This is so because the firms and corporates also vie with each other to attract investments from investing public or body corporates in a financial market. The companies and firms are in need of money to fund their business activities. In order to raise capital or money these companies, firms and other private and public bodies access financial markets. The financial market serves as a medium, so that the most profitable or productive projects may not suffer due to lack of capital and the not so productive ones receive funding priority over the other from the investors in the financial market. This kind of financial trend might be dangerous and also might end up decelerating the economic growth and damaging the entire wellbeing of the country as a whole. The financial system in an economy shares the huge responsibility of efficiently allocating financial resources of the nation amongst the competing firms. Thus the set of activities in a financial market would include production, distribution, exchange and holding of financial assets/ instruments of different kinds by financial institutions, banks and other intermediaries of the market. **In a nutshell, financial market, financial assets, financial services and financial institutions constitute the financial system.**

The financial sector reforms initiated by the Government of India (GOI) soon after 1991 were majorly aimed at promoting an efficient, well diversified and competitive financial system with the ultimate objective of improving the resource allocational efficiency of the system.³⁹² Various factors influence the capital market and its growth. These include level of savings in the household

³⁹² Supra FN 1

sector, taxation levels, and health of economy, corporate performance, industrial trends and common patterns of living.

The strength of the economy is determined by various economic indicators like growth in GDP (Gross Domestic Product), investments, growth in capital formation, stock market indices, agricultural production, consumer price index, unemployment rate, quantum and spread of rainfall, interest rates, strength of the currency, industrial production, bankruptcies, internet and technological penetration, inflation, position on balance of payments and balance of trade and levels of foreign exchange reserves etc.³⁹³

The traditional form of financing companies' projects consists of internal resources and debt financing, particularly from financial institutions for renovation/ modernization, expansion and diversification of the business etc. While the traditional commercial banks and financial institutions may represent important channels for savings, bank deposits etc. but they generally represent immobilized funds, and the banking institutions are as a rule, subjected to a set of regulations, (in Indian context, the set of regulation would refer to RBI³⁹⁴ regulations) applicable to banking and financial institutions in the country, which is issued from time to time by the apex bank and which also limits the activities of the institutions it governs, in converting savings into long-term financing. The remedy lies in broadening the range of assets in which intermediaries may invest. In addition, given the current inclination for greater participation by the non-governmental sector in capital formation, alternative means of intermediation must be explored.³⁹⁵ The upsurge in performance of certain large companies and the astounding increase of their share prices boost the market sentiment to divert their savings more and more into equity investments in such companies. In this process investors are lured to tap the market potentials and increase their

³⁹³ Ciccone, Antonio, and Marek Jarociński. 2010. "Determinants of Economic Growth: Will Data Tell?". *American Economic Journal: Macroeconomics* 2 (4). American Economic Association: 222–46. <http://www.jstor.org.ezproxy.nujs.ac.in/stable/25760327>; Table 3,4 and 5 accessed on the 20th of Dec. 2015; alt. citation Ciccone, Antonio, and Marek Jarociński. "Determinants of Economic Growth: Will Data Tell?". *American Economic Journal: Macroeconomics* 2.4 (2010): 222–246. Web...accessed on 20th of Dec. 2015

³⁹⁴ The Reserve Bank of India; India's Central Bank; incorporated and constituted under the Reserve Bank of India act, 1934; url: <https://www.rbi.org.in/home.aspx> accessed on the 20th of Dec. 2015; The Reserve Bank of India Act, 1934 is available at <https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/RBIA1934170510.pdf> accessed on 20th of Dec. 2015

³⁹⁵ Sebastian, S. B. J.. (1989). The Role of the Securities Market in Mobilizing Resources for the Region. *Social and Economic Studies*, 38(4), 115–132. Retrieved from <http://www.jstor.org.ezproxy.nujs.ac.in/stable/27864906> alt. citation Sebastian, St. Bernard J.. "The Role of the Securities Market in Mobilizing Resources for the Region". *Social and Economic Studies* 38.4 (1989): 115–132. Web... accessed on 20th of Dec. 2015

returns on their investments. This leads to the growth of equity cult among investors to contribute to resources not only for companies but even for financial institutions and banks.

The functions of a good financial system are manifold.³⁹⁶ They are:

- a) Regulation of currency
- b) Banking functions
- c) Performance of agency services and custody of cash reserves
- d) Management of national reserves of international currency
- e) Credit control
- f) Administering national, fiscal and monetary policy to ensure stability of the economy supply and deployment of funds for productive use
- g) Maintaining liquidity. Long term growth of financial system is ensured through:
 - a) Education of investors- Investor education programs empowers the investors and boosts their confidence to participate in the economic growth of the nation. In financial sector investor, education plays a vital role in enhancing and assuring greater participation /involvement of different categories of investors in the financial system of the country.
 - b) Allowing autonomy to Financial Institutions so that the FIs are enabled to become more efficient in a healthy and competitive financial system.
 - c) Consolidation through mergers

