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Patent Protection in Biotechnological Sector: An Ethical Dilemma

Dr. Mona Purohit[1]

INTRODUCTION

The emphasis of technology is on inventions and development. The object of the patent is to promote and protect inventor's rights. The ethics and moral values that demand humanitarian interests of society are some time adversely affected by it. Patenting of Biotechnological material raises various issues including ethical one as the subject matter of biotechnology is living matter and their use raises different questions and creates numerous problems. Fulfillment of criteria of inventiveness and industrial application is sufficient to patent living organisms. In this way modified gene can form patentable inventions. The dilemma combines two differing ideas i.e. ethics and technique. The harmonization of these two differing ideas is the biggest challenge.

The living subject like human or animals can be patented as the biotechnological subject but regards to moral issues normally they are treated differently. Questions arise whether human or animals require the same patent protection as other non-living things? Are they different in scopes of morality? What do the international or national laws and policies tell about this?

Biotechnology has attracted critics from religious and welfare groups concerning animals, that experiments on animals is unethical and should not be granted on living matter. Such concern is based on the concept that that we have no moral right to unreasonably exploit our world. Prof Gardner has put: "Our experience with animals suggests that there would be a very real danger of creating seriously handicapped individuals if anybody tries to implant cloned human embryos into the womb."

Such questions are likely to become increasingly pertinent, not only for the international community but also for national policymakers. Industrial funding is growing for research and innovation in the biotechnological sector. The ethical issues arising from the development of new technologies and particularly, from the dimension of the patent need to be addressed. In this work intellectual property protection and related ethical issues have been discussed. The paper provides an overview of the field of biotechnological patent and moral which influences on health.

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The impact of biotechnological inventions on living subject upsurges ethical issues. The most controversial issue of biotechnological patenting is 'manipulation of living organisms'. Living organisms are considered as objects of exclusive rights with inheritable characteristics. To regulate patenting of biotechnological products need due care. The moral debate and exclusions under the Indian patent law are therefore worthy of an analysis. The key ethical issues concerning the health care are the biopharmaceutical industry and patent protection.

Ethics and morals relate to "right" and "wrong" conduct. Such as what is right or wrong? When an act is right or wrong? What is good or bad? In some respect, they are different where ethics refer to rules provided by an external source, e.g., codes of conduct in workplaces or principles in religions. Morals refer to an individual's own principles regarding right and wrong. While they are sometimes used interchangeably so for the purpose of this study ethics and m orals are used interchangeably.[2]

WHAT PATENT PROTECTS?

The objects of granting of patents are unique. The patents protect monopoly to use an invention for limited time. The patent only gives exclusive rights to commercial use. 'The right only enters into force if there are no other obstacles to commercial use. In other words, the patent only gives a monopoly, and in a sense is hypothetical (**if** X is permitted, it is the patent holder who has exclusive rights to X). Patent protection is appealing because it may attract investors and provide a basis for sales and licensing agreements. The patent right is an important incentive scheme because, by attracting investors with the promise of a patent, it makes it possible to conduct research which otherwise would be difficult to finance'.[3]

The inventor exercises exclusive rights on invention for some years and 'in return the inventor discloses detailed description of the invention, making the new knowledge available to all. A discovery thereby enables others to further develop the achieved knowledge. The aim is to define the conditions of a "social contract" between the inventors and society. On one hand inventors are able to be granted financial rewards and thus share profits with industrialist. And on the other hand inventors are obliged to disclose information on useful inventions for the benefit of the public good. This means that the purpose of a patent is to strike a balance between different interests. The patent system aims to keep a balance between the inventor's interests and the interests of society. That is why a fair balance between both interests, meaning that the scope of the claim of the patent must be proportional to the scope of the effectively described applications of the inventions, has an ethical dimension'.[4] Patents are currently

2. "Ethics vs. Morals", *Diffen available at:* http://www.diffen.com/difference Ethics_vs_Morals (last visted on March 12, 2020).
3. National Research Ethics Committee, "Research ethics and patents", *The Research Ethics Magazine,* Jan. 2, 2016, *available at*: https://www.etikkom.no/en/library/topics/the.../research-ethics-and-patents/ (last visited on March 17, 2019).
4. Astrid Burhöi and Jonas Ledendal, "Moral exclusions in European Biotechnology Patent Law", *Lund University Publications* (2007) *available at*: http:// www. lup.lub.lu.se/student-papers/record/1337961/file/1646263.pdf (Visited on March 16, 2019).

being granted for the 20 years, but they can be extended. After expiration of patent protection, another person can improve on it more widely.

The trend towards commercialized science is symbolized by the U.S. Congress which decided that publicly funded science should be commercialized, and during the 1980s intellectual property rights were decentralized from government to research institutions to create commercial incentives. This trend has become world-wide.[5]

The positive side of Indian patent system is provision of compulsory license that actual benefit to public at large.

ETHICAL RELEVANCE OF THE PATENT RIGHT

Patent ethics in respect of the issuance actual patent is different from ethical issues in the research or general use. Patent issuance indicates that commercialization is acceptable, and the patent gives legitimacy.

What is the ethical relevance of the patent right? Critics argues that 'Obtaining a patent on processes for cloning human beings cannot it itself be an ethical problem. If it is unethical to clone human beings, it is the research that should be prevented, not the patent. The research may upset public order and morality; likewise, making a certain product available on the market may be ethically problematic (e.g. harmful effects), but the actual patent protection, which only gives an exclusive right to use, can hardly be said to upset the public perception of morality.[6]

RIGHT TO MONOPOLY AS AN ETHICAL PROBLEM

It is useful to distinguish between patentability issues that revolve primarily around the ethical aspects of research, use and commercialization on the one hand, and issues related particularly to exclusive rights on the other hand. Since the former is covered by legislation and also raises questions about research ethics in itself, we will focus here on exclusive rights.

Exclusive rights (a monopoly) have two ethical dimensions:

1. **Public availability** (Will a patent prevent the invention from benefitting potential users?)
2. **Legitimate ownership** (Does the inventor deserve exclusive ownership rights to a given invention?)

Questions related to the last points are (a) how the invention has come into being? and (b) whether the invention should be regarded as being part of humankind's collective heritage?[7]

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5. Darryl R. J. Macer, *Ethical Issues in patenting scientific research*, Proceedings of the International Conference of the Council of Europe on Ethical Issues Arising From The Application of Biotechnology, Volume II (Council of Europe, 2000) *available at*: http://www.eubios.info/PAPERS/PATENT.HTM (last visited on March 21, 2019).
6. *Supra* note 3
7. *Supra* note 5

PATENT AND MORAL: JURISPRUDENTIAL UNDERPINNING

The correlation between patent protection and morals can be understood by jurisprudential perspective. Few jurisprudential concepts have been analyzed in the paper to understand how conflicts interest of individual and society can be harmonized, which is a big challenge.

SOCIETY VS. INDIVIDUAL

Patent are difficult to obtain and hold the strongest protection. Their attributes include providing strong protection, and total exclusivity. Their downsides include long expensive, technical processes, and inventors must make all the details of their product known to the public. An intangible -new, useful, non-obvious idea can get protected under Indian patent law. The patent gives exclusive rights to make, use, and sell a product for 20 years. For 20 years the inventors had exclusive rights and procure the benefits of the work, afterward it became public property. "The time when the inventor had exclusive rights was his/her time to reap the benefits of their work, but after their time was up, it became public property. Today, this has all changed. Copyrights and patents can be renewed and at no point is it mandatory for any information to become public knowledge. The inventor is allowed to benefit from his work until he dies. This is helpful to the inventor but detrimental to society".[8]

UTILITARIANISM

The basic idea of utilitarianism is to behave in a way which results in more good than bad consequences, preferably with the most good possible. Utilitarianism is similar to what's known as 'cost-benefit analysis,' except that the latter is principally concerned with monetary costs and benefits, while the former is concerned with all good and bad in regard to all stakeholders.

In addition to the possibility of stifling innovation, copyrights and patents also allow the holder to ransom the health and welfare of the public. If there is a drug under patent which would reduce the number of heart attacks or other deadly inflictions by half, it's up to the holder of the patent to set the price. In this case, there are many who can't wait long enough for the patent to expire; they will die trying. These examples and many more show the shortcomings of our current intellectual property regime in terms of maximizing good consequences.[9]

RIGHTS AND DUTY ETHICS

Rights and duties are correlated concepts. Where there is a right enjoys property, others have a duty to not interference in it. Patent can be compared with negative right (a right that others not do something that is called a negative right).While many believe

8. Ibid.
9. Ibid.

in strictly rights concerning liberty, Socialists and Libertarians believe that people have at least a right to have basic needs met. One has liberty and welfare right to health and get medicine.

On one hand, allowing people the freedom to create without the fear of someone stealing your invention preserves liberty. On the other hand, once something is copyrighted or patented, people are no longer free to create it. Even with knowledge of how something works is readily accessible, one would be prohibited from selling it, themselves. People presumably have the right to not have things taken from them, but the only things taken if someone's intellectual property is copied is potential profit, recognition, and/or control of the invention. Even if one were to consider this theft. It could be justified if the person had a right to welfare that they were being denied.[10]

VIRTUE ETHICS

Aristotelian moral philosophy places a great amount of emphasis on an individual's character. Virtue is a carefully, consciously, and rationally inculcated habit that is done for its own sake**.** In Virtue ethics a person acts according to the virtues of character like wisdom, righteousness, etc. The "careful, conscious, rational and voluntarily" aspect is especially important. The virtuous person act rationally and his act should be community oriented. Patentee are accepted to peruse this virtue ethics for society.

SELF-INTEREST

Theories of self-interest would tend to suggest that if everyone acts according to their own interest, the world would be a better place. The classic self-interest theorist is Thomas Hobbes, who promoted self-interest as a way for people to mutually restrain each other. Free-market capitalism would be another expression of this ideal. Hobbes would leave the decision about whether to acknowledge intellectual property to the "Leviathan," or dictator, while capitalism supports the idea of patenting and copyrighting and would leave all further decisions in the hands of the owner.[11]

MORAL IN THE PATENTS LAWS

The EPO's regulations as well as the Indian Patents Act contain a paragraph on patent ethics. Accordingly, patent applications may be denied on ethical grounds.

The TRIPS Agreement[12] states that Members states may exclude from patentability: (a) diagnostic, therapeutic and surgical method for the treatment of humans or animals; (b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants and animals other than non-biological and microbiological processes.

Following sections of Indian Patent Act describes what are non patentable in India-Section 3 (b) of the Patents Act States 'an invention would not be patentable if

10. Ibid.
11. Article 27.3 of the TRIPS Agreement.

it is immoral or against public order, harmful to human, animal or plant life or harmful to environment. Position of Micro-organisms in the Indian Patents Act, 1970 as amended up to 2005 is as follows: Section 3 of the Patents Act specifies inventions which are not patentable. The relevant provisions of that Section are as below: 3(c): "the mere discovery of a scientific principle or the formulation of an abstract theory or discovery of any living thing or non-living substances occurring in nature." 3(j) : "plants and animals in whole or any part thereof other than micro- organisms but including seeds, varieties and species and essentially biological processes for production or propagation of plants and animals." Section 3(i)-Any Process for the medicinal, surgical, curative, prophylactic, diagnostic or therapeutic or other treatment of human beings or animals to render them free of disease or to increase their economic value or that of their products, Section 3(h)-Methods of agriculture or horticulture. Section 3(p) –Traditional knowledge.

RESEARCH ETHICS AND PATENTS

The National Committee for Research Ethics in Science and Technology (NENT) UK describe, "Just as ethics is about a vision of the good life, research ethics is about a vision of good knowledge. The term "research ethics" refers to a diverse set of values, norms and institutional regulations that help constitute and regulate scientific activity". It further states, "The aims of research do not violate common morality, ethics and respect for human dignity. Good research practice also entails that the researcher respects current regulations and principles of research ethics. Both the researcher and the research institution are responsible for accommodating and exercising good research practice". Principle of ethics emphasizes that research has responsibility to society, animals and the environment.

Rules of ethics in Patent are social and political issue. The ethical guidelines for research not explicitly mentioned patents. Although as per general norms on research ethics it is vital that the researchers who are involved in patent research process are aware of issues related to patent ethics. The social responsibility and transparency of research can contribute a lot in this.

CONCLUSION

The Indian Patents Act provides no inclusive definition of patentable subject matter. It only provides a list of what is considered non-patentable. The vagueness of the exceptions sometimes leads to uncertainty. The complex nature of the technology, especially in biotechnology, it creates more ambiguity. Innovators, investors and patent practitioners must analyze their inventions in light of Indian patent law before making any strategic decisions regarding patenting in India.

Patentee should act in accordance with research ethics and use scientific knowledge for the benefit of humanity and for a sustainable development; patentee must show respect for animals and nature. He should not allow considerations based on ideology, religion, ethnicity, prejudices or material advantages.

The National Committee for Research Ethics in Science and Technology UK provides guidelines for research in 2005, which provide comprehensive ethical guidance to deal with ethical aspects and ethical responsibility. These obligations should be incorporated in Indian perspective. The some important strategies of the guidelines such as Research must be conducted in accordance with human rights, sustainable development and respect for the environment, promote peace, promote greater global justice in the distribution of wealth through the spread of information and respect the demand for informed consent, should be the part of Indian policies.

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Criminal Justice and Inherent Powers of The High Court: An Analysis

Dr. Pawan Kumar Mishra[1]

INTRODUCTION

Inherent powers of the High Court under Section 482 of the Code of Criminal Procedure are unique in criminal jurisprudence. It is the most potent weapon for the High Court to clear the province of criminal law jurisdiction of all vitiating and malicious influences. The powers laid down in this section are not available to the subordinate courts for the obvious reason that there will be pandemonium in the criminal justice system. The inherent powers are available only to the High Court for reasons historical, jurisprudential and practical. Still the High Courts have to labour hard to wield the inherent powers without being erratic, slipshod or arbitrary.[2]

Section 482 was added by the Code of Criminal Procedure (Amendment) Act, 1923 as the High Courts were unable to dispense complete justice even if in a given case the illegality was palpable and apparent.

This Section was introduced in the Code so as to enable the High Courts to render justice to the seekers and to penalize the lawbreakers either with fine or imprisonment or both. Section 482 of the Cr.P.C.[3] states: "*Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice*". But such powers can only be applied in exceptional cases.[4]

THE INHERENT POWERS OF THE HIGH COURT

The essential object of criminal law is to protect the society against criminals and law-breakers. For this purpose, the law holds out threats of punishments to prospective

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2. Ranu Purohit, "The Scope of Inherent Powers of High Court U.S. 482, the Code of Criminal Procedure, 1973" (June 18, 2015) *available at*: SSRN: https://ssrn.com/abstract=2662626 (last visited on June 12, 2019).
3. The Code of Criminal Procedure, 1973.
4. The Code of Criminal Procedure, 1973, s. 482.

lawbreakers as well as attempts to make the actual offenders suffer the prescribed the punishment for their crimes. Therefore, criminal law, in its wider sense, consists of both the substantive criminal law as well as the procedural criminal law. Substantive criminal law defines offences and prescribes punishments for the same, while the procedural law is to administer the substantive law.

Our criminal justice system is mainly contained in the Code of Criminal Procedure, 1973 which has come into force from April 1, 1974. It provides the machinery for the detection of crime, apprehension of suspected criminals, collection of evidence, determination of the guilt or innocence of the suspected person and the imposition of suitable punishment on the guilty person. In addition, this Code also deals with the prevention of offences (Sections 106- 124, 129- 132 and 144- 153), maintenance of wives, children and parents (Sections 125- 128) and public nuisances (Sections 133-143).

The Code also controls and regulates the working of the machinery set up for the investigation and trial of offences. On the one hand it has to give adequately wide powers to make the investigation and adjudicatory processes strong, effective and efficient, and on the other hand, it has to take precautions against errors of judgement and human failures and to provide safeguards against probable abuse of powers by the police or judicial officers. This often involves a "nice balancing of conflicting considerations, a delicate weighing of opposing claims clamouring for recognition and the extremely difficult task of deciding which of them should predominate".

The Code has obviously tried to make it exhaustive and complete in every respect; and it has generally succeeded in this attempt. However, if the Court finds that the Code has not made specific provision to meet the exigencies of any situation, the court of law has inherent power to mould the procedure to enable it to pass such orders as the ends of justice may require. It has however been declared by the Supreme Court that the subordinate courts do not have any inherent powers. The High Court has inherent powers and they have been given partial statutory recognition by enacting Section 482 of this Code.

BACKGROUND

The power to quash an FIR (First Information Report) is among the inherent powers of the High Courts of India. Courts possessed this power even before the Criminal Procedure Code (Cr.P.C) was enacted. Added as Section 482 by an amendment in 1923, it is a reproduction of the Section 561(A) of the 1898 code. Since high courts could not render justice even in cases in which the illegal was apparent, the section was created as a reminder to the courts that they exist to prevent injustice done by a subordinate court.

"Nothing in this code shall be deemed to limit or effect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under the code, or to prevent abuse of the process of any court or otherwise to secure the ends of justice"

Exercise of power under Section 482 Cr.P.C. is the exception and not rule. Inherent jurisdiction of High Court under Section 482 Cr.P.C. may be exercised:

1. To give effect to an order under the Code.
2. To prevent abuse of the process of Court.
3. To otherwise secure the ends of justice.

According to Sec 26 of Cr.P.C., 1973 Offences below the Criminal Procedure Code (hereinafter the Cr.P.C.) are divided into:[5]

1. Offences under Indian Penal Code (IPC) (triable by HC Sessions Court and other court shown in the 1st Schedule to the Cr.P.C.)
2. Offences under any other law (empowers HC when no court is mentioned for any offence under any law other than IPC to attempt such offences) Sec 482 deals with Inherent powers of the Court. It is under the 37th Chapter of the Code titled Miscellaneous. It comes into action when the court acts judicially and passes an order. If order is passed by Executive officer of State in administrative capacity it has no application. Therefore persons aggrieved by such order cannot arrive to HC to exercise its inherent power under this section. As the Inherent powers are vested in HC by law within meaning of Art 21 of Constitution consequently any order of HC in violation of any right under Art 21 is not *ultra vires*. E.g. cancelling of bail bond by HC thereby depriving a person's personal liberty.

PURPOSE BEHIND ITS INCORPORATION

Section 482 makes it clear that the provisions of the Code are as intended to limit or affect the inherent powers of the High Courts. Obviously the inherent power can be exercised only for any of the three purposes specifically mentioned in the section. This inherent power cannot naturally be invoked in respect of any matter covered by the specific provisions of the Code. It cannot also be invoked if its exercise would be inconsistent with any of the specific provisions of the Code. It is only if the matter in question is not covered by any specific provision of the Code that Section 482 can come into operation, subject further to the requirement that the exercise of such power must serve any of the three purposes mentioned in the said section. In prescribing rules of procedure legislature undoubtedly attempts to provide for all the cases that are likely to arise; but it is not possible that any legislative enactment dealing with the procedure, however carefully it may be drafted, would succeed in providing for all the cases that may possibly arise in the future.

Lacunae are sometimes discovered in procedural law and it is for the purpose of covering such lacunae and dealing with such cases where such lacunae are discovered that procedural law invariably recognises the existence of inherent powers in courts.

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5. Akhil Bandhu Ray and Ors. v. Emperor, AIR 1938 Cal 258; Krushna Mohan v. Sudhakar Das, AIR 1953Ori 281; Nagen Kundu v. Emperor, ILR 61 Cal 498. Also see District and Sessions Judge, In re, 1986 Cri LJ 1966 (Ker).

Here it is extremely important to be noticed that it is only the High Court whose inherent power has been recognised by Section 482, and even in regard to the High Court's inherent power definite statutory safeguards have been laid down as to its exercise.

It is only where the High Court is satisfied either that an order passed under the Code would be rendered ineffective or that the process of any court would be abused or that the ends of justice would not be secured that the High Court can and must exercise its inherent powers under Section 482 of this Code.

It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction. No legislative enactment dealing with procedure can provide for all cases which may possibly arise. It has also been held that Section 482 cannot be invoked in non-- criminal proceedings such as those under the Customs Act.

"Inherent jurisdiction", "to prevent abuse of process", "to secure the ends of justice" are terms incapable of definition or enumeration, and capable at the most of test, according to well established principles of criminal jurisprudence. "Process" is a general word meaning in effect anything done by the court. The framers of the Code could not have provided all the cases that should be included within the meaning of abuse of process of court. It is for the court to take decision in particular cases.

CONDITIONS FOR USE OF INHERENT POWER

There are several conditions laid down by various cases that indicate the circumstances under which this inherent power may be used. These conditions may be enumerated as follows[6]:

1. The jurisdiction is completely discretionary it can refuse to use the power.
2. The jurisdiction is not limited to cases that are pending before the High Court. It can consider any case that comes to its notice (in appeal, revision or otherwise).
3. This power can be invoked only in an event when the aggrieved party is being unnecessarily harassed and has no other remedy open to it.
4. The High Court, under Section 482, does not conduct a trial or appreciate evidence. The exercise of this power (although it has a wide scope) is limited to cases that compel it to intervene for preventing a palpable abuse of a legal process.
5. The High Court has the power to provide relief to the accused even if s/he has not filed a petition under Section 482.
6. This power cannot be exercised if the trial is pending before the apex court

6. A.S. Gaurava v. S.N. Thakur, 1986 SCC (Cri) 249: (1986) 2 SCC 709. Talab Haji Hussein v. Madhukar Purushottam Maondkar, AIR 1958 SC 376: 1958 Cri LJ 701,703- 704; also Dhirender Kumar Banerjee v. State of Bihar, 2005 Cri LJ 4791 (Jhar); Vishal Paper Tech India Ltd. v. State of A.P., 2005 Cri LJ 1838 (AP).

and it has directed the session judge to issue a non-- bailable warrant for arresting the petitioners.

7. The power under Section 482 is not intended to scuttle justice at the threshold but to secure justice.
8. This power has to be exercised sparingly with circumspection and in the rarest of rare cases, but cannot be held that it should be exercised in the rarest of rare cases – The expression rarest of rare case may be exercised where death penalty is to be imposed under Section 302 of IPC but this expression cannot be extended to a petition under Section 482 Cr.P.C..
9. So long as inherent power of Section 482 Cr.P.C is in statute, the exercise of such power is not impermissible.
10. In exercise of the powers court would be justified to quash any proceeding if it finds that initiation or continuance of it amounts to abuse of the process of Court or quashing of these proceedings would otherwise serve the ends of justice.
11. Where the accused would be harassed unnecessarily if the trial is allowed to linger when prima facie it appears to Court that the trial would likely to be ended in acquittal.
12. In proceedings instituted on complaint, exercise of inherent powers under Section 482 Cr.P.C. to quash the proceedings is called for only in a case where the complaint does not disclose any offence or is frivolous, vexatious or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same.
13. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in *Toto*.
14. All Courts, whether civil or criminal possess, in the absence of any express provisions, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in course of administration of justice.

"To prevent abuse of process of any court" Ordinarily High Court will not interfere at an interlocutory stage of criminal proceeding in subordinate court but, High Court is under an obligation to interfere if there is harassment of any person (Indian citizen) by illegal prosecution. It would also do so when there is any exceptional or extraordinary reasons for doing so. Test to determine whether there has been an abuse of any court are:

a. Whether a bare statement of facts of case would be sufficient to convince High Court if it is a fit case for interference at intermediate stage.
b. Whether in the admitted circumstances it would be a mock trial if case is allowed to proceed. Reasons High Court can interfere: 1. Long lapse of time 2. Failure or impossibility to supply to accused, copies of police statements and other relevant documents- grounds for other relevant

documents- grounds for High Court to quash proceedings against accused. "To secure ends of justice" e.g. When a clear statutory provision of law is violated- High Court can interfere. It is of vital importance in the administration of justice, and ensure proper freedom and independence of Judges must be maintained and allowed to perform their functions freely and fearlessly without undue influence on anyone, even Supreme Court. At the same time Judges and Magistrate should act with a certain amount of justice and fair play.

The Supreme Court in *Madhu Limaye v. Maharashtra*[7], has held the following principles would govern the exercise of inherent jurisdiction of the High Court: 1. Power is not to be resorted to if there is specific provision in code for redress of grievances of aggrieved party 2. It should be exercised sparingly to prevent abuse of process of any Court or otherwise to secure ends of justice 3. It should not be exercised against the express bar of the law engrafted in any other provision of the code. It is neither feasible nor practicable to lay down exhaustively as to on what ground the jurisdiction of the High Court under Section 482 of the Code of Criminal Procedure should be exercised. But some attempts have been made in that behalf in some of the decisions of this Court.[8]

GUIDELINES:

The inherent powers contemplated by Section 482 has to be used sparingly, carefully and with caution and only where such exercise is justified by the tests specifically laid down in the section itself.[9]

Thus the Supreme Court has reiterated the nature of its power that;"The powers conferred on the High Court under Article 226 and 227 of the Constitution and under Section 482 of the Code of Criminal Procedure have no limits but more the power more the cases and caution is to be exercised while invoking these powers. When the exercise of powers could be under Article 227 or Section 482 of the Code, it may not always be necessary to invoke the provisions of Article 226. Some of the decisions of this Court laying down principles of Articles 226 and 227 may be referred to."

The following cases have been stated by the Supreme Court, by way of illustration wherein the extraordinary power under Article 226 or inherent power under Section 482 can be exercised by the High Court to prevent abuse of process of any court or to secure justice:

1. Where the allegations in the FIR/complaint, even if they are taken at their face value do not prima facie constitute any offence against the accused.

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7. AIR 1978 SC 47.
8. Madhulimaye v state of Maharashtra, AIR 1978 SC 47.
9. Pushkraj Deshpande, "Overview Of Section 482 Cr.P.C Vis-À-Vis The Landmark Judgments Of The Supreme Court Of India" (May 1, 2018) *available at*:https://www.mondaq.com/india/trials-amp-appeals-amp-compensation/697362/overview-of-section-482-crpc-vis-%C3%A0-vis-the-landmark-judgments-of-the-supreme-court-of-india (last visited on Oct. 27, 2019).

2. Where the allegations in the FIR or other materials do not constitute a cognizable offence justifying an investigation by the police under Section 156(1) of the code except under an order of a Magistrate within the purview of Section 155(2).
3. Where the uncontroverted allegations in the FIR/complaint and the evidence collected thereon do not disclose the commission of any offence.
4. Where the allegations in the FIR or other materials do not constitute a cognizable offence but constitute a non- cognizable offence to which no investigation is permitted by the police without Order of a Magistrate under Section 155(2).
5. Where the allegations are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.
6. Where there is an express legal bar engrafted in any of the provisions of the Code or statute concerned (under which the proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the code or in the statute concerned, providing efficacious redress for the grievance of the aggrieved party.
7. Where a criminal proceeding is manifestly attended with mala fide intention and/or where the proceeding is maliciously instituted with an ulterior motive for wrecking vengeance on the accused with a view to spite him due to private and personal vengeance.

The Courts have been following these in dealing with requests for quashing criminal proceedings. The following principles in relation to the exercise of the inherent power of the High Court have been followed ordinarily and generally, almost invariably, barring a few exceptions:

1. That the power is not to be resorted to if there is a specific provision in the Code itself for the redress of the grievance of the aggrieved party;
2. That it should be exercised very sparingly to prevent abuse of process of any court or otherwise to secure the ends of justice;
3. That it should to be exercised as against the express bar of law engrafted in any other provision of the Code. In most of the cases decided during several decades the inherent power of the High Court has been invoked for the quashing of a criminal proceeding on one ground or the other. In *R.P. Kapur* v. *State of Punjab*[10], the Supreme Court considered the circumstances in which the High Court can, by invoking its inherent powers, quash the criminal proceedings in a subordinate criminal court.

The Supreme Court observed: "It is not possible, desirable or expedient to lay down any inflexible rule which would govern the exercise of this inherent jurisdiction. However, we may indicate some categories of cases where the inherent jurisdiction

10. AIR 1964 SC 786.

can and should be exercised for quashing the proceedings. There may be cases where it may be possible for the High Court to take the view that the institution or continuance of criminal proceedings against an accused person may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice. If the criminal proceeding in question is in respect of an offence alleged to have been committed by an accused person and it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding the High Court would be justified in quashing the proceeding on that ground. Absence of the requisite sanction may, for instance, furnish cases under this category. Cases may also arise where the al1egations in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged; in such cases no question of appreciating evidence arises; it is a matter merely of looking at the complaint or the First Information Report to decide whether the offence alleged is disclosed or not. In such cases it would be legitimate for the High Court to hold that it would be manifestly unjust to allow the process of the criminal court to be issued against the accused person.

A third category of cases in which the inherent jurisdiction of the High Court can be successfully invoked may also arise. In cases falling under this category the allegations made against the accused person do constitute an offence alleged but there is either no legal evidence adduced in support of the case or evidence adduced clearly or manifestly fails to prove the charge. In dealing with this class of cases it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is manifestly and clearly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not support the accusation in question. In exercising its jurisdiction under Section 482 of the Code the High Court would not embark upon an enquiry as to whether the evidence in question is reliable or not." The law stated above is not affected by Section 397(2) of the new Code of 1973. It still holds good in accordance with Section 482. Circumstances may arise where failure to exercise the inherent powers in case of interlocutory orders may occasion great hardship. To inhibit or deny the High Court's power to provide remedies on such occasion may cause injustice for the removal of which alone the Court exists. This position has made the Supreme Court to observe thus: ". . . . though the revision before the High Court under sub- section (3) thereof, the inherent power of the High Court is still available under Section 482 of the Code and it is paramount power of continuous superintendence of the High Court under Section 483 the High Court is justified in interfering with the Orders leading to a mistake of justice." Relief under Section 482 is not barred by any limitation since the power is conferred to secure the ends of justice. Hence, the mere fact that revision petition was filed at a belated stage cannot provide legality to an order which is patently illegal or suffers from the abuse of process of Court. The High Court can in the exercise of its inherent jurisdiction expunge remarks made by it or by a lower court in respect of any conduct of a person or official if it be necessary to do so to prevent abuse of the process of the court or otherwise to secure the ends of justice; the

jurisdiction is however of an exceptional nature and has to be exercised in exceptional cases only.

In considering the expunction of disparaging remarks against persons or authorities the High Court will take into account:

1. Whether the party whose conduct is in question is before the court or has an opportunity of explaining or defending himself;
2. Whether there is evidence on record bearing on that conduct justifying the remarks; and
3. Whether it is necessary for the decision of the case, as an integral part thereof, to animadvert on that conduct.

The Supreme Court has clarified that Section 482 could be invoked to award cost. Its observations are instructive: "In the result we hold that while exercising inherent jurisdiction under Section 482, the High Court has the power to pass "such orders" (not inconsistent with any provision of the Code) including the order for costs in appropriate cases – to give effect to any order passed under the Code, or to prevent the abuse of process of any court, or to secure the ends of justice. As stated above, this extraordinary power is to be used in extraordinary circumstances and in a judicious manner. Cost may be to meet the litigation expenses or can be exemplary to achieve the aforesaid purposes". It has also been recognised that judicial pronouncements must be judicial in nature and should normally not depart from sobriety, moderation and reserve. It has been categorically declared by the Supreme Court that the subordinate Courts do not have inherent powers. It has at the same time, explained the vitality of High Court's inherent powers while locating its own residuary powers in Article 136 of the Constitution.

It observed:

" . . . *though there is no provision like Section 482 of the Criminal Procedure Code conferring express power on this court to quest or set aside any criminal proceedings pending before a court to prevent abuse of process of the court, but this court has power to quash any such proceedings in exercise of its plenary and residuary power under Article 136 of the Constitution"*.

High Court has no power to review own order its under Section 482 Cr.P.C.:

(a) Court cannot alter or review its judgment or final order after it is signed except to correct clerical or arithmetical error.

(b) As soon as judgment is pronounced or order is made by a Court, it becomes *functus officio* (ceases to have control over the case) and has no power to review, override, alter or interfere with it.

(c) Power of review is not an inherent power and must be conferred on a Court by a specific or express provision to that effect.[11]

11. (1971) 3 SCC 844.
12. AIR 2007 SC 976.

JUDICIAL OPINIONS

In the case of *D. Venkatasubramaniam and Others* v. *M. K. Mohan Krishnamachari and Another*[12], the respondent lodged FIR against appellants alleging commission of offences under sections 406 and 420 of IPC. Even while investigation was in progress respondent filed petition under section 482 of Cr.P.C. The high court directed the police to expedite and complete investigation. Hence the issue in the present appeal was whether it was open to the high court in exercise of its jurisdiction under Section 482 of Cr.P.C. to interfere with statutory power of investigation by police and if such a power is available with the court, what are the parameters for its interference. The High Court cannot direct investigating agency to investigate a case in accordance with its views as that would amount to unwarranted interference. In the present case, the high court, without recording any reason whatsoever, directed police that it is obligatory on their part to record statements from witnesses, arrest, and seizure of property and filing of charge sheet. The high court interfered with investigation of crime which is within the exclusive domain of police. It was held in the present case that without realising the consequences, the high court issued directions in a casual and mechanical manner without hearing appellants. The order of the high court was held to be an order passed overstepping the limits of judicial interference and hence null and void.

In *M/s Pepsi Foods Ltd* v. *Special Judicial Magistrate*,[13] it was held that no doubt the Magistrate can discharge the accused at any stage of the trial if he considers the charge to be groundless, but that does not mean that the accused cannot approach the High Court under Section 482 of the Code or Article 227 of the Constitution to have the proceeding quashed against him when the complaint does not make out any case against him and still he must undergo the agony of a criminal trial.

In *Madhu Limaye* v. *State of Maharashtra*,[14] an interlocutory order was passed by a Court subordinate to the High Court against which Revision Petition was filed. It was contended that sub-section (2) of Section 397 barred exercise of revisional powers "in relation to any interlocutory order passed in an appeal, inquiry, trial or in any other proceeding". Since the order was interlocutory in nature, revision petition was not maintainable. This Court held that even where an order cannot be challenged in revision, inherent powers under Section 482 of the Code could be exercised by the High Court in appropriate cases. Supreme Court bench comprising Justices P Sathasivam and Anil R Dave said, 'While exercising jurisdiction under Section 482 of the Code, the High Court would not ordinarily embark upon an inquiry whether the evidence in question is reliable or not or whether on a reasonable appreciation of it accusation would not be sustained. It was stated: "It is true that court should be circumspect and judicious in exercising discretion and should take all relevant facts and circumstances

13. (1998) 5 SCC 749.
14. AIR 1978 SC 47.

into consideration before issuing process, otherwise, it would be an instrument in the hands of a private complainant to unleash vendetta to harass any person needlessly. At the same time Section 482 is not an instrument handed over to an accused to short-circuit a prosecution and bring about its closure without full-fledged inquiry."

CONCLUSION

Section 482 Cr.P.C. has a very wide scope and it's really important for the courts to use it properly and wisely. Many a time it has been observed that when there is an issue of money for eg. Any money matter then the petitioner instead of filing a civil suit files an FIR against the other person just to harass him. In such cases it becomes very important for the High Courts to quash such complaints as it leads to the abuse of the process of the lower courts. This section would enable the courts for providing proper justice and also should be exercised to stop the public from filing fictitious complaints just to fulfil their personal grudges.

The best explanation of the view of the courts, in my opinion, has been given by *Justice Dhingra.* This is what he says: "While exercising powers under Section 482 of the Cr. P.C. the Court has to keep in mind that it should not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable appreciation of it accusation would not be sustained. This is a function of the Trial Court. Though the judicial process should not be an instrument of oppression or needless harassment but the Court should be circumspect and judicious in exercising discretion and should take all relevant facts and circumstances in consideration before issuing process under Section 482 lest the Section becomes an instrument in the hands of accused persons to claim differential treatment only because the accused persons can spend money to approach higher forums. This Section is not an instrument handed over to an accused to short circuit a prosecution and bring about its sudden death".

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Final Report and Protest Petition: Practice and Procedure in State of Uttar Pradesh

Mr. Prakash Chandra Shukla[1]
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INTRODUCTION

The criminal justice system in India gets momentum from registration of First information report. The version of FIR is examined by investigating officer on the basis of spot visit, statements under section 161 and 164 Code of Criminal Procedure and on the opinions of medical or scientific experts. After investigation, investigating officer comes to the conclusion that he should file charge sheet or final report, cumulatively called police report defined U/S 2(r) of Code as a report forwarded by a Police Officer to a Magistrate under sub section (2) of Section 173. This report passes through various hierarchies of police personnel and then placed before magistrate for judicial application of mind. The Hon'ble Supreme Court of India and Hon'ble High Courts have interpreted provisions of law and regulations on this point in catena of judgments to bring clarity in practice and procedures regarding charge sheet, final report and protest petition.

In the above backdrop this article aims to discuss procedure and practice on final report and protest petition in the light of judicial interpretations of Hon'ble Supreme Court of India and Hon'ble High Courts.

LEGAL FRAMEWORK ON POLICE REPORT AND PROTEST PETITION

The report under Section 173 is a report on the results of the investigation made under Chapter XIV, which means an investigation made under Section 155 (2) or Section 156. The 'Police report' which Section 173 contemplates cannot therefore be a report of a case in respect of which no investigation under Chapter XIV has taken place or is

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possible. Police Report has been interpreted to mean a police report within the meaning of Section 170 According to Hon'ble Apex Court as explained in *Kaptan Singh* v. *State of Madhya Pradesh*[4] the police report is a conclusion that an investigating officer draws on the basis of materials collected during investigation and such conclusion can only form the basis of a competent court to take cognizance there upon under section 190 (1) (b) of the Code and to proceed with the case for trial, and it cannot rely on the investigation or the result thereof. There are three different kinds of reports to be made by police officers at three different stages of investigation. *Firstly*, Section 157 requires a preliminary report from the officer in charge of a police station to the Magistrate. *Secondly*, Section 168 requires reports from a subordinate police officer to the officer in charge of the station. These reports are known as forwarding reports. *Thirdly,* Section 173 requires a final report of the police officer as soon as investigation is completed to the Magistrate. The report under Sub section (2) of Section 173 is called Completion Report also known as the Charge Sheet. The Final report refers to that document which records the conclusion arrived at by the Police after the investigation process. Final report is deemed to be final as it signifies the culmination of investigation .Nevertheless Police has a statutory right to re-investigate the matter when some new information comes to light.

The police report under Section 173 constitutes the facts and conclusions drawn by police. Section 173, Cr.P.C. places a mandatory duty upon the Investigating Officer to place all detailed materials, both oral and documentary, before the Magistrate, so that he may consider the same and decide for himself whether it is a fit case for taking cognizance or not. However, Investigation of an offence cannot be considered to be inconclusive merely for the reason that the investigating officer, when he submitted his report in terms of sub-section (2) of Section 173 of the Code to the Magistrate, still awaited the reports of the experts or by some chance, either inadvertently or by design, failed to append to the police report such documents or the statements under Section 161 of the Code, although these were available with him when he submitted the police report to the Magistrate .

When an investigation culminates into a final report as contemplated under Section 173 then the competent court enjoins a duty within its authority sanctioned by law to scrupulously scrutinize the final report by applying its judicial mind and take a decision either to accept or reject the final report.

Rule 122 of Chapter X of U. P. Police Regulations refers how reports to be submitted in which format and through whom. Sub rule 1 prescribes that Charge sheet shall be on Police Form No. 339 and Final report on Police Form No. 340. Investigating officer shall submit to officer in charge who will send to court through Circle officer and the public prosecutor. None of them shall retain for more than a week and in case of default special reasons be assigned. Sub rule 3 prescribes that the final report must in all cases be submitted through the Superintendent of Police and sub rule 4 specifies that result of investigation must be sent by the officer in charge of

4. AIR 1997 SC 2485

the police station to the complainant in Police Form No. 47, at the time he submits the charge-sheet or the final report, as the case may be.

The Code does not define protest petition. This word has genesis from principle of natural justice, so that informant may get opportunity to put forward facts before court against acts of investigating officers.

ROLE OF MAGISTRATE ON POLICE REPORT

Magistrate is not bound by the conclusions of police. On receiving report under Section 173 of the Code, which is a final report, Magistrate has full jurisdiction to differ with the conclusion of the Police and direct that accused not named in the report sent up should be put on trial was held in *Fakhruddin Ahmad* v. *State of Uttaranchal*[5] but Magistrate doesn't have power to call upon police to submit charge sheet after final report under Section 173 (1) has been filed This exercise of jurisdiction must be in terms of Section 190(1) (b) of Code.

When after investigation, the police submitted final report and then the Magistrate has several options such as,

(i) to reject the final report and on the basis of the material available on record along with the police report straightway summoned the accused persons;

(ii) direct for further investigation; and

(iii) accept the final report and drop the proceedings or

(iv) he may treat protest petition as complaint case and thereafter may proceed in accordance with procedure provided under Chapter XV of Code.

In the case of *Chittaranjan Mirdha* v. *Dulal Ghosh and another*[6] the Hon'ble Apex Court has considered its earlier pronouncements of *Minu Kumari and Another* ***v.*** *State of Bihar*[7] also in *Gangadhar Janardan Mhatre* v. State of Maharashtra and others[8] *Bhagwant Singh* v. *Commissioner of Police*[9] , *Abhinandan Jha and others* v. *Dinesh Mishra*[10] *and M/s India Caret Private Limited* v. *State of Karnataka and another*[11] and pronounced as under:"

When a report forwarded by the police to the Magistrate under Section 173(2) (i) is placed before him several situations arise. The report may conclude that an offence appears to have been committed by a particular person or persons and in such a case, the Magistrate may either (1) accept the report and take cognizance of the offence and issue process, or (2) may disagree with the report and drop the proceeding, or (3) may direct further investigation under Section 156(3) and require the police to make a

5. (2009) (64) ACC 774 SC
6. (2009) 6 SCC 661
7. 2006(4) SCC 359
8. 2004 (7) SCC 768
9. (1985) 2 SCC 537
10. AIR 1968 SC 117
11. 1989 (2) SCC 132

further report. The report may on the other hand state that according to the police, no offence appears to have been committed. When such a report is placed before the Magistrate, he has again the option of adopting one of the three courses open i.e. (1) he may accept the report and drop the proceeding; or (2) he may disagree with the report and take the view that there is sufficient ground for further proceeding, take cognizance of the offence and issue process; or (3) he may direct further investigation to be made by the police under Section 156(3). The position is, therefore, now well settled that upon receipt of a police report under Section 173(2) a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. Section 190(1)(b) does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the investigating officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, exercise his powers under Section 190(1)(b) and direct the issue of process to the accused. The Magistrate is not bound in such a situation to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance of a case under Section 190(1)(a) though it is open to him to act under Section 200 or Section 202 also. The above mentioned law has fountained from *H. S. Bains* v. *State of Union Territory of Chandigarh*[12],*Mahesh Chand* v. *B. Janardhan Reddy and Another*[13]**,** and is reiterated in *Kishore Kumar Gyanchandani* v. *G.D.Mehrotra and Another*[14]

In *Uma Shankar Singh* v. *State of Bihar*[15] , a two-Judge Bench was considering the issue pertaining to the power of the Magistrate under Section 190(1) (b) of Cr. P.C. The Court, scanning the anatomy of the provision, opined that the Magistrate is not bound to accept the final report filed by the investigating agency under Section 173(2) of the Code and is entitled to issue process against an accused even though exonerated by the said authorities. The principle stated by the two-Judge Bench reads as follows:- " … even if the investigating authority is of the view that no case has been made out against an accused, the Magistrate can apply his mind independently to the materials contained in the police report and take cognizance thereupon in exercise of his powers under Section 190(1)(b) CrPC." The said principle was followed by another two-Judge Bench in *Moti Lal Songara* v. *Prem Prakash*[16] **.** In *Dharam Pal* v. *State of Haryana*[17] , the Constitutional Bench, while accepting the view in *Kishun Singh v.*

12. 1980 Cri.LJ 1308.
13. 2003 (1) SCC 734.
14. 2011(15)SCC513.
15. (2010) 9 SCC 479.
16. (2010) 9 SCC 479.
17. (2014) 3 SCC 306.
18. (1993) 2 SCC 16.

State of Bihar[18] **,** has held that the Magistrate has a role to play while committing the case to the Court of Session upon taking cognizance on the police report submitted before him under Section 173(2) Cr.P.C. In the event the Magistrate disagrees with the police report, he has two choices. He may act on the basis of a protest petition that may be filed, or he may, while disagreeing with the police report, issue process and summon the accused. Thereafter, if on being satisfied that a case had been made out to proceed against the persons named in column 2 of the report, proceed to try the said persons or if he was satisfied that a case had been made out which was triable by the Court of Session, he may commit the case to the Court of Session to proceed further in the matter. But if the Magistrate decides that there is no sufficient ground for proceeding further and drops the proceeding or takes the view that though there is sufficient ground for proceeding against some, there is no sufficient ground for proceeding against others mentioned in the first information report, the informant would certainly be prejudiced because the first information report lodged by him would have failed of its purpose, wholly or in part. Moreover, when the interest of the informant in prompt and effective action being taken on the first information report lodged by him is clearly recognized by the provisions contained in sub-section (2) of Section 154, sub-section (2) of Section 157 and sub-section (2) (ii) of Section 173, it must be presumed that the informant would equally be interested in seeing that the Magistrate takes cognizance of the offence and issues process, because that would be culmination of the first information report lodged by him. There can, therefore, be no doubt that when, on a consideration of the report made by the officer in charge of a police station under sub-section (2)(i) of Section 173, the Magistrate is not inclined to take cognizance of the offence and issue process, the informant must be given an opportunity of being heard so that he can make his submissions to persuade the Magistrate to take cognizance of the offence and issue process.[19] In *Vinay Tyagi* v. *Irshad Ali*[20], Hon'ble Apex Court has opined while referring decisions *Reeta Nag* v. *State of W.B*[21] *, Ram Naresh Prasad* v. *State of Jharkhand*[22] *and Randhir Singh Rana* v. *State (Delhi Admn.)*[23] that a Magistrate cannot *suo moto* direct further investigation under Section 173(8) of the Code or direct reinvestigation into a case on account of the bar contained in Section 167(2) of the Code, and that a Magistrate could direct filing of a charge-sheet where the police submits a report that no case had been made out for sending up an accused for trial. The gist of the view taken in these cases is that a Magistrate cannot direct reinvestigation and cannot *suo motu* direct further investigation...the Magistrate before whom a report under Section 173(2) of the Code is filed, is empowered in law to direct "further investigation" and require the police to

19. See also Balveer Singh v. State of Rajasthan 2016(162) AIC 24; Bhagwant Singh v. Police Commissioner, Delhi, AIR 1985 SC 1285; Gangadhar Janardan Mhatre v. State of Maharashtra and others, (2004) 7 SCC 768.
20. (2013) 5 SCC 762.
21. (2009) 9 SCC 129.
22. (2009) 11 SCC 299.
23. (1997) 1 SCC 361.
24. Criminal Appeal No. 866 of 2015.

submit a further or a supplementary report. In the case of *Chandra abu@MosBes* v. *State Through Inspector of Police and Others*[24] Hon'ble the Apex Court has concluded in regard to the powers of a Magistrate in terms of Section 173(2) read with Section 173(8) and Section 156(3) of the Code as follows:

1. The Magistrate has no power to direct "reinvestigation" or "fresh investigation" (*de novo*) in the case initiated on the basis of a police report.
2. A Magistrate has the power to direct "further investigation" after filing of a police report in terms of Section 173(6) of the Code.
3. The power of the Magistrate to direct "further investigation" is a significant power which has to be exercised sparingly, in exceptional cases and to achieve the ends of justice. To provide fair, proper and unquestionable investigation is the obligation of the investigating agency and the court in its supervisory capacity is required to ensure the same. Further investigation conducted under the orders of the court, including that of the Magistrate or by the police of its own accord and, for valid reasons, would lead to the filing of a supplementary report. Such supplementary report shall be dealt with as part of the primary report. This is clear from the fact that the provisions of Sections 173(3) to 173(6) would be applicable to such reports in terms of Section 173(8) of the Code.
4. It is well-settled canon of the criminal jurisprudence that the superior courts have the jurisdiction under Section 482 of the Code or even Article 226 of the Constitution of India to direct "further investigation", "fresh" or "de-novo" and even "reinvestigation". "Fresh", "de-novo" and "reinvestigation" are synonymous expressions and their result in law would be the same. The superior courts are even vested with the power of transferring investigation from one agency to another, provided the ends of justice so demand such action.

Power of police to conduct further investigation, even after laying final report, is recognized under Section 178 (8) of Code which strengthens on the basis of judicial pronouncements as passed in *Sri B.S.S.V.V.V Maharaj* v. *State of Uttar Pradesh,*[25].In the cases of *Rama Chaudhary* v. *State of Bihar*[26], *Chote lal* v. *State of U.P*[27] , *Dauji Prasad* v. *State of UP and others*[28], and *Ashish Mani Tripathi* v. *State of U.P*[29] wherein it is held that on final report magistrate is under obligation to invite objection from the complainant and not from the agency who has investigated the case and the police has right of further investigation under Section 173 (8), but it has no right of fresh investigation or reinvestigation. In celebrated decision of case *K. Chandrasekhar* v.

25. 1999 Cri.LJ 3661 SC.
26. 2009 (65) ACC 962 SC.
27. 2007 (1) All JIC 274.
28. 2010 (5) ALJ 65 All.
29. 2007 (2) All JIC 355.
30. 1998 (37) ACC 136 SC; See also Sumaran Singh v. State of UP 2017(2) JIC 514 All.

State of Kerala and Others[30] Hon'ble Supreme Court has explained what further investigation means:

> "The dictionary meaning of further (when used as an adjective) is additional, more, supplemental. Further investigation is therefore is the continuation of the earlier investigation and not a fresh investigation or reinvestigation to be started *ab initio* wiping out the earlier investigation altogether. In drawing this conclusion we have also drawn inspiration from the fact that sub-section (8) clearly envisages that on completion of further investigation the investigating agency has to forward to the Magistrate a further report or reports and not fresh report or reports regarding the further evidence obtained during such investigation."

As held in *Popular Muthiah* v. *State, Represented by Inspector of Police*[31], the court ordinarily should not interfere with the statutory powers of the investigating agency. The court cannot issue directions to investigate the case from a particular angle or by a particular agency.

Magistrate has power to summon straightwayto accused if he thinks fit as mentioned in the case of *Karan Singh* v. *State of U. P,* [32] but accused has no *locus standi* at the time of disposal of final report according to law laid down in *Chandra Deo* v. *Prakash Chander Bose*[33] and *Mathura Prasad* v. *State of U.P*[34]

In *Gopal Vijay Verma* v. *Bhuneshwar Prasad Sinha and others*[35] it is held by Hon'ble Court that Magistrate can take cognizance of a case upon complaint or protest petition even he had earlier refused to take cognizance of the case on a police report in respect of the same facts constituting the offence as mentioned in the final form. In *Hargyan* v. *State of U.P*[36], it is held that cognizance cannot be taken on the basis of affidavits of the complainant or the witnesses. 'In *Deokinandan* v. *State of U.P*[37] and *India Carat Pvt. Ltd* v. *State of Karnataka*[38] Hon'ble Courts have held that if there is protest petition filed by the complainant the magistrate is entitled to initiate action on that petition. However, if there is no indication by the informant that his protest petition may be treated as complaint and the magistrate did not also consciously proceed as in a complaint case, mere filing of the protest petition would not make it obligatory for the magistrate to treat it as a complaint case. Similarily in *Rupan Deol Bajaj* v. *K P S Gill*[39] the Hon'ble Supreme Court held that when police report recommends discharge of accused and the complainant raises an objection against acceptance of such report,

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31. (2006) 7 SCC 296
32. 1997(34) ACC 163
33. AIR 1963 SC 1430
34. 2007 (1) JIC 492 All
35. 1982(3) SCC 510
36. 2011 (75) ACC 761 All
37. 1996 Cri. LJ 61 All
38. (1989) 2 SCC 132
39. AIR 1996 SC 309

the magistrate has to apply his mind, decide the objection and record reasons if he is inclined to discharge the accused.

In the cases of *Gopal Vijay Verma* v. *Bhuneshwar Prasad Sinha and others*[40]; *Kishore Kumar Gyan Chandani* v. *M.D. Mehrotra and others*[41]; *R.Rathinasabapathy* v. *State*[42], Hon'ble Supreme Court and in the cases of *Ramvir Singh and others* v. *Sundar Lal*[43] and *Yasin* v. *Sajjad Husain*[44] Hon'ble Allahabad High Court have established that even after disposal of final report Magistrate has power to take cognizance on private complaint based on same or similar allegations of fact and accused can be summoned by following procedure of complaint.[45]

PROBLEMS IN DISPOSAL OF FINAL REPORTS

Honble High court of Allahabad has by its administrative circulars such as *CL No. 96/ VIII-13 dated 19th July 1971 and CL No. 10/VII-C/25 Admin G. Dated 24th January 1986* and through its judicial pronouncement in *Pradeep Kumar Srivastava* v. *State of U.P and other Criminal Miscellaneous Case 2520/12* under Section 482 Cr. P. C. directed to dispose final reports in one month of time but service of notice for providing opportunity of hearing to informant is a big challenge. Police personnel do not provide information to informant in form No. 47 in real sense. They play mischief on this point. Similarly, advocates delay disposal of protest petition for unknown reasons. In cases of FIR lodged by public servants in their official capacity, departments do not show interest nor provide correct address of informant. Huge pendency of cases in criminal courts also becomes obstacle in disposal.

CONCLUSION AND SUGGESTIONS

Completion of investigation and report submitted by Police under Section 173 of Code of Criminal procedure has been controversial ever since the Code was enacted. This article analyzed the courses available to the Magistrate after the submission of final report. It has been seen that though the final report is deemed to be final since it signifies the culmination of investigation, the Magistrate has the power under Section 156(3) to direct further investigation which is clearly an independent power .Further investigation in the offence is legally permissible as contemplated by Section 173 (8) of the Criminal Procedure Code. Investigation into an offence is a statutory function of the police and the superintendence thereof is vested in the State Government and the Court cannot in the absence of any compelling and justifiable reason interfere with the investigation. In other words there is a statutory right on the part of the Police to

40. 1983(20) ACC 72 SC.
41. AIR 2002 SC 483.
42. 2004 Cr.LJ. 2734.
43. 1985(22) ACC 282 All.
44. 1996 Cr.LJ. 147 All.
45. See, Pakhandu and others v. State of UP and Another 2002(1) JIC 104 All; Suryabhan v. State of UP and others 2007(3) JIC 828; Mohd Yusuf and others v. State of UP and others 2007 (3) JIC 485; Samoon and others v. State of UP and Another 2017(2) JIC 58 All.

investigate the circumstances of an alleged cognizable crime without requiring any authority from the Judicial Authorities. However, the investigation can be reopened and a supplementary charge-sheet can be submitted only on the basis of such materials which could not come to the knowledge of the Investigating Officer during investigation and not as a routine affair.

At the same time there are a series of judicial pronouncements to the effect that Magistrate is not bound by the final report and he can validly differ from the same. Magistrate, even after accepting the final report, can take cognizance of the offence upon a complaint or a protest petition on same or similar allegations of fact. However, if there is no indication by the informant that his protest petition may be treated as complaint and the Magistrate did not also consciously proceed as in a complaint case, mere filing of the protest petition would not make it obligatory for the Magistrate to treat it as a complaint case. If magistrate thinks fit after applying his judicial mind on material submitted by investigating officer, he can straightway summon accused for trial.

It can be concluded that the Code has tried to strike out a balance between the powers of Police on the one hand and Criminal Courts on the other in the interest of justice but in reality despite serious and sincere efforts of courts final reports are still pending since long and the reasons are obviously non cooperation by other stakeholders. Thus following suggestions are submitted for quick disposal of final report:

1. Information has been given to informant of First information report must be stated on affidavit by Investigating officer countersigned by superintendent of Police and personal liability of I.O. must be fixed.
2. Information must be given through e-mail, mobile messages etc.
3. In cases relating to departments in absence or transfer of public servants who lodged the FIR the Head of Department must be assigned duty to take decision regarding final report.
4. Investigating officer must be directed to produce informant in court while filing final report in Court.
5. Advocates should be offered some incentives so that they may act enthusiastically in disposal of final reports.
6. Just to recognize efforts of judicial officer and to motivate for quick disposal of final report some quota should be prescribed.
7. Special awareness and sensitization programmes should be organized under auspices of District Legal Services Authority regarding final report.

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4

Cell Phone Radiations, Public Health and Law: Need for Legislative Measures and Public Awareness

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INTRODUCTION

Mankind, with all other living beings have been living in an environment of radiation hazards from natural sources to man-made technological sources, starting from radioactive minerals in rocks and soils to non-ionizing electromagnetic radiations from cell phones.

We are living in a technological era, where electronic gadgets like mobile phones, TV have become an inseparable part of human lives. The advantages of mobile phones are huge, considering the many lives that have been saved during emergencies, and the revolution it has brought in every field and in every aspect, but at the same time it has exposed such a great proportion of the population to non-ionising electromagnetic radiations. According to K. J. Sharma,[3] any dose of radiation beyond human adapted level may not be considered safe or further adaptable.

There have been cases in India and abroad where people have alleged having caught cancer due to electromagnetic radiations from mobile phones and mobile phone towers. Although many scientific researchers have been conducted, the research reports are varied and controversial.

The goal of this article is to highlight the various harms being caused to human health, both short term and in near future, from mobile phone and mobile towers due to RF-radiations, with an emphasis on identifying the gaps in our legal system in comparison to other developed nations, and finally suggesting measures as put forward by various National and International Agencies, to avoid the harmful effects of non-ionising RF- radiations, and bring in legislative guidelines to regulate cell phone industry,

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to save the human race and the ecology from being harmed.

MOBILE PHONE RADIATION AND HUMAN HEALTH

A mobile phone is an instrument that enables wireless communication through radio waves. For this purpose, the mobile phone contains an antenna and a transmitter, through which it can communicate with the nearest base station.[4] This radio waves or radio frequency energy is a form of *electromagnetic radiation (EMR)*,[5] which can be categorised into two types:

i) *ionizing*[6] (e.g., x-rays, radon, and cosmic rays) and

ii) *non-ionizing*[7] (e.g., radiofrequency and extremely low frequency, or power frequency).

The radiation transmitted by the antenna and the circuitry inside the mobile handset is not directional, meaning it propagates in all directions more or less equally.[8] The human body absorbs such energy from devices that emit *radiofrequency* (RF) electromagnetic radiation. The dose of the absorbed energy is estimated using a measure called the *Specific Absorption Rate* (SAR)[9], which is expressed in watts per kilogram of body weight.[10] The SAR of a mobile phone is defined by the *American National Standards Institute* (ANSI) as "the time rate at which radio frequency electromagnetic energy is imparted to an element or mass of a biological body. It is expressed as energy flow (power) per unit of mass in units of w/kg." When referring to human tissue, this means that SAR is the measurement of heat absorbed by the tissue.[11] High

4. "Mobile Phone Radiation", Ministry of Health, State of Israel, available at: https://www.health.gov.il/English/Topics/radiation/cell_phone/Pages/default.aspx assessed on 27 June, 2017.
5. Electromagnetic radiation is defined according to its wavelength and frequency, which is the number of cycles of a wave that pass a reference point per second. Electromagnetic frequencies are described in units called hertz (Hz). The frequency of radiofrequency electromagnetic radiation ranges from 30 kilohertz (30 kHz, or 30,000 Hz) to 300 gigahertz (300 GHz, or 300 billion Hz). Electromagnetic fields in the radiofrequency range are used for telecommunications applications, including cell phones, televisions, and radio transmissions.
6. Radiations with enough energy which can remove tightly bound electrons from the orbit of an atom, causing the atom to become charged or ionised, thereby changing the structure of the atom, are called Ionising Radiations.
7. Non-ionising radiation refers to any type of electromagnetic radiation that does not carry enough energy per quantan (photon energy) to ionize atoms or molecules- that is, to completely remove an electron from an atom or molecule. It includes the spectrum of Ultraviolet (UV), visible light, infrared (IR), microwave (MV), radio frequency (RF), and extremely low frequency (ELF) with not enough energy to change the atom structure.
8. Manasi Dash and Arun Mehta, "Understanding Mobile Phone Radiation and Its Effects" 46 EPW 22-25 (2011).
9. The SAR is a measure of the amount of radio frequency energy absorbed by the body when a handset is in use. Lower number indicates a lower radiation exposure risk.
10. National Cancer Institute, "Cell Phones and Cancer Risk" *available at:* https://www.cancer.gov/about-cancer/causes-prevention/risk/radiation/cell-phones-fact-sheet
11. All about mobile phone radiation, available at https://sites.google.com/site/allaboutmobilephoneradiation/what-is-radiation, assessed on 27 June, 2017.
12. *Supra* Note 4.

levels of radio-wave radiation can affect health by heating the body. These effects are known as thermal effects.[12] The thermal effect has the ability to heat human tissue, much like the way a microwave oven heats food. The level of temperature increase is of an order of magnitude less than that obtained during the exposure of the head to direct sunlight.[13]

On 13 January 2010 an *Inter-Ministerial Committee*[14] submitted its report on electro-magnetic frequency radiation to the *Department of Telecommunications*(DOT), according to which, radiation can cause thermal effects by holding mobile phones close to the body.[15] It can also cause non-thermal effects, which may result in burning and tingling sensations on the skin of the head, fatigue, sleep disturbance, dizziness, lack of concentration, ringing in the ears, reaction time, loss of memory, headache, disturbance in digestive system and heart palpitation, etc.[16] Studies have shown that exposure to RF waves emitted from mobiles can also cause tumors, brain damage, foetal damage and slightly raised blood pressure at the time of use.[17]The DOT has said it is going to issue orders to the mobile handset manufacturers, to prominently display the SAR levels on the packing, so that it is readily available to the consumer at the point of sale.[18]

EFFECT ON CHILDREN

In January 2015, Forbes published an article that suggested Wi-Fi exposure could be more dangerous to children than previously thought. This is reversal from Forbes' previous stance that radiation-exposure mongers were using scare tactics to frighten those off of commonly accepted technology.[19]Children experience radiation exposure during critical developmental periods in their life as most parents do hand their kids a wireless device to alleviate boredom, without knowing that cell phones can be *carcinogenic*[20].Children absorb a greater amount of microwave radiation than adults

13. *Supra* Note 8.
14. The Inter-Ministerial Committee comprising of the Department of Telecom, Ministry of Health, Ministry of Environment and Forests, Department of Biotechnology, and Indian Council of Medical Research, was set up in August 2010 for studying radiation from cellular towers and mobile handsets.
15. DOT, Ministry of Communication and Information Technology, Government of India,"Inter-Ministerial Committee on EMF Radiations" *available at*: www.dot.gov.in/ miscellaneous/IMC%Report/IMC%20Report.pdf assessed on 29 June, 2017.
16. *Supra* Note 8.
17. Mobile phone radiation, available at: https://www.uswitch.com/mobiles/guides/mobile-phone-radiation/ assessed on 27 June, 2017.
18. *Supra* Note 8.
19. The Effects of Cell Phone Radiation on Children, available at https://www.defendershield.com/ effects-of-cell-phone-radiationn-on-children, assessed on 11 July, 2017.
20. A carcinogen is any substance, radionuclide, or radiation that is an agent directly involved in causing cancer. This may be due to the ability to damage the genome or to the disruption of cellular metabolic processes. Some carcinogens do not affect DNA directly, but lead to cancer in other ways. For example, they may cause cells to divide at a faster than normal rate, which could increase the chances that DNA changes will occur.
21. *Supra* Note 17.

do, as their bodies are very immature, changing and are extremely sensitive to foreign environmental influences.[21]It is advisable to keep mobile phones away from infants and kids for they have thinner skulls, which allows radiation to penetrate further into their brains. They have developing nervous systems with a faster rate of cellular division, meaning cell damage can occur at a faster rate. Their brain tissues hold more water, through which radiation can travel more quickly. *Foetuses*[22] are even more vulnerable than children. Adolescent girls and women are advised not to keep cell phones inside their bras. Research shows that a correlation has been found between brain cancer and cell phone usage. Brain cancer among children has now surpassed leukemia.[23]

Very few studies have been conducted around the world on RF radiation exposure to children. The World Health Organization (WHO) recognizes that RF EMF research, especially in relation to children, should be given priority.[24]In a 2010 study conducted in Germany, researchers studied over 3000 children randomly selected from the population of four cities in the South of Bavaria. Interview data was taken on the participants' mental health, socio-demographic characteristics and other points of interest. Using a personal dosimeter, the test subjects were assessed for RF EMF exposure over the course of 24 hours. In total, 7% of the children and 5% of the adolescences showed abnormal mental behaviour. Using multiple logistic regression analyses, it was determined that measured exposure to RF fields in the highest quartile was associated to overall behavioural problems in adolescents.[25]

ENVIRONMENTAL IMPACT

Cell phones pose a serious burden on the environment, gobbling up power and precious materials before heading to landfill. In the developing countries where they are repurposed or dismantled, they can end up in the rivers and soil, where they help contribute to cancer, damage to the nervous system and to brain development in children.[26] The Electromagnetic Radiation (EMR) emitted from mobile towers is so powerful that it affects the biological systems of birds, insects, and even humans. A 10-member committee under Bombay Natural History Society (BNHS) with director Asad Rahmani constituted in 2010 reviewed 919 studies performed in India and abroad

22. In human development, a fetus or foetus is a prenatal human between the embryonic state and birth. The fetal stage of development tends to be taken as beginning at the gestational age of eleven weeks, i.e. nine weeks after fertilization. In other words, its an unborn or unhatched offspring of a mammal, in particular an unborn human more than eight/nine weeks after conception.
23. Vidya Frazier, "Israeli Bill Addresses Cell Phone Radiation Danger" (2012) available at: http://www.earthcalm.com/israeli-bill-addresses-cell-phone-radiation-danger assessed on 12 July, 2017 .
24. *Supra* Note 17.
25. *Supra* Note 17.
26. Alex Pasternack, "The Environmental Costs (and Benefits) of Our Cell Phones" available at: https://www.treehugger.com/clean-technology/the-environmental-costs-and-benefits-of-our-cell-phones.html assessed on 13 August, 2017.

regarding the effects of cell-phone towers on birds, insects, animals, wildlife, and humans, pinpointed cell-phone towers as a potential cause in the decline of animal populations.[27] It was suggested that to prevent overlapping high radiations fields, new towers should not be permitted within a radius of one kilometre of existing towers. If new towers must be built, construct them to be above 80 feet and below 199 feet to avoid the requirement for aviation safety lighting.

Many components of mobile phones are considered toxic like arsenic, lithium, cadmium, copper, lead, mercury and zinc. These poisonous substances may leach from decomposing waste in landfills, seep into groundwater and contaminate the soil. Metals build up in the soil, can then enter the food chain and in sufficient concentrations may cause health problems. But not just the dumping of mobile phones is dangerous for the environment, the production of new mobile phones to contribute to climate change by using up energy and virgin materials which release greenhouse gasses into the atmosphere. It is estimated that up to 90% of these greenhouse gases can be saved by recycling materials from mobile phones.[28] Plastics may contain brominated flame retardants that are toxic and persist in the environment. Studies suggest they accumulate in household dust and in the food chain, and they have been detected in some fish.[29]

CELLULAR INDUSTRY, RADIATION RESEARCH & CANCER

The Cellular industry was started in the early 1980s. The Communication Technology which was primarily meant for The Department of Defence, USA was put into commerce by companies focussing on profits, and pressurised Government Regulatory Agency, *Food and Drug Administration* (FDA) to allow cell phones for sale in market without Pre-Market Testing. The rational, known as the Low Power Exclusion, distinguished cell phones from dangerous microwave ovens based on the amount of power used to push the microwaves. The pressure worked and cell phones were exempted from any type of Regulatory oversight.[30] Questions about cell phone safety arose in the early 1990s, when a lawsuit was filed by Florida businessman David Reynard against cell phone manufacturer NEC, alleging that cell phones caused his wife's death due to brain cancer. Reynard revealed to the public on the Larry King Live show, complete with dramatic x-rays showing the tumor close to where Susan held her cell phone to her head for hours each day.[31] Pressurised by media and public,

27. Anthony Gucciardi, "Cell-phone Towers EMR Damaging Biological Systems of Birds, Insects, Humans" available at http://naturalsociety.com/cellphone-tower-emr-damaging-birds-insects-human, assessed on 13 August, 2017.
28. The Problem with mobile phones, available at: http://www.cleanup.org.au/au/CleanUpMobilePhone/the-problem-with-mobile-phones.html, assessed on 13 August, 2017 .
29. *Supra* Note 26.
30. Sue Kovach, "Hidden Dangers of Cell Phone Radiation", (2007), available at: http://www.lifeextension.com/magazine/2007/8/report_cellphone_radiation/page-01 assessed on 27 June, 2017.
31. Ibid.

the US Congress ordered the Telecommunications Industry Association (TIA) to invest 28 million into studying cell phone safety. A non profit organisation, *Wireless Technology Research* (WTR) was formed and Dr. George Carlo[32] was appointed Chairman.