³⁹⁶ See generally The Institute of Company Secretaries' July 2014 module on Capital Markets and Securities law; The Institute of Company Secretaries of India, url - <http://www.icsi.edu/> accessed on 23rd of Dec. 2015 is a statutory body formed under The Company Secretaries Act, 1980; sec. 15, 15A and 15B of The Company Secretaries Act, 1980 deals with the functions of the Company Secretaries and its Council of Members and the Institute, among other functions also approve academic courses and their contents, imparts training to the secretarial professionals (also sometimes referred to as corporate governance professional in India) for companies in India. As per G.S.R 390(E) notification issued by The Ministry of Corporate Affairs, Government of India, dated 9th of June 2014, rule 8A has been added to the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 vide which 'A company other than a company covered under rule 8 which has a paid up share capital of five crore rupees or more shall have a whole-time company secretary'. In addition, Section 203 of The Companies Act, 2013, that is applicable to every listed company and also companies having a paid up capital more than 10 crores also club a qualified Company Secretary of a company as a 'Key Managerial Personnel' of a company. Hence in India every company irrespective of whether listed or otherwise with stock exchanges in India but having a paid up capital worth 5 crore or more is mandated by law to employ a whole-time in-house company secretary for compliance purposes. G.S.R 390(E) notification issued by The Ministry of Corporate Affairs, Government of India, dated 9th of June 2014 is available at https://thecompaniesact2013.com/admin/uploads/1402465211_kmp%20amendment.pdf accessed on the 23rd of Dec. 2015

- d) Facilitating entry by way of allowing registration of new institutions to add depth and efficiency to the market
- e) Optimizing regulatory measures and market segmentation.³⁹⁷ Optimizing regulatory control over market participants is a vital function of the financial or economic regulators as the same in effect possess the immense potential to accelerate growth in a systematic manner to achieve the desired economic results.

It is pertinent to mention that many of the aforementioned functions like regulation of currency, regulation of banking system, maintaining cash reserves, credit control and maintaining liquidity etc. or in other words, maintaining overall financial stability in the country is the primary function of the Central Bank i.e. RBI as the Preamble to The Reserve Bank of India Act, 1934 clearly states as under:

*“Reserve Bank for India to regulate the issue of Bank notes and the keeping of reserves with a view to securing monetary stability in [India] and generally to operate the currency and credit system of the country to its advantage”*³⁹⁸

Chapter- III of The Reserve Bank of India Act, 1934 enlists the functions with which the apex bank in India is entrusted with. Section 22 of The Reserve Bank of India Act, 1934 authorizes the apex bank in India i.e. the RBI, to exercise power with regard to the issuance of bank notes, Section 42 of the same legislation bestows the apex bank with the authority to regulate and maintain cash reserves of the scheduled banks in India. Likewise, chapter – IIIA of The Reserve Bank of India Act, 1934 deals with power of RBI to deal with credit information management. The Central Bank is empowered to make rules, regulations and levy penalties in accordance with the applicable laws in financial domain to execute its primary function of maintaining financial stability of the country.

³⁹⁷ Supra FN 16

³⁹⁸ The Reserve Bank of India Act, 1934 is the legislation vide which The Reserve Bank of India derives its power to act as a banker to the Government of India, regulates the banking institutions in India, issues currency notes etc. A copy of this important legislation is also be available in electronic form at <https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/RBIA1934170510.pdf> accessed on the 24th of Jan. 2016

OVERVIEW OF CAPITAL MARKET

Broadly speaking, organizational structure of financial system includes various components i.e. Financial Markets, Products and Market Participants.

CONSTITUENTS OF FINANCIAL SYSTEM:

- a) Financial Markets Products,
- b) Market participants

FINANCIAL MARKETS: Within a domestic economy there are sectors which generate economic surpluses; they are generally referred to as savings. There are other sectors which borrow that surplus and invest it, and thereby expand the economy's productive capacity. The rate at which capital is accumulated will depend on the efficiency with which savings can be transformed into investments.³⁹⁹ Efficient transfer of resources from those having idle resources to others who have a pressing need for them is achieved through the establishment of stable financial market system. In the recent case of **Kotak Mahindra Bank Limited, Mumbai v Trupti Sanjay Mehta and others**⁴⁰⁰ the Hon'ble Bombay High Court acknowledged and highlighted the importance of free flow of funds from one sector to the other or from one avenue to the other smoothly and reiterated that *'Liquidity of finances and flow of money is essential for any healthy and growth oriented economy'*. In this case the Court shared a concern with regard to the huge blockade of funds in the shape of NPAs⁴⁰¹ of scheduled nationalized banks and emphasized the need for converting these NPAs into liquid assets, so that the same can be put to some other productive usage and can also be circulated back in the economy. Hence stated formally, financial markets provide channels or passages for quick and timely allocation of savings converting the same into investment. Money or capital being the scare resource in any economy, its flexible, faster and smooth flow ensures timely availability of funds to different sectors deserving priority over the other to be invested in terms of capital. These also provide a variety of options to the savers as well as make its various forms of assets or instruments available through which the investors can help entrepreneurs raise funds and thereby decouple the acts of saving and investment. The savers and investors are constrained not by their individual abilities, but by the economy's ability, to invest and save