As early as 1996, the international expert committees recommended the need to conduct a comprehensive epidemiological study that will answer the subject of the possible connection between Mobile phone use and the development of tumors in the exposure area. Evaluation of carcinogenicity in humans relies on three sources of data: epidemiological, experimental animal and in-vitro genotoxicity data.[33]Epidemiologic studies take into account the following things:[34]

i) How "regularly" study participants use cell phones (the number of calls per week or month)

ii) The age and the year when study participants first and last used a cell phone (allows calculation of the duration of use and time since the start of use)

iii) The average number of cell phone calls per day, week, or month (frequency)

iv) The average length of a typical cell phone call

v) The total hours of lifetime use, calculated from the length of typical call times

A study in 2003 on eight rats exposed for two hours to the radiation of different strengths of the mobile phones having the *Global Systems for Mobile* (GSM) communications resulted in neuronal damage in the cortex, hippocampus and basal ganglia in the brains of exposed rats.[35] The findings from a study in 2004 data suggests an increased risk of acoustic neuroma associated with mobile phone use of at least 10 years duration.[36] Sweden has recognised electro-hypersensitivity (subjective and objective skin and mucosa related symptoms, such as itching, smarting, pain, heat sensation, redness, papules, pustles, etc, after the exposure to visual display terminals, mobile phones, as well as other electromagnetic devices) as functional impairment.[37]

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32. Dr. George Carlo was an epidemiologist whose expertise was in public health and how epidemic diseases affect the population. He was then working with the FDA on silicone breast implant research.
33. M Kundi, "Mobile Phone Use and Cancer" Occupational and Environmental Medicine, 61 BMJ 560-570 (2004).
34. National Cancer Institute, "Cell Phones and Cancer Risk" *available at*: https://www.cancer.gov/about-cancer/causes-prevention/risk/radiation/cell-phones-fact-sheet
35. Salford, Leif, G, Arne E Brun, Jacob L Eberhardt, Lars Malmgren and Bertil R R Persson (2003): "Nerve Cell Damage in Mammalian Brain after Exposure to Microwaves from GSM Mobile Phones", Environmental Health Perspectives, Vol 111, No 7, June, pp 881-83, Brogan & Partners.
36. Lönn, Stefan, Anders Ahlbom, Per Hall and Maria Feychting (2004): "Mobile Phone Use and the Risk of Acoustic Neuroma", Epidemiology, Vol 15, No 6, (November), pp 653-59, Lippincott Williams and Wilkins.
37. "Mobile Phone Radiation is it safe or not", *available at:* http://www.bevolution.dk/pdf / MobilePhoneRadiationIsitsafeornot.pdf assessed on 14 August, 2017

A Swedish-control study series, suggested substantially increased risks for glioma among both short and long term users of mobile phones.[38]There have been many researchers and many are still going on, but it is said that Telecom Industry lobbyists have been trying to get the report results favour their claim that everything is safe and fine. One such widely noted article by K S V Nambi and S D Soman has been highly criticised by Arjun Makhinjani in his article, "*Low Level Radiation and Cancer: Incomplete Data, Faulty Analysis*", where he says that the data which Nambi and Soman use are seriously deficient; their analysis is utterly faulty. He further writes

> *"Nambi and Soman have written a paper whose data are essentially incomplete. They have not even exercised minimal care in drawing conclusions from this data. They have ignored many of the important factors which could contribute both to cancer incidence and to the differences in such incidence between the cities. Their paper is a shameful piece of work presented in the guise of science, which not only discredits the authors, but also Bhabha Atomic Research Centre where they work, the referees who allowed such a shoddy piece of work to be published, and the journal, Health Physics, which published it."*[39]

European Commission in 2009 echoed that the exposure to radio frequency fields is unlikely to lead to an increase in cancer in humans.[40] The Washington based Government watchdog group, Environmental Working Group in 2009 said that scientific evidence to date has not been able to make a hard link between cancer and mobile phones, but that recent studies were showing an increased risk for brain and mouth tumours for people who have used mobile phones for at least 10 years.[41] George Carlo, a public health scientist, epidemiologist and lawyer who headed the $28.5 million research programme funded by the cell phone industry from 1993 to 1999 had said then

> *...with medical science indicating increased risks of tumors, cancer, genetic damage and other health problems from the use of cell-phones, the government and the cell phone industry have abandoned the public.*[42]

In Israel, a study was conducted by Dr. Siegal Sadetzki, Director of the Cancer Epidemiology and Radiation Unit at the Gertner Institute, Sheba Hospital. The results of the study found a statistically significant connection between relatively long use (over 10 years) and the development of tumors in the salivary glands, in particular

38. L. Hardell, K. H. Mild, M. Carlberg and F Soderqvist "Tumour Risk Associated with Use of Cellular Telephones or Cordless Desktop Tele-phones, 4 World Journal of Surgical Oncology 74 (2006)
39. Arjun Makhinjani, "Low Level Radiation and Cancer: Incomplete Data, Faulty Analysis" Vol. 22, No. 44 EPW 1853-1855 (1987).
40. Supra Note 6.
41. Supra Note 6.
42. Will Your Cell Phone Kill You? 2002, available at http://www.pcworld.com/article/92444/will_your_cell_phone_kill_you.html assessed on 11 July, 2017.

among people who used to hold the mobile phone on the same side where the tumor developed.[43]In May 2011, the *International Agency for Research on Cancer* (IARC), the cancer research arm of the World Health Organization (WHO), declared cell phones a Group 2B Possible Carcinogen, meaning a "*possible cancer-causing agent*," based on the available research. According to the press release *Dr. Jonathan Samet, Chairman of the Working Group, indicated that "the evidence, while still accumulating, is strong enough to support a conclusion and the 2B classification ... and therefore we need to keep a close watch for a link between cell phones and cancer risk."*[44]According to *Martin Blank*[45] electromagnetic fields (EMF) damage cells and DNA by inducing a cellular stress response. The coiled structure of DNA is very vulnerable to electromagnetic fields, which possesses the same structural characteristics of a fractal antenna (electronic conduction and self-symmetry), and these two properties allow for greater reactivity of DNA to EMF than other tissues. Moreover, no heat is required for this DNA damage to occur.[46] Blank believes that the potential harm of wireless technologies can be significant, and that there's plenty of peer-reviewed research to back up such suspicions. For example, a 2009 review of 11 long-term epidemiologic studies revealed using a cell phone for 10 years or longer doubles your risk of being diagnosed with a brain tumor on the same side of the head where the cell phone is typically held.[47]Studies in both Australia and India have found that men who use their cell phones most frequently (and keep them in their pants pocket) had lower sperm counts than those who used cell phones less often.[48]

Dr. Devra Davis, an epidemiologist and author of the book, "*Disconnect*," has been an outspoken proponent of improved cell phone standards and regulations. At present, the *Federal Communications Commission* (FCC) bases its standards on a model that overwhelmingly does not apply to the population at large.[49]As explained in one of his recent articles, Dr. Davis says

> *"The current FCC standards are unrealistic because they're based on ... a creature called Standard Anthropomorphic Man, or SAM — that's larger than the average person, and, therefore, able to withstand more radiation exposure than most people. SAM is not an ordinary guy. He ranked in size and mass at the top 10 percent of all military recruits in 1989, weighing more than 200*

43. Ministry of Health, Government of Israel, *available at:* https://www.health.gov.il/English/Topics/radiation/cell_phone/Pages/default.aspx.
44. Dr. Mercola, "Latest Radio Frequency Study Adds Credibility to Concerns About Cell Phone Hazards" 2016 June, available at http://articles.merocola.com/sites/articles/archive/2016/06/15/cell-phones-radiation-effects.aspxassessed on 11 July, 2017.
45. Special Lecturer and retired Associate Professor at Columbia University in the Department of Physiology and Cellular Biophysics and former president of the Bio-Electromagnetics Society.
46. Martin Blank gave this informative speech at the November 18, 2010 Commonwealth Club of California program, "The Health Effects of Electromagnetic Fields," co-sponsored by ElectromagneticHealth.org.
47. Supra Note 42.
48. Lulu Chang, "Cell Phones Radiation Is Making Headlines Again With Berkeley's Right To Know Ordinance" (2015) available at https://www.digitaltrends.com/mobile/cell-phones-radiation-is-making-headlines-again-with-berkeleys-right-to-know-ordinance/ assessed on 11 July, 2017.
49. Supra Note 42.

> *pounds, with an 11-pound head, and standing about 6 feet 2 inches tall. SAM was not especially talkative, as he was assumed to use a cell phone for no more than six minutes."*[50]

However, in May, 2016, Dr. Davis reiterated her call for revised FCC standards that would be based on the average person. Therefore the entire debate about these researches is of no use, so long FCC doesn't change its standard suitable for the general people. According to the Environmental Protection Agency (EPA) the FCC's exposure standards are "seriously flawed."[51] Food and Drug Administration (FDA) says that the FCC rules do not address the issue of long-term, chronic exposure to RF fields." National Institute for Occupational Safety and Health (NIOSH) says the FCC's standard is inadequate because it "is based on only one dominant mechanism—adverse health effects caused by body heating."[52] According to Amateur Radio Relay League Bio-Effects Committee, "The FCC's standard does not protect against non-thermal effects."[53]In a new report, they conclude that evidence is strong enough to warrant immediate action to protect children and others from the potentially harmful effects of electromagnetic radiation emitted by wireless devices:

> *"… non-ionizing frequencies, be they sourced from extremely low frequencies, power lines or certain high frequency waves used in the fields of radar, telecommunications and mobile telephony, appear to have more or less potentially harmful, non-thermal, biological effects on plants, insects and animals, as well as the human body when exposed to levels that are below the official threshold values. One must respect the precautionary principle and revise the current threshold values; waiting for high levels of scientific and clinical proof can lead to very high health and economic costs, as was the case in the past with asbestos, leaded petrol and tobacco."*[54]

Despite what you may have heard, the link between cell phone use and brain tumors is well substantiated and backed by more than 100 scientific studies.[55]In 2008, Dr. Vini Gautam Khurana, a Mayo Clinic-trained neurosurgeon with an advanced neurosurgery fellowship in cerebral vascular and tumor microsurgery, concluded:

> *"There is currently enough evidence and technology available to warrant industry and governments alike in* taking immediate steps to reduce exposure of consumers to mobile phone-related electromagnetic radiation *and to make consumers clearly aware of potential dangers and how to use this technology sensibly and*

50. Supra Note 42.
51. Official comments to the FCC on guidelines for evaluation of electromagnetic effects of radio frequency radiation, FCC Docket ET 93-62, November 9, 1993.
52. Comments of NIOSH to the FCC, January 11, 1994.
53. Comments of the ARRL Bio-Effects Committee to the FCC, January 7, 1994.
54. "European Leaders Call for Ban of Cell Phones and WiFi in Schools" (2011) available at http://articles.mercola.com/sites/articles/archive/2011/06/02/european-leaders-call-for-ban-of-cell-phones-and-wifi-in-schools.aspx assessed on 11 July, 2017.
55. Ibid.

safely."[56]

LEGISLATIVE MEASURES

San Francisco, California, USA was the first city to pass cell phone safety legislation "The Right to Know" Ordinance and signed by Mayor Lee, as early as August, 2011. The Ordinance requires that cell phone retailers must distribute an Educational Sheet created by San Francisco Department of Environment, explaining Radio Frequency emissions from cell phones, to be given at the point of purchase/sale, and instructions as to how consumers may minimise exposure. Each Retailer must display a poster that states that cell phone emit RF energy that is absorbed by head/body. The European Parliament passed resolution in 2009 titled "Health Concerns Associated with Electromagnetic Fields" which calls for Government actions by member states/ nations to address concern over the link between use of cell phones and certain type of cancer including brain, auxiliary nerves, parotid gland tumour, especially when children are concerned.

The Israeli Parliament too passed a bill in 2012 requiring all cell phones sold in Israel to bear a health hazard warning label. The warning will read: *"Warning—the Health Ministry cautions that heavy use and carrying the device next to the body may increase the risk of cancer, especially among children."*[57]Israel has also created the first National Institute to study the potential health effects of cell phones and other devices and make recommendations to minimize exposure to microwave radiations.[58]It will also send SMS everyday at 12 O'clock warning: "*This mobile emits non ionizing radiation and according to WHO it can cause cancer*". And each time mobile is turned on; message will appear on screen. The Public Health Service in Canada has issued guidelines over children's mobile phone use. In Russia, the Ministry of Health has issued guidelines stating that youth under 18 should not use cell phones.[59] In France, mobile phones are banned from primary schools and advertising to minors is banned. Also all cell phones must be supplied with a headset. The French Legislation namely "National Engagement for the Environment", prescribes the following:

i) Each French Electronic stores and cell phone vendors must post each devices SAR labelling, in French legible language so that consumers may make their informed choices through comparison;

ii) Cell phones be sold with headset;

iii) Ban cell phone advertisements aimed at children and adolescents younger than 14 years;

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56. Ibid.
57. Supra Note 21.
58. Available at: https://ehtrust.org/newsletter-israel-requires-warnings-on-cell-phones assessed on 12 July, 2017
59. Israeli Bill Addresses Cell Phone Radiation Danger, 2012 available at http://www.earthcalm.com/ israeli-bill-addresses-cell-phone-radiation-danger assessed on 17 August, 2017.

iv) ban the manufacturers of cell phones specifically made for kids younger than 6 years

In 2002, Interdisciplinary Society for Environmental Medicine, Germany recommended banning cell phone use by children, and also banning cell phones and cordless phones in preschools, schools, hospitals, nursing homes, events halls, public buildings and vehicles.[60] In August 2005, Vienna Medical Association warned against Wi-Fi, and cell phone use by children up to age 16.[61] In 2006, German Government, Frankfurt stated not to install Wi-Fi in its schools until it has been shown to be harmless.[62]The International Commission on Electromagnetic Safety comprising Scientists from 16 nations recommended in early 2008 to limit cell phone use by children, teenagers, pregnant women and the elderly.[63] National Library of France, Lakehead University, Ontario and Sainte-Genevieve University, Paris and Progressive Librarians Guild removed Wi-Fi from their libraries because of health concerns in 2008. The UK Teachers Union namely VOICE in 2008, the Irish Doctors Environmental Association in 2009 and the Austrian Medical Association (OAK) in 2012 recommended for a ban on Wi-Fi in schools due to exposure to electromagnetic fields, and came up with guidelines in these regard. In May, 2009 the US Fish and Wildlife Service urged Congress to focus on the potential connection between electromagnetic fields and "Bee Colony Collapse".[64] The Russian National committee on Non-Ionizing Radiation Protection has officially recommended on June 19, 2012 that Wi-Fi not to be used in schools.[65] On 15 Aug 2013, the Elementary Teachers Federation of Ontario, representing 76,000 teachers, recommends that cell phones be turned off in classrooms, and that all Wi-Fi transmitters be labelled as part of a hazard control program.

In India, the Karnataka State Government banned cell phones in all schools and pre-university colleges as early as 2009.[66] On 16 Sept 2013, the City of Mumbai, adopted a policy prohibiting cell towers on schools, colleges, hospitals, orphanages, and juvenile correction homes; prohibiting nearby antennas from being directed toward such buildings; and requiring that antennas on such buildings be removed. The policy also requires the approval of 70% of the residents of an apartment or condominium building, and the approval of 100% of the residents of the top floor, before antennas

60. http://www.powerwatch.org.uk/pdfs/20021019_englisch.pdf assessed on 17 August, 2017.
61. Ibid.
62. http://www.icems.eu/docs/deutscher_bundestag.pdf assessed on 17 August, 2107.
63. The Venice Resolution (2008) available at: http://www.icems.eu/resolution.htmassessed on 17 August, 2017.
64. New U.S. Fish and Wildlife Services Reports on EMF and Warnke report on "Bees, Birds and Mankind (2009) available at http://electromagnetichealth.org/electromagnetic-health-blog/emf-and-warnke-report-on-bees-birds-and-mankind/assessed on 17 August, 2017.
65. Government and Organisations that Ban or warn against Wireless Technology, available at http://www.cellphonetaskforce.org/?page_id=128 assessed on 17 August, 2017.
66. Government Bans Cellphones in its colleges (2009) available at http://www.hindu.com/2009/09/14/stories/2009091454460500.htmassessed on 10 April, 2017.

are installed on the roof.[67]

JUDICIAL DECISIONS

For the first time ever, a judge in Italy has ruled that excessive cellphone use can result in brain cancer.[68] The court in the northern town of Ivrea awarded the plaintiff a state-funded pension. The judgement, which was handed down on 11 April, 2017 is subject to a possible appeal. A medical expert estimated the damage to the plaintiff at 23% of his bodily function, prompting the judge to make a compensation award of •500 per month to be paid by INAIL, a national insurance scheme covering workplace accidents.[69]

A 42-year-old domestic help, Harish Chand Tiwari, from Gwalior, recently moved the SC complaining that a BSNL tower illegally installed on a neighbour's rooftop in 2002 had exposed him to harmful radiation 24x7 for the last 14 years. Radiation from the BSNL tower, less than 50 metres from the house where he worked, afflicted him with Hodgkin's Lymphoma caused by continuous and prolonged exposure to radiation.[70] Tiwari argued that if there is no conclusive evidence to show adverse health effects of electromagnetic radiation emitted from cell phone towers, there is no conclusive study to show that such radiation is safe for humans. Tiwari alleged that the respondents including the Central Government, have ignored the Precautionary Principle, in their endeavour to achieve the goal of making India, a country with the highest tele-density in the world. However laudable this goal may be, it cannot be at the cost of human welfare and well being, which is the paramount right enshrined under Article 21 of the Constitution, Tiwari contended. Tiwari has further alleged that more than 50 per cent mobile towers in the country are illegal, without following the statutory prescribed limits of radiation.[71] A bench of Justices Ranjan Gogoi and Navin Sinha directed that the particular mobile tower shall be deactivated by BSNL within seven days from the order.

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67. "Revised Draft Policy Guidelines For Installation Of Mobile Towers In The City Of Mumbai" available at http://www.mcgm.gov.in/irj/go/km/docs/documents/MCGM%20Department%20List/Public%20Relation%20Officer/Press%20Release/Public%20Notice%20for%20 Chief%20Engineer%20Development%20Plan%20Department%20eng.pdf assessed on 14 August, 2017.
68. Janice Williams, "Cancer Linked To Cellphone Use, Italian Court Rules In Landmark Case" available at http://www.newsweek.com/cell-phone-italy-cancer-mobile-phone-brain-tumor-587704, assessed on 14 August, 2017.
69. Agence France-Presse, "Italian court rules mobile phone use caused brain tumour" available athttps://www.theguardian.com/technology/2017/apr/21/italian-court-rules-mobile-phone-use-caused-brain-tumourassessed on 14 August, 2017.
70. Dhananjay Mahapatra, "Man claims cell tower gave him cancer, Supreme Court shuts it down" available at http://timesofindia.indiatimes.com/india/man-claims-cell-tower-gave-him-cancer-supreme-court-shuts-it-down/articleshow/58137346.cms?TOI_browsernotification=trueassessed on 14 August, 2017.
71. "SC Directs Deactivation of BSNL's Mobile Tower, On A Complaint From A Cancer Patient [Read Petition & Order]"available at http://www.livelaw.in/sc-directs-deactivation-bsnls-mobile-tower-complaint-cancer-patient/ assessed on 14 August, 2017.

The Rajasthan High Court recently in 2016 held that mobile towers are harmful and ordered all base towers for fourth generation (4G) telecom services to be removed. The high court held that radiation emitted from mobile phones and mobile base towers are "hazardous to children and patients".[72] The court also asked all mobile companies with towers in Rajasthan to relocate these from a periphery of 500 meters from prisons and those falling within a 100-meter distance of ancient and archaeological heritage monuments. The court emphasised that electromagnetic radiation emitted from cell phones as well as mobile towers have both thermal and non-thermal effects, that is, these waves cook human tissues just like a microwave oven would if a body is exposed to these radiation for long.[73] A three judge Supreme Court Bench of Chief Justice T.S. Thakur and Justices R. Banumathi and Uday Lalit recently while hearing appeals from various High Courts relating to mobile towers, the CJI observed that one retired judge who died of cancer had written a book in which he said that he was afflicted with cancer as he was using mobile phones for longer hours and even holding conferences on mobile phones. The bench was also informed by the Counsel that in foreign countries mobile towers are erected outside the city and boosters are erected at various points to transmit signals. This system is not being followed in India as service providers will have to incur huge costs for erection of boosters.[74]

The Supreme Court of India on 5th July, 2013upheld a decision of the High Court of the State of Rajasthan to remove all cell towers from the vicinity of schools, colleges, hospitals and playgrounds because of radiation "hazardous to life." The over 200-page November 27, 2012 Rajasthan decision reviews worldwide evidence that cell towers are harming human beings and Wildlife.

PRECAUTIONS

1. Mobile phones with a low SAR number should be bought. Lower SAR level indicates lower radiation exposure risk.
2. Keep the mobile phone away from the body. Use a speaker phone or hands-free instrument to decrease the electromagnetic radiation to the head, ensure that a ferrite bead is clipped to the headset to absorb radiation.
3. People with active medical implants should keep their cell phone at least 30 cm away from the implant.
4. Use a phone with external antenna, preferring one where the antenna is further away from the skull.
5. Avoid sleeping with cell phone below your pillow or near your head.
6. Do not use the telephone in a car without an external antenna.

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72. J. Venkatesan, "Supreme Court to Examine if mobil towards cause radiation" available at http:// www.asianage.com/india/supreme-court-examine-if-mobile-towers-cause-radiation-580 assessed on 14 August, 2017.
73. Ibid.
74. Ibid.

7. Use a landline for longer telephone calls.
8. Avoid using a mobile phone in metallic enclosures such as lifts, where the radiation has nowhere to go but into the body.
9. Limit cell phone use to areas with excellent reception because cell phones emit more radiation in areas where signals are weak.
10. Use a mobile phone radiation shield. Many companies offer such shields.
11. Use mobile phone radiation block applications which deactivate radiation emitting points in a mobile phone like the antenna, Wi-Fi, GPS, Bluetooth for desired time periods.
12. Do not let children use a cell phone[75.]
13. Children, who have smaller and thinner skulls should limit mobile phone use.

CONCLUSION

Many epidemiological investigations have been conducted by agencies sponsored by either Government or telecom industry or by independent agencies. Some of the reports gave clean chit to telecom industry and some claimed a link between radiations from mobile phones and mobile towers with cancer and other serious diseases. However no single and final conclusion has been reached. Everybody knows that smoking is injurious to health and can cause cancer. But not everybody who smokes catches cancer. Similarly not everybody exposed to mobile phone radiations will catch cancer, but then lakhs will be affected. Flora and Fauna has already been affected. We no more see the sparrow in cities these days, and it's not because of a decrease in the number of trees. Research has claimed that an uninterrupted exposure for nearly 10 years at an average period of 2 hours daily will lead to cancer. It will be too late if we wait to verify the future threat by experimenting these harmful radiations on our children and loved ones. It will be too late and we will only repent if the research proves to be true.

The Government should rather take precautionary measures like other foreign nations by bringing in legislation to control and regulate the telecom industry and the harmful mobile phone radiations .Authorities in Finland, Canada and the UK have already issued official warning about limiting cell phone use by children. The Digital India concept is without doubt a brilliant initiative by the Government, but it should not come at the cost of our children and future generations. Standing at this juncture of development and modern lifestyle, we do not believe in abandoning this revolutionary technology but we may demand attention from government as well as corporate side promoting safer use and design for public health. Till the time the technology is enhanced or developed enough to checkmate the harmful effect of the radiations, let's follow the precautions. Until science is settled and the Government updates its standards to

75. EHHI, "The Cell Phone Problem" *available at*: www.healthandenvironment.org/uploads/docs/cell_phone_report_EHHI_Feb2012_1.pdf assessed on 17 August, 2017.

reflect actual health risk or safety of cell phone use, Consumers should take precautionary measures when using cell phone, such as using a headset or the speakerphone, limiting children's use to emergencies, and turning phone off when not in use. The current and future research needs to be more experimental than epidemiological; independently funded than industry funded; focused not just on the development of cancer, but also on subtle biological effects such as headache, sleep disorder and other ailments.

At present States seem to be focussing more on cell phone legislation that covers more immediate risk of harm that is increased vehicle accident risk caused by texting and calling while driving but a comprehensive legislation is required to save generation from the harmful effect of cell phone radiation both from the cell phone's radiation as well as from cell phone towers. Public awareness may be increased through future legislation requiring cell phone manufacturers to fund informal campaigns or conspicuously post safer cell phone practices on production for sale or phone bills.

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Sanskrit Literature and Personal Laws in India: A Journey from Ancient India to Modern India

Dr. Om Prakash Sharma[1]

INTRODUCTION

Sanskrit is our *Sanskriti* and the legal system is a part of our *Sanskriti*. Since ancient literature is in Sanskrit language and the Hindu law being an ancient system; it must be found in these Sanskrit literatures. So there is strong connection between *Sanskrit* literature and law of our country. Sanskrit Literature begins with the Veda and the Veda is the source of all knowledge. In ancient India not only was there tremendous development of Mathematics, Astronomy, Medicine, Grammar, Philosophy, Literature, etc., but there was also tremendous development of law[2]. India has a recorded legal history starting from the Vedic ages. It is believed that ancient India had some sort of legal system in place even during the Bronze Age and the Indus Valley Civilization. India's legal system presents the most extensive and diverse written law in the world. The term Law was known as *Dharma*[3] which in its common connotation means *Duty*. It was duty which regulated the entire society in ancient age. Law as a matter of religious prescriptions and philosophical discourse has an illustrious history in India. Emanating from the Vedas, the Upanishads and other religious texts, it was a fertile field enriched by practitioners from different Hindu philosophical schools and later by the Jains and criminal matters were essential features of many ruling dynasties of ancient India.

The present Indian legal system is a British legacy which we have been following since our independence from British Raj. India maintains a common law legal system inherited from the colonial era and various legislations first introduced by the British are still in effect in modified forms today. Indian personal law is fairly complex, with each religion adhering to its own specific laws. In this small paper my endeavor would be to study the relevant Sanskrit literature relating to law and also to examine the provisions relating to marriage, divorce, maintenance, adoption and succession in this literature. I will also try to compare the ancient position with the modern position

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2. Markand Katju, Former Judge, Supreme Court of India.
3. Dharma in India is mainly consisted of three important aspects such as Acharas (customs and rituals), Vyavaharas (legal procedures and dispute settlement) and Praschita (penances).

and that includes development of Hindu Personal Law from Vedic age to modern age and the changes brought in it in the modern time.

CONCEPT OF PERSONAL LAWS AND IT'S SOURCES

Hindu Law refers to the system of personal laws of Hindus applied to Hindus in India[4]. Hindu law is applicable to the personal and family matters of Hindus such as marriage, divorce, maintenance, adoption, minority and guardianship, rights of a member of joint family, pious obligation of sons for the debts of the father, alienation of family property, partition of joint family property and succession. The sources of Hindu Personal Law can be divided into two broad categories: (1) Ancient Sources and (2) Modern Sources. The Ancient sources are *Vedas*, *Dharmashastras*, *Dharmasutras*, Commentaries and Digest, *Manu Smiriti* and Customs. The modern sources are: Justice Equity and Good Conscience, Precedent and Legislation.

APPLICATION OF HINDU LAW

Before the advent of Muslims in India, the term Hindu' had no creedal connotation. Then it had a territorial significance; probably it also denoted nationality.[5] It seems that the word 'Hindu' came into vogue with the advent of Greeks who called the inhabitants of the Indus valley as *idol* and later on this designation was extended to include all persons who lived beyond the Indus Valley.[6] In old Hindu Law, the expression 'Hindu 'was given sufficiently wide meaning so as to include not merely persons who were Sikhs, Jains or Buddhist by religion but also several tribes, communities and people who were not Hindus.

A precise definition of Hinduism does not exist. Hence, it is impossible to define fixed criteria for determining who is a Hindu. So a negative definition of 'who is not a Hindu' is used. Further, in this land, several religions have been born and they follow the same customs and practices. So it cannot be said that Hindu Law can be applied only to people who are Hindus by religion. Due to these reasons, in general, the following people are considered to be Hindu with respect to application of Hindu Law:

4. In India we have divergent Personal Laws meant for the people of different religion. Different religions like Hindu, Muslim, Christian and Parsietc are governed by their own personal law as Hindu law (Hindu law Acts 1955-56), Muslim law (Muslim personal laws (Shariat) application act 1937), Christian law, Parsi law (Parsi Marriage and Divorce act 1936), respectively. Every religion follows their own personal laws in the family matters pertaining to marriage, divorce, maintenance, guardianship, adoption and succession.
5. Paras Diwan, *Modern Hindu Law* 1 (Allahabad Law Agency, Allahabad, 1993).
6. Ibid.

1. Hindu by Religion - A person who is Hindu, Jain, Bauddha, or Sikh by religion[7].
2. Hindu by Birth - A person who is born of Hindu parents. If only one parent is a Hindu, the person can be a Hindu if he/she has been raised as a Hindu.
3. Persons who are not Muslim, Christian, Jew, or Parsee by religion.
4. Persons who are not governed by any other religious law will be governed by Hindu Law.

CODIFICATION OF HINDU LAW

Hindu Law applicable in India consists of two parts. First part consists of Uncodified Hindu Law which includes some customs and traditions which are being followed since the Vedic age. For example the son's pious obligation to repay his father's debt, *Stidhan* must be held by wife only, rules relating to charitable endowment, rules relating to appointment of *Mahant* and other Priests of Hindu Temples and rules relating to coparcenary property. The Codified Hindu Law is basically statute laws passed by the legislative body in India. In modern time the codified Hindu Law is applicable to two types of persons: (1) Those who are Hindus, Shikhs, Jains or Budhist by religion, and (2) Those who are not Muslims, Christians, Parsis or Jews by religion. A person who is a Sikh, Jain or Buddhist is not a Hindu by religion, though Hindu law applies to him. Similarly a person who is not a Muslim, Christian, Parsi or Jew is not Hindu by religion though Hindu Law applies to him. Section 2 (1) of the Hindu Marriage Act, 1955 categorizes the persons to whom Hindu Law applies, and sub-section (3) of section 2 calls them Hindus. Section runs "the expression Hindu in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion is nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section." This virtually means that a uniform family law applies to all persons within the territory of India excluding Jammu and Kashmir who are not Muslims, Christians, Parsis and Jews.[8]

PERSONAL LAWS IN ANCIENT INDIA

Hindu system of law has the most ancient pedigree of the known system of law. If the Vedic period is accepted to be 4000 to 1000 B.C., Hindu law is about 6000 years old. The history of Hindu law falls into three epochs:

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7. In Shastri v. Muldas, AIR 1961 SC 119. SC has held that various sub sects of Hindus such as Swaminarayan, Satsangis, Arya Samajis are also Hindus by religion because they follow the same basic concept of Hindu Philosophy. Converts and Reconverts are also Hindus. SC, in the case of Peerumal v Poonuswami, AIR 1971 SC SC 2352, has held that a person can be a Hindu if after expressing the intention of becoming a Hindu follows the customs of the caste, tribe, or community, and the community accepts him. In Mohandas v. Dewaswan board 1975 KLT 55, Kerala HC has held that a mere declaration and actions are enough for becoming a Hindu.
8. Ibid.

1. From the earliest time down to the writing of *Mitakshara*
2. From the *Mitakshra* to the establishment of British rule
3. From the date onwards which mark its modern development by the British Court.

Hindu Law is considered to be divine law, a revealed law. All sacred literature is divided into the main groups- the *Shruti* and *Smriti*, the former being synonymous with *the Vedas*; while the later comprises most of early post-Vedic literature which has, by its antiquity acquired the halo of sacredness. All laws of the Hindus are nominally traceable to *the Vedas* which are the only records of direct revelation.[9] The *Vedas* contain a collection of hymns in two parts, one touching the Supreme Being or Brahma. The later portion is called the Upanishad, and appears to have been added after the ceremonial section later on. As there are three branches of the ceremonial, the *Veda* is, for the better performance of its sacrifices, divided into three books; the *Rig Veda*, *Yajur Veda* and *Sama Veda* which were really the records of ceremonies as performed by three priestly families, namely, *Hotri*, *Adhvaryu* and the *Udgatri*. The *Atharva Veda* is not used for solemn sacrifices and is very different from the others, as it teaches only expiatory, preservative, or imprecatory rites.

The *Shruti* or the *Vedas* depicts the life of our early ancestors, their way of life, their way of thinking, their customs, their thought, but does not deal with rules of law in any systemic manner.[10] The Code of *Manu* or *Manu-Smiriti* is the first and foremost repository of Hindu Law.[11] *Manu* describes eight kinds of marriages, but of these he regards the first four as approved in the case of Brahmins. The rest he reprobates. The first four are godly, the last four, demoniac. The difference between first four lay in the price paid for the bride. The first two were marriages without consideration; the third and the rest were less meritorious, because they were marriages for a price or where otherwise non-consensual. Wives enjoyed considerable liberty. The marriage itself was not a mere contract but a sacrament. To the wife is assigned the duty of the hostess. A man is recommended to consult his guide before marriage. All men are enjoined to honour women. *Manu* disapproves of widow marriages. Child marriage appears to be common; girls below 8 are mentioned as possible bride[12]. *Manu* and the later text-writers do not regard marriages as an end in any sense, but only as a means to the sole end of securing the male issue to pull the begetter out of the torments of hell. Consequently, as *Manu* treats every alliance between a man and a woman as marriage, he regards the son anyhow procreated, whether by the procreator or not, legitimate son. He classified twelve types of sons. The *Manu*'s Code commends strict conjugal fidelity. It prohibits polyandry, a practice which appears to be of later growth. Of course, polygamy was then, as if now legal. The right of married women to her separate property was recognized. Brahmins were wholly exempt from the payment

9. Sri Hari Singh Gour, *Hindu Code* (R.G. Sagar Law Publishers (India) Pvt. Ltd., Allahabad, 6th edn. 1997).
10. Paras Diwan, *Modern Hindu Law* 29 (Allahabad Law Agency, Allahabad, 1993).
11. *Supra* note 9.
12. Ibid.

of taxes, and kings, even though dying, were bound to see that the Brahmins were neither taxed nor left hungry. Not only Brahmins but their benefactors were free from having to bear the burden of the state which was thrown on the rest of the community. Justice was administered by the king with the assistance of three Brahmin assessors. Law could however be interpreted by any of the twice-born. The procedure is elementary, and for the most part fair. Only Brahmins are to be appointed as judges.