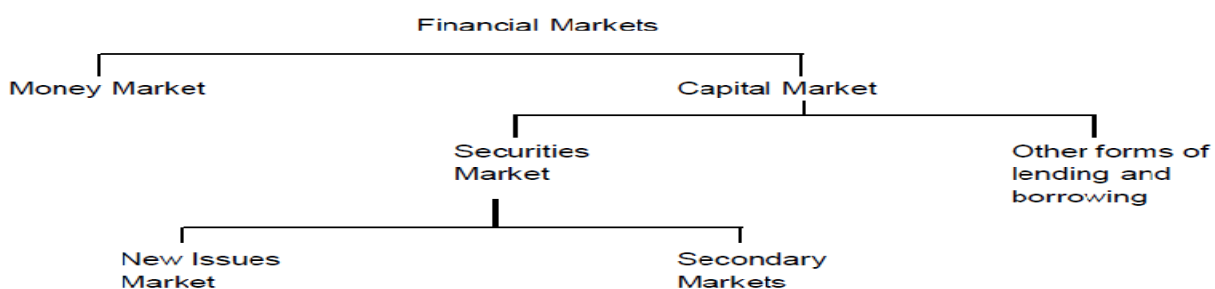
³⁹⁹ Supra FN 11

⁴⁰⁰ 2015 Indlaw MUM 1360

⁴⁰¹ Non-performing assets of banks under the SARFAESI Act, 2002

respectively. The financial markets, thus, contribute to economic development to the extent that the latter depends on the rates of savings and investment.

The financial markets have two major components; the money market and the capital market. Or in other words, there are two types of markets where borrowing and lending of money takes place between fund surplus and fund scarce body corporates and groups. **The market catering to the need of short term funds are called ‘money market’ the markets that are meant to cater to the need for long-term funds are called ‘capital market’.** Financial markets are categorized as under:



Source: Module of ICSI on Capital Markets and Securities laws (published April, 2016)

MONEY MARKET

The money market refers to the market where borrowers and lenders exchange short term funds to solve their liquidity needs. Money market instruments are generally financial claims that have low default risks, maturities below one-year period and high marketability. **Chapter –IIID of The Reserve Bank of India Act, 1934 prescribes legal provisions regulating the money market instruments in India** by the Central Bank or the apex banking institution of the country i.e. The Reserve Bank of India. **Section 45U clause (b) of The Reserve Bank of India Act, 1934⁴⁰² provides an inclusive definition of the term ‘money market instruments’.** According to the section money market instruments includes a variety of instruments like term money, call or notice

⁴⁰² Section 45U of The Reserve bank of India Act, 1934 defines the term ‘money market instruments’ and also it defines some of the instruments that legally constitute ‘money market instruments’ like section 45U cl. (a) defines certain specific types of ‘derivatives’, repo, reverse repo and government securities etc. The Reserve Bank of India is the central bank of the nation and is a statutory body formed under The Reserve bank of India Act, 1934. The Act can also be accessed from the official website of the Reserve Bank of India available at <https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/RBIA1934170510.pdf> accessed on the 23rd of Jan. 2016.

money, repo, reverse repo, certificate of deposit, commercial paper and such other debt instruments etc. which has the maturity period ranging from 14 days' period to a maximum of 1 year period.

The apex banking institution of the country i.e. **The Reserve Bank of India derives its power to regulate money market instruments**, certain specific types of financial derivative instruments which is primarily based upon money market instruments and the government securities⁴⁰³ etc. from **section 45W of The Reserve Bank of India Act, 1934.**⁴⁰⁴

CAPITAL MARKET

Capital Market is a market for financial investments which are direct or indirect claims to capital. Capital markets play a significant role in the national economy. It is wider than the Securities Market and embraces all forms of lending and borrowing, whether or not evidenced by the creation of a negotiable financial instruments. A developed, dynamic and vibrant capital market can immensely contribute to speedy economic growth and development of a nation. As such the capital market comprises of a set of complex institutions and mechanisms through which intermediate and long term funds are pooled and made available to business, government and individuals. The Capital Market also encompasses all the process by which securities already outstanding are flexibly transferred. The capital market and in particular the stock exchange is referred to as the barometer of the economy. Government's policy is so moulded that creation of wealth through products and services is facilitated and surpluses and profits are channelized into productive uses through capital market operations. Reasonable opportunities and protection are afforded by the Government through special measures in the capital market to get new investments from the public and the Institutions and to ensure their liquidity.

NEED FOR CAPITAL MARKET

⁴⁰³ Government securities are regulated by the Reserve Bank of India as per the Government Securities Act, 2006 read with the Government Securities Regulations, 2007. A copy of the Act and the corresponding regulations promulgated there under is also available in digital form at

<https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/GOVTSA130312.pdf> and at

<https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/GSRE13032012.pdf> accessed on the 7th of June, 2016.