Next to Manu, Gautama is the oldest *Dhamashastra* but it was the only work composed since the code of Manu, for *Gautama* refers to other writers whose opinions he quotes without naming them. Its age cannot be ascertained, but it appears to be *older than Baudhayana* by several generations, as the customs in vogue in his time appears to have died out when the *Baudhayana* school founded just as the customs current in *Baudhayana's* time had disappeared when the *Apastamba schools* was founded. The dominating note of the Aryan society in the days of Gautama was the same as in the days of *Manu*. Some changes were no doubt creeping into society. Caste was becoming a trifle more rigid, but it was still in a fluid condition as before. Inter caste marriages were customary and their offspring are declared legitimate. But as was the view of all ancient laws, the wife was merely a means to an end. She was married for the sole purpose of procreating a son. If her husband died sonless, she may procreate up to two sons by his brother or a *sapinda*, a*s a gotra* a*s a mana-pravar* or one belonging to the same caste. Another means of raising an issue was to obtain a son by an appointed daughter. Girls were married off before they attained *puberty*. Polygamy was then customary.[13] Gautama's law of inheritance recognizes the rule of primogeniture as the rule of succession, but the rule on that point was fluctuating, and the tendency was towards the equality of shares amongst all the sons, the eldest being given two shares. A legitimate son, a son born secretly, and a son abandoned by his natural parents inherit the estate of their father. The son of an unmarried damsel, the son of a pregnant bride, the son of a twice-married woman, the son of an appointed daughter, a so self-given and a son bought receive one-fourth on failure of the other sons. Idiots and eunuchs were disinherited, but the disqualification was personal and they were entitled to maintenance. Cases of inheritance not covered by the express texts were to be decided by the committee of ten Brahmins learned in law. The outstanding feature of Baudhayana is the recognition of family relations in their widest sense. *Baudhyana* justifies divorce on the part of the husband. *Baudhayan* prefaces to his Smiriti a long dissertation on personal purity in which he follows *Manu*, *Gautama* and the other sages of his time. In *Baudhyana* time , the law of coparcenership had not yet developed. There could be no partition during the father's lifetime except with his permission. The right of the younger sons to an equal division with their eldest brother was now recognized. He still received an additional 10 per cent or the most excellent chattle, but it all depended upon the father's volition. He believes in limited polygamy, allowing four wives to a Brahmin, three to a *Kshatriya*, two to a *Vaisya* and only one to a Shudra. Inter-caste unions are discussed without

13. *Supra* Note 9.

being condemned. Their offspring are treated as legitimate. The right of women to acquire property was now recognized. Though women possess no independence and are never fit for it, nevertheless, the daughters shall obtain the ornaments of their mother, as many as are presented according to the custom of the caste, or anything else that may be given according to custom. The work concludes with a chapter on adoption, in which occurs the text prohibiting the giving and taking of an only son in adoption[14].

Apastamba's law of inheritance follows the beaten track except that it allows the daughter to take after the pupil. The wife's *Stridhan* is better defined as comprising her ornaments and the wealth received from her relations. The doubtful equity in favour of the eldest son in now positively swept away. In regards to the marriage rites, *Vahishtha* only recognizes six forms of marriages. In his writings the dependence of women upon men is insisted on. He allows the widow after six months of widowhood-her appointment to raise an issue to her deceased husband from whose estate she is to be maintained. A woman may marry of her own accord three years after attaining puberty, but with Gautama he counsels marriage before puberty and permits re-marriage of virgin widows and of deserted wives to one of the husband's kinsmen, failing him to a stranger. The meat of domestic animals was still eaten, and Vashishtha adds the interesting fact that camel-flesh was equally served at the *Aryan* table. *Vshishtha* is quite modern in his law of property. Ten years, continuous adverse possession destroys the owner's right to property. He recognizes possession as evidence of ownership. He entrusts the minor's property to the king[15].

Vishnu like his predecessors recognizes inter caste marriage and the legitimacy of their offspring. He is the first to regard *Suttee* or self-immolation with her husband's death as a wifely duty, but this is regarded as a later interpretation. He recognizes the right of the wife and the daughter to inherit to her husband and father in absence of male issue. He also allows the mother to succeed to her son. He however enlarges the scope of *Stridhan* and prescribes the mode of its devolution. He gives mothers and unmarried daughters a share on partition. Most *Vishnu* law of inheritance has become obsolete with the discontinuation of inter-caste marriages. He apportions the share of each son according to the caste of his mother. *Narada* allows the wife to divorce her husband for impotency. He writes "women have been created for the sake of propagation, the wife being the field and the husband the giver of the seed. The field must be given to him who has seeds. He who has no seeds is unworthy to possess the field". *Narada* permits an engagement to be broken in favour of a better suitor. The sonless widow must have intercourse with her husband's brother till she has begotten a son, after which the brother is enjoined to let her go. A married woman could remarry, if her husband does not return after a stated number of years.

The *Smiriti* of *Yadnyavalka* is stated to rank next only to the Code of *Manu* in its authority. It owes its added importance to one of its commentators *Vidnyaneshwar,*

14. *Supra* note 9.
15. Ibid.

whose commentary thereon- called the *Mitakshra*- is nominally still the current law of the land, though in reality most of it has naturally been buried under the dust of ages, and what remains can only be safely relied upon if it is supported by judicial commentary of the ultimate court of appeal. The work is divided into three parts: the first deals with *Achar* or rule of conduct, the second with Vyavahar or domestic law, and the third with *Prayaschit* or penances. The two commentaries on the *Mitakshra* are the *Subodhini* by Visveshwar Bhatt and the *Laxmi Vyakhyan* or *Ballam Bhatta Tika* composed by a lady author by name Laxshmi Devi, whose patronymic was Payagunde. This closes the first stage of Hindu Law. In this period laws were composed by common customs of the society which were not codified.

DURING THE BRITISH PERIOD

Its second stage is one of elucidation and exposition by European writers who, charged with the duty of administering the Hindu Civil Law in determining their personal relations, were naturally anxious to know something of that at first hand. It is general principle that the private law of a community is not to be affected by a change of rulers, except on points upon which it conflicts with the public law. The mere establishment of a court to administer the law according to justice and right does not of itself imply any change in the law to be thus administered. The real history of Hindu Law under the East India Company begins from 1773 when the Regulating Act was passed. It reserved to the Crown the power of establishing a supreme court of Judicature at Ford William, which was constituted by the Charter of 1774, till its suppression by the establishment of the High Court in 1861. It conferred jurisdiction on the supreme court over all the inhabitants of Calcutta provided that their inheritance and succession to lands, rents and goods, and all matters of contract and dealing between party and party shall be determined in the case of Mahomedans by the laws and usages of Mahomedans, and in the case of Gentus, by the laws and usages of Gentus; and where only one of the parties shall be a Mohamedans or *Gentu*, by the laws and usages of the defendant. Sir William Jones, then a Judge of the Supreme court, felt the necessary of digests and authentic translations. In 1796, Jagannath Pandit composed Vivad Bhangarnava who translated it in the same year into English. Sir William Hay Macnaughten came to India as a cavalry cadet and while serving as Magistrate of the Sudder Diwani, he published in 1829 his "Considerations on Hindu Law" and "Principle and Precedents of Hindu Law".

PERSONAL LAW IN MODERN TIME

The executive and statutory declarations, above referred to, have not prevented the modification of Hindu law by statute. The freedom of Religion Act, 1850, the Widow's Re-marriage Act and some reform of the marriage laws have been impelled by the desire to suppress malpractices, while still later Acts have modified the law of succession and repealed the forfeiture of rights by a person born important and the like. Similarly, the Hindu Family Law and that of property and procedure have been modified or repealed to a very large extent by numerous Acts of the Legislature, rendering all but

very principles of Hindu Law, as stated in the Shastras, operative. There is scarcely any principle of the orthodox law that has not been eaten into either completely or partially by the legislature or by the codes. So far as the Legislature is concerned, the whole of the Civil Procedure, the Criminal Procedure and the law of Evidence are now subject to the Statute Law superseding the Shastric Law on the subject. Even as regards the substantive rights, Transfer of Property Act, the Succession Act and several other Acts have directly superseded the personal law.

Not only the Legislature but the decisions of the courts, particularly of the Privy Council, have tended to modernize Hindu Law. The process comprises (a) the enunciation of rules in accordance with the precepts of justice, equity and good conscience, upon points on which Hindu Law was wholly silent, or guided by the self-same principle, (b) the interpretation of ambiguous or contradictory texts, (c) the application of the principle of analogy with (d) the consequent fertile deductions and corollaries.[16] During the British raj Government was slow and cautious to change Hindu Law by legislative intervention. However, the legislative modifications till August 15, 1947, are not insignificant. Some of the statutes which have effected modification in Hindu law, either by reforming Hindu law or by superseding rules of Hindus, may be noted here.

Thus Hindu laws were reformed and modified to some extent. But these reforms were half-hearted and piecemeal. The Government ultimately decided to split up the Hindu Code and pass it in installments. Thus came into existence the four major enactments of codified Hindu Law, viz., Hindu Marriage Act, 1955, Hindu Succession Act, 1956, Hindu adoption and Maintenance Act, 1956, and Hindu Minority and Guardianship Act,1956. By these enactments of codified Hindu Law some fundamental Changes have been introduced, though a break from the past has not been made. In modern time Hindu Personal Laws are codified but in these codified laws, Hindu custom and traditions have been widely incorporated in their respective places. Apart from those, the court cannot give recognition to or enforce other customs and traditions.

CONCLUSION

Law in India emerged from classical traditions rather than a construction of a public body or state and the system was considered as very near to people. The classical legal traditions of India were exclusively recorded in the Sanskrit texts and believed to have developed by the ancient sages. This is evident from the large number of legal treaties written in ancient India in Sanskrit language. These traditions are widely understood as Hindu Law. Since society is dynamic and it keeps on changing, so for changing society law should also change. The aim of every legal system is to provide justice to its citizen and if it is not able to do that, the system will result discrimination and suppression in the society. Despite its numerous traditional and modern elements, Hindu Law today must be seen as a postmodern phenomenon, displaying its internal dynamism and perennial capacity for flexibility and realignment in conjunction with

16. *Supra* note 9.

the societies to and in which it applies. Hindu law has not remained mired in some distant past, as is often too readily assumed by modernist scholars who would not even know where to start studying this complex phenomenon, or who do not trust Hindu Law to develop ameliorative internal mechanism.

The purpose of law is to serve the need of the society and if any law that of course including personal law does not fulfill the social needs or it does not run according to the changing need of the society such law cannot be appreciated and such law serves no other purpose than the serving vested interest of handful people who claim they have better understanding of law and social needs. We can say that the journey of Hindu Personal Law from ancient India to modern India is a journey towards secularization.

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6

Access to Sea Rights of Landlocked Countries Under International Law: A Study with Special Reference to Transit Blockade

Britant Khanal[1]

INTRODUCTION

Law of sea has a place of importance in international law because it was the first complete attempt of the ILC to place a large segment of international relations on a multilateral treaty basis. One of the issues explored in this body of laws is the access of land locked countries to the sea. On February 21, 1957 the UNGA passed a resolution which requested the United Nations Conference on Law of Sea to "study of the free access to the sea of land lock countries as established by international practice and treaties."[2] Pursuant to this resolution, the Fifth Committee of the First conference began consideration of the special problems of landlocked countries in 26, February 1958. In an effort to fortify the rights of land lock countries right to access, Nepalese delegates proposed that the word 'may' in the statement, "May have free access to the sea" in the 2nd line of the first paragraph of the 'five power amendment'[3] be replaced by the word 'shall' i.e. "shall have free access to the sea"[4].

The efforts of the nations (especially LLC's) and institutions like the UN from a very early period of development of International Law have added tremendously to the development of rights of the land-locked countries regarding the access to sea. After nine long years of negotiation, the 1982 conference upgraded the rights of land lock states under Part X of the UNCLOS. An underlying theme of the 1982 convention on law sea is that it should contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries whether

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2. David Harris, *Cases and Material on International Law* 321 (Sweet and Maxwell, London, 7th edn., 2011).
3. Boas, The delegate of the United States at the twenty third meeting of the fifth committee of the conference of law, introduced a five power amendment jointly sponsored by the delegate of Bolivia, France, the federal republic of Germany, The Netherland and the United States, which converted original wording of the Swiss Proposal in Para 2.
4. Ibid.

costal or landlocked[5]. But did this addition act as a panacea for the issues regarding rights of landlocked states especially in the use of resources in the sea? This paper highlights the difference in the principles and the practice concerning the rights to access to sea for landlocked countries lay down by UNCLOS. Transit rights can be fully exercised by landlocked states only after they achieve access to the sea.

This paper focuses on the right of access to and from sea of landlocked states and freedom of transit provided by UNCLOS Article 125 with special reference to Nepal.

In both law and geography, a landlocked country connotes a state which has no sea coast and which must, therefore rely on one or more neighboring countries for the access to the sea.[6] "Transit state" Means a state, with or without a sea coast, situated between the land lock state and the sea, through whose territory traffic in transit passes.

EVOLUTION OF THE RIGHTS OF ACCESS TO AND FROM SEA

Common Heritage of Mankind (CHM) principle, whose development is attributed to Arvid Prado - a Maltese representative to United Nations, is viewed by 'developing countries as a mechanism to assure their direct participation in the international management of resource exploitation in the CHM region thereby facilitating the distribution of the economic befit in their favor'[7]. Use of the phrase 'the common heritage of mankind' implies or prescribes worldwide common ownership of the seabed and its resources beyond the limits of national jurisdiction.[8] In current international law, *res communes* generally refers to the high sea, which has the characteristic that they may not be subject to the sovereignty of any state and the states are bound to refrain from taking any act which might adversely affect their enjoyment by other states[9]. It is only logical to state that the right to use the high seas as common heritage of mankind is only effective and can only be exercised by a landlocked country if they are able to exercise their right to access the sea and transit related rights.

UNCLOS provides that 'LLC shall have rights to and from sea for the purpose of exercising the rights provided for in this convention including those relating to the freedom of high seas and common heritage of mankind. To this end, it states that the landlocked countries shall enjoy freedom of transit through the territory of the transit state by all means of transport[10]. But while the LLCs are recognized to have the right

5. United Nations Convention on the Law of Sea (UNCLOS), 1982, Preamble.
6. UNCLOS art 124; Stephen C. Vasciannie, *Land-lock and Geography Disadvantage States in the International Law of Sea* 4 (Clarandon Press Oxford, 1990).
7. Werner Scholtz, "Common heritage: saving the environment for humankind or exploiting resource in the name of eco-imperialism?" 41 *The Comparative and International law Journal of Southern Africa* 273-293 (2008).
8. Rudolf Preston Arnold, "The common heritage of mankind as a legal concept" *International Lawyers* 155 (January, 1975).
9. I. Brownlie, *Principle of Public International Law* 164-166 (Oxford University, London, 6th edn., 1966).

to access the seas, the transit states have a parallel right to take all necessary measures to protect their legitimate interest.[11]

Rights provided to LLC by UNCLOS are navigational rights of land locked states; transit rights through states lying between Landlocked States and the sea; access to the resources of neighboring coastal states' EEZs; and proper recognition of their interests in the international sea bed regime. But all the rights provided to LLC under UNCLOS can be exercised only if at the same time they also enjoy the right to have access to the seas. Every landlocked state has the right of free access to the sea derived from the principle of the freedom of the high seas[12].

ECONOMIC DISADVANTAGES FACED BY LLC

While approximately 20% of the countries in the world are landlocked, they are distributed as approximately 40% of the world's low income economies and less than 10% in world's high income countries[13]. One of the reasons for this is the economic disadvantage faced by the LLCs because of lack of access to sea which is the portal to an immense reservoir of natural resources[14].

Economic progress requires that a country's international trade be as unhampered, speedy, reliable and inexpensive as possible. Thus the freedom of transit is an important consideration for all states and an absolutely vital prerequisite for landlocked countries to get engaged in a systematic effort of economic and trade relations with other states and to reap benefits for itself and its people from it[15].

Because LLCs do not possess a coastline, their international trade is non-competitive because such competitiveness is directly linked with the issue of free access to the sea. This is again inseparably linked with the question of transit, since LLCs rely on transit through the territories of other states.

Moreover Nepal faces a peculiar disadvantage because it has to rely on only one neighbor to feasibly access the sea. The enormous distance to any Chinese seaport from Nepal means that Calcutta remains the only viable port of economic access to the rest of the world[16]. Thus the economic development of Nepal is largely dependent on India as it is abutted to 3 sides of Nepal border and it is the sole transit state. Also, Nepal and India have a history of enormous fluctuations in their relationship with each other. Nepal is commonly viewed as a proxy battlefield for two rising economies of

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10. UNCLOS, Art125 (1).
11. Ramesh Kumar Rana, *Right of access of Land lock state to the sea by examples of bilateral agreement between land lock State Nepal and port State India* (2010) (Masters of Law in Laws of Sea, Small Master's Thesis, University of Tromso).
12. UNCLOS, Art 125 (I).
13. *Supra* note 11
14. Bidhisa Lahiri & Feroz K. Masjidi, "Landlocked Countries: A Way to integrate with Coastal Economies" *27 Journal of Economic Integration* 505-519 (December, 2012).
15. John H.E. Fried, "The 1965 Convention on Transit Trade of Land-locked States" *Indian Journal of International Law* 9-30 (1966).

south Asia viz. India and China. Thus, it is very difficult for Nepal to exercise any of its rights without giving due regard to the principle of reciprocity. This amounts to an onerous burden upon the LLCs which are already burdened by low levels of economic prosperity.

LIMITATION OF THE RIGHT OF ACCESS TO AND FROM SEA

Freedom of Transit is subordinated by the fundamental principle of "Sovereignty of the Transit State".

UNCLOS provides that land-locked States the right of access to and from the sea for the purpose of exercising the rights provided under UNCLOS but 'the terms and modalities for exercising freedom of transit shall be agreed between the land-locked States and transit States concerned through bilateral, sub regional or regional agreements'[17]. But this right is once again conditioned with the provision 'that transit states, in the exercise of their full sovereignty over their territory, shall have the right to take all measures necessary to ensure that the rights and facilities provided for in this part for land-locked states shall in on way infringe their legitimate interests'[18]. Transit states are authorized to take 'all measures necessary' in protection of their legitimate sovereign interests. But the scope of 'legitimate sovereign interests' is not explained, which could be used by transit states in any way possible. The provision is derived from the concept of territorial sovereignty. A state is unquestionably sovereign over its territory[19]. If sovereignty means anything in this context, it must comprehend the right to exclude aliens or to prevent the construction or use of instrumentalities dedicated to the transit of persons or goods[20]. In other articles of UNCLOS where sovereign right of coastal states is mentioned the scope of such right is well-defined, but the sovereignty of the coastal states in art 125(3) is not given enough clarification and substantiation to enable one to determine what this sovereignty and legitimate interest stands for[21]. It can thus be seen that 'there is no absolute right of transit, but rather that transit depends upon arrangement to be made between the landlocked and the transit states and largely upon the mercy of the transit state[22].

'Opinions are divided on the question of knowing whether there is or not a general duty to grant the right of transit throughout the national territory to neighboring states suffering from an unfavorable position. The lack of clarity in the question of whether there is an obligation upon the transit state to grant the right of transit in their national

16. Pashupati Shumshere J.B. Rana, "Nepal : The Political Economy of a Relationship" 11 *Asian Survey* 254 (July,1971).
17. UNCLOS (n), Art 124 (3).
18. UNCLOS(n), Art 125 (3).
19. UNCLOS Art 73 & Art 56.
20. Malcolm N. Shaw QC, *International Law* 607 (Cambridge University Press, UK, 6th edn., 2008).
21. Kishor Upreti, "Landlocked States and Access to the Sea: An Evolutionary Study of a Contested Right" 12(3) *Penn State International Law Review* 407 (1994).
22. E. Lauterpacht, "Freedom of Transit in International Law" 44, *Transaction of the Grotius Society: Problems of Public and Private International Law* 313-356 (1958).

territory to neighboring LLC states along with priority over the sovereignty of the transit state have made the right to access to sea abdicable. In the context of international law, 'state sovereignty' has gained the character of customary international law while the right of landlocked states are still being debated with reference to whether or not they have the value of customary international law.

STATE PRACTICE REGARDING TRANSIT RIGHT OF NEPAL AND AGREEMENT OF THE SAME WITH INDIA

The existing transit treaty between Nepal and India is the treaty signed on 5th January 1999 at Kathmandu[23]. This treaty in its preamble recognizes that 'Nepal as a LLC needs freedom of transit, including permanent access to and from the sea, to promote its international trade[24]. Here, the text of the preamble does not utilize the term 'right' of free access to and from sea. In such a context, the words are usually interpreted in the context of their surrounding words i.e '*noscitur a sociss'*. The use of word freedom to express transit and followed by 'including permanent access to and from sea' does not expressly mentions the 'access to and from sea' as the 'right' of LLC Nepal. It appears that these facilities were not granted by India under a sense of legal obligation and were not claimed by Nepal as a legal right[25].

Also, the principle of reciprocity' which is non-existent in the UNCLOS, exists in the 'treaty of transit between Nepal and India in articles I, the verbatim being 'freedom to transit across their respective territories through routes mutually agreed upon. This is not the principle of free access to and from sea for landlocked countries. It is also shown in article II that the 'freedom of transit is subordinated to the fundamental principle which is the sovereignty of the state thus must not all violate the sovereignty of the transit state[26]. All the provisions in the treaty are applied in reciprocity, which include the benefits of custom duties, transit duty and facilities provided under the treaty of transit. Also the treaty places limitations in the form limiting the access to port of Kolkata and Haldia which are the only ports available for trade between Nepal with any third country. This has forced unduly long transit times and high transportation costs on Nepalese trade and has contributed in lowering the trade competitiveness of Nepal mainly because the containers being transshipped in route are transported by Indian feeder vessels[27]

Also, the Calcutta port authorities resort time and again to checking of goods bound for Nepal and third countries, which is a flagrant violation of the principle that

23. Treaty of Transit Between the Government of Nepal and Government of India, Nepal Transit and Warehousing company Limited (An Undertaking of Government of Nepal), 5th January 1999, Art XI.
24. Ibid.
25. Amrit Sarup, "Transit Trade of Land-locked Nepal" 21 *The International and Comparative Law Quarterly* 295 (April, 1972).
26. *Supra* note 21 at 28.

no goods in transit to a land-locked country from a third country should be checked by coastal state authorities.[28] Under the guise of sovereign right, infringement of the legitimate interests and security issues, India, time again uses these principles to bargain and fulfill its strategic interests with Nepal. For all the foregoing reasons, political disruptions or other diplomatic reasons sometimes result in the coastal economy blocking the transit of food and other material to its LLC thus infringing of the right to access to and from sea as in the case of India's economic blockage in late march 1989.

In the same way, India has already allowed the agreements relating to oil processing and warehouse space in Calcutta in relation to the goods destined to Nepal expire.[29]

Applying international laws in relation to Nepal and India, Nepal has a "Right of Transit" in international law, but it is not a perfect right. It is more a right to a treaty to be concluded with India[30]. This has brought to light the greater debate regarding the rights of LLCs to free access to and from sea based on the principle of equitable distribution which is impossible to exercise without right to transit. Since the right to transit is an imperfect right, the right that can only be exercised after to transit is guaranteed, becomes imperfect right *de facto* if not *de jure*.

LEGAL IMPLICATIONS OF BLOCK ADE IMPOSED ON NEPAL BY INDIA AFTER NEPAL'S PROMULGATION OF CONSTITUTION ON 2015

The blockade occurred in the context of the drafting and promulgation of the new constitution of Nepal by its constituent assembly in 2015. The political parties representing the *Madhesi* minority groups in Nepal were opposed to the terms of the constitution and were vehemently opposed to the promulgation of the constitution. The situation in southern Nepal was growing tense with violent outbreaks and demonstrations occurring frequently. In the day prior to the declared day of promulgation and release of the new constitution, the Indian Foreign Secretary paid a visit to Nepal try and persuade the majority parties to delay or postpone the promulgation. The Indian Government had previously made statements that Nepal should address the concerns of the *Madhesis* in its new constitution. The Nepalese government denied to postpone the day of the promulgation and went ahead with it as declared. As soon as this occurred, the transit of trucks and other vehicles ferrying material into Nepal were stopped at the Indian border citing "security concerns". While many other states were welcoming the new Nepalese Constitution, India only "noted" this event. This denial of passage of vehicles into the territory of Nepal continued for the preceding 6 months when no goods could be imported to Nepal via any of the Indian borders. This consequently caused a shortage of fuel, medicine and foodstuff inside Nepal causing a minor humanitarian crisis. Eventually, other states including China agreed to aid

27. *Supra* note 16 at 22.
28. *Supra* note 25 at 295.
29. Jean-Marc F, Blanchard & Norrin M. Ripsman, *Economic Statecraft and Foreign Policy: Sanction, Incentives and Target State Calculation* 101 (Routledge, Milton Park, 2013).
30. *Supra* note 25 at 297.

Nepal providing some resources such as fuel. However, the Nepalese people and businesses had to suffer unprecedented losses during the period of this blockade. The blockade was eventually lifted after an agreement was made between the majority parties and the *Madhesi* minority parties to discontinue violent protests. The situation was worsened by the fact that this blockade occurred not long after Nepal suffered a natural catastrophe in the form of an earthquake.

Legal implication of this blockade includes violation of principle of sovereignty and non-intervention within domestic matters, which stems from not only the UN Charter[31] and Montevideo Convention[32] but also from Charter of SAARC[33], which is a regional instrument created by active participation of India and Nepal. Oppenheim states that a major element for non-intervention is with regards to matters in which each state is permitted by principle of state sovereignty to decide freely the choice of political, social and cultural systems and foreign policy[34]. Thus, blockade done by India with a view to coerce a constitutional amendment in favour of agitating parties can be termed as 'intervention'.

As Nepal and India has a bilateral agreement on Trade and Transit, Nepal had right to transit and had right to exercise right under freedom of high seas[35] as per UNCLOS[36], Convention On Transit Trade of Land-Locked States[37] and General Agreement on Trade and Tariff[38]. Further, India, being the transit state had the obligation to take all appropriate measures to avoid delays in traffic in transit and lend cooperation towards expeditious elimination of all problems that hinder free transit[39].

Along with violation of norms codified in various multilateral treaties mentioned above, the blockade violated norms codified in Bilateral Treaties and agreements between Nepal and India. India violated its obligation to undertake all necessary measures for free and unhampered flow of goods under Revised Treaty of Trade and Transit, 2009[40]. Although Article 10 of the treaty provides that any country can take measures for protection of its essential security interests India had no legitimate security interests in imposing the blockade. The protesters were agitating against Nepali Government and there was no possibility of its spill over to the Indian side. Further, both parties had the obligation to 'facilitate effective and harmonious implementation' of the trade treaty[41] and India had never lent its hand to thwart any disturbances. Instead, it was reported that the agitators used Indian soil for resting and fooding after daily protests.

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31. UN Charter, Article 2(1), 2(4).
32. Montevideo Convention Article 8, 1934.
33. SAARC Charter Article 2, 1985.
34. Oppenheim, *International Law* 14 (Longmans, Green and Co. London, 1904) cited in Nicaragua Case, Merits, 1986, ICJ
35. UNCLOS Article 125 (1) & (2), 87, Geneva Conventions on High Seas, Article 3, 1958.
36. UNCLOS Article 125 (2).
37. Convention on Transit Trade of Land-locked States, 1965 Article 2.
38. General Agreements on Trade and Tariff, 1994, Article 5.
39. UNCLOS Article 131, 132; Convention on Transit Trade of Land-locked States, Article 7, 1965.
40. Article 2 of Revised Treaty of Trade and Transit, 2009.

By not abiding by the above mentioned bilateral and multilateral treaty norms in good faith, India has violated a fundamental principle of treaty law, i.e. *pacta sunt servanda*[42]. As a corollary, it has also defeated the object and purpose of the treaties mentioned above. Apart from violating treaty norms, India has also violated customary norms of right to free access to sea and right to transit and violation of principle of sovereignty and non-interference. As a whole, India had performed an internationally wrongful act and if Nepal chooses to apply to appropriate forum, it can very well get an adequate remedy.

CONCLUSION

Even though 1982 Convention brought changes in terms of removing the concept of principle of reciprocity in exercising transit rights, the key concept of protection of transit rights are still left vague and ambiguous. LLCs' right from the history have been successfully integrated in UNCLOS but this is definitely not the apogee of achievement of LLCs' rights. When the transit and land-locked State are in very different positions in terms of economic development, the land-locked countries usually remain acquiescent as they are easily swayed by the Coastal State as per their interest. But it should be understood that Freedom of transit over the territory of adjacent States may be a matter of convenience to a coastal State; to a land-locked State it is a matter of survival. [43] This seems to be the question of proper implementation of the right of free access of sea of LLC but there is greater doctrinal debate necessary regarding 'which right will prevail?' i.e. the principle of State sovereignty or CHM principle guided by equality of State sand equitable distribution of the natural resources. Thus, this question should be sorted out mean while developing the greater regional integration in terms of trade and economy would be a solution for now. In context of Nepal if SAARC could play a role to integrate trade among south Asian region, the problem of transit for Nepal as a landlocked country could be solved thus its right of free access to and from sea guaranteed under UNCLOS could be better implemented in practice.

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41. Article 11 of Revised Treaty of Trade and Transit, 2009.
42. VCLT Article 26.
43. *Supra* note 25.

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Law of Torts and Medical Negligence: A Discussion with Special Reference to India

***Mr. Sougata Talukdar*[1]**

INTRODUCTION

The classical concept of a doctor-patient relationship born in the golden days of family physicians has undergone a drastic change due to dramatic advancement in medical technology, availability of sophisticated imaging systems, high tech electronics, and preponderance of new diseases.[2] Where a duty of care is breached, liability for negligence may arise. Medical negligence is part of a branch of law called tort derived from the Latin verb 'tortere' i.e. to hurt.[3] The idea of hurt or injury is the most important consideration in establishing a case of negligence. The patients who admitted in hospitals or approaches medical professional for treatment are faced with many problems.[4] Everyone wants a safer medical system. Each year, thousands of medical errors are made, resulting in injuries to patients who may deserve compensation.[5] A breach of duty has done by doctor or hospital gives a patient the right to initiate action against negligence. But the majority of tortious claims do not succeed because patient fails to establish that harm has occurred as a direct result of such failure.

CONCEPT OF MEDICAL NEGLIGENCE

The medical profession is considered a noble profession because it helps in preserving life. A patient generally approaches a doctor or hospital with full of expectations. Expectations of a patient are two-fold: (i) doctors and hospitals are expected to provide medical treatment with all the knowledge and skill at their command;(ii) they will not do anything to harm the patient inany manner either because of their negligence, carelessness, or reckless attitude of their staff.[6] Every person who enters into this

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2. Shibani Mehra, "Medical Negligence" 12(1) JIACM 26-27 (2011).
3. Daniele Bryden, Ian Storey, "Duty of Care and Medical Negligence" 11(4) *CEACCP 124-127(2011)*
4. Pulyapudi Srinivas, "Impact of Medial Mal Practice in India" 3(1) IJMER 30-44 (2013).
5. T. Brennan, L. Leape, et.al., "Incidence of Adverse Events and Negligence in Hospitalized Patients: Results of the Harvard Medical Practice Study I" 13(2) QSHC 145-152 (2004).
6. M. S. Pandit, Shobha Pandit, "Medical negligence: Coverage of the Profession, Duties, Ethics, Case Law, and Enlightened Defense - A Legal Perspective," 25(3) IJU 372-378 (2009).

profession undertakes to bring to the exercise of it a reasonable degree of care and skill.[7]

In the matter of professional liability, the medical profession differs from other occupations for the reason that the former operates in spheres where success cannot be achieved in every case and very often success or failure depends upon factors beyond a doctor's control.[8] A doctor cannot and does not guarantee that the result of treatment would invariably be beneficial. The only assurance which such a professional can give that he is possessed of the requisite skill in that branch of profession which he is practicing and while undertaking the performance of the task entrusted to him he would be exercising his skill with reasonable competence. This is what all, the person approaching the professional can expect.[9] A person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person when consulted by a patient owes him certain duties: (a) A duty of care in deciding whether to undertake this case. (b) A duty of care in deciding what treatment to give. (c) A duty of care in the administrating that treatment properly.[10] A breach of any of these duties gives a right of action for negligence to the patient. In order to prove medical negligence under the law of torts, the aggrieved patient must establish to the satisfaction of the court that[11]:

(a) The doctor owed him a duty of care of a particular standard of professional conduct.

(b) The doctor contravened the duty.

(c) The patient suffered damage.

(d) The doctor's conduct was the direct and the proximate cause of damage.

With the growing number of medical negligence, it has acquired itself attention of the lawmakers and accordingly some immediate strict laws to be made in this regard.

DUTY TO CARE

a. The Duty: The first element when medical negligence is considered is that the doctor must have the duty to care. Unless there is a duty to care by the doctor, there is no question of negligence. Existence of the duty to take care is the very essence of negligence. This duty of care arises when there is a relationship between the patient and the doctor, which may be fiduciary, contractual or something else. The relationship may differ from case to case. There is no general rule of law defining such duty. All we can say is that the relationship starts from the moment the doctor accepts or undertakes the treatment of the patient. This duty of taking care is the assimilation of the following duties:

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7. State of Haryana v. Smt. Santra (2000) 5 SCC 182.
8. Lavlesh Kumar and B. K. Bastia, "Medical negligence- Meaning and Scope in India" 51(181) JNMA 49-52 (2011).
9. Talha Abdul Rahman, "Medical Negligence and Doctors' Liability" 2(2) IJME 60-61 (2005)
10. Poonam Sharma v. Union of India, AIR 2003 Delhi 50.
11. Philips India Ltd. v. Kunju Punnu, (1975) MLJ 792.

(a) Doctor must decide whether he will undertake the case or not.
(b) Doctor must act in utmost good faith towards the patient.
(c) Doctor must diagnose the decease properly.
(d) Doctor must follow the required steps for proper medication or treatment.
(e) Doctor must exercise reasonable care, reasonable skill and diligence.
(f) Doctor must take consent of the patient or relatives of patient before starting the treatment procedure.
(g) Doctor must inform the patient or his relatives about the risk and complication that may arise later.

In Lakshmi Rajan v. Malar Hospital Ltd.,[12] the complainant, a married woman, noticed development of painful lumps in her breast. The hospital's doctor while treating the lumps removed her uterus without justification. It was held to be a case of failure of doctor to take care for which the opposite party was directed to pay Rs. 20,000 as compensation to the complainant. Further in Dr. P. Narsimha Rao v. G. Jayaprakasu,[13] the plaintiff, a brilliant student of 17 years, suffered irreparable damage in the brain due to the negligence of the surgeon and anesthetist. There was no proper diagnosis and if the surgeon had not performed this operation, the plaintiff could have been saved from the brain damage. The anesthetist was also negligent in so far as he failed to administer respiratory resuscitation by oxygenating the patient with a bag or a mask. The defendants were, therefore, held liable. In *Dr. P.B. Desai* v. *State of Maharashtra*,[14] it was held that appellant's "duty" to act contractually, professionally as well as morally and such an omission can be treated as an "act" under civil law. However, having advised the operation, the appellant failed to take care of the patient and thus found to be guilty of committing professional misconduct.

b. Reasonable foreseeability: The risk which is the reason of duty to take care should be foreseeable one. Even it is not enough that the injury is foreseeable, but reasonable likelihood of the injury has to be proved. In *Fardon* v. *Harcourt-Rivington*,[15] Lord Dunedin said that while people must guard against reasonable probabilities but they are not bound to guard against fantastic possibilities. In *R* v. *Croydon Health Authority*,[16] the plaintiff applied for a nurse job with the authority. She had a chest X-ray that was reported by the radiologist who missed the findings indicative of Primary Pulmonary Hypertension. Generally, if any woman suffers with this decease then pregnancy is a threat to such women in respect of her span of life. But the without having knowledge of such decease became pregnant and had a healthy baby. After few days she fell ill and had cardiac catheterization. She

12. III (1998) CPJ 586;Joint Director of Health Services, Shivagangal v. Sonal, AIR 2000 Mad 305
13. AIR 1990 AP 207.
14. AIR 2014 SC 795; Tamil Nadu Medical Council v. Easwaran DNB FRCS, AIR 2015 Mad 11.
15. (1932) 146 LT391.
16. (1998) 40 BMLR40.

filed a case against the authority for such mistake. But her claim failed as her pregnancy and subsequent illness were outside the foreseeability of the radiologist.

c. Standard of Care: Once the duty to care of a doctor or hospital is established, the next question is how much care he must take in the given circumstances. The answer of this question can be determined by taking the followings in consideration: (a) importance of the object to be attained, (b) magnitude of the risk, (c) amount of consideration for which the service are offered, (d) the circumstances of each case.The standard of care does not mean perfection in practice.[17] The standard of the 'reasonable man' is usually applied for most tort cases.[18] However, where there has been a potential breach of professional duty, this is reinterpreted as that of the standard of comparable professional practice. The Supreme Court in the case of *Jacob Mathew* v. *State of Punjab*[19] sets out thatthe standard of care, when assessing the practiceas adopted is judged in the light of the knowledge available at the time of the incident, and not atthe date of trial.[20]

Bolam v. Friern HMC[21] is the most well-known case in relation to this professional standard. In this case it was argued that if a doctor acted in accordance with a practice that was considered acceptable by a responsible body of doctors that was sufficient and the claimant must show that no reasonable doctor acting in the same circumstances would have acted in that way. But the application of the *Bolam* test to cases of medical negligence has been the subject of prolonged criticism.[22] The test has been interpreted as a state-of-the-art descriptive test based on what is actually done, whereas in negligence cases generally, the test is a normative test based on what should be done.[23] Further the test is heavily dependent on expert evidence for either side which may be in conflict. Even the experts are from same profession and there is a high chance of being bias. It has a tendency to allow peer evidence to sanction negligence.[24] Moreover, it can be interpreted as that the duty of judge is performing by the body of medical personal, which is not desired one. But the Bolam test is still frequently considered in cases of medical negligence in India.

In the case of *Bolitho*[25], the House of Lords held that a judge will be entitled to choose between two bodies of expert opinion and to reject an opinion which is

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17. Peter Moffett, Gregory Moore, "The Standard of Care: Legal History and Definitions: The Bad and Good News" 12(1) *WJEM 109-112(2011)*.
18. Savitri Devi v. Union of India, IV (2003) CPJ 164.
19. (2005) 6 SCC 1.
20. Irvin Sherman, "The Standard of Care in Malpractice Cases" 4 (2) OHLJ 222-242 (1966).
21. (1957) 2 All ER 118.
22. Alasdair MaClean, "Beyond Bolam and Bolitho" 5(3) *MLI* 205-230 (2002).
23. J Warren Jones, "Law and ethics: The Healthcare Professional and the Bolam Test" 188 BDJ 237-240(2000).
24. Michael Kirby, "Patients' Rights: Why the Australian Courts Have Rejected Bolam" 21(1) JME5-8 (1995).
25. Bolitho v. City and Hackney Health Authority, (1996) 4 All ER 771.

logically indefensible. This has been interpreted from a point of view where the Court sets the law not the profession. The House of Lords decision in *Bolitho* case seems to be a departure from the old Bolam test. However, the Court in *Bolitho* case did not specify in what circumstances it would be prepared to hold that the doctor has breached his duty of care by following a practice supported by a body of professional opinion, other than stating that such a case will be "rare". The Bolitho test has been mentioned by the Indian Supreme Court on only two occasions. It was stated in *Samira Kohli* v. *Prabha*,[26] where the court clearly supported the view of *Bolitho* case and *Pearce* v. *United Bristol Healthcare*.[27] Similarly, in *Binitha* v. *Lakshmi Hospital*[28] where the court did not look into the test at all.[29]

BREACH OF DUTY

In an action of negligence, it has to be proved by the patient to establish his case, that the doctor had not only the duty to care, but he breached the duty to care. Breach of duty means omitting to do something, which a reasonable doctor would do, or doing something that a reasonable doctor would not do.[30] A doctor cannot be held responsible for a trifling injury, if he has taken reasonable care and exercised skill. Some circumstances that are relevant while determining breach of duty are:[31]

1. The gravity of the risk involved in the management of a case.
2. Whether the patient is aged or minor.
3. Whether the patient is suffering some other associated medical conditions.
4. The common practice of the profession with respect to the management of the case.
5. The degree of knowledge at the prevailing time.
6. The available resources.

It is a well-accepted fact that variations of opinion in the realm of diagnosis is the most obvious in the today's modern medical system. So negligence cannot be alleged against a doctor, just because his opinion differs from other professional man of the same field. To establish liability by a doctor where deviation from normal practice is alleged, three facts must be met: first, it must be proved that there is a usual and normal practice; secondly, it must be proved that the defender has not adopted that practice, and thirdly, it must be established that the course the doctor adopted is one which no professional man of ordinary skill would have taken if he had been acting

26. (2008) 2 SCC 1.
27. (1998) EWCA (Civ) 865.
28. (2001) 8 SCC 731.
29. A. Samanta, J. Samanta, "Legal Standard of Care: A Shift from the Traditional Bolam Test" 3(5) *CM443-446*(2003).
30. Dr. D. P. Narshima Rao v. G. Jayaprakasu, AIR 1989 AP 207.
31. Tapas Kumar Koley, Medical Negligence and the Law in India 67 (Oxford University Press, New Delhi, 2010).

with ordinary care.[32] However, before commencing the treatment, the doctor must do the appropriate examination of the patient which will help him to diagnose the real decease. During treatment, the doctor must attend the patient with reasonable promptitude and failure to do so would be a breach of duty. The doctor must keep the patient under observation in the post- operative care. Doctor must warn the patient of the surgery which he is going to be subjected to, and refer the patient if the patient's condition is beyond his competence. If a doctor fails to perform any of these duties, it will be treated as he has committed breach of duty.

The standard of reasonable care is a flexible criterion capable of setting the boundaries of legal liability of the professionals depending on duties founded on tort or contract. The standard can be assessed in an objective manner according to the nature of the task undertaken by the professional, irrespective of his qualifications or job title.[33] In many diseases the early symptoms may be obscure, and may lead to a wrong diagnosis which is not negligence. But later developments may make things clear. If a doctor does not take these later developments into consideration and does not modify his earlier mistaken diagnosis, he may be held as negligent.[34]

PROXIMATE CAUSE

Doctor is not liable for every injury sustained by the patient during the course of treatment. Doctor is only liable in an action for medical negligence if his action is the proximate or immediate cause of the injury of the patient. The law does not demand from the complainant to prove doctor's negligence as a sole reason for the alleged injury. If there are many causes for the alleged injury, but the doctor's negligence has aggravated the injury, the doctor will be held to be liable.[35] So, it can be said that if the complainant can prove that doctor's negligence is one of the proximate cause of the injury, then it is sufficient to make the doctor liable for medical negligence.

BURDEN OF PROOF

The onus of proof of essentials in a case of medical negligence is generally on the plaintiff.[36] The plaintiff must prove the allegation against the doctor by citing the best evidence available in medical science and by presenting expert opinion.[37] However, where a general duty of care arose and there was failure to recognized treatment procedure by a doctor or medical practitioner, which led to an unavoidable damage then the burden of proof at the first instance would lie on the defendant.[38] The doctor

32. Mehari Wildu, "Medical Liability in the Eritrean Context," JEMA 31-35 (2006).
33. Pushpa Devi v. Government of Himachal Pradesh, 2013 ACJ 406.
34. Brig. M.A. George, Hospitals and the Law, 21(LexisNexis, Gurgaon, 2016).
35. Patrick J. Kelley, "Proximate Cause in Negligence Law: History, Theory and the Present Darkness" 69(1) WULR49-105 (1991).
36. Calcutta Medical Research Institute v. BimaleshChatterjee, I (1999) CPJ 13 (NC).
37. Laxman Balkrishna Joshi v. Trimbak Bapu God bole, AIR 1969 SC128; State of Punjabv. Shiv Ram,AIR 2005 SC 3280.
38. Andrew Grubb, "Causation of Medical Negligence" 47(3) CLJ350-352 (1988).

would be required to show how he had not been in breach of his duty and how the damage suffered by the patient did not result from any act or omission of his.[39] In Madhubalav. Government of N.C.T. of Delhi,[40] it was held that negligence has to be established and cannot be presumed. Plaintiffs' can also shift the entire burden of proof to the doctor if he can successfully show how the circumstances surrounding the case speaks about the negligence of the doctor for itself.[41]

RES IPSA LOQUITUR

Res ipsa loquitur is not a cause of action but a rule of evidence.[42] In the context of health care liability claims, a *res ipsa loquitur* allegation may cause a health care provider some degree of anxiety because expert testimony on the applicable standard of care and a breach of that standard of care is not necessary. For *res ipsa loquitur* to be applicable, the claimant must produce evidence from which it can be concluded, that the incident resulted from negligence and was the responsibility of the defendant.[43]

In *Achutrao Haribhau Khodwa* v. *State of Maharashtra*,[44] the appellant's relative was admitted to a government hospital for a sterilization operation. During the operation however, a mop was left inside the body of the deceased leading to the pus formation and subsequent death. The appellant could not have proved the negligence of the doctors and hence the doctrine of *Res Ipsa Loquitur* was applied to hold the defendants liable.[45] The doctrine applied in cases where the only inference on the evidence before the court, it must be proven that there was no other possible explanation for the plaintiff's injury except through the negligence of the defendant.[46] To defend this, the doctor has to prove that the injury caused by some other cause not due to his negligence.[47] *Res Ipsa Loquitur* cannot be applied for cases of negligence of common occurrence but where the same negligence is of a very high degree causing serious damage then the maxim can be applied.[48] However, medical practitioner should not be scared of this doctrine. It is rarely made use of and actually cannot be availed of till the doctor has acted in an extremely careless manner like leaving a swab in the abdomen and stitching it in after concluding the operation itself etc.

39. Aphraim Jayanand Rathod v. Shailesh Shah, (1996) 1 CPR 547 (Guj).
40. (2005) 118 DLT 515.
41. Mark F. Gardy, "Res Ipsa Loquitur and Compliance Error" 142(3) UPLR887-947 (1994).
42. Haddock v. Arnspiger 793 S.W.2d 948 (Tex.1990).
43. Spring Meadows Hospital v. Harjot Ahluwalia, AIR 1998 SC 1801; V. Kishan Rao v. Nikhil Super Speciality Hospital, (2010) 5 SCC 513.
44. AIR 1996 SC 2377; Jasbir Kaur v. State of Punjab, AIR 1995 P&H 278.
45. Aparna Dutta v. Apollo Hospital Enterprises Ltd., 2002 ACJ 954.
46. Soniya Bai and Ramswaroop Morya v. Dr.Pramod Sharma, AIR 2012 MP 21.
47. Govind Singh v. Prahlad, 1986 (1) TAC 194 (Raj).
48. Fowler V. Harper, "Effect of Doctrine of Res Ipsa Loquitur" 22 ILR 724-747 (1928).

DEFENCE

There are several defences available to medical professionals accused of negligence.

a. **Standard Negligence Defenses:** Medical malpractice is a form of negligence; therefore, many of the defenses allowed against general negligence claims are also viable against malpractice claims. For example, a doctor may argue that his care was in line with the standards upheld in the medical profession, or that the patient's injuries weren't the result of a medical error. Moreover, it is a well settled principle that until and unless a doctor-patient relationship is established the former cannot be assumed to have a duty of care towards the later. Therefore, the question of breach of duty and consequential negligence cannot be established.[49]

b. **Contributory Negligence:** Oftentimes, medical professionals aren't the only ones to blame for an injury occurred due to negligence. If a doctor or medical professional can show that the injury would not have occurred had it not been for a negligent act by the patient, doctor may have a valid defense against a malpractice claim. Contributory negligence is a good defence, but is not an absolute defence. Usually this would result in decrease in the amount of the damages. The principle of proximity of causation is the most important factor in determining contributory negligence. The doctor has to prove that the patient's negligence is the proximate factor which aggravated the injury.

c. **Respectable Minority Principle:** There are various instances when medical professionals decide to pursue a new or non-customary form of treatment in order to effectively treat a patient. While the decision may place the doctor outside of the medical mainstream, he or she could have a valid defense if a respectable minority of medical professionals supports that line of treatment.

d. **Good Samaritan Laws:** Many states have "Good Samaritan" laws, shielding individuals who come to the aid of those in medical distress. Doctors, nurses, and other medical professionals are often specifically included in such laws. Generally, however, a medical professional who voluntarily aids someone owes the same duty of care and treatment as that of a reasonably competent physician under the same or similar circumstances.

e. **Consent by the Patient:** Consent by the patient or his relative is the most accepted defense in a case of medical negligence. If the doctor can submit evidence of the fact the patient or his relatives were aware of the complex nature of the treatment, risk involved in the treatment and gave their informed consent voluntarily before the doctor started the treatment.[50] But the mere fact that the patient has consented to a treatment and operation does not imply that he has assented to risks of recklessness or negligence.[51]It is for the

49. Fought v. Solce [1991] 821 SW 2d 218.
50. Shaun D. Pattinson, Medical Law and Ethics, 101 (Thomson Sweet and Maxwell, London, 2006).
51. Samira Kohli *v*. Dr. Prabha Manchanda and Ors. I (2008) CPJ 56 (SC).

doctor to prove that he has acted innocently and with required care.[52]There is exception to this defense also, i.e. Volens as an Essence. Volens as an Essence means in certain circumstances consent is implied. In case of an accident, the consent according to the rules of the medical practices is implied, and the doctor should not waste any time for an oral or written consent. But this exception is not available in case of usual surgery and those cases where negligence is alleged.[53]

f. Bona fide error: A doctor is liable for misjudgment, only if he acts without the care and skill expected from him as standard of care. If a doctor, after conducting required tests, arrived in a conclusion regarding the decease of the patient, then even though the diagnosis is wrong the doctor is not liable. Often doctor has to make choice between the lower risk less fruitful procedure and higher risk more fruitful procedure. This choice between devil and sea could lead him to pick a method which eventually fails. But so long as it can be found that the procedure which was in fact adopted was acceptable to medical science as on that date, the medical practitioner cannot be held negligent merely because he chose to follow one procedure and not another and the result was a failure.[54]

g. Emergency: In an emergency situation it is expected that a doctor will take all the necessary step as required without any delay and will make full use of the available drugs to save the life of the patient. The standard of care expected from the doctor in emergency situation depends upon the circumstances of the case. Even in emergency cases the duty of the doctor to take the consent of the patient or his relatives may be waived. In all these situations the life of the patient is the paramount interest. So in those situations emergency is a good defence in an action for medical negligence.

h. Statute of Limitations: State laws place time limits on when an action can be brought for medical malpractice. Some states have adopted the "discovery rule," which holds that the statute of limitations period doesn't begin until an injury is actually discovered. If the medical professional can show that the patient discovered the injury at a certain point and that the statute of limitations has since run, the case may be dismissed.

i. Defences Available to the Hospital: The modern trend in medical negligence cases is to file suits against the hospitals. Hospitals are generally sued for vicarious liability. The basis of holding the hospital liable for actions of doctor employed therein is that if the former derives benefit from the business of medical services it should also bear the liability arising from such business.[55] The defences which the hospitals can take in an action for medical negligence are that (a) it had hired professionals with recognised medical degree and

52. T.T. Thomas v. Elisa, AIR 1987 Ker. 52.
53. Arun Bala Krishnan Iyer v. M/s Soni Hospital, AIR 2003 Mad. 389.
54. Arun Bal, "Consumer Protection Act and Medical Profession" 28(11) EPW432-435 (1993).
55. State of Maharashtra v. Kanchanmala Vijasinci Shirke, 1995 ACJ 1021 (SC).

medical stuffs are competent enough for taking care of the treatment procedure. (b) it had to convince the court that they use to take proper action against the stuff and doctor in case of their negligence. (c) it provided all modern equipment and infrastructures including ambulance service to its stuffs and patients.[56] (d) it had performed the duty of keeping all the medical records of each patient.

DAMAGES

The concept of awarding compensation is the most usual form of providing a remedy to the injured party under the law of torts. The concept behind providing compensation is not to punish the negligent one but to provide help to the injured party so that he can at least partially recover the loss that he has suffered due to the negligent act of a doctor. To get a damage award, the patient must show that (a) the medical malpractice caused the damages in some way, and (b) some kind of approximate price tag can be put on the damages. The damages fall into three main categories: (i) General damages refer to the patient's cost of suffering. The most common examples are: loss of enjoyment of life, physical and mental pain and suffering, and loss of future earning capacity. It is pertinent to mention here that every case is different and there are no clear rules about how the exact amount of damages is determined. To arrive at a definite price, the patient and others will give evidence about the patient's suffering. [57] (ii) Special damages cover the more quantifiable expenses caused by the medical malpractice including medical bills, other expenses. Special damages are typically more exact than general damages. (iii) In some circumstances, the patient may be able to recover exemplary damages. The rules on when a patient may get punitive damages vary from cases to case depending upon the circumstances of each one, but the general requirement is thatthe doctor must have known that he was behaving in a harmful manner.A doctor intentionally leaves a sponge in the patient during surgery in order to create a reason for a second surgery to remove the sponge. This behaviour would warrant punitive damages. Punitive damages are meant to compensate the injured, not for physical or mental injury but for hurt caused by breach of trust and feeling of despair.

CONCLUSION

Public awareness of medical negligence in India is growing. Hospital managements are increasingly facing complaints regarding the facilities, standards of professional competence, and the appropriateness of their therapeutic and diagnostic methods.[58] After the Consumer Protection Act, 1986 has come into force it recognises medical treatment as "service" under Section 2(1)(o) and with the help of that some patients

56. K. K. Kannan, Medicine and Law, 320 (Oxford University Press, New Delhi, 2014).
57. Lisie Hospital v. T.V. Ajayakumar, (2004) II A.C.C. 201 (Ker).
58. K. K. S. R. Murthy, "Medical Negligence and the Law," 4(3) IJME116-118(2007).

use to file cases against the doctors and demand compensation for medical negligence.[59] This Act ironed out a lot of procedural creases that existed under traditional legal system and increased the awareness amongst the patient about their rights. Moreover, this Act help to curtail the time taking legal procedure and delivering the fruit of legal proceeding within few months. The awareness amongst the patients and simpler legal proceeding of consumer forums motivated the general people as a whole to prefer proceedings under Consumer Protection Act rather than the traditional proceeding under law of torts against the doctor as well as against the medical service providing institutions.[60] But still in our legal system both the option is open for the patient to establish his case of medical negligence.

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59. Sanjay Gupta, Renu Jamwal, "Medical Services Vis-À-Vis Consumer Protection Act" 5(7) IJSR 599-601 (2016);
60. B. R. Saini v. Lio Hospital and Research Centre, 2017(2) CLT 4 29 (DEL).

8

A Theoretical Study of Constitutionalism: A Global Overview

Dr. Ramratan Dhumal[1]

INTRODUCTION

Constitution has an extensive history. Its origin can be traced in the writings of Greek scholars such as Plato, Aristotle, and Cicero.[2] Yet, this ancient understanding of constitution differed from the modern constitution.[3] Even in medieval times, the traces of constitution can be found in the Charter of Liberties and the Magna Carta.[4] These traces, however, were merely top-dressing without substantive form and substance, eventually lacked democratic setup and functioning, until the beginning of enlightenment era.[5] Enlightenment era challenged the authority of the *ancien régime*.[6] In the eighteenth century, the United States of America (USA) laid down the foundation of democratic

1. Faculty of Law, University of Delhi, Delhi.
2. Loughlin, Martin, "What Is Constitutionalism?", in Petra Dobner and Martin Louglin (eds.), *The Twilight of Constitutionalism*? 49 (Oxford University Press, New York, 2010).
3. McIlwain argues that it is difficult to precisely trace the features of ancient constitutionalism. However, he points few of them as, "First, in ancient regime there is no remedy for an unconstitutional act short of actual revolution. Secondly, such revolution, when it occurs, is usually no more modifications of the public law…but a complete overturn of the state's, a change in its whole way of life…. Thirdly …changes usually carried out by violence, proscription, ostracism and even death…" See, McIlwain Charles Howard, *Constitutionalism: Ancient and Modern* 38 (Cornell University Press, 1947).
4. Grimm, Dieter, "The Achievement of Constitutionalism and Its Prospects in a Changed World", in Petra Dobner & Martin Loughlin (eds.), *The Twilight of Constitutionalism*? 6 (Oxford University Press, New York, 2010).
5. Enlightenment age had a profound influence on the intellectual class. They persistently challenged the dogmas and superstitions that did not stood the test of reason. See, O'Neil Johnathan & McDowell Gary L. (ed.), *America and Enlightenment Constitutionalism* 1-2 (Palgrave Macmillan, New York, 2006). Moreover, the idea of tolerance, multiculturalism was laid down during the same enlightenment period. See, Voltaire, *Treatise on Toleration*, translated by Desmond M. Clarke (Penguin Classics, UK, 2016).
6. French Revolution against the Monarchy and the American Revolution against the colonial rule at the end of the eighteenth century challenged the established undemocratic authority. French revolution, particularly, was against the ancien regime of monarchy.

constitution.[7] Western constitutionalism, although a complex term, primarily identified with the western constitutional thought i.e.—the diffusion of authority, antithetical to the totalitarianism or absolutism, and incorporation of purposive institutional design within the framework of rule of law rather than rule of man.[8] It is identified with the peculiar features of the traditional western constitutions, but predominantly the USA Constitution.[9] Western Constitutionalism primarily strived to overcome the abuses of the past, i.e. the tyranny of the authoritarian rule.[10] In a more subtle interpretation, it can be identified with the phrase 'power is proscribed and procedures prescribed'.[11] But this understanding is not uniformly accepted. Breakaways exist in the post-colonial world in the form of positive and global south constitutionalism approaches. This divergence, however, do not observe complete severance from the western constitutionalism. Of course, they share some commonalities with the west, but also possess distinct features embedded in their socio-cultural realities and historical past. This paper undertakes a general description of constitutionalism normatively engraved in the western traditions and its discontinuity with the non-western world. It reflects on the alternative approaches arguably in the form of positive and global south constitutionalism.

WESTERN OR NEGATIVE CONSTITUTIONALISM: A WELL TRODDEN PATH

Before dealing with the constitutionalism in general and western constitutionalism in particular, let us examine some of the definitions on constitution. Constitution, according to Thomas Paine, is a thing that exists in fact, has real existence and visible form,

7. Emergence of the US Constitution was significant in two ways. Firstly, it was a product of revolution that overthrew tyranny British rule. Secondly, a culmination of enlightenment thought. It penned down the norms of controlled government and strengthened the belief that governmental power emanates from the consent of the governed. See, George Athan Billias, *American Constitutionalism Heard Round the World, 1776-1989: A Global Perspective* 7 (New York University Press, New York, 2009); Glenn N. Schram, "A Critique of Contemporary Constitutionalism" 11(4) *Comparative Politics* 484 (July, 1979); Andrew C. McLaughlin, *Constitutional History of the United States* 103 (D. Appleton-Century Company, INC., New York, 1935); Alexis de. Tocqueville (translator Henry Reeve), *Democracy in America* 290-291 (The Pennsylvania State University, 2002).
8. M J C Vile,"Constitutionalism and the Separation of Powers. Indianapolis: Liberty Fund, 1998." *Lane J* (1967). Dixon Rosalind and Ginsburg Tom (eds.) *Handbook Research on Comparative Constitutional Law* 2 (Edward Elgar Publishing Ltd., UK, 2011).
9. James Madison, during the framing the US Constitution expressed its novelty as, "Happily for America, happily we trust for the whole human race, they pursued a new and more noble course. They accomplished a revolution which has no parallel in the annals of the human society. They reared the fabrics of government which have no model on the face of the globe." See, Goldman, Lawrence Goldman, Alexander Hamilton, James Madison and John Jay (eds.), *The Federalist Papers* 72 (Oxford University Press, New York, 2008).
10. A primary belief among the US constitution framers was that the government under written constitution could be a rule through the status of law and will overcome arbitrary exercise of power, Stephen M. Griffin, "Constitutionalism in the United States: From Theory to Politics" 10(2) *Oxford Journal of Legal Studies* (Summer, 1990).
11. Andrews William, *Constitution and Constitutionalism* 13 (D. Van Nostrand Company Inc., New Jersey, 2nd edn., 1963).

rather than a mere name, ideal and invisibility. It is antecedent to the government and government is its only creature.[12] Further, Paine identifies its key elements as — a written document, government by people, principles comprehensively organizing civil government, and unaltered fundamental law.[13] According to George Billias, constitution governs the state and delimits its powers. A written document encompasses fundamental system of principles and rules.[14] Generally, it is divided into—constitution as a text/document and constitution as norms—which is a supreme law.[15] For Russell Hardin, constitution is a document that coordinates the populace through set of institutions and enables them to be jointly better-off.[16] More than coordination, it intends to overcome despotic rule and establish a basic framework for governance. It is the highest polity, therefore a source of all laws. Constitutional order with collective self-rule, the government, Separation of powers and Rule of Law are the ultimate objectives of the constitution.[17] Recently, Dieter Grimm identifies four key characteristics of the modern constitution—a set of legal norms, regulation of public power, consent of the people and a comprehensive framework of the constitutional principles.[18] Overall, Constitution is a fundamental document—a law of the land—that lays down objectives

12. Thomas Paine, *Rights of Man, Common Sense and Other Political Writings* 122-123 (Oxford University Press, New York, 1998). Thomas Paine further elaborates the constitution as, "The constitution of a country is not the act of its government, but of the people constituting a government. It is the body of elements, to which you can refer, and quote article by article; and which contains the principles on which the government shall be established, the manner in which it shall be organized, the powers it shall have, the mode of elections, the duration of parliaments, or by what other name such bodies may be called; the powers which the executive part of the government shall have; and, in fine, everything that relates to the complete organization of a civil government, and the principles on which it shall act, and by which it shall be bound. A constitution, therefore, is to a government, what the laws made afterwards by that government are to a court of judicature. The court of judicature does not make the laws, neither can it alter them; it only acts in conformity to the laws made: and the government is in like manner governed by the constitution.
13. Ibid.
14. George Athan Billias, *American Constitutionalism Heard Round the World, 1776-1989: A Global Perspective* 6 (New York University Press, New York: , 2009).
15. Michael J Perry, "What Is 'the Constitution'?", in Larry Alexander (ed.) *Constitutionalism: Philosophical Foundations* 99 (Cambridge University Press, New York, 1998).
16. Russell Hardin, *Liberalism, Constitutionalism, and Democracy* 35 (Oxford University Press, New York, 1999).
17. Steven L. Taylor, *et al. A different democracy: American government in a 31-country perspective* 47 (Yale University Press, 2014); Martin Loughlin, *Swords and Scales: An Examination of the Relationship between Law and Politics* 190 (Portland Oregon: Hart Publishing, Oxford, 2000).
18. Dieter Grimm, "The Achievement of Constitutionalism and Its Prospects in a Changed World", in Petra Dobner and Martin Loughlin (eds.) *The Twilight of Constitutionalism*? 16 (Oxford University Press, New York, 2010).

and machinery to secure it. Broadly, it overcomes historical wrongdoings and sets a new course.[19]

Constitutionalism, generally, identified with the western constitutions.[20] It encompasses the peculiarities of the western constitutions.[21] De Smith views constitutionalism as western liberal democratic model. It includes observation of rules with procedures to limit legislative and executive acts of the government, curbs arbitrary exercise of discretionary powers and ensures individual liberty.[22] According to Greenberg Douglas, constitutionalism is a political process, emerges in specific cultural and historical context and resides in public consciousness. It involves allegiance to the limitations on the ordinary political power, and overlaps with the democracy to balance state, individual and collective rights.[23] In a more subtle exposition, Julio Faundez refers constitutionalism not merely as an intellectual commodity that can be sold, imposed or transplant political models, rather it is a device to regulate and limit democracy. In essence, it clearly embodies the anti-majoritarian principle to curb unruly electoral majority.[24] Similarly, Jon Elster refers constitutionalism, a limitation, an anti-majoritarian principle, but it should be self-imposed and brought into practice. Limitations, either substantive or procedural, primarily restrict or slow down the process of legislative change. In written constitutions, limitations include—complicated procedures to overcome alteration of the constitution, delays and qualified majorities among others. It also includes procedural or substantive limitations in the form of electoral process, civil and political rights.[25] M. Vile incorporates a distinct perspective and describes it as an institutional arrangement rather than a mere limitation. It includes

19. James Madison on novelty in the constitution argued that, "But why is the experiment of an extended republic to be rejected merely because it may comprise what is new? Is it not the glory of the people of America, that whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience? To this manly spirit, posterity will be indebted for the possession, and the world for the example of the numerous innovations displayed on the American theatre, in favor of private rights and public happiness". Supra note 8 at 71-72; See also, Mark Tushnet, *Advanced Introduction to Comparative Constitutional Law* 10 (Edward Elgar Publishing Limited, 2014).
20. Walter Murphy, "Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity", in Sanford Levinson (ed.) *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* 179 (Princeton University Press, New Jerser, 1995)
21. Homes, Stephen & Sunstein Cass Robert, 1995, "The Politics of Constitutional Revision in Eastern Europe." In Sanford Levinson (edt.) *Responding to Imperfection: The Theory and Practice of Constitutional Amendment*. New Jersey: Princeton University Press. p.302.
22. De Smith, Stanley Alexander, 1964, *The New Commonwealth and Its Constitutions*. London: Stevens. p.106.
23. Douglas, Greenberg, 1993, (edt.) *Constitutionalism and Democracy: Transitions in the Contemporary World*. New York: Oxford University Press. p.21.
24. Julio Faundez, "Constitutionalism: A Timely Revival", in Douglas Greenberg, e*t al.(eds.) Constitutionalism and Democracy: Transitionsin the Contemporary World* 358 (Oxford University Press, New York, 1993).
25. Jon Elster & Slagstad Rune (eds.), *Constitutionalism and Democracy* 2 (Cambridge University Press, Cambridge, 1988).

advocacy of certain types of institutional arrangements with a normative element to secure certain ends. Normative arrangement produces a belief of demonstrable dual relationship between the institutional arrangements and the production of vital values.[26] These definitions present a traditional approach of western constitutionalism.

At the end of the twentieth century and in the early twenty-first century, few scholars engaged human right narrative and relabelled constitutionalism as "New Constitutionalism", "Global Constitutionalism" or "Human Right Constitutionalism".[27] Said Arjomand describes this human right narrative in the constitutionalism and traces its three elements viz., majoritarian democracy with the organization of state authority; human rights; and constitutional courts. As a result, new constitutionalism incorporates two fundamental principles—human rights and free democratic society.[28]

Similarly, Lawrence Beer articulates constitutionalism from a 'transcultural persuasive' approach based on human rights, to bridge consensus between western and non-western constitutional principles.[29] Eventually, Beer prefers to call constitutionalism as "human rights constitutionalism" rather than western traditional model. Constitutionalism does not imply a commitment either to the individual rights, distribution of powers and governmental functions or to the forms of government like republic, monarchy, parliamentary and presidential forms of government. From the human right perspective, it is an authority limited by rules, obedience to constitutional values and presence of a valid political process.[30]

For Larry Alexander constitutionalism is the practice of establishing a constitution for social governance. It depends on the nature of the constitution, its functions and the institutional balance it undertakes.[31] Alexander defines constitution as an 'entrenchment of rules with varying degrees' established on an agreement with a graded procedure. This entrenchment is justified on the ground that it overcomes the 'moral and prudential costs' in the form of delay, expenses, disorganization and lack

26. M J C Vile,"Constitutionalism and the Separation of Powers. Indianapolis: Liberty Fund, 1998." *Lane J* (1967).
27. Post-World War II the emergence of human rights and respect for sovereignty ended colonisation. See, Beer, Lawrence Ward. 2009. Human Rights Constitutionalism in Japan and Asia: The Writings of Lawrence W. Beer. Folkestone: Folkestone: Global Oriental Ltd.; Elkin, Stephen and Karol Soltan. 1993. A New Constitutionalism: Designing Political Institutions for a Good Society. Chicago: The University of Chicago Press; Peters, Anne Peters, "The Merits of Global Constitutionalism." 16(2) *Indian Journal of Global Legal Studies* 397–411 (2009).
28. Said Amir Arjomand "Constitutional Development and Political Reconstruction from Nation-Building to New *Constitutionalism", in Constitutionalism and Political Reconstruction* 51-52 (Koninklijke Brill NV, Netherlands, 2007).
29. Beer, Lawrence Ward, 2009, Human Rights Constitutionalism in Japan and Asia: The Writings of Lawrence W. Beer. Folkestone: Folkestone: Global Oriental Ltd.; By 'transcultural persuasive' approach, Lawrence Beer suggests an universal acceptance of constitutional principles across cultures.
30. Supra 28.
31. Larry A Alexander, "Constitutionalism", in Martin P. Golding & William A. Edmundson (eds.) The Blackwell Guide to *the Philosophy of Law and Legal Theory* 248 (Blackwell Publishing Ltd., UK, 2004)

of expertise.[32] Dieter Grimm views constitutionalism as substantive attainment of rule of law and democracy.[33]

From the above diverse thoughts on constitutionalism, it incorporates three common and significant features. Firstly, it presupposes existence of constitution as a fact. Secondly, it is a practice, commitment, belief, observation, and allegiance on behalf of the State. Thirdly, it restricts or limits the government. Thus, constitutionalism mainly viewed as—limits on the government—a prominent traditional western perspective. This is also termed as negative constitutionalism.[34]

NON-WESTERN APPROACH: AN ALTERED PATH

Non-western constitutions adopts a distinct approach.[35] Acceptance of democracy, historically was not uniform, hence constitution and constitutionalism altered.[36] This alteration can be traced in two set of contrasting ideologies: first, positive versus negative constitutionalism; and second, the global south versus global north constitutionalism.