⁴⁰⁴ Section 45W of The Reserve Bank of India Act, 1934 available at

<https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/RBIA1934170510.pdf> accessed on the 23rd of Jan. 2016

There are number of economists who suggest that stock market growth is directly proportional to the economic growth of a country. Though there are no conclusive evidence backed by quantitative data analysis that the stock market growth results in growth of an economy but it has been largely observed that the countries that have a robust, strong and well-regulated stock market system in place have performed fairly well economically compared to those who do not have them. Or in other words, it has been mostly observed that most developed countries across the globe also do have put in place a strong and well-regulated stock market system. Some of the important role played by the capital market system in an economy is chalked out as under:⁴⁰⁵

- Capital market plays an extremely important role in promoting and sustaining the growth of an economy.
- It is an important and efficient conduit to channel and mobilize funds to enterprises, both private and government.
- It provides an effective source of investment in the economy.
- It plays a critical role in mobilizing savings for investment in productive assets, with a view to enhancing a country's long-term growth prospects, and thus acts as a major catalyst in transforming the economy into a more efficient, innovative and competitive market place within the global arena.
- In addition to resource allocation, capital markets also provide a medium for risk management by allowing the diversification of risk in the economy.
- A well-functioning capital market tends to improve information quality as it plays a major role in encouraging the adoption of stronger corporate governance principles, thus supporting a trading environment, which is founded on integrity.
- Capital market has played a crucial role in supporting periods of technological progress and economic development throughout history.
- Among other things, liquid markets make it possible to obtain financing for capital-intensive projects with long gestation periods. This certainly held true during the industrial

⁴⁰⁵ See generally ICSI module on Capital Markets and Securities Law, as per new syllabus published in July 2014; ICSI is a statutory body of compliance professionals in India formed and regulated by The Company Secretaries Act, 1980; The Company Secretaries Regulations, 1982 and The Company Secretaries (Nomination of Members to The Council) Rule, 2006 in India. The set of rules, regulations and the legislation governing the Company Secretaries in India is available at <http://www.icsi.edu/AboutUs/CompanySecretariesAct1980andRulesRegulation.aspx> accessed on the 23rd of Dec. 2015

revolution in the 18th century and continues to apply even as we move towards the so-called "New Economy".

- Capital markets make it possible for companies to give shares to their employees via ESOPs.
- Capital markets provide a currency for acquisitions via share swaps.
- Capital markets provide an excellent route for disinvestments to take place.
- Venture Capital and Private Equity funds investing in unlisted companies get an exit option when the company gets listed on the capital markets
- The existence of deep and broad capital market is absolutely crucial in spurring the growth the country.

Emphasizing the role played by the stock exchanges in the economic development of a nation, the Hon'ble Supreme Court of India in the case of *Madhubhai Amathalal Gandhi Vs. The Union of India (UOI)*⁴⁰⁶ observed that the history of stock exchanges in foreign countries as well as India shows that the development of joint stock enterprise would never have reached its present stage but for the facilities which the stock exchanges provided for dealing in securities. They have a very important function to fulfil in the country's economy. Their main function, in the words of an eminent writer, is "to liquefy capital by enabling a person who has invested money in, say, a factory or a railway to convert it into cash by disposing of his share in the enterprise to the someone else." Without the stock exchanges, capital would become immobilized.

Available literature suggests that many African countries have been able to tap/ attract better global investments by forming and establishing stock exchanges in their jurisdiction. As such there has been a surge in establishment stock exchanges in the last two and half decades among African countries.⁴⁰⁷ Various governments of Sub-Saharan African countries have taken active interest in setting up stock exchanges across the country. Prior to around two and a half decade the Sub-

⁴⁰⁶ MANU/SC/0023/1960

⁴⁰⁷ Allen Franklin, Otchere Isaac and Senbet Lemma W.; *African financial Systems: A Review* available at <http://www.sciencedirect.com/science/article/pii/S1879933711000042> accessed on 17th of Dec. 2015; Allen, F., et al., *African financial systems: A review*. *Rev. Dev. Finance* (2011), doi: 10.1016/j.rdf.2011.03.003. Allen Franklin is from Finance Department, Wharton School, University of Pennsylvania, USA; Otchere Isaac is from Sprott School of Business, Carleton University, Canada; Lemma Senbet W is from the Robert H. Smith School of Business, University of Maryland, USA

Saharan Africa had only 5 stock exchange and 3 stock exchanges in North Africa now there are around 20 stock exchanges in Sub Saharan Africa.⁴⁰⁸ Many governments have formed capital market commissions with the aim of forming and regulating stock markets in their economy.⁴⁰⁹ Some of the stock exchanges formed around last two and half decades in the African sub-continent are Botswana Stock Exchange (opened in 1989), Ghana Stock Exchange (opened in 1989), Malawi Stock Exchange (opened in 1996), Namibia Stock Exchange (opened in 1992), Swaziland Stock Exchange (opened in 1990) and Zambia Stock Exchange (opened in 1994) etc.⁴¹⁰

An essential imperative for India has been to develop its capital market in order to ensure free flow of funds from one sector to the other and to provide alternative sources of funding for companies and in doing so, achieve more effective mobilization of investors 'savings. Capital market also provides a valuable source of external finance. For a long time, the Indian market was considered too small to warrant much attention. However, this view has changed rapidly as vast amounts of both international and domestic investment have poured into the Indian capital markets over the last two decade or more. The Indian market is no longer viewed as a static universe but as a constantly evolving one providing attractive opportunities to the investing community.

FUNCTIONS OF THE CAPITAL MARKET

The major objectives of capital market are:

- To mobilize resources for investments.
- To facilitate buying and selling of securities.
- To facilitate the process of efficient price discovery.
- To facilitate settlement of transactions in accordance with the predetermined time schedules as agreed upon between to the parties to the transaction.

SECURITIES MARKET: The long term securities market is regulated by The Securities and Exchange Board of India, a statutory body formed under The Securities and Exchange Board of

⁴⁰⁸ Ibid

⁴⁰⁹ Staines Nicholas, *Developing Angola's Capital Markets*; Staines Nicholas is the Resident Representative at Luanda, Angola, His interview available at www.imf.org/luanda accessed on 16th of Dec. 2015

⁴¹⁰ Kenny Charles J and Moss Todd J, *Stock Markets in Africa: Emerging Lions or White Elephants*; World Bank Vol 26, No.5, pp 829-843, 1998, Elsevier Science Ltd. PII: S0305- 750X (98)00019-9; Kenny Charles J belonged to World Bank, Washington DC, USA and Moss Todd J belonged to School of Oriental and African Studies, London UK

India Act, 1992.⁴¹¹ The Securities Market refers to the markets for those financial instruments/claims/obligations etc. that are commonly and readily transferable by sale. The term ‘securities’⁴¹² have been defined under section 2 sub-section (h) of The Securities Contract (Regulation) Act, 1956. Section 2(h) of The Securities Contract Regulation Act, 1956 provides a very wide and inclusive definition of the term ‘securities’ and includes also the financial derivative instruments defined under section 2(ac) of The Securities Contract Regulation Act, 1956. The Securities Contract Regulation Act, 1956 is the primary law governing the day to day operations of the stock exchanges and securities dealings in India. In this regard it is pertinent to mention that the **Proviso to section 45W of The Reserve Bank of India Act, 1934**⁴¹³ clearly excludes the regulation of securities mentioned under **section 2 of The Securities Contracts (Regulation) Act, 1956** from the purview and domain of regulatory supervision of the Central Bank of India i.e. The Reserve Bank of India. This clearly demarcates and draws the line between the scope of activity of the banking and securities market regulator in India. The Securities Market has two inter-dependent and inseparable segments, the new issues (primary) market and the stock (secondary) market.

Since money market instruments are regulated by The Reserve Bank of India and also because of their nature and shorter maturity period they are generally considered as less risky instruments by the investors. This research paper would go deeper and primarily analyses in details the long term capital market instruments regulated by the Securities and Exchange Board of India (SEBI) and make reference to the RBI regulated money market instruments wherever necessary for the purposes of the study of long-term securities market regulated by the SEBI.

PRIMARY MARKET:

In its simplest form market means a space (including the online e-commerce domain space) where buyers and sellers of goods and services meet and carry out their transaction. Hence market need not essentially have a physical location and may be even an online domain space or portal only.

⁴¹¹ The Securities and Exchange Board of India is the regulator for securities markets in India. url: <http://www.sebi.gov.in/sebiweb/> accessed on 23rd of Jan. 2016

⁴¹² Section 2 sub-section (h) of The Securities Contract Regulation Act, 1956 defines term ‘securities’ that are traded in the market in India. In India the Securities Contract Regulation Act, 1956 is the primary piece of legislation regulating the operations in securities markets.

⁴¹³ A copy of The Reserve Bank of India Act, 1934 is available at <https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/RBIA1934170510.pdf> accessed on the 23rd of Jan. 2016

The primary market provides the channel for sale of new securities, while the secondary market deals in securities previously issued. The issuer of securities viz. the public companies (as defined under section 2(71) of The Companies Act, 2013)⁴¹⁴ or other corporate bodies, sell the securities in the primary market to raise funds for investment and/or to discharge some of their pre-existing obligation(s). **This is the reason also why the primary market is also known as the market of ‘original’ or ‘first’ sale, because in this market the buyer or the investor of securities purchases the securities directly from its creator or issuer (company) of securities.** In other words, the market wherein resources are mobilized by companies through the issue of new securities is called the primary market. These resources are required for new projects as well as for existing projects with a view to expansion, modernization, diversification and upgradation.

The Primary Market (New Issues) is of great significance to the economy of a country. It is through the primary market that funds flow for productive purposes from investors to entrepreneurs. The latter use the funds for creating new products and rendering services to customers in India and abroad. The strength of the economy of a country is gauged by the activities of the Stock Exchanges. The primary market creates and offers the merchandise for the secondary market.

SECONDARY MARKET:

The secondary market enables those who hold securities to adjust their holdings in response to changes in their assessment of risk and return. They also sell securities for cash to meet their liquidity needs. The price signals, which subsume all information about the issuer and his business including, associated risk, generated in the secondary market, help the primary market in allocation of funds. Secondary market essentially comprises of stock exchanges which provide platform for purchase and sale of securities by investors. The trading platform of stock exchanges are accessible only through brokers and trading of securities is confined only to stock exchanges. The stock market or secondary market ensures free marketability, negotiability and price discharge. For these reasons the stock market is referred to as the nerve center of the capital market, reflecting the economic trend as well as the hopes, aspirations and apprehensions of the investors.