Western constitutionalism, as we discussed above, primarily focuses on limited government, also termed as negative constitutionsliam.[37] Negative constitutionalism believes in the negation of an absolute State.[38] It emerged in the backdrop of historical experience of despotic rule. Before the emergence of US Constitution, half-hearted attempts were made to limit the tyranny rule, through certain bill of rights. For instance, the Magna Carta of 1215, an outcome of protests by barons against the crown, the

32. Ibid, 254
33. Supra 4, at 10
34. 'Limits', 'Control' on the arbitrary exercise of power to secure 'stability' was the prominent feature emanated from the US Constitutionalism. In other words constitutionalism is antithesis to arbitrary power, therefore, it is also termed as negative constitutionalism. To recite MCJ Vile words as, "Constitutionalism is not a matter of seizing a short term advantage, it is a belief in the need to establish and support those values in the political system which provide for stability and to maintain the procedures which protect the liberty of the individual in a democratic society." Supra 25 at 408; Oliver Gerstenberg, "Negative/Positive Constitutionalism, 'Fair Balance', and the Problem of Justiciability." 10(4) *International Journal of Constitutional Law* 906 (2012).
35. Jeremy Waldron, "Constitutionalism – A Skeptical View". in Thomas Christiano and John Christman. (eds.) *Contemporary Debates in Political Philosophy* 271 (West Sussex: Blackwell Publishing Ltd., 2009).
36. Samuel P. Huntington, *The Third Wave-Democratization in the Late Twentieth Century* 15-16 (Norman and London: University of Oklahoma Press, 1993); Huntington identifies three waves of democratization viz., first wave from 1828-1926; second wave from 1943-1962; and third wave from 1970s. Huntington defines waves of democratization as transition from non-democratic regimes to democratic regimes.
37. Oliver Gerstenberg, "Negative/Positive Constitutionalism, 'Fair Balance', and the Problem of Justiciability." 10(4) *International Journal of Constitutional Law* 910 (2012).
38. Ngoc Son Bui, *Confucian Constitutionalism in East Asia* 177 (New York: Routledge, 2016). Murphy observes negative constitutionalism primarily as a classical liberal thought that believes in restricted government. Government serves as a night watchman. On the other hand, positive constitutionalism imposes obligation on the government to bring qualitative change in the lives of the citizens. See, Walter F. Murphy, *Constitutional Democracy – Creating and Maintaining a Just Political Order* 7 (Baltimore: The John Hopkins University Press, 2007).

Bill of rights in 1689, resulted due to the Glorious Revolution of 1688.[39] But, the US Constitution, for the first time, constructively laid down the foundation of negative constitutionalism, and was path-breaking. In the words of Thomas Paine, American Constitution is to liberty, what a grammar is to language.[40] It thwarted despotic rule of British State and historical wrongs of unbridled exercise of authority.[41] Negative constitutionalism includes constraints on both the legislative and executive powers through judicial review. Rule of law and Separation of powers constitutionally entrenched within the constrained model to overcome despotic or tyranny rule. Separation of powers is commonly viewed as an intrument to protect individual liberties.[42] It is antagonistic to the existence of authoritarian State, safeguards individual liberties, and renders more importance to private rights than public welfare.

As negative constitutionalism gives primacy to the individual liberties than social justice, Jeremy Waldron, considers it (American constitutionalism) as fundamentally flawed. Although it relies on judges for its enforcement, it incorporates a narrow political ideology and a minimalistic approach towards state liberalism. Eventually, the State restricted to undetake and implement social benefit policies such as healthcare scheme and other poverty alleviation programmes.[43] Thus, prioritization of negative constitutionalism limits social justice.[44]

On the other hand, positive constitutionalism focuses on positive benefits.[45] According to Barber, negative and positive constitutionalism are constitutional rights and constitutional powers respectively. Positive constitutionalism, as constitutional powers, secures certain ends such as national security and prosperity. Such powers are absent in the negative constitutionalism, instead it promotes rights that restraints powers.[46] According to Stephen Holmes and Cass R. Sunstein constitution perform

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39. Tom Bingham, *The Rule of Law* 10 (New Delhi: Penguin, 2011).
40. Thomas Paine, *Rights of Man, Common Sense and Other Political Writings* 147 (New York: Oxford University Press, 1998)
41. Ibid.
42. Barendt, Eric, "Separation of Powers and Constitutional Government." Public La,. (1995) 599–619, p.599; Calabresi, Steven & Rhodes Kevin. "The Structural Constitution: Unitary Executive, Plural Judiciary." Harvard Law Review. (1992) 105 (6). p.1153.
43. Supra 34.
44. Ibid.
45. Sotiorios A Barber, "Fallacies of the Negative Constitutionalism." 75(2) *Fordham Law Review* 651 (2006) Barber identifies three kinds of fallacies regarding negative constitutionalism. They are constitutional institutions, constitutional rights and constitutional powers. Barber argues that US Constitutionalism should equally consider the aggregative public interests; Also see, Sotiorios A. Barber, *Welfare and the Constitution* (Princeton: Princeton University Press, 2003).
46. Barber mentions, "Negative constitutionalism places greater normative weight on constitutional rights than constitutional powers because it sees restraint as the principal task of popular constitutions and rights as restraints on power. Positive constitutionalists place greater, or at least equal, weight on constitutional powers because positive constitutionalists are interested in goods like national security and prosperity, and it is through power and specific powers that such ends are pursued (Ibid., 663)."

multifunctional tasks. Therefore, it is mere oversimplification to identify it specifically with the prevention of tyranny rule or in other words with negative constitutionalism. They argue that,

A constitution is not simply a device for preventing tyranny. It has several other functions as well. For instance, constitutions do not only limit power and prevent tyranny; they also construct and guide power and prevent anarchy. More comprehensively, liberal constitutions are designed to help solve a whole range of political problems: tyranny, corruption, anarchy, immobilism, collective action problems, absence of deliberation, myopia, lack of accountability, instability, and the stupidity of politicians. Constitutions are multifunctional. It is a radical oversimplification to identify the constitutional function exclusively with the prevention of tyranny.[47]

As constitution performs multifunctional tasks, it involves both positive and negative perspectives. Merely associating contstitution to negative constitutionalism will create political deadlock. From a realistic point of view, equal importance paid to the postitive constitutionalism, which undertakes reform programmes. While addressing the significance of positive constitutionalism, Holmes and Sunstein mentions that,

Advocates of negative constitutionalism dominate the discussion and make it difficult to see the advantages for governmental effectiveness to be gained from constitutional channelling of sovereign power. This is unfortunate. If constitutions are designed with a primarily negative purpose, to prevent tyranny, they will probably lead to political deadlock, and thus invite tyranny. If the government cannot govern, if it cannot pass its reform program, for example, public pressure will mount to throw the hampering constitution off and govern extra-constitutionally. In short, the challenge of constitutional drafting in Eastern Europe is positive as well as negative. Theorists should therefore place greater emphasis than they have hitherto done on positive constitutionalism.[48]

Thus, positive constitutionalism refers to social reforms or collective good. It undertakes exercise of power towards socially desirable ends and putting democracy to work.[49]

47. Stephen Holmes & Sunstein Cass Robert, "The Politics of Constitutional Revision in Eastern Europe". in Levinson Sanford (ed.) *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* 302 (New Jersey: Princeton University Press, 1995).
48. Supra 34, p.302-303.
49. Martin Loughlin, S*words and Scales: An Examination of the Relationship between Law and Politics* 192 (Oxford-Portland Oregon: Hart Publishing, 2000).

The second set of contrasting approach to constitutionalism is Global South versus Global North divide.[50] According to the Global South approach, constitutionalism predominantly reflects the experiences of global north. This classification although based on the premise that constitution generally contains ideals and principles, it differs with distinct historical and social context. Global south nations share common historical and social context.[51] Daniel Maldonado clubs constitutions of India, South Africa and Colombia to form global south perspective. They share a common normative commitment towards social inequalities and economic injustices. Socio-economic rights form peculiar feature of global south.[52] Maldonado explicitly argues that,

The Constitutions of India, Colombia, and South Africa all differ in the status they grant to socioeconomic rights, as well as in the specifics of their formulation. However, in contrast to the constitutions of France, the United States, and Canada, they share a core normative commitment towards state institutions having obligations to address the economic injustices and inequalities in their societies. These documents generally express such a commitment through recognizing a number of socioeconomic entitlements that advance the welfare of individuals in the society… Thus, these three examples suggest that one of the characteristic features of a "new" constitutionalism of the Global South is the inclusion of socioeconomic entitlements in a Constitution, thus placing a central emphasis on advancing a particular vision of distributive justice through processes of law and, in some cases, through the institution of judicial review.[53]

Maldonado traces two elements of the constitution – first, ideals and values, and second, structures and institutions of governance.[54] Among these ideals, socio-economic rights form the core and an end in itself. Establishment of institutions forms the means.[55] Socio-economic rights mark a unique feature of the global south constitutions and are in tune with its social realities. On the contrary, US Constitution merely strived to safeguard civil and political rights.[56] In this regard Maldonado argues that,

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50. The north-south divide seeks its relevance in the economic and power disparity that exist between powerful developed nations referred as 'North' on one hand, and least developed nations in Asia, Latin America and Africa as 'South' on the other hand. This divide formidably engaged as a tool in various fields of enquiry. Recently, scholars have addressed it to reflect on global south approach on regulatory regime. See, Dubash Navroz K & Morgan Bronwen. 2013. The Rise of Regulatory State of the South: Infrastructure and Development in Emerging Economies. United Kingdom: Oxford University Press. Similarly, this approach also adopted to show disparity in environment other issues. See, Alam Shawkat et. al. 2015. International Environmental Law and the Global South. New York: Cambridge University Press; Grugel Jean et al. 2017. Demanding Justice in the Global South – Claiming Rights. Switzerland: Palgrave Macmillan.
51. Daniel Bonilla Maldonado (ed.), Constitutionalism of the Global South: *The Activists Tribunal of India, South Africa, and Colombia* 44 (New York: Cambridge University Press, 2013).
52. Ibid.
53. Ibid.
54. Supra 50.
55. Ibid.
56. Ibid.

"These arguments highlight an important critique that can be lodged against the older Northern Constitutions. The background structure of law conditions the economic relations and distribution of resources that may exist within a society. Without protection for the fundamental socioeconomic interests of individuals, economic relations and the actual distribution of resources can develop in such a way that individuals are unable to survive or are only capable of living in terrible conditions. The omission of socioeconomic rights guarantees means that the Constitution, at its normative core, does not protect individuals from being allowed to sink into deep poverty. …The Constitutions of the Global South can be seen to correct this imbalance in Northern Constitutions and thus help advance our understanding of the principles and guarantees that should be essential elements in any decent Constitution. From an ideal point of view rooted in political philosophy, by including socioeconomic guarantees, the new constitutions of the Global South are not simply reactions to their own histories and particularities. In doing so, they assert universal principles that are highly desirable and, at least, difficult to contest at an ideal level."[57]

In nutshell, the global south constitutionalism incorporates distributive justice. It includes in its fold principles of justice, equity and fairness to overcome substantive inequalities. Global south rendition presents holistic approach that not only ensures the liberties of few, but also social rights of the deprived and marginalised sections.

Thus, non-western constitutions both in the north/south divide, and positive & negative constitutionalism, suggest a partial breakaway from western constitutional models, in other words they follow an altered path. Both the approaches stresses on the positive role of the state to secure welfare objectives. But, mere imposition of positive obligation is not a valid test for an effective or successful constitution. The valid approach lies, in deciphering whether constitutional objectives were substantively realised. Constitutions are 'imaginary' fields, its worthiness lies in making it 'real', and therefore, the right approach is to decipher the real.

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57. Ibid.

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The Jurisprudence of Inclusive Social Development Vis-À-Vis Human Development in India: A Need For Judicial Intervention

Dr. S.V. Giri Kumar[1]

If you are planning for a year, sow rice; if you are planning for a decade plant tree; If you are planning for a lifetime, educate people.

Chinese proverb

INTRODUCTION

Gross National Development is the actual progressive development alongside the social development. The Road to all-round and sustainable Development is of the social development. Social development does exist in the Natural Law which directly relates to justice. The Law of Nature consists of those ideals, abstract principles of universal justice and applicability which were considered to be based on reason or god for guidance of all men for all times and for all places[2], so the social development should be prioritized over the other kinds of developments in India.

The word "*Development*" has witnessed various stages and its meaning in the several contexts. It is despite that the world is on its move for changes and re-defining the conceptual note of the development. The jurisprudence is an analysis of change in the subject in the science of law and true investigation needs absolute approval of democracy as reflection of development. The social development is fall out of the protection of rights and flourishment in the developing society; though India has witnessed sea changes through the transitional democracy it's not able to deliver complete justification in the area of social development.

The development exists within a human rights framework. Development should rightly be seen as an integral part of human rights[3], the constitutional philosophy of India has literally dreamt the future of society in its class and casts, it is there by there was a need for state policy. The development may not only be material or an achievement, the social development is an expansion of human development. It is

1. Advocate, High Court of Karnataka & Law Lecturer.., attoreygiri1@gmail.com.
2. Prof. Nomita Aggarwal, *Jurisprudence* (Central Law Publications, 2019).
3. The Rights way to Development: A human right approach to development Assistances, Human Rights Council Of Australia eds. 1995 at 25-26.

without social development there cannot be human development in India, vital social factors have a strong play over the human development in democratic India.

Social relationships are generally weak in India and especially with Master-National and Regional Politics. The structure of inclusive development is left distracted without spear goal. The Inclusive development is very much essential for the Developing Nation, there are many people / sectors who are excluded from development vis-à-vis social development because of their, identity, Skin colour, Gender, ethnicity, age, sexual orientation, practice of casteism, no implementation of prohibition of untouchability, social evils, vulnerability, racism, religion, affordability, education and literacy, transparency in administration, access to resources and justice, regionality, disability or poverty and the gap between rich and poor.

The effects of such exclusion are staggering, deepening inequality across the world. The richest ten percent of people in the world own 85 percent of all assets, while the poorest 50 percent own only one percent. Development can be inclusive - and reduce poverty - only if all groups of people contribute to creating opportunities, share the benefits of development and participate in decision-making. Inclusive development follows UNDP's[4] human development approach and integrates the standards and principles of human rights: participation, non-discrimination and accountability[5] which are eventually a social justice demand.

The 42nd Amendment to the Constitution of India amended the Preamble and changed the description of India from "Sovereign Democratic Republic" to a "Sovereign, Socialist , Secular, Democratic and Republic", and also changed the words "unity of the Nation" to "unity and integrity of the Nation". The socialistic and secular approach for human development now on the Indian Constitution also and has made it more complex and comprehensive. It is for the formation of socialistic pattern of society based on equality, liberty and fraternity, it laid down certain provisions in Constitution of India for the social justice and development of the downtrodden India, as part of National commitment. The National Social Justice would require immense of strategies to be adopted and to put on to reality in a special social policy with an inclusive development.

India has the high potential to become the second largest economy in the world by 2050 in PPP (Private Public Partnership) terms (third in MER terms), although this requires a sustained program of structural reforms discussed further in the recent PwC report on the future of India Potentially, Indian GDP could reach $10 trillion by 2035 if the right policies are pursued,[6] the demand for inclusive social development leading to the human development in an appropriate National Social Policies would ensure there is protection of human development at large. The world in watching the Indian National progress and several companies are researching about the strategic development of India rather misguiding into corporate vibrant entrepreneurial sector

4. United Nations Development Program.
5. UNDP *available at*: http:// www.undp.org (last visited on June 12, 2019).
6. PwC, "The world in 2050" (Feb, 2015) *available at*: www.pwc.co.uk/economics.(last visited on July 24, 2019).

creating partnerships with government in order to implement developmental approach which construes materialistic development and not human development.

THE JURISPRUDENCE

The term "*jurisprudence"* has at different times, been used in different senses as law, nature of law and legal systems , science of law, legal theory, philosophy of law, the study of law which should involve judgments of te social goals and of ideological and sociological goals which the legal system is to conserve or cater etc. The jurisprudence involves theoretical questions as to law, legal system, moral and justice and social nature of the law and its justice delivery to the individual and the class of persons – citizens. The society has witnessed the theories of jurisprudence wrong and sometimes the facts does not fit in to theory; there are some speaking pillars which have proven and tested at times. The father of Jurisprudence, Salmond,[7] defines jurisprudence in two senses:-

a. Generic Sense- Science of Civil Law
    1. ***Legal exposition***: the purpose of which is to set forth the contents of an actual system as existing at any time, whether past or present.
    2. ***Legal history***: - The purpose of which is to set forth the historical process whereby any legal system came to be what It is submitted that is or what It is submitted that was.
    3. ***The science of legislation***: - Purpose of which is to set forth the law, not as it is or has been, but as It is submitted that ought to be. It is submitted that deals not with It is just and necessary ideal future.

b. Specific Sense – Science of The First Principle of Civil Law:
    1. ***Analytical jurisprudence***: the purpose of which is to analyze, without reference either to their historical origin or development or to their ethical significance or validity – The first principles of law.
    2. ***Historical jurisprudence***: - the purpose of which is to deal with the general principles governing the origin and development of law. It is the history of the first principles and conceptions of the legal system.
    3. ***Ethical jurisprudence****:* - The purpose of which is to deal with the law from the point of view of It is just and necessary ethical significance and adequacy. It is submitted that is concerned not with the intellectual content of the legal system or with It is just and necessary historical development but with purpose for which It is submitted that exists and the measure and manner in which it is submitted that exists and the measure and manner in which that purpose is fulfilled.

The analysis of society structure and law was as early as early to the jurisprudence and today is the study of laws as administered by courts of justice and also takes notes of the fact of social life of societies. *Salmond* in his specific sense science of the

7. John W. Salmond, Glanville Williams (eds.), *Salmond on jurisprudence* (Sweet & Maxwell, London, 10th ed., 1947).

first principle in his classification of civil law jurisprudence have entered in to analytical, historical and ethical jurisprudence which creates stages for development.

Sociological jurisprudence is with the relations of law to contemporary social institutions which is *still* in making with the changes in the Social, Political and economic outlook and also changing scenario of the conditions of individual and National life may come under science of law.

It is necessary to revitalize jurisprudence, embracing every aspect of law-related study, with a strong commitment to policy research. "*A concern for policy*," it was argued, "can bring focus to social science research, historical investigation, and philosophical analysis these in turn can insure that policy studies will be truly basic and critical, not confined by existing assumptions and perspectives, Hence "Jurisprudence and Social Policy" are required for development[8]. The science without social application is not a science by itself. The juxtaposition of jurisprudence in Indian social progress and of the human development should be taken into consideration in all the policies, the underdeveloped country and highly populated poor citizens should be focus of the programs.

The Natural Law and developmental jurisprudence is part and parcel of the developmental packages to the citizens of the country and there is lack of proper implementation of such policies, which are basic social needs for human development, not in justifiable sense to the social progress.

CONSTITUTION OF INDIA & SOCIAL - JUSTICE DEVELOPMENT

Preamble to Constitution of India

"We, the people of India, having solemnly resolved to constitute India into a Sovereign Socialist Secular Democratic Republic and to secure *to all its citizens Justice, Social, Economic and Political, Liberty of Thought, Expression, Belief, Faith and Worship. Equality of status and of opportunity and to promote among them all fraternity among the dignity of the individual and the unity and the integrity of the Nation.*

Every country's Constitution has its own philosophy and for the philosophy of the Indian constitution must look into the preamble of the constitution of India, which emphasis on justice of social, economic and political and equality and liberty. Constitution of a country will enshrine the aspirations of a society. The framers of the Indian constitution thought that each individual in society should have all that is necessary for them to lead a life of minimal dignity and social respect.

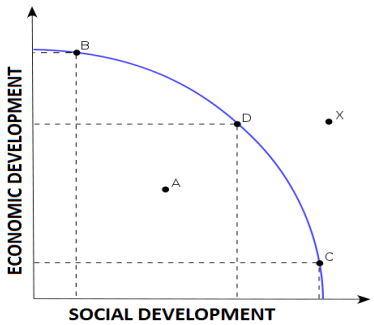
The Indian constitution enables the government to take positive welfare measures some of which are enforceable. We find that such enabling provisions have the support of the preamble of our constitution and these provisions are found in the section on fundamental rights. Constitution not only gives rules and regulations controlling the powers of the government. They also give powers to government for pursuing collective good of the society. It also gives fundamental identity to its entire people. We have

8. Philip Selznick, "Jurisprudence and Social Policy" 68(5) *California Law Review* 206-220 (1980).

inherited a very robust constitution, because basic framework of the constitution is very much suited to our country. The word "secure" to justice and access to justice is part of basic structure of the constitution and principles of constitution are adopted by, we the people of India and hence it is our at most duty to frame policies for the protection of philosophy of our constitution.

The Social development starts with the concept of development, the development is a muliti-dimensional concept , there is lot of discussions with regards to development in the international platform and also could be seen in Article 1 of the Declaration to Right to development which declares the right to development means "*The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized*."

Renowned *Professor A. Sethuramasubbiah* Head of the Social Work Dept. of Social Work, Bharthiar University, Coiambatore has cited in his substantial article / work "*Social development and the corporate*" that the "*Social development"* in its broadest social terms as an upward directional movement of society from lesser to greater levels of energy, efficiency, quality, productivity, complexity, comprehension, creativity, choice, mastery, enjoyment and accomplishment. Development of individuals and societies results in increasing freedom of choice and increasing capacity to fulfill its choices by its own capacity and initiative. Growth and development usually go together, but they are different phenomenal subject to different laws.



Development involves a vertical or qualitative enhancement of the level organization. Social development is driven by the subconscious aspirations will of the society for advancement. Development of society occurs only in fields where that collective Will is sufficiently strong and seeking expression. *Development strategies will be most effective when they focus on identifying areas where the social will is mature and provide better means for the awakened social energy to express itself*. Only those initiatives that are in concordance with this subconscious urge will gain momentum and multiply. Social development starts with physical experience which eventually leads to conscious comprehension of the process.

The concept of social progress is to be measured by the human development, the Mass Will Demand for social progress and upliftment is of the exploring human

happiness without misery and hardships. The social work promotes social change, problem solving in human relationships and the empowerment and liberation of people to enhance well- being. Utilizing theories of human behavior and social systems, social work intervenes at the points where people interact with their environment. Principles of human rights and social justice are fundamental to social work[9]. Social work redresses the barriers, inequalities, and injustices that exist in society.

The area of social work is wide and broad but when it comes for immediate assessment of development in the social order, prefer some of the areas are most important than the other developments are as follows:-

a. Children;
b. women ;
c. Senior Citizens;
d. Differently abled;
e. Mentally challenged;
f. Disadvantaged and vulnerable groups;
g. Socio - economically weaker section;
h. Transgender issues;
i. Community help/ services;
j. Counseling and therapy;
k. Religious harmony;
l. The problems of Human rights and social justice etc.

The social work is very sensitive and some of the issues are to be addressed by the law itself. Social Work is concerned and involved with the interactions between people and the institutions of society that affect the ability of people to accomplish life tasks, realize aspirations and values, and alleviate distress. These interactions between people and social institutions occur within the context of the larger societal good. Therefore, three major purposes of social issue/ work may be identified:

1. To enhance the problem-solving, coping and developmental capacities of people;
2. To promote the effective and humane operation of the systems that provide people with resources and services;
3. To link people with systems that provide them with resources, services, and opportunities[10]

Social work utilizes a variety of skills, techniques, and activities consistent with its holistic focus on persons and their environments. Social work interventions range from primarily person-focused psychosocial processes to involvement in social policy, planning and development. Interventions also include agency administration, community

9. International Association of Schools of Social works/ international federation of social workers definition of social work jointly agreed, 27th June, 2001 Copenhagen .
10. Wright State University, "Social Work" *available at*: http://www.wright.edu/cola/Dept/social_work/sw_definition.htm (last visited on July 15, 2019).

organization and engaging in social and political action to impact social policy and economic development[11]. The work of the law is a similar to the social work to resolve the complex situation to the ease, the law derivative from Scandinavian word *lagu;* it indicates the putting of things in order – in other words, an orderly system. The word law also resembles the word *Lex* which is a Latin word meaning a specific rule of law rather than a system of laws. Law as used in English means either general law or a particular law, depending upon the context.

Now the strategical Development in India has the potential to become the second largest economy in the world by 2050 in PPP terms (third in MER terms), although this requires a sustained program of structural reforms discussed further in the recent PwC report on the future of India Potentially, Indian GDP could reach $10 trillion by 2035 if the right policies are pursued[12] the said right policies should be of social progress and of the human development leading to social ultimate justice.

THE HUMAN DEVELOPMENT OF INDIA ACHIEVEMENT IS REPORTED[13]

(a) The HDI is an average measure of basic human development achievements in a country, measured by UNDP

(b) In 2015, India has been placed at 130th position with 0.609 score in the medium human development category. Country's rank was 135 with 0.586 score in the 2014 report

(c) India is ranked in the medium human development category. The country continued to rank low in the HDI, but has climbed five notches to the 130th rank in the latest UNDP report on account of rise in life expectancy and per capita income.

The human development is measured through rise in life expectancy and per capita income basis, the social developmental measure is not taken in to account as a criteria and there is a serious lacuna in the measurement. Constitution of India, 1950 was basically framed after an in depth study into poverty, long years deprivation and inequalities based on caste, creed sex and religion[14]. The social problem presented by the existence of a very large number of citizens who are treated as untouchables has received the special attention of the Constitution as Article 15 (1) prohibits discrimination on the grounds of religion, race, caste, sex, or place of birth. The state would be entitled to make special provisions for women and children, and for advancement of any social and educationally backward classes of citizens, or for the SC/STs. A similar exception is provided to the principle of equality of opportunity prescribed by Article 16 (1) in as much as Article 16(4) allows the state to make provision for the resolution of appointments or posts in favour of any backward class of citizens which, in the opinion of the state, is not adequately represented in the services under the state.

11. IASSW, "Social Dialogue" *available a*t: http://www.iassw-aiets.org/index.php?option=com_content&task=blogcategory&id=26&Itemid=51 (last visited on July 12, 2019).
12. Ibid.
13. "India ranks 130th in 2015 Human Development Index" , India Today, Dec. 15, 2015 *available at*: http://www.indiatoday.intoday.in/education/story/india-ranks-130th-in-2015-humandevelopment-index/1/547372.html (last visited on July 12, 2019).

Article 17 proclaims that untouchability has been abolished & forbids its practice in any form & it provides that the enforcement of untouchability shall be an offence punishable in accordance with law. These provisions under the constitution are made to achieve socio- economic justice in this country.

Article 19 enshrines the fundamental rights of the citizens of this country. The sub-clauses of Article 19 (1) guarantee the citizens seven different kinds of freedom and recognize them as their fundamental rights. Articles 23 and 24 provide for fundamental rights against exploitation. Article 24, in particular, prohibits an employer from employing a child below the age of 14 years in any factory or mine or in any other hazardous employment. Article 38 under Part IV, Directive principles of state policies the state should make an effort to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice social, economic and political shall inform all the institutions of National life. Article 39 clause (a) says that the State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular provide free legal aid, by suitable legislation or schemes, or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

Article 41 recognizes every citizen's right to work, to education & to public assistance in cases of unemployment, old age, sickness & disablement and in other cases of undeserved want. Article 42 stresses the importance of securing just and humane conditions of work & for maternity relief. Article 43[14] holds before the working population the ideal of the living wage and Article 46 emphasizes the importance of the promotion of educational and economic interests of schedule castes, schedule tribes and other weaker sections.

It is the Roscoe Pound propounded the Doctrine of "*Social Engineering*". The social engineering aims at building an efficient structure of society resulting in satisfaction of maximum of wants with minimum of friction and waste, it involves the rebalancing of the conflicting interests of the society. It ensures that people share just obligations and enjoy social security. Social Justice is the strength of a Democratic Country in understanding the philosophy of the Indian Constitution and it's working.

JUDICIAL INTERVENTION

It is the spirit and not the form of law, that keeps justice alive – Earl warren

It is seen at large that though there is constitutional will to attain social development the state policy is not giving implementing scope for human development. The guardian of the constitution of India is judiciary and only the ray hope for social justice and development. The powers and functions of High Courts have not been described in detail in the constitution however as a matter of norms and practice the powers and functions of High Courts-maybe discussed under the following five heads:

14. The state shall endeavor to secure by suitable legislation or economic organization or any other way, to all workers agricultural, industrial or otherwise, work, a living wage, condition of work, a decent standard of life and full enjoyment leisure, social and cultural opportunities.

Original Jurisdiction

(a) Fundamental Rights,

(b) Judiciary has been given the power to protect the fundamental rights of citizens. Under Article 32, the Supreme Court exercises this power to enforce fundamental rights. Besides the Supreme Court, the High Court's also enjoy this power under Article 226.

(c) Under Article 226, the High Courts shall have the power issue any person or authority, directions, orders or writs in nature of Habeas Corpus, Mandamus, Prohibition, Quo Warranto and Certiorari or any of them for the enforcement of any of the fundamental rights and for any other purpose.

Appellate Jurisdiction: The High Court has appellate jurisdiction over both civil and criminal cases.

Supervisory Jurisdiction: The High Court, under Article 227, has the power of superintendence over all the Courts and Tribunals except those which deal with Armed Forces located in the state.

The power of superintendence, vested in the High Court, is judicial as well as administrative in nature. The High Court is thus in charge of the administration of justice in the state. It is important to note that the Supreme Court has no similar power vis-a-vis the High Courts.

Administrative Jurisdiction: The officers and servants (employees) of the High Court are under its total control. They are appointed by the Chief Justice or any other Judge or officer of the High Court, as he may direct (Article 229).

Power to Transfer cases from Subordinate Courts: If the High Court is satisfied that a case pending in a Subordinate Court involves a substantial question oflaw as to the interpretation of the constitution, it may withdraw the case to itself and do either of the following two :

(i) It will dispose of the case; or

(ii) It will determine the question of law and return the case to the concerned court along with its judgment and direct the Court to dispose of the case in conformity with this judgment.

A Court of Record: The High Court is a Court of Record. Its decisions are binding for all Subordinate Courts. The decisions and proceedings of the High Court have evidentiary value and no Subordinate Court can challenge them.

Miscellaneous Powers

(a) The High Court has the power to send for the judgment of lower court. By exercising this power, the High Court can examine the legal validity of this judgment.

(b) The High Court can punish any person or institution for contempt of court

The Supreme Court of India, during the last decade, has been developing a new jurisprudence which for want of a better expression may be called 'social jurisprudence[15] the pledge of socialism in the Preamble of the Constitution can be fulfilled only by social jurisprudence to be developed by competent activist Judges. It is the order in which laws command respect. In a legal system which is principally based on Constitutional system of governance the Constitution commands the highest respect as law. It is the *lex suprema* i.e., law supreme or law of the land. The value judgment of the social goals and of ideological and sociological goals which the legal system is to conserve or cater. The courts of law and equity, having exemplary powers and duty under the constitution of India and nobody can prevent the discharge of social justice delivery.

CONCLUDING THOUGHTS

The Human development is a biggest tool of Nation. The country should re-view the present situation as against the materialistic development. The concept of social development requires attention of the Nation and a National policy for social development is need of the hour. Development is of multi-dimensional, the real development is in human development which is a real assessment of the society, the development is an activity of the society as a whole it can be stimulated , directed or assisted by government policies, laws and special programmes, but it can compelled or carried out by administrative or external agencies on behalf of the population, development strategy should aim to release peoples initiative not substituted.

Human beings are the ultimate resource and ultimate determinant of the development process. It is a process of people becoming more aware of their own creative potentials and taking initiative to release those potentials and taking initiative to realize those potentialities. The changing dimension of jurisprudence in respect of the natural law and social development in the modern era requires re-valuation of the present social order. Judiciary is unimpeachable in its contribution and its intervention is required for the honest social order preventing the violation human development.

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15. (1988) 1 SCC (Jour) 8

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Cry of a Child: The Rohingya Crisis and The Law

***Dr. Shambhu Prasad Chakrabarty*[1]**
***Mr. Durjay Kumar Deb*[2]**

INTRODUCTION

The basic elements of justice demand the adherence to the principles of human rights. After the Second World War, two things developed greatly one, the de-colonization movement and second, the Human Rights movement. The origin of Human Rights in the international forum can be noticed in the provisions of Universal Declaration of Human Rights (UDHR) and its up-liftment in various domestic legislations, both substantive and procedural.

ROHINGYA CRISIS

The Muslim minorities of Myanmar mostly belong to the Myanmar's Rakhine State. They are identified as Rohingyas and have a population of around eight lakh people. The relationship between the Buddhist Rakhine community and Rohingya Muslims could be traced in historical records in various economic relations. The relationship and inter dependence continues irrespective of the political turmoil adversely affecting their relationship. There have been stray incidents of conflict and tension which ultimately gave birth to a long standing tension between the two communities leading to the mass ethnic cleansing steps by the Myanmar Government. In the absence of some basic rights like the right to vote, citizenship rights and also the right to self identify. Some of the major restrictions imposed on the Rohingyas in Myanmar were banning them from free movement, work outside their villages (limiting them to livelihood opportunities) and also in personal decision making process of marriage. This huge physical and mental pressure was a sine que non of all the ethnic minorities in the country. Educational rights were also not available to children belonging to these minority communities. The health care facilities were not sufficient to meet the growing demand of the community and there ware strict restrictions to go elsewhere for the said because of such mobility restrictions. Another interesting situation was the administrative existence of the children as there was restriction of children to two.

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And the actual, being out of control was beyond records.