This secondary market has further two components, first, **the spot market where securities are traded for immediate delivery and payment, the other is futures market where the securities**

⁴¹⁴ The Companies Act, 2013 is the newly enacted law by the Indian Legislature regulating and governing companies in India. Section 2(71) of The Companies Act, 2013 legally defines ‘public’ companies in India.

are traded for future delivery and payment.⁴¹⁵ Another variant is the options market where securities are traded for conditional future delivery. Generally, **two types of options are traded** in the options market. **A put option permits the owner to sell a security to the writer of the option at a pre-determined price before a certain date, while a call option permits the buyer to purchase a security from the writer of the option at a particular price before a certain date.**⁴¹⁶ Products and Market Participants Savings are linked to investments by a variety of intermediaries through a range of complex financial products called “securities” which has been defined in the Securities Contracts (Regulation) Act, 1956 to include shares, scrips, stocks, bonds, debentures, debenture stock, or other marketable securities of like nature in or of any incorporate company or body corporate, government securities,⁴¹⁷ derivatives of securities, units of collective investment scheme, security receipts, interest and rights in securities, or any other instruments so declared by the central government.⁴¹⁸ There are a set of economic units who demand securities in lieu of funds and others who supply securities for funds. These demand for and supply of securities and funds determine, under competitive market conditions in goods and securities market, the prices of securities. It is not that the suppliers of funds and suppliers of securities meet each other and exchange funds for securities. **It is difficult to accomplish such double coincidence of wants. The amount of funds supplied by the supplier of funds may not be the amount needed by the supplier of securities.** Similarly, the risk, liquidity and maturity characteristics of the securities may not match preference of the supplier of funds. **In such cases; they incur substantial search costs to find each other. Search costs are minimized by the intermediaries who match and bring these suppliers together.** They may act as agents to match the needs of the suppliers of funds/securities, help them in creation and sale of securities or buy the securities issued by supplier of securities and in turn, sell their own securities to suppliers of funds. It is, thus, a misnomer that securities market disintermediates by establishing a direct relationship between the suppliers of funds and suppliers of securities. The market does not work in a vacuum; it requires services of a large variety of intermediaries like merchant bankers, brokers, etc. to bring

⁴¹⁵ Section 2 sub-section (i) (a) and (b) of The Securities Contract Regulation Act, 1956 defines spot delivery contracts. The sub-section excludes the postal delays incurred while calculating the time period of delivery of securities or funds in physical deliveries of funds or securities. The sub-section deals with both online (i.e. demat account transactions) as well as offline transactions.

⁴¹⁶ Section 2 sub-section (d) of The Securities Contract Regulation Act, 1956 defines ‘options in securities’

⁴¹⁷ Supra FN 24

⁴¹⁸ Supra FN 23

the suppliers of funds and suppliers of securities together for a variety of transactions. The disintermediation in the securities market is in fact an intermediation with a difference; it is a risk-less intermediation, where the ultimate risks are borne by the suppliers of funds/ securities (issuers of securities and investors in securities), and not the intermediaries. *The securities market, thus, has essentially three categories of participants with a statutory regulator i.e. The Securities and Exchange Board of India*⁴¹⁹ to regulate and promote the market. **The three market participants are namely, the issuers of securities, the investors in securities and the market intermediaries.** The issuers and investors are the consumers of services rendered by the intermediaries while the investors are consumers of securities issued by issuers. Those who receive funds in exchange for securities and those who receive securities in exchange for funds often need the reassurance that it is safe to do so. This reassurance is provided by the law and custom, often enforced by the regulator. The regulator develops fair market practices and regulates the conduct of issuers of securities and the intermediaries so as to protect the interests of investors in securities. The regulator ensures a high standard of service from intermediaries and supply of quality securities and non-manipulated demand for them in the market. The Securities Market allows people to do more with their savings than they would otherwise could. It also provides financing that enables people to do more with their ideas and talents than would otherwise be possible. The people's savings are matched with the best ideas and talents in the economy. Stated formally, the Securities Market provides a linkage between the savings and the investment across the entities, time and space. It mobilizes savings and channelizes them through securities into preferred enterprises. The Securities Market also provides a market place for purchase and sale of securities and thereby ensures transferability of securities, which is the basis for the joint stock enterprises system. The existence of the Securities Market makes it possible to satisfy simultaneously the needs of the enterprises for capital and the need of investors for liquidity. Securities Market

- Is a link between investment & savings
- Mobilizes & channelizes savings
- Provides liquidity to investors

⁴¹⁹ The Securities and Exchange Board of India, url: <http://www.sebi.gov.in/sebiweb/> accessed on the 23rd of Jan. 2015 commonly addressed as 'SEBI' is the regulator of capital markets in India. The Securities and Exchanges Board of India has been formed vide a legislation enacted by the Indian Parliament viz. The Securities and Exchange Board of India Act, 1992.

- Is a market place for purchase and sale of securities?

The liquidity, the market confers and the yield promised or anticipated on security ownership may be sufficiently.

OVERVIEW OF CAPITAL MARKET:

It is great to attract net savings of income which would otherwise have been consumed. Net savings may also occur because of other attractive features of security ownership, e.g. the possibility of capital gain or protection of savings against inflation. A developed Securities Market enables all individuals, no matter how limited their means, to share the increased wealth provided by competitive private enterprises. The Securities Market allows individuals who cannot carry an activity in its entirety within their resources to invest whatever is individually possible and preferred in that activity carried on by an enterprise. Conversely, individuals who cannot begin an enterprise, they can attract enough investment from others to make a start. In both cases individuals who contribute to the investment made in the enterprise share the fruits. The Securities Market, by allowing an individual to diversify risk among many ventures to offset gains and losses, increases the likelihood of long-term, overall success. A well-functioning securities market is conducive to sustained economic growth. There have been a number of studies, starting from World Bank and IMF to various scholars, which have established robust relationship not only one way, but also the both ways, between the development in the securities market and the economic growth. The securities market fosters economic growth to the extent that it-

- a) Augments the quantities of real savings and capital formation from any given level of national income,
- b) Increases net capital inflow from abroad,
- c) Raises the productivity of investment by improving allocation of investible funds, and
- d) Reduces the cost of capital. It is reasonable to expect savings and capital accumulation and formation to respond favourably to developments in securities market.

The provision of even simple securities decouples individual acts of saving from those of investment over both time and space and thus allows savings to occur without the need for a concomitant act of investment. **If economic units rely entirely on self-finance, investment is constrained in two ways:** by the ability and willingness of any unit to save, and by its ability and

willingness to invest. The unequal distribution of entrepreneurial talents and risk taking proclivities in any economy means that at one extreme there are some whose investment plans may be frustrated for want of enough savings, while at the other end, there are those who do not need to consume all their incomes but who are too inert to save or too cautious to invest the surplus productively. For the economy as a whole, productive investment may thus fall short of its potential level. In these circumstances, the securities market provides a bridge between ultimate savers and ultimate investors and creates the opportunity to put the savings of the cautious at the disposal of the enterprising, thus promising to raise the total level of investment and hence of growth. The indivisibility or lumpiness of many potentially profitable but large investments reinforces this argument. These are commonly beyond the financing capacity of any single economic unit but may be supported if the investor can gather and combine the savings of many. Moreover, the availability of yield bearing securities makes present consumption more expensive relative to

future consumption and, therefore, people might be induced to consume less today. The composition of savings may also change with fewer saving being held in the form of idle money or unproductive durable assets, simply because more divisible and liquid assets are available.

INTERNATIONAL LINKAGE:

The securities market facilitates the internationalization of an economy by linking it with the rest of the world. This linkage assists through the inflow of capital in the form of portfolio investment. Moreover, a strong domestic stock market performance forms the basis for well performing domestic corporate to raise capital in the international market. This implies that the domestic economy is opened up to international competitive pressures, which help to raise efficiency. It is also very likely that existence of a domestic securities market will deter capital outflow by providing attractive investment opportunities within domestic economy.

IMPROVED INVESTMENT ALLOCATION:

Any financial development produces allocational improvement over a system of segregated investment opportunities. The benefits of improved investment allocation are such that **Mc Kinnon defines** economic development as reduction of the great dispersion in social rate of return to existing and new investments under domestic entrepreneurial control. Instead of emphasizing

scarcity of capital, he focuses on the extra-ordinary distortions commonly found in the domestic securities markets of the developing countries. In the face of great discrepancies in rate of return, the accumulation of capital does not contribute much to development. A developed securities market successfully monitors the efficiency with which the existing capital stock is deployed.

STANDARDISED PRODUCTS AND REDUCTION IN COSTS:

In as much as the securities market enlarges the financial sector, promoting additional and more sophisticated financing, it increases opportunities for specialization, division of labour and reductions in costs in financial activities. The securities market and its institutions help the user in many ways to reduce the cost of capital. They provide a convenient marketplace to which investors and issuers of securities go and thereby avoid the need to search a suitable counterpart. The market provides standardized products and thereby cuts the information costs associated with individual instruments. The market institutions specialize and operate on large scale which cuts costs through the use of tested procedures and routines.

DEVELOPMENTAL BENEFITS:

There are also other developmental benefits associated with the existence of a securities market;

1. The securities market provides a fast-rate breeding ground for the skills and judgement needed for entrepreneurship, risk bearing, portfolio selection and management.
2. An active securities market serves as an 'engine' of general financial development and may, in particular, accelerate the integration of informal financial systems with the institutional financial sector. Securities directly displace traditional assets such as gold and stocks of produce or, indirectly, may provide portfolio assets for unit trusts, pension funds and similar FIs that raise savings from the traditional sector.
3. The existence of securities market enhances the scope, and provides institutional mechanisms, for the operation of monetary and financial policy.

CAPITAL MARKETS ALSO ACT AS DATA REPOSITORY:

Availability and accessibility of reliable, timely and accurate data can be termed as an asset that needs to be utilized and further processed for public good and policy decision making. Regulatory compliance can be enhanced and ensured by getting access and control of various disintegrated

and scattered data and integrating them into a centralized system, which can then be used for meaningful policy making. In this regard, the capital market regulator in India i.e. **SEBI has set up Data Warehouse** to cater to its surveillance, investigation and research requirements. While statistics on securities markets is needed to make informed policy decisions, it is also a pre-requisite for the genuine empowerment of stakeholders, researchers and investors.

SEBI began publishing data's and statistics in the form of a handbook since 2004⁴²⁰ and the same is uploaded on its website for enrichment and utilization by various domestic and international stakeholder groups including academics, researchers, policy makers and other market participants.