THE BACKDROP

In the said backdrop, there has been wide spread discontent amongst the Rohingya Muslims in Myanmar and there has been retaliation in certain belts. There has been wide spread violence leading to displacement of ethnic minorities from their location. Violence erupted leading to casualties on both sides. Almost one lakh forty thousand were displaced followed by international initiative to rehabilitate the displaced. However, the efforts to rehabilitate was inadequate leading to more than a lakh people living in temporary camps and make shift shelters with nearly no access to education, health care and livelihood opportunities for them. There have been huge reliefs provided by various international organizations to provide relief to these people during 2012. There have been allegations and counter allegations as to the allocation of relief benefits leading to extremist movement amongst the Rakhine Muslims. After a couple of years, in 2014, a series of attacks by these extremist groups resulted loss of huge relief materials including the officials and their residences. This led to a huge setback in the relief and rehabilitation process. However, the process got a boost with the aid flowing in again in 2015

Rakhine extremists erroneously perceive that humanitarian aid, which is allocated strictly according to needs, is distributed unevenly and benefits only the Rohingya. In March 2014, this triggered organized attacks targeting international community offices, residences and warehouses, which resulted in millions of Euros of losses. The flood and cyclone relief interventions which supported both communities in 2015 allowed to somewhat mitigate this perception, but it remains prevalent in the extremists' rhetoric. Access to the IDP camps around Sittwe remains highly regulated preventing sufficient assistance delivery.

The recent turmoil in the South Asian region relating to the Rohingya issue has played havoc in the maintenance of peace and tranquility of the region and has been considered as the worst human rights violation of recent times. The creation of ethnic division and the notion of ethnic cleansing has been one of the major issues that led to the killing of hundreds while thousands were forced to leave their country, their place of abode and their way of life.[3]

The Rohingya crisis has raised various questions in the international scene. Questions like the mindset and approach of the people in power to take such a decision, the way such directions were carried out and implemented, the helplessness of the people, the refugee rights, the vulnerability of the international community in such crisis and the lack of sting in the approach and process of these international bodies allotted to address these crisis.

Amongst all of these unanswered questions, the primary area of concern is the

3. UNHCR, Operational Update: Bangladesh, November 3, 2017; and Inter Sector Coordination Group, Situation Update: Rohingya Refugee Crisis, Cox's Bazar, (November 9, 2017).

gross violation of human rights in situation like this and how such violations can be addressed.

The human rights questions raised by various national and international bodies may be summed up in furtherance of issues relating to over use of military power by the Myanmar Government and their acts concerning crimes against humanity, genocide with the objective of ethnic cleansing. The counter allegation by the Burmese Government regarding ARSA as a terrorist outfit is also one of the concern. The situation has now become more complicated with the increasing risk of the Rohingyas joining the ARSA outfit to avenge the arbitrary application of power to harm torture and murder thousands of Rohingyas. The United Nations Human Rights Council after the immediate impact of the crisis has created an investigation team to investigate the alleged and wide spread human rights violations in Burma. The Government of Myanmar has however accepted the newly formed fact finding mission to Burma after initial denial of the mass allegations brought against them.

U.N. High Commissioner for Human Rights Zeid Ra'ad Al Hussein told the U. N. Human Rights Council on September 11, 2017:

> *"We have received multiple reports and satellite imagery of security forces and local militia burning Rohingya villages, and consistent accounts of extrajudicial killings, including shooting fleeing civilians".*[4]
>
> *"Last year I warned that the pattern of gross violations of the human rights of the Rohingya suggested a widespread or systematic attack against the community, possibly amounting to crimes against humanity, if so established by a court of law. Because Myanmar has refused access to human rights investigators the current situation cannot yet be fully assessed, but the situation seems a textbook example of ethnic cleansing."*[5]

The initial impact of the mass exodus of Rohingyas has adversely and coercively affected the women and children of this ethnic community. Child, perhaps is the worst affected amongst those involved in the refugee crisis of Myanmar. UNHCR report matches with other humanitarian as to the fact that 94% of the more than 600,000 displaced people in Bangladesh are Rohingya. Only a very small number includes the Hindu and Rakhine who were amongst the areas affected by the attack. The most fascinating fact seems to be that an estimated 54% of the displaced are children and 4% are elderly. The remaining 42% are adult refugees, roughly 52% of who are women.[6] The majority of refugees who entered Bangladesh are staying in temporary shelters and there has been inadequate infrastructure to deal with the crisis which may be considered as the worst in recent times. Bangladesh is establishing a

4. U.N. Office of the High Commissioner, *Darker and More Dangerous: High Commissioner Updates the Human Rights Council on Human Rights Issues in 40 Countries,* September 11, 2017.
5. Ibid.
6. The Bangladesh Refugee Relief and Repatriation Commissioner (RRRC), launched on October 4, 2017, which conducted a family counting exercise with the support of UNHCR. RRRC Fact Sheet: Family Counting, (November 7, 2017).
7. Medhavi Aroora and Ben Westcott, "Bangladesh to Move 800,000 Rohingya into Single Enormous Camp," CNN, (October 23, 2017).

new 3,000-acre camp at Kutupalong that is to reportedly accommodate 800,000 people in a single, enormous camp[7] apart from the one in Cox Bazar, Bangladesh.

UNITED NATIONS AND PROTECTION OF CHILDREN IN ROHINGYA CRISIS

The United Nations Organization has declared the crisis in Myanmar relating to Rohingyas as the worst example of textbook style ethnic cleansing. It has condemned the act as the worst affecting human rights involving children. It declares the crisis having very serious humanitarian consequences. It reflected the concern relating to the limited access to basic necessities regarding livelihood and health. The U.N. Security Council in a presidential statement released on November 6, 2017, inter alia, expressed:

> *"..grave concern over reports of human rights violations and abuses in Rakhine State, including by the Myanmar security forces, in particular against persons belonging to the Rohingya community, including those involving the systematic use of force and intimidation, killing men, women, and children, sexual violence, and including the destruction and burning of homes and property.*8

Another important concern that was raised in this regard is the status issues of the members of Rohingya community not only for those who are in Bangladesh as refugees but also those who are still in Myanmar. It is a matter of concern as these people are not provided with the status of citizen in Myanmar. They are legally regarded as people illegally staying in Myanmar for decades. The international community has already raised their voice for stopping such discriminatory practice and has urged the Myanmar Government to provide solution to this major hindrance. In the absence of a legal status, the member of this community has been subjected to limited and restrictive access to various basic and necessary facilities available in their country. It has been urged to the Myanmar Government that the standards that they should adhere in this regard must comply with international standards. The UN also recommends initiating State wise programs to develop various section of the society. Another area of concern that has been specifically highlighted by the UN is the widening of regional imbalance which will have a far reaching effect in the decades to come. Rohingyas have because of the crises fled to various other parts of the south Asian countries. The largest flock has gathered in Bangladesh where the majority of refugees have settled in. It has been estimated that around ninety four thousand people have moved into Bangladesh from the border of Myanmar till date.[9]

UN has also focused on the crisis leading to a much wider regional imbalance. There has been large scale exodus of Rohingyas to various parts of South Asia and in Bangladesh alone the numbers of Rohingyas are approximately 94,000 people till date. The members of the international community and the UNO have appreciated the Bangladeshi government for allowing the refugees to settle and provide them with

8. United Nations Security Council, *Presidential Statement*, S/PRST/2017/22, November 6, 2017.
9. This number includes statistics from 2014-2015 till date.

basic necessities with the support of the UNO. The largest affected in the said crisis includes children as they are in a state of vulnerability from various physical and psychological factors.

CHILD RIGHTS UNDER THE REFUGEE CONVENTION: THE PRIMARY ISSUES

Children are provided with the necessary protective shield by various international conventions including the Refugee Convention. The Universal Declaration of Human Rights, 1948 in its declaration has proclaimed the need of special care and assistance for the child. The primary reason behind this is that the majority of child immigrants travel alone leaving behind their parents who have been subjected to major difficulties arising out of challenges and adverseries. In majority of the cases that occasioned in the case of Rohingya children the parents are dead. In a case reported, there has been unwarranted attack by the state by air, where bombs were dropped on mud and straw built huts having women and children. People are found in houses engulfed with fire. After people rushed out of their houses there has been realization that some of their relatives are still stuck in their fire engulfed houses.

> *"Swishhh…In the middle of the night, Ismat Ara heard a faint sound. Within seconds, the 27 year old Ara knew what it meant: her mud and bamboo thatched hut was on fire. She sprang on the floor, lifted her three and a half hear old son Absar and ran out, all in one movement. When she turned to look back, her dwelling was engulfed in flames. And then came the shocking realization: her 13 year old daughter was still inside the hut."*[10]

As a matter of past experiences[11] it has been identified that there are at least three ways of migration:

1. They move with their family[12];
2. They migrate alone without their parents;[13]
3. They were left behind by migrant parents who have no other option than going abroad to seek means of sustenance for their family.[14]

The situation of Rohingya children is primarily limited within the first two ways mentioned above. According to various international treaties and the standard set out by these international covenants the country states have some basic responsibility towards the refugee children. Once the country concerned has ratified the treaty, the country promises to the international commitment to follow certain basic standards

10. Subhojit Bagchi, "For Rohingya, it was all a blinding flash and a smear of ash", *The Hindu*, October 22, 2017.
11. SOS Children's Villages International, "Position paper on migrant and refugee children" 3 (2016) *available at:* https ://www.sos-childrensvillages .org/getmedia/73abf1b5-05ca-4f1a-89bf-841350b7a8ae/SOS-CVI-Position-Migrant-Refugee-Children-A4.pdf (last visited on July 17, 2019).
12. Ibid.
13. Ibid.
14. Ibid.

provided in the treaty. There are two basic Conventions which guides the Refugee Children. One, the Refugee Convention of 1951 and secondly, the Protocol (Relating to the Status of Refugees) of 1967. The standard set forth by the said conventions categorically applies to both the children and the adults.

The three basic standards are as follows[15]:

(1) a child who has a "well-founded fear of being persecuted" for one of the stated reasons is a "refugee",[16]

(2) a child who holds refugee status cannot be forced to return to the country of origin (the principle of non-refoulement)[17], and

(3) no distinction is made between children and adults in social welfare and legal rights.[18]

Apart from the aforesaid position, Article 22 of the Convention provides that the refugee must receive the 'same treatment' as nationals in primary education and treatment at least as favorable as that given to non refugees while imparting secondary education.

The Convention on the Rights of Child (CRC) 1989 is applicable to refugee children as well as Article 1 of the said convention does not exclude refugee children and is thus applicable to all the children of the world. Article 2 of the said convention also prohibits discrimination. Thus the discrimination made towards the refugee children is also prevented under the said Convention. The rights thus available to the children of the country must also be provided to the refugee children in relation to juvenile justice, family rights, adoption, social welfare, health, education and the like. To make it more effective the United Nations has approached for a mandatory ratification of the said convention. A major development took place in this regard when the World Summit for Children adopted a Declaration and Plan of Action in 1990. The primary objectives behind the said Summit were to set major standards to work for protecting the rights of children relating to education and health.

THE MAJOR VIOLATIONS

The majority of refugees have got their basic rights violated due to the Myanmar ethnic cleansing. The crisis has affected basic rights of the refugees, the majority of which are children. Amongst major areas of violation are their deprivations to basic human rights inter alia food, medicines, vaccination, sanitation, shelter and education. The various international agencies have stepped up their assistance to provide basic

15. UNHCR, "Refugee Children: Guidelines on Protection and Care" *available at*: http://www.unhcr.org/protect/PROTECTION/3b84c6c67.pdf (last visited on Oct. 10, 2019).
16. Ibid.
17. Ibid.
18. Ibid. This is one of the primary reasons for most of the countries not to allow refugees in their jurisdiction, as it is one of the prime reasons for increasing the burden on the state over the refugees. India very recently stated by highlighting this point as to why they don't want Rohingya refugees to be in India.

rights for the needy. The three camps that was setup in Bangladesh have been provided with major aids from international assistance. However, the biggest thing missing in the process is providing education to these children. This gap has exposed the child with a massive deficiency in the intellectual development of these children. The story of such deprivation has been a bench mark of most refugee crisis, be it in Bosnia or Syria. It is not that the state concerned is not doing their duty towards the international commitment. As a matter of fact, these countries have done a commendable job but the said situation is so challenging that more efforts from newer dimensions are needed.

Another interesting challenge is the lack of major health care facilities amongst the said refugee children. The primary reason for such a condition is the lack of basic background information about the child like their age, previous medical history etc. The lack of awareness as to the benefits of such medical advice also contributes to the children for not going for vaccination.

Children also need the be provided with a continuation of care and medical attention as they have already been affected and infected adversely due to huge sanitary issues coupled with human corpses affected ground water contamination. Compulsory monitoring of the situation is not always possible for a considerable span of time which is needed for the said purpose. In the absence of a proper citizenship provided by the Myanmar Government has led to a deprivation of state aided medical support to the Rohingya. Thus the children would, under the current scenario would eventually suffer in the long run as that would have made it worse for the children to be provided with sustained medical support and attention.

Connecting the children with their parents specially those whose parents are still alive would be a mammoth challenge for any organization. But that is what would be best for the welfare of the child concerned. Childhood that has been lost can perhaps never be returned. The children have faced the things that perhaps they should never have experienced at their age. One of the pictures drawn by a Rohingya Child refugee has reflected the various experiences that they have experienced. The figure below portrays the said experience.

19. Drawing by a Rohingya boy, Abdul, reveals horrific experiences he endured while fleeing from Myanmar to Bangladesh, at a child-friendly space at the Balukhali makeshift refugee camp in Cox's Bazar district, Bangladesh, Oct. 2, 2017.

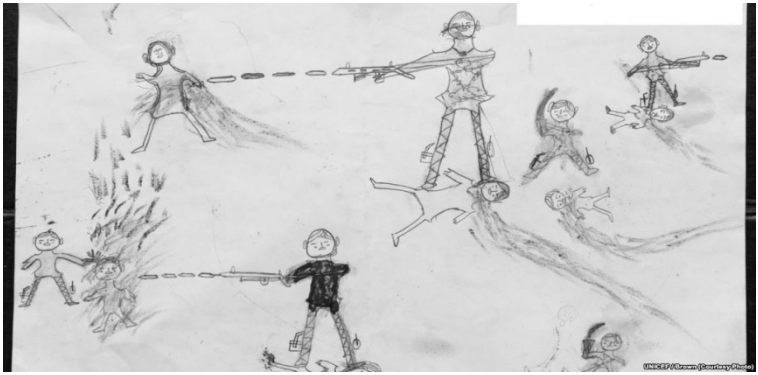

Figure 1: A picture drawn by a seven year old child refugee.[19]

To bring back the children from the trauma would be a great challenge for all concerned under the backdrop of the traumatic condition of the home land of these refugee children.

RESETTLEMENT

Normal community life of the refugees should be one of the best possible way to bring back mental well being of the traumatized refugees primarily the children. Regenerating the community well being is however not an easy task. Some of the major steps that should be taken in this regard are cultural and social re building. The elders amongst the refugees may be oriented to achieve the target audience to bring back cultural association amongst the refugees. This is commonly called Traditional leadership.[20] In the absence of existing leaders there are may be efforts to develop new leadership amongst the refugees. Providing specific arrangements to bring the refugees to stay together rather than on a segregation and distributed form may be a serious effort to bring back the community life amongst the refugees. This provides a sense of security and oneness amongst the community specially the children. Once the people started living together there is every possibility to make people oriented planning on the basis of homogeneous interest areas of the community. Major homogenous areas inter alia include language, rituals, religion, art, recreation and the like. Efforts are already on in this direction for providing strategic measures to protect the interest of the refugees.

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20. A refugee population may already include part, if not all, of its traditional leadership. The aid worker can help to strengthen and reinforce traditional leaders by consulting and working through them. Preservation of the refugees' traditional form of social organization enhances not only their well-being but also the effectiveness of assistance efforts. *Supra* 14 at 11
21. ICJ and others call on the EU to protect refugees and migrant children's rights, available at https://www.icj.org/wp-content/uploads/2016/11/EU-Joint-Statement-Refugee-and-Migrant-Children-Advocacy-Non-Legal-Submission-2016-ENG-.pdf accessed on (last visited on February 25, 2018).
22. Ibid.

INTERNATIONAL COURT OF JUSTICE ON REFUGEE RIGHTS

Very recently ICJ and seventy seven other civil society organizations and UN agencies made initiatives to protect the refugees and migrant children. The ICJ has called upon the EU institutions as well to take initiatives to prevent the ongoing atrocities of refugee and most importantly children. The ICJ has deep concern about the failure to popularize child rights in the world. Rights like access to education, access to information, access to a lawyer etc.[21] The ICJ has also stated that EU and Member states can do much more than what has been done in the recent past.[22]

ICJ also emphasized the need to work on areas including strengthening the necessary safeguards in the asylum legislations, to provide more financial aid for national child protection plan and to build developed mechanism to protect the child across borders.

ROLE OF JUDICIARY

It is common that the State shall try to implement Executive Discretion to address the refugee crisis. However, the state must understand that judges also have a role to play and more importantly a much effective role to play in a refugee crisis in a state. As a matter of fact the judges must also understand the relevance of jurisdiction of refugee crisis as a part of their discretionary jurisdiction. What has been noticed from past experiences is that the state would not generally appreciate the intervention of judiciary in such cases but it must also be understood that the executive discretion in such scenario has done worse than good to the people concerned including irreparable harm and gross violation of human rights. The judiciary should play a major role that the constitution vests upon it, the rights of the people and the protection of larger interest of the State. That is what rule of law suggests and that is why the Supreme Court (SC) of India accepted the PIL filed by Rohingya Refugees which wanted the SC of India to act in favor of the right of the people whose basic rights have been abused and to prevent any further damage to their already vulnerable condition. In a state of emergency the judiciary is vested upon the power to restore justice to the people in need of it and it is not executive discretion but judicial discretion that should writ large to protect the rights of the refugees most importantly the children. The majority of refugees that are under terrible situation demands the protection of the judiciary to sustain an immediate relief to the ongoing turmoil of their life.

In India there has been sharp criticism over the acceptance of the PIL of the refugee Rohingyas by the government. The Attorney General reiterated in this regard that India would not like to be the refugee capital of the world as it has already been burdened with other problems. India has already been up preventing the Rohingya refugees to enter the country and access to the main land. India has emphasized largely on the need of deportation of those who have already entered Indian territories and urged the Supreme Court to carry on with the Executive Discretion.

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23. The concept has been elucidated by the famous radical feminist Catharine Mackinnon.

THE ROAD AHEAD

The cry of the Rohingya child acts as a butterfly effect[23]. As the tears roll down the eyes of millions of children, thousands of miles away, all across the planet debates, discussion and strategies are formulated to remove the difficulties, distress and abuse of human rights of all those who have survived the ordeal in furtherance of ethnic cleansing developed and executed by the Myanmar Government.

Majority of these refugees are children and Bangladesh Government has done a commendable job to provide assistance to them. The world now must stand together to provide sufficient economic and resource assistance to help the Rohingya refugees to come back to basic life. The other arrangements that should also be formulated is the re structuring of the areas in Myanmar where they used to reside. There must also be efforts to provide the solutions to major discrepancies in Myanmar that led to the massive cleansing exercise. It is not possible to solve these aspects in a short span of time. Major solutions would need considerable period of time.

Primary areas that could be taken into consideration are education, health and infrastructure.

Both long term and short term measures are needed to strategically eradicate the problems.

RAY OF HOPE

There have been relief teams and aids flooding in to protect the refugees in Bangladesh. Special care has been taken and newer dimensions are explored to make the life of the refugees especially the children more conducive for their overall development. Children in Bangladesh Refugee camps in Cox Bazar and other areas have now started staying together in communities. Children are vaccinated on a regular basis. Huge funds are utilized to provide healthy sanitation and hygienic stay of children in these camps. Children are provided with training in various areas that would help them to address the challenges that are facing. Major improvements have been noticed in the mind of these children from the sketches they are now creating. The children are now moving towards a better tomorrow and better days are ahead. However, there shall be sustainable effort to provide them as wells as Bangladesh with the aid and support to realize the goals that the international community seeks to achieve. Recently, the Bangladeshi Prime Minister has reflected the inability to provide support to further refugee crises if created in Burma. She also urged the international organizations to provide necessary support in this regard.

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11

Right to Health and Social Security in India: Emerging Issues and Challenges

***Ms. Sanjukta Ghosh*[1]**

INTRODUCTION

> "The health of a society is truly measured by the quality of its concern and care for the health of its members….The right of every individual to adequate healthcare flows from the sanctity of human life and that dignity belongs to all human beings…We believe that health is a fundamental human right which has as its prerequisites social justice and equality and that it should be equally available and accessible to all"
>
> *- Sadullah Khan*

Health is wealth and is the greatest of all human blessings, encoding within the basic tenets of right to life such as food, water, shelter, environment, employment, sanitation, education and so on. As a member of the human race our health and the health of those we care for is the matter of daily and foremost concern regardless of age, gender, socio-economic conditions or ethnic background.

I. K. Gujral, the former Prime Minister, in his address to the 1998 Science Congress at Hyderabad, made a revealing comment concerning the state of our basic amenities. ' I see before me the bottled water kept for the dignitaries on the dias. It reminds me of three classes of Indians: one who can afford bottled water; others who can manage to get some water in their taps or in a nearby tap or a pump irrespective of its quality or regularity of supply; the third set of Indians are those for whom drinking water is a daily problem and who will be ready to drink any polluted water.'[2] If this is the situation even after seven decades of our independence, can we say that our society is secured? The fact is all our basic human needs are perfectly secured within the papers of the election manifestoes but unfortunately very little have been answered. We need to understand that there is no straight jacket definition of right to health. It embraces all the basic amenities essential to livelihood. In the ultimate analysis, a society will be evaluated by its capacity or ability to provide universal healthcare for its people, that is

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2. A .P. J. Abdul Kalam, Y. S. Rajan , *India 2020: A Vision for the New Millennium* (Penguin, UK, 2014).

to say a healthcare paradigm irrespective of socio-economic conditions, caste, religion, race, gender and age of its citizens. A society that is sick is retarded and cannot be a living society and to ensure social security one has to keep in mind that right to health to the highest attainable standard needs to be assured first for a truly secured society.

RIGHT TO HEALTH IN THE INTERNATIONAL HUMAN RIGHTS REGIME

Traces of initiatives by international co-operation on 'healthcare' can be found from the mid-nineteenth century with the calling of International Sanitary Conference in 1851 by the French Government which was followed by a series of International Sanitary Conferences to synchronize the procedures to prevent the spread of diseases

The Charter of the United Nations under its Chapter IX seeks 'international economic and social co-operation' with a view to promote "higher standards of living full employment and conditions of economic and social progress and development"[3] and "solutions of international economic, social, health and related problems and international cultural and educational co-operation."[4]

The right to the enjoyment of the highest attainable standard of physical and mental health was for the first time depicted in the Constitution of the World Health Organization in 1946 defining 'health' as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."[5]

Article 25 of the Universal Declaration of Human Rights of 1948 declares health as part of the right to an adequate standard of living.[6]

The most authoritative and comprehensive interpretation of 'right to health' is

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3. Chapter IX; Article 55 of the Charter of the United Nations.
4. Chapter IX; Article 55 of the Charter of the United Nations.
5. Preamble; the Constitution of World Health Organization.
6. Article 25 of UDHR reads as follows:
   (1) Everyone has the right to standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
   (2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.
7. Article 12 of ICESCR reads as follows:
   1. The State Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
   2. The steps to be taken by the State parties to the present Covenant to achieve the full realization of this right shall include those necessary for
      (a) The provision for the reduction of the still birth rate and of infant mortality and for healthy development of the child;
      (b) The improvement of all aspects of environmental and industrial hygiene;
      (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
      (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

enshrined in Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966.[7]

The right to health as the fundamental human right has been addressed by various international and regional human rights instruments, some of which are of general application while others acknowledge right to health of specific groups such as women, children, disabled, elderly or working class.[8]

The International Conference on Primary Health Care also known as Alma Ata of 1978 unanimously spells out the crucial role of primary health care which addresses the main health problems in the community, providing promotive, preventive, curative and rehabilitative services. It stresses that access to primary health care is the key to attaining a standard of health that will allow all individuals to lead a socially and economically productive life and to contributing to the realization of the highest attainable level of health.

The World Bank since 1979 has been contributing significantly towards betterment of public health. In 1979 it constituted a Population, Health and Nutrition Department and in 1980 published a Health Sector Policy Paper committing itself towards lending in the health care.

In 2001, the World Trade Organization adopted a landmark declaration in Doha on the Agreement on Trade Related Aspects of Intellectual Property Rights affirming that the TRIPS Agreement should not prevent member States from taking measures to protect public health including importing medicines from other States which they cannot themselves manufacture to ensure medicines are accessible and affordable to their own populations.

RIGHT TO HEALTH AND THE INDIAN CONSTITUTION

What really makes a country developed? The vital parameters are obviously wealth of the nation, the prosperity of its people and its standing in the international forum but at the same time it should be borne in mind that a nation is not a separate entity from its citizens and development does not merely mean economic or infrastructural development but the development of the quality of lives and standards of living of the citizens.

The Constitution of India provides for healthcare only as a constitutional obligation of the State in the form of Directive Principles of State Policy in Part IV. However, the judiciary from time to time stretched the ambit of fundamental rights in Part III to

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8. International human rights treaties recognizing the right to health:
   (i) The 1965 International Convention on the Elimination of All Forms of Racial Discrimination: Article 5 (e) (iv)
   (i) The 1979 Convention on the Elimination of All Forms of Discrimination against Women: Articles 11 (1) (f), 12 and 14 (2) (b)
   (i) The 1989 Convention on the Rights of Child: Article 24
   (iv) The 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families: Articles 28, 43 (e) and 45 (c)
   (v) The 2006 Convention on the Rights of Persons with Disabilities: Article 25

acknowledge right to health. The Preamble of the Constitution declares that "to secure to all its citizens- justice, social, economic and political" and provides for "equality of status and of opportunity". Article 253 of the Constitution empowers the Parliament to make law for the whole or any part of the territory of India for implementing treaties and international agreements and conventions.

FUNDAMENTAL RIGHTS

Article 14: Equality before law.

Article 14 enshrines "right to equality" or "likes should be treated alike" or that all those who are similarly situated in similar circumstances should be equally treated. In the context of critically ill patients and matters connected with healthcare, no discrimination shall be made on grounds of their economic conditions or social status.

Article 15: Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. Under Article 15 (2) (b), the words 'place of public resort' means places which are frequented by the public like a public park, a public road, a public bus, ferry, public urinal or railway, a hospital, etc.

Article 21: Protection of life and personal liberty.

The Supreme Court in *State of Punjab* v. *Mohinder Singh Chawla*[9] held that the right to life includes the right to health. Further, in *Paschim Banga Khet Mazdoor Samity* v. *State of West Bengal*[10] and *Pt. Parmanand Katara* v.*Union of India*[11], the Supreme Court declared that failure on the part of a government hospital to provide timely medical treatment amounts to violation of right to life.

Article 32: Remedies for enforcement of rights conferred by Part III.

In *Bandhu Mukti Morcha* case[12], Juctice Bhagwati (as he then stood) furthered the goal of social security by saying " Article 32 does not merely confer power on the Court to issue a direction, order or writ for the enforcement of the fundamental rights of the people and for that purpose this Court has all incidental and ancillary powers including to forge new remedies and fashion new strategies designed to enforce fundamental rights. It is in realization of this Constitutional obligation that this Court has innovated new methods and strategies particularly for enforcing the fundamental rights of the poor and disadvantaged who are denied their human rights and to whom freedom and liberty have no meaning".

DIRECTIVE PRINCIPLES OF STATE POLICY

The provisions uttered in this part are not enforceable in any court of law, but the principles therein are fundamental in the governance of the country and it shall be the duty of the State to apply these principles while legislating.

9. AIR1997 SC 1225: (1997)2 SCC 83.
10. AIR 1996 SC 2426.
11. AIR 1989 SC 2039.
12. Bandhu Mukti Morcha v.Union of India, AIR 1984 SC 803.

Article 38: State to secure a social order for the promotion of welfare of the people.

Article 38 (2): The State shall, in particular, strive to minimize the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

Article 39: Certain principles of policy to be followed by the State.

Article 39 (a): equal rights of citizens,, men and women to adequate means of livelihood.

Article 39 (e): spells out that the health and strength of workers, men and women, and the tender age of children are not abused and hat citizens are not forced by economic necessity to enter avocations unsuited to their age or strength.

Article 39 (f): State to secure that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and hat childhood and youth are protected against exploitation and against moral and material adornment.

Article 41 – Right to work, to education and to public assistance in certain cases — State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

Article 42 – 'Provision for just and humane conditions of work and maternity relief: The State shall make provision for securing just and humane conditions of work and for maternity relief.

Article 47 – 'Duty of the State to raise the level of nutrition and the standard of living and to improve public health' : The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purpose of intoxicating drinks and of drugs which are injurious to health.

STRIVING AT THE POSSIBLE AVENUES TO AN EFFICIENT AND AFFORDABLE HEALH CARE PARADIGM

The function of the State regarding healthcare under the broader spectrum of social security should be five dimensional- *Informative, Promotive, Preventive, Curative and Rehabilitative* and to achieve this there should be a strong network between the State, intergovernmental organizations, NGOs, charitable foundations and the private sector.

(a) National Health Organization and State Health Organizations can be constituted by the Ministry of Health consisting of medical experts and pharmacists to formulate policies and review the public healthcare regime. The State Health Organization should keep under constant vigil Government and private hospitals, diagnostic centres and medicine shops within the respective State.

(b) There should be a three-fold networking system between the District Health Departments, State Health Departments and the Union Ministry of Health at the top to pierce deep into the healthcare system through regular surveillance and reporting. This will help in making the working of the healthcare sector more efficient.

(c) India is a developing country and majority of the population cannot afford the costs of multispecialty or super specialty hospitals or nursing homes. So, more technical and infrastructural support should be extended to the Government hospitals and health care centres. Government hospitals should also be brought under the purview of NABH.

(d) It is also expected that the Government will seriously think for establishment of fair-price medicine shops and pathological and diagnostics clinics in all blocks (panchayat) of the State. For transportation of patients in case of emergency, ambulance must be stationed in each block. These will ultimately lead to the development of rural health care facilities.

(e) Like all major long-distance trains have pantry cars, there should be emergency medical care unit attached to the trains. In case any passenger on board falls ill midway or in between stations can get preliminary medical assistance.

(f) Door to door campaigning regarding vaccination of children should be done specially in rural areas. If possible volunteers through NGOs should be arranged by local bodies to escort mothers and children to the vaccination centre through Registered Pick-Up Vans to secure healthy child-hood.

(g) Provisions for Free-Clinics should be made in every blocks (panchayat) and wards and doctors from Government hospitals and health-centres should attend those clinics in rotation basis. This will help the people who for economic impediment cannot afford quality medical and health care facilities.

(h) Health Camps should be regularly organized in rural and slum areas so that major out-break of diseases can be prevented. There should be provisions for health check-ups of children at least once a week in every State funded or aided primary schools.

(i) Provisions should be made in every super-specialty and multi-specialty hospitals and nursing homes whether State aided or private for free medical and health care facility for people who cannot afford such treatment. That is to say *reservation of some seats* for free treatment and care for people who are economically debarred from such care and treatment.

(j) Regular classes in all private and public schools relating to *health and hygiene* should be conducted as a part of course curriculum.

(k) Awareness programmes should be convened relating to communicable and non-communicable diseases and their risk factors. Street plays and road shows are the best modes of carrying out such programmes especially in rural and remote areas.

(l) Government should aim at reducing morbidity and mortality and improving health during pregnancy, childbirth, the neonatal period, childhood and adolescence; and promoting active and healthy aging; taking into account the necessity to address determinants of health and internationally agreed development goals, in particular the health related Millennium Development Goals.

(m) There should be mechanism for surveillance and effective response to disease outbreaks, acute public health emergencies and the effective management of health-related aspects of humanitarian disasters to ensure health security thereby contributing to social security.

(n) In order to achieve the ultimate goal of healthy and living society there must be organizational leadership on the part of the Government and accountability towards society on the part of the corporate sectors that are required to make society truly secured.

CONCLUDING OBSERVATIONS

"It is health that is real wealth and not pieces of gold and silver"

- Mahatma Gandhi

Social security according to ILO is "the security that society furnishes, through appropriate organization, against certain risks to which its members are exposed. The risks are essentially contingencies against which the individual of small means cannot effectively provide by his own ability or foresight alone or even in private combination with his fellows.'' The various risks are sickness, invalidity, maternity, employment injury, unemployment, old age, death, emergency expenses.

Ever since the inception of the ILO, a lot of social security conventions and resolutions have been adopted by it. The Social Security (Minimum Standards) Convention of 1952 identified nine key issues viz. (i) medical benefits, (ii) sickness benefits, (iii) unemployment benefits, (iv) old-age benefits, (v) employment injury benefits, (vi) family benefits, (vii) maternity benefits, (viii) invalidity benefits, and (ix) survivor's benefits. In 1962 the ILO adopted another convention on The Equality of Treatment (Social Security) Convention to strengthen social security laws.

The United Nations and its constituent bodies have always come up with new mechanisms to ensure implementation of social security in order to achieve the broader human rights goal.

The Universal Declaration of Human Rights in its Article 3 declares that "everyone has the right to life, liberty and security of person" and "everyone as a member of society, has the right to social security….."[13] and "has the right to standard of living adequate for the health and well being of himself and of his family, including food,

13. Article 22 of UDHR: "Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality."

clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."[14]

These provisions are self explanatory and it can be inferred that social security and right to health are complimentary and supplementary to each other and cannot be isolated. Right to health or the right to health care is recognized in at least 115 national Constitutions. At least six other national Constitutions cast duties in relation to health upon the State to develop health regime or to allocate a specific budget to them.

At the national level, India has an impressive list of social security laws but a concrete legal framework concerning right to health is unavailable and is urgently sought. The Constitution of India though recognizes 'right to health' but the word 'right' is nowhere depicted. The mandate of the *National Human Rights Commission of India* is to protect and promote rights guaranteed by India's Constitution and international treaties. The Commission has been very active with respect to the right to health.

There are a lot of Governmental policies and schemes regarding 'health', but eventually they are of no use if they cannot be made available to the socially disadvantageous class of people who cannot effectively avail of those facilities.

Citizens of the country though well covered and protected by the makers of the Constitution in Parts III and IV of the Constitution even then the most deserving part 'health' is not included.

A citizen can pray for protection in employment, freedom of speech, personal liberty etc but all such prayers can only be available if the citizen concerned is not betrayed of health.

Laws and policies cannot operate in vacuum, and to bring them out of papers we need proper mechanism and systematic infrastructure to implement them to achieve the 'highest attainable standard of health," thereby creating a 'healthy, living and secured society'. The 2018 Union Budget presented by the Hon'ble Finance Minister, Mr. Arun Jaitley revealed a 'mega health-care project' named the National Health Protection Scheme (NHPS), very famously known as 'Modicare' is aimed at "extending healthcare insurance to 100 million families, and raises the insurance ceiling to Rs. 5 lakh per family".[15] The working of the 'Modicare' is yet to be tested though.