CAPITAL MARKET REFORMS:

Reforms in secondary market in India have focused on three main areas: structure and functioning of stock exchanges, automation of trading and post trade systems, and the introduction of surveillance and monitoring systems.⁴²¹ Computerized online trading of securities, and setting up of clearing houses or settlement guarantee funds were made compulsory for stock exchanges. Stock exchanges were permitted to expand their trading to locations outside their jurisdiction through computer terminals. Thus, major stock exchanges in India have started locating computer terminals in far-flung areas, while smaller regional exchanges are planning to consolidate by using centralized trading under a federated structure. Online trading systems have been introduced in almost all stock exchanges. Trading is much more transparent and quicker than in the past.

CONCLUSION:

In this chapter the researcher made an attempt to analyses and consolidate the various views of different authors and economists across the globe and the thrust which they lay upon securities market system of a nation. These views generally put forth the potential and actual contribution of the capital market system in an economy. In this perspective, the researcher tried to highlight the arguments provided by some economists who contend that there is strong connection between the

⁴²⁰ SEBI's Handbook of Statistics available at <http://www.sebi.com/> and SEBI's Handbook of Statistics 2014 available at http://203.199.247.102/cms/sebi_data/attachdocs/1434443549912.pdf accessed on the 15th of Dec. 2015

⁴²¹ Prof. Cho Yoon Je, *Indian Capital Market Recent developments and Policy Issues*; available at <http://citeseerx.ist.psu.edu/viewdoc/download?rep=rep1&type=pdf&doi=10.1.1.194.4505> accessed on 15th Dec. 2015. Prof. Cho is Ph.D. in Economics from Stanford University and is currently a Full Time Professor of International Finance at the Graduate school of International studies, Sogang University Seoul, Korea. His full profile is available at <http://gsis.sogang.ac.kr/> accessed on 15th of Dec. 2015.

existences of a robust capital market system with that of positive economic growth and development of a nation.

Moreover, **‘investment in securities markets’ and the size of ‘market capitalization by listed domestic companies’⁴²² in an economy, have been identified as one of the key indicators of economic growth of a country by international financial institutions of repute like the World Bank.**⁴²³ Also as per the statistics available at the World Bank’s website⁴²⁴, most OECD and non OECD High income countries have higher total volume of stock trades expressed as a percentage of the total GDP, as compared to India. Hence it can be assumed to some extent **that the higher the volume of stocks traded in securities markets and domestic bourses; the better it is for an economy.** In this regard, it is pertinent to mention here that in the year 2015, **the total value of stock traded to percentage of GDP has been approx. 108 for the world, for USA the same is approx. 237, for upper middle income countries it is 81, for the United Kingdom it is approx. 46, for India the same is only 35.**⁴²⁵ In this chapter, the researcher also made an attempt connect the various aspects of capital market system with applicable laws in India, which determines the scope of their activity and the regulatory framework within which the system must operate or function.

In her concluding remarks to this chapter, the researcher would prefer to conclude by saying that *though there is no conclusive evidence to support the view that economic growth of a nation is fully dependent on the existence of a robust and a well-regulated securities market, because economic growth depends on multiple factors and hence it is difficult to isolate one factor and study its co-relation with overall macro-economic wellbeing. Moreover, there are strong evidences on both of argument that support bank-based and market based economy systems. For instance,*

⁴²² According to section 2 sub-section (52) of The Companies Act, 2013 “listed company” means a company which has any of its securities listed on any recognized stock exchange in India. The Companies Act, 2013 is the primary law regulating all types of companies in India. The Companies Act, 2013 came into force majorly on the 1st of April, 2014. The Companies Act, 2013 replaced and repealed the 57 years old existing statute governing and regulating companies in India, i.e. The Companies Act, 1956. Some of the provisions of the new legislation governing companies in India i.e. The Companies Act, 2013 are yet to be notified. A copy of the newly enacted The Companies Act, 2013 can also be accessed at the website of The Ministry of Corporate Affairs’ website available at <http://www.mca.gov.in/Ministry/pdf/CompaniesAct2013.pdf> accessed on 23rd of Jan. 2016

⁴²³ Financial indicators used by the World Bank to measure the economic growth or stage of development of an economy is available at <http://data.worldbank.org/indicator#topic-3> accessed on the 23rd of Jan. 2016

⁴²⁴ Source: Statistical data on financial sector uploaded by the world bank and available for downloading at <http://data.worldbank.org/topic/financial-sector> accessed on 24th of Jan 2015

⁴²⁵ Supra FN 42

strong economies like Germany and Japan which are primarily bank-based economies of the world, on the other hand there are also rich countries like The USA and The UK which are primarily market based. However, it has been generally witnessed that most developed nations of the world also have a developed and a well-regulated securities market.

In the researcher's opinion an ideal economic situation would be the one, where both the banking system as well as the securities market system functions in harmony and promotes the objective to provide widened investment opportunities and better financial services to the savers or the investing public of the nation. Both banks and securities markets should be perceived as the competing components of financial system in a healthy and well-functioning economy. Hence the need to regulate and ensure that both the systems function in a manner that promotes systematic and balanced growth and long-term prosperity in the economy restoring investor/customer confidence in the system.



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