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14. Article 25 of UDHR.
15. Rohan Abraham, "What is 'Modicare' and how will it affect you?", *The HIndu*, Feb. 2, 2018 *available at*: https://www.thehindu.com/business/budget/what-is-modicare-and-how-will-it-affect-you/article22635372.ece (last visited on July 28, 2019).

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Parameters of Patient Safety with Reference To Negligence And State Response

Sriparna Rajkhowa[1]

INTRODUCTION

Health, with full able potential innately possessed or otherwise, is the foremost constituent of a living being. Its meaning and facets of inclusiveness, including physical and mental, has received global recognition within the disciplines of law and medicine. A common phenomenon in third world countries is that people neglect their health status and many a time they do not even consider visiting their health professionals, unless required to do so under compulsion. This is much in contrast with their counterparts in the developed world, where they are much aware about benefits of regular health checkups, not only to know of their physical and mental well being , rather to take precautionary measures against any eventualities that may possibly be detected, following the adage of prevention is better than cure. They are very much concerned with their health status; even the states provide for such facilities though social insurance policies. In these countries, medical services, though highly expansive, are very much available and the doctor population ratio has been found to be very healthy. There are appurtenant demands of the profession in the shape of utmost patient care and safety. Professional negligence, be it by doctors, or paramedical staff, and those involved in the rendering of clinical services are alert and alive to the fact that any negligence or compromise in the rendered services can have the propensity to lead them to the verge of penury. The services rendered, at times at exorbitant rates, have to meet excellent standards as any form of negligence or want of care can be very much ruining. Of course, different facilities depending on the purse are available for being afforded as well the ease of availability of meaningful available social security benefits. However, when it comes to patient safety resulting from negligence, the attendant risks cannot be expected to be avoided. Consequently, the standards of care and precautions are of that order.

In contrast, the developing countries depict a different scenario. Though any sweeping statement would be misleading and depict a completely negative picture, the

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level of care and the resultant consequences for the professionals, service providers including medical establishments are comparatively not very threatening, consequently resulting in laxity in medical administration and negligence on the part of the professionals involved. Therefore, questions at times arise on the nature and extent of professionalism in regard to patient safety and negligence, particularly in state run or state managed institutions, where major expenditure is found to be borne from the state exchequer. Nonetheless, this cannot be regarded as a shield to defend oneself from maintenance of high standards or lack of accountability for inherent negligence. This need not sound very scary, nor one need to be a skeptic or pessimist as the situation has witnessed much change in this respect, aided and attributed by the law and policy prescriptions. Besides, the alertness and choices available have led to much more responsible administration and witnessed improved professional health care. This can be vouched for the fact that in some of the developing countries, medical tourism has come up in a big way , particularly the private establishments, where expertise matching international standards have witnessed a steady flow of international patients from the developed world. This can be attributed to two reasons, namely; prompt, effective and efficient prognosis and diagnoses and highly affordable treatment at a price that cannot be imagined in the developed world.

Though all encompassing and of wide amplitude, as suggestive in the caption, this write up intends to confine itself to concept of patient safety and conversely, appurtenant consequences of negligence, through the prism of medical jurisprudence vis-a-vis the bearer of rights duties of patients and doctors, primarily the very encompassment to assure patient safety through its various facets.[2] Viewed from the penumbra of medical negligence,[3] patient safety has to be secured and be ascertained, clarified and assembled against the scattered aspects, collated and made legally enforceable.

CONCEPTUAL FRAMEWORK OF PATIENT SAFETY

Patient safety is universally regarded as a serious global public health issue. Its objective has been the prevention of harm to patients, particularly during hospital care or health care. The primary concern of patient safety has been about eliminating preventable medical mistakes by care givers, guarding against the impact of human error and establishing systems to safeguard patients' health and well- being.[4] Increasingly gaining in recognition, it demands a complex systematic effort, involving a wide range of actors and actions in performance enhancements, environmental safety, risk management including infection and safe use of medicines, equipment safety, safe clinical practice and safe environment of care.[5]

In fact, it was in the year 2002, that the members of the World Health Assembly adopted a resolution on patient safety, though the terminology came to be formally

2. Including aspects of blood transfusion, hospital associated infections etc.
3. It includes Para- medical and associated serviced.
4. Ministry of Health and Family Welfare, Government of India, *National Consultation Workshop on Patient Safety,* May 2010 *available at:* http://www.nabh.co/images/PDF/ patientsafety.pdf (accessed on November, 1, 2019).

adopted only in the year 2004. It may be sated that the thrust and momentum on patient safety gained from the London Declaration of March, 2006.[6] The foundation came to be reiterated and consolidated the very next year in the Jakarta Declaration wherein patients, consumer advocates, health care professionals, policy makers, NGOs, professional associations and regulatory councils, called upon Member States, various stakeholders and policy makers in building safer health care systems and creating a culture of safety within the health care institutions.[7]

It has emerged that the very concept of patient safety centered on the elimination of preventable medical mistakes. It is not that realization of the gravity of the situation dawned very late, but the world community till such time did not consider it imperative to formally address it from the rights perspective, thereby highlighting the consequence of resultant negligence. Formal recognition of guarding against the impact of human error and establishing systems of patients' safeguards and well being, came to be established as an imperative, since the WHO considered it a concern of endemic proportions.[8]

RESPONSE OF THE GOVERNMENT OF INDIA

The Government of India being a party to the process and a signatory to the Declaration naturally had an obligation to perform. This happened to be all the more so, as its teeming millions required not only treatment, mostly at state expense, but quality treatment having adequate safety standards for the patients. With mushrooming growth of clinics and private hospital establishments, many with profit motive and less bothered with safety standards or missionary zeal, extra efforts were required to be undertaken to robe in such establishments.

Patient safety pledge was signed by the Government of India in the month of July, 2006. Hence, it became incumbent upon the government to take gradual steps towards fulfillment of the noble objectives of the Declarations. This took the shape of an initiative namely "Hospital Patient Safety Initiative" aimed at successful and healthy outcome of patient care, safe and error free care, making available the most advanced and experienced medical care for patients, comfort and peace of mind for providers.[9] This has resulted in patient safety committee being initially set up in three tertiary hospitals in Delhi. Further, a training module was also developed for hospital staff on patient safety, which came to be implemented. The process involved many patient safety measures, including infection control and bio-medical waste management, extending to measures in operation theatres and outpatient Departments, as well as devising safety norms for patients in vital areas of hospitals.

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5. WHO, 2002, *available at*: www.who.int/patientsafety/en/brochure_final.pdf (accessed on November 15, 2019).
6. WHO, *Patient Safety*, Dec. 12, 2012 *available at*: http;//www.who.int/patientsafety_patient/ London_Declaration_EN.pdf (accessed on November 1, 2017).
7. *Supra* note 4.
8. *Supra* note 5.

Patient safety came to be recognized as a fundamental element of health care, primacy and paramount importance having been so accorded, in the shape of National Patient Implementation Framework.[10] Consequent upon endorsement of the Regional Strategy for Patient Safety (WHO) South East Region, 2016-2025, at the WHO Regional Committee meeting for South East Asia Region in the year 2015, the Government of India constituted a multi-stakeholder Patient Safety Group in August 2016 which has been tasked with the responsibility to operationalise patient safety agenda at the national level and also to develop a National Patient Implementation Framework. The latter identifies some challenges in patient safety, including unsafe injections, biological waste management, medication and medical device safety and high rates of health care associated infections.[11] Such measures are mandated to cover the entire spectrum of public and private health care establishments, encompassing elements of health care provisions, including prevention, diagnosis, treatment and follow-up through a cardinal patient centric and evidence based approach.

It is significant to note, that emphasis has been laid on investing in evidence generation to ensure effective interventions.[12] Inter alia it envisages a national level steering committee as a central coordinating mechanism for patient safety, incorporating patient safety principles in the Public Health Act, 1875. From safety incident surveillance and reporting system, it envisages revising licensing and certification standards for all categories of health workforce. The group has also admitted that the policies and laws are largely fragmented, leading to the corollary of the need to have a proper legislative framework; in other words, an effective legal regime. It is highly imperative that Patient safety parameters have to be put in place, if at all specific concerns in the patient safety are to be addressed. Towards this end, the country specific concerns primarily centre around failure to deliver safe care that result from unsafe clinical practices, besides unsafe processes and poor systems and processes. Hence, the challenges range from unsafe injections to medication and medical device safety.[13] It also extends to physical safety, medical check-up of the care providers,[14] air exchanges especially in high-risk Intensive Care Unit, Operation theatre, apart from safety of clinical care including periodic immunization of the care providers.

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9. Ibid.
10. Ministry of Health & Family Welfare, Government of India, *National Patient Safety Implementation*, April 2016, *available at:* http;//rstv.nic.in/patients-safety-fundamental-element-healthcare-ministrys-draftframework.html (accessed on November, 2, 2017).
11. PRS, *available at:* http;//www.prsindia.org/administrator/uploads/general/1512125025-MRP-%20sept202017 (accessed on November, 2017).
12. *Supra* note 10.
13. The need for a comprehensive baseline date is surgical care, safe childbirth, injection safety, blood safety, medication safety, medical device safety, safe donation.
14. Health care infrastructure besides providing for a safe environment in hospital in the form of proper cleaning and decontamination of patient care and procedures and procedures like labour table, operation theatre wards, injection rooms etc., apart from proper segregation, storage and disposal of bio medical waste.

INITIATIVES UNDERTAKEN

In order to ensure quality of services, National Quality Assurance Standards have been formulated and published, incorporating all essential requirements pertaining to patient safety, drug safety and infection control under the National Quality Assurance Programme for public health facilities. In the area of clinical services, standard has been designated for drug safety while ensuring safe drug administration.[15] Check list to ensure physical infrastructure has been provided for along with provision for quality assessment at three levels, namely; facility level, periodic assessment by State team and external assessment by the Government of India. The Indian public health standards moreover provide the norms for infrastructure and disaster preparedness. National Rural Health Mission as well as National Immunization Programmes has been addressing the issue of patient safety with proper monitoring agencies. Measures to check adherence to clinical Protocols and prompt identification of danger sign and referrals have also been implemented.[16]

LAWS IN EXISTENCE AND ON THE ANVIL

A brief account of the policy parameters indicate that responding to the international developments, the country has been incorporating the same at the domestic level, though much remain to be done. Moreover, the mechanism for implementation, follow-up and assessment need to be further addressed. Though some pre and post Constitution laws exist relating to the health establishment focus on patient safety and countering measures at negligence were either missing or not properly addressed. The rights perspective was also found to be wanting. The foregoing paragraphs very much indicate that even at the international level, patient safety has been taken up with right earnest only recently; hence, to expect incorporation of such measures may not have crossed the mind of the legislative bodies previously. Lest the focus of the discussion gets diluted, as well as due to constraints of space, a few Acts are being focused upon.

One of the laws that pertain to the issue under consideration happens to be the Clinical Establishment (Registration and Regulation) Act, 2010.[17] The significance of the legislation lies in the fact that it has been enacted under Article 252 of the Constitution of India, extending to the states of Arunchal Pradesh, Himachal Pradesh, Mizoram and Sikkim (and also for implementation in the Union Territories). Other states have the option of implementing this legislation or enacting similar legislation on its own. As the title specifies, the intent of the Act has been to regulate registration and regulate clinical establishments with a view to provide for minimum basic standards

15. Nursing and Midwifery Board of Ireland, *Standards for Medicines Management for Nurses and Midwives,* 2015 *available at:* http;//www.nmbi.ie/nmbi/media/NMBI/standards-fpr-medicines-management.pdf (accessed on November, 4, 2017).
16. WHO, "Patient Safety" *available at:* http;//www.who.int/patientsafety/topics/safe-childbirty/en (accessed on Nov. 7, 2017).
17. Act 23 of 2010.

of facilities and services, that may be cast upon them. In other words, the specific law stipulated the minimum measures to be undertaken. It is aimed at extending the law to the territories where clinical establishments (hospitals, maternity homes, nursing homes, dispensaries, clinics, sanatoriums or institutions by whatever name called, that offers services for diagnosis, care or treatment of patients in any recognized form of medicine (allopathic, Ayurveda, Unani or Siddha); be it private of public, except the establishments run by the armed forces. This Act holds registration mandatory for all clinical establishments, unless it is registered. For this purpose, according to the provisions of this Act, the establishment has to fulfill conditions, such as the maintenance of minimum standards of facilities and services and staff, as prescribed. It also mandates proper record keeping and submission of reports and returns on treatment, as entailed. It stipulates that such establishments have to provide necessary medical examination and also to stabilize the emergency medical condition of an individual brought to any such establishment. It is endowed with the responsibility of charging of rates for each type of procedure and service within the range determined and issued by the Central Government in consultation with the State Government. The establishments have to maintain and make available medical record of every patient, as may be prescribed by the Central or State Government. The Act, besides providing for a legal framework, brings about accountability and transparency. The said law further necessitates for standard treatment guidelines for cardiovascular diseases, critical care, gestroenterogical diseases, besides those for Obstetrics and Gynecology, Haemodialysis, Ophthalmology, Otolaryngology, Orthopedics, Medicine (Respiratory), Medicine (Non Respiratory Medical Conditions), Organ transplant etc.

Another related piece of legislation on the anvil happens to be the National Health Bill, 2009 that aims to recognize Health as a fundamental right.[18] The Bill contains provisions conferring upon every citizen a right to the highest attainable standard of health and well -being. A perusal of the provisions of the bill reflects that it aims at providing a policy window for the government to overhaul medical education truly integrating all systems of medicine, as envisaged in the National Health policy of 2015.[19] This aims at furthering the constitutional mandate of the right to health deduced from Article 21 of the Constitution and judicial reflection upon the same which has enlarged the same to a degree not envisaged earlier.

RIGHTS AND DUTIES OF PATIENTS AND DOCTORS

In the year 2002, the same year when the World Health Assembly held discussions on the concern of patient safety, a Code of Ethics was adopted by the Medical Council of India. It focused primarily on the ethical conduct of doctors in the professional dis-

18. The State of Assam already has such a Law.
19. Neethi Rao, "A National Health Commission Would Serve India Better Than a Medical Commission", *The Wire*, Jan. 13, 2017 *available at*: http;//the wire.in99213/health-commission-bill (accessed on Nov. 8, 2017).

charge of their duties. However, this code did not represent the patients' rights, except incidentally. The Code adopted a duty centric approach in contrast to the rights approach adopted by the Association of American Physicians and Surgeons. This may party be attributed to the fact that negligence in the United States was met with challenges and exorbitant amount of compensation were being awarded. What the Code ignored was that the medical profession is bound to uphold the rights of patients that happen to be incidental to her/ his duties.

It bears immense significance, that patients have a right to receive treatment, irrespective of their type of illness, socio-economic status, age, gender, sexual orientation, religion, caste, cultural preferences, linguistic and geographical origins or political affiliations. They have a right to be heard to their satisfaction without the doctor interrupting before completion of narration of their entire problem and concerns. That apart,[20] they have a right to be provided with information and access on whom to contact in case of an emergency.[21]

A significant aspect of medical jurisprudence is that of the confidentiality, privacy and informed consent. Appurtenant issues encompass the role of National Accreditation Boards, Insurance Regulatory Agencies and the like. Patients' too have a right to demand and receive complete information, besides that on treatment procedures.

Patients' have a right to justice by lodging a complaint through an authority dedicated for the purpose by the health care provider organization or with government health authorities. They have the right to a fair and prompt hearing of their concern (s). The patient, in addition has the right to appeal to a higher authority in the health care provider organization, insisting on a written response on the outcome of the complaint. Patients too have the right to request the facility of being provided a person of their own gender to be present during certain parts of physical examinations, treatment or procedures performed by a health professional of the opposite sex, except in emergencies, and the right not to remain undressed any longer than is required for accomplishing the medical purpose for being undressed. Patients' as a matter of right should have a safe, secure and sanitary accommodation and a nourishing, well balanced and varied diet.

DUTIES AND RESPONSIBILITIES OF DOCTORS

Correspondingly, doctors have certain responsibilities in general, like that of maintenance of medical records pertaining to his/her indoor patients for a period of three years from the date of commencement of treatment. This has to be maintained in a standard proforma laid down by the Medical Council of India. They are also required to provide documents in the event of a request for medical record either by

20. NABH, "Patients' Charter " *available at:* http;//www.nabh.co/images/pdf/patient_Charter-DMAI_NABH. pdf (accessed on Nov. 10, 2017).
21. RB Ghooi, SR Deshpande, "Patients' Rights in India: An Ethical Perspective" 9(4) *IJME* 277-278 (2012).

the patient/authorized attendant or legal authorities involved within a period of 72 hours. They are legally obliged to maintain a Register of Medical Certificates providing full address of certificates issued, display the registration number accorded by the State Medical Council / Medical Council of India certificates, money receipts given to patients, prescribe generic drugs with generic names as far as possible, among others.

Doctors have certain duties towards their patients too. Like obligations to the sick, which include duties in the form of being ever ready to respond to the calls of the sick, making endeavour to add to the comfort of the sick, by making his visits at the hour indicated to the patients, not refusing treatment arbitrarily to a patient, except for a good reason when a patient is suffering from an ailment which is not within the range of experience of the treating physician. In such an eventuality he may refer the patient to another physician; neither exaggerate nor minimize the gravity of patient's condition, respond to any request for his assistance in an emergency, not neglecting a patient once having undertaken a case, not withdrawing from a case without giving adequate notice to patient and his family, avoiding unnecessary consultations which are not justifiable in the interest of the patient, not advising irrelevant consultation with pathologists, radiologists and/or blood tests. They are also required to properly mention the case summary of a patient when referred to a specialist by the attending physician by communicating his opinion in writing to the attending physician, explaining and discussing reasons for variations in treatment. Further, if any unexpected change occurs, also required to clearly display his fees and other charges on the board of his chamber and/or the hospitals he is visiting, write his full name and designation in full along with registration particulars in his prescription letter head (except in Government hospital where since the patient-load is heavy, the name of the prescribing doctor must be written below his/her signature.) These measures bind the doctor so that proper identification can be ensured, thus facilitating transparency and accountability.

With the rights duties or obligations perspective coming to the fore, the issue of patients' safety has gained in increasing importance. As a corollary, the subject matter of patient safety has led to a lot of emphasis being laid on preventing hospital associated infections, and for that matter, very pertinently so. It is quite natural for a patient to expect the best of treatment in a sanitized environment, free from the possibility of harm being caused to the patient, whatever condition one may be hospitalized in. Hospital Associated Infection being an important indicator for patient safety, the same should be accorded the deserved priority in terms of WHO First Global Safety Challenge[22] termed "Clean Care Is safe Care". This has, in fact received the requisite response with the necessary focus being accorded to Hospital Associated

22. Objective is to raise awareness of the impact of health care-associated infections on patient safety and promote preventive strategies within countries, apart from strategies in the area of clean products for blood safety including safe clinical procedures and practices.

Infection. It may be pertinent to state that such infection[23] may occur during the process of care while being hospitalized or in any health care facility, which was not present or incubating at the time of admission. The ambit of the terminology is comprehensive enough to include acquired infections appearing after discharge, besides occupational infections among health-care workers of such facility. Other aspects and components include medication safety and process and avoiding highly susceptible blood transmission[24] that need to be avoided through proper blood transfusion process that is very much linked to patient safety.

Laws related to blood transfusion services exist in India as a part of the Drugs and Cosmetics law under the Drugs and Cosmetics Act, 1940. This is not considered full proof in the sense that it is not comprehensive enough to deal with transfusion and related attributes. Therefore there is an imperative need to develop and operationalise legal guidelines on recruitment and retention of voluntary blood donors to direct related organizations for such essential emergency related need .In essence, it facilitates effective management of severe trauma and major elective surgeries and as such comprise an integral part of hospital. However, this is to be maintained in liaison with the National Blood Transfusion Council and the State Transfusion Councils[25] as the case may be.

MEDICAL NEGLIGENCE

Patient safety standards are intricately linked to medical negligence; since in majority of the cases hospital falter in taking steps that happen to be a result of medical negligence, rather than an 'Act of God'. In view of the serious concern raised both at the international and domestic level, a brief reflection of the same on it is being alluded to. In ones quest to look at the legal regime as in the present instance, one has to be concerned with the extent law applicable in such cases. At the domestic level medical negligence can be comprehended to arraign criminal negligence or civil negligence depending on the presence of animus or the appurtenant law or attendant circumstances. Furthermore, one may be arraigned under the law of consumer protection.

The criminal law places a medical professional with respect to his profession on a different footing from that of an ordinary human, however, there are certain defenses available to such professional under the law.

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23. It can cause more serious illness, prolongation of stay in health -care facility, long term disability, excess deaths, high additional financial burden and high personal costs on patients and their families.
24. Required to ensure that contamination like HIV, Hepatitis B and Hepatitis C does not take place.
25. Common Cause V UOI and ors.

Under normal circumstance the Indian Penal Code, 1860 (IPC) provides for punishment for a negligent act.[26] Criminal liability can be imposed upon a doctor under particular situations wherein a patient dies during the time of administering anesthesia during an operation; the death has to occur due to malicious intent or gross negligence. At times, vicarious liability visits a person if ones employee rashly causes death of a patient. In such cases, both the employee as well as the doctor becomes vicariously liable under the Law of tort.

As stated above, the doctor is placed on a different footing under certain circumstances despite the rights possessed by a patient or his relative. This is laid down under section 80 and 88 of the IPC. Under section 80, in case of an accident in performing a lawful act, nothing is to be considered that is caused by accident or misfortune and without any criminal intention or knowledge, in the doing of a lawful act by lawful means with due care and caution. Similarly, section 88 provides that 'a person cannot be accused of an offence if she/he performs an act in good faith for the other's benefit, does not intend to cause harm even if there is risk, and the patient has explicitly or implicitly given consent.'[27]

Consequent upon the enactment of the Consumer Protection Act, 1986 speculation arouse as to the inclusion of medical services within the ambit of the definition of 'services' as enshrined under section 2(1) (0) of the Act.[28] It may be pertinent to note that the Supreme Court held in Indian Medical Association v. VP Shantha[29] that medical profession comes under the ambit of ' service' under the Consumer Protection Act, 1986. This effectively determined the relationship between patients and medical professionals by providing contractual patients the power to sue doctors, if they sustained injuries in the course of treatment, through consumer courts for compensation.

The position regarding negligence under civil law is very important. It encompasses many elements within itself. Within the ambit of the law of torts or civil law, even in the event of receiving free treatment, the principle stands applicable. In other words, where the consumer law ends, the law of torts begins. Such a possibility emerges, when the services offered by a doctor or hospital does not fall within the realm of 'services' as defined under the Consumer Protection Act, patients can still have recourse to under the law of torts for negligence and consequent claim for compensation. The onus lies on the patient to establish negligent act on the part of the

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26. Section 304 A of the IPC states that ‘ whoever causes death of a person by a rash or negligent act not amounting to culpable homicide shall be punished with imprisonment for a term of two years, or with fine or with both.
27. Section 88 of the Indian Penal Code.1860.
28. Deficiency of service means any fault, imperfection, shortcoming, or inadequacy in the quality, nature or manner of performance that is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract of otherwise about any service.
29. AIR, 1996, SC, 550

doctor or hospital on whose account the patient suffers any injury. Such cases may include transfusion of blood or identification or administration of incorrect blood group, leaving a mop in the patient's abdomen after an operation. One can move such action in the event of removal of organs without consent, or administering wrong medicine, resulting in injury. Persons, who offer medical advice and treatment, implicitly state that they have the skill and knowledge to do so. Even such action may lie in the event of the professional who claims to have the skill to take up a case, decide on the treatment and administer it. This is known as implied undertaking on the part of a medical professional.

No human being can claim to be perfect, even the most renowned specialist can commit a mistake in diagnosing a disease. Hence, a doctor can be held liable for negligence for negligence only if one can prove that that she/ he is guilty of a failure that no doctor with ordinary skills would be guilty of if acting with reasonable care. However, every doctor has a duty to act with a reasonable degree of care and skill.[30] The apex court held that an error of judgment constitutes negligence only if a reasonably competent professional possessing the standard skills that the defendant professes to have, and acting with ordinary care, would not have made the same error.[31] One has to consider the attendant circumstances, in other words, certain conditions must be satisfied before liability can be considered. The person accused must have committed an act of omission or commission in breach of a person's duty and this must have caused harm to the injured person. The complainant required to prove the allegations against the doctor by citing the best available evidence in medical science nod by presenting an expert opinion.

In a case involving Section 304 (A) of the IPC, the Apex Court held[32] that to impose criminal liability under the penal code, it is necessary that the death should have been the direct result of rash and negligent act of the accused without other person's intervention.

Besides sections 80 and 88 of the IPC, the law of medical malpractice in India finds mention in Sections 52, 81, 90, 92, 337 and 338 provide different aspects .

While the judiciary has been circumspect in holding a doctor guilty of negligence devoid of best evidence, appurtenant circumstances need to be taken into consideration towards promoting patients safety. This in the light of the decision rendered in Indian Medical Association v. P Shantha and ors[33] that resolved the questions relating to the definition of the terms 'deficiency', 'consumer' and 'service'. The Apex Court clearly held that the doctor patient relationship is that of a 'contract of personal service' while dispelling the claim of it being a 'master- servant' relationship.

30. State of Haryana v. Smt Santra, (2005) 5 SCC 182.
31. Ibid.
32. Kurban Hussein v. State of Maharastra,(1965) 2 SCR 622
33. Supra note. 28 at p 551.

It held[34] the doctor to be an independent contractor as the doctor, like the servant, is hired to perform a specific task.

It was in the year 2004 that the Supreme Court[35] held medical practitioners liable, both under civil and criminal negligence. While considering the death of a patient due to alleged negligence, it admitted that determination or weighing the degree of carelessness and negligence on the part of was difficult. For convicting a doctor for alleged criminal offence, the standard should be a proof of recklessness and deliberate wrong doing; it therefore requires a prosecution to come out with a case of high degree of negligence on the part of the doctor. Hence the Court[36] ruled that doctors should not be held criminally responsible unless there is prima facie evidence before the court in the form of credible opinion from another competent doctor, preferably a Government doctor in the same field of medicine, supporting a charge of a rash and negligent act.

The limited application of criminal prosecution against a medical practitioner, therefore, rests on the credible opinion from another competent doctor. In reality, however it is often claimed that physicians usually hesitate to testify against each other giving rise to a situation which is judicially labeled as the ' conspiracy of the silence'.

According to K L Joshi,[37] a doctor may be held liable for negligence for one of the two findings: he was not possessed of the requisite skill which he professed to have, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising-ordinary skill in the medical profession.

CONCLUSION

The brief incursion into aspects of patient safety and negligence has being for the need to enhance measures and establish standards towards patient safety. Towards this end the government of India needs to ensure patient safety, leading to accepted identification of the parameters of patient safety, wisely identified by policy imperatives. These should be adequately implemented and assessed, both qualitatively and qualitatively. The legal regime, providing for patient safety, calls for a comprehensive piece of legislation in the light of international efforts and judicial renderings. The patient safety measures should not be ignored or relegated to the background due to the artificial divide between paid for medical services, that is service hired for costs and those available free of costs in Government hospitals, for irrespective of the location of the hospitals or their management, lives are equally

34. Ibid.
35. Dr Suresh Gupta v. Government of NCT of Delhi,(2004) 6 SCC 42.
36. Ibid.
37. Safety Management in Hospitals, Jaypee Brothers Medical Publishers (P) Ltd., 2012, p 30.

precious and similarly, accountability be tasked equally. It should not behold that negligent act on the part of doctors in government run or managed hospitals should be broached from a different angle. The magnitude of patient safety is primordial, hence there should not be any latitude for exceptions on the score of accountability, on the artificial premise of the paid for services or otherwise. Furthermore, measures for cancellation of registration in respect of private establishments under the Clinical Establishments (Registration and Regulation) Act, 2010 though possible, may not be practically feasible, in view of admitted patients in different stages of treatment, hence exemplary penalties extending to imprisonment of trustees, CEOs COOs, in the event of repeated negligence may be more effective. Moreover, the constitution of a National Health Commission with powers to provide punitive sanctions may be more effective than a National Health Commission. In fine, issues and concerns relating to patient safety should be approached and addressed from a rights perspective with identifiable mechanisms for accountability for negligent acts for it be to more meaningful and effective.

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Right to Compensation: Contemporary Trends and Judicial Doctrine

***Ms. Sharita Sharma*[1]**

INTRODUCTION

The Compensation to victim of crime is a matter of concern, throughout the world the condition of the victims of crime is not better. The function of Compensation is straightforward. Compensation serves to right what would otherwise count as wrongful injuries to persons or their property[2]. For a quite, long time the victim was not concern for traditional criminology. It is true that the victim of any serious crime is not getting his due in whole world[3]. We find the human rights always dishonoured by the barbarous acts at the hands of individuals, groups or the sovereign powers. It is the need of the day to recognize and respect human rights in social, cultural, economic and political spheres. By nature, the human rights are indivisible, inter-related and inter-dependent. They are natural rights come by birth as human beings. Separate efforts are not required to get them. Generally, human rights are those rights which are inherent in every human being. In absence there of human beings are not in position to live as human beings. They are entitled for their enjoyment, protection and enforcement. Human rights are universal equally and also inalienable. They are derived from the principle of natural law, neither derived from the social order nor conferred upon the individual by the society. They reside inherently in the individual human beings independent of and even prior to his participation in the society. Consequently, they are the result of recognition by the state but they are logically independent of the legal system for their existence. Their origin may be sought in the natural law and not in the positive law. They are based on their intrinsic justification and not on their enactment or recognition by certain individuals[4]. Human person possesses rights because of the very fact that it is a person, a whole, a master of itself and of its acts by natural law, the human person has the right to be respected, is the subject of rights, possesses rights. These are things which are owned to a man because of the very fact that he is a man. A human right is a moral right held unconditionally and unalterably by

1. Research Scholar, Department of Law, University of North Bengal (WB)
2. Robert E. Goodin, "Theories of Compensation" 9 *Oxford Journal of Legal Studies* 56 (1989).
3. Dr. Prakash Chandra Mishra, "Victim Compensation Scheme: An Aspect of modern Criminology" 136 *Cri.LJ* (2014).
4. Dr. V.K. Anand, *Human Rights* 1 (Allahabad Law Agency, 1st edn., 2001).

all human beings. Human Rights are often said to belong to persons already prior to and independently of legislative enactment[5].

However, their protection requires efforts and their violation requires to be compensated. Victims of crime, either direct or indirect, are human beings. They have every right to get compensated. The Compensation may be awarded against wrongs committed by individuals, groups or agencies of the State. In recent years, Compensation to victims of crime has been introduced in several countries, which has its roots in the concept of protection of human rights.

HUMAN RIGHTS UNDER THE CONSTITUTION OF INDIA

The Law Commission led by Justice Mallimath has made various recommendations to overcome the problem. Accordingly, the provisions of Section 357-A of the Code of Criminal Procedure are introduced. However, those provisions are not full-fledged to cope with all needs of victims and to cover all kinds of victims, direct and indirect. To bring reformation in criminals is an object of modern law. However, victims, their problems and violation of their human rights are not so much looked into. The Courts are much slow, rather restrained by inadequate provisions of law to grant Compensation to the victims. The definition of victim given in Section 2 (wa) of the Code of Criminal Procedure is not exhaustive. To become entitled for Compensation under Section 357-A, is dependent upon the recommendation made by the trial Court to the Legal Service Authority. Moreover, except few States like Tamil Nadu, other States have not prepared schemes and sanctioned requisite funds for the Compensation of victims. Thus, the provisions of Section 357-A are either inadequate or rendered inoperative by the passive attitude of the State. Moreover, the provisions of Section 372 of the Criminal Procedure Code are silent on the point when the Compensation is not at all granted by the trial Court, as there is no provision for appeal when Compensation is denied or recommendation is not made to the Legal Service Authority. The Constitution of India does not confer any special rights relating to compensation although the Courts have read such rights as inherent in Article 21 of the Constitution[6]. Hon'ble Supreme Court reiterated that in case of infringement of fundamental right of large number of persons the Court can award remedial relief of Compensation in writ petition itself[7]. However the Court qualified the said as an exceptional measure only when an infringement of fundamental right is gross and patent i.e incontrovertible and ex facie glaring. Taking into consideration the above principle the Supreme Court in *State of Maharashtra* v. *Ravi Kant S. Patel*[8] awarded Compensation for wrongful hand cuffing of a person. A child being dead due to police torture, the Supreme Court in *Saheli, a Women's Resources*

5. Oyelade O.S. , "Conflict Resolution and Human Rights in Traditional African Society" *Indian Journal of International Law* 201 (2005).
6. Article 21 of the Constitution of India states that: No person shall be deprived of his life or personal liberty except according to the procedure established by Law.
7. M.C. Mehta v. Union of India (AIR 1987 SC 1086).
8. State of Maharashtra v. Ravi Kant S. Patel (1999) 2 SCC 373.

Centre v. *Commissioner of Police, Delhi*[9] awarded Compensation of Rs 75,000/-. More than four decades back Krishna Lyer, J., speaking, it is weakness of our jurisprudence that victims of crime and the distress of their dependents of the victim do not attract the attention of law. In, fact, the victim reparation is still the vanishing point of our criminal law. This is the deficiency in the system, which must be rectified by the legislature[10]. The Hon'ble Supreme Court in another case of *Kumari* v. *State of Tamil Nadu*[11] awarded Compensation of Rs. 50,000/- because a child of six years died falling into uncovered sewerage tank. Equally the Supreme Court in *Nilabati Behera* v. *State of Orissa,*[12] awarded Compensation of Rs. 1.3 lakh to the mother whose son had died during police custody and the same was described as 'exemplary damages'.

REMEDY FOR VIOLATION OF CONSTITUTIONAL RIGHTS

In India, the jurisprudential basis for the award of Compensation seems to be two-fold; 1) Under a controlling Constitution like ours, the State has a legal duty to protect the rights that are guaranteed therein and therefore it must compensate the victims if it breaches the rights.[13] 2) The writ powers that are available to the Superior Courts to ensure that the State does protect these rights, are not to be used in a hyper technical fashion and therefore in order to be really effective in securing redress to the victims must involve the payment of Compensation.[14] In India neither the Supreme Court nor the High Courts have laid down any proper guideline in this regard and Compensation has ranged from Rs. 5,000[15] to 3 lakhs.[16] Only in one case, the Court resorted to the framework provided under the Motor Vehicles Act to compute the Compensation that was payable.[17] The question of Compensation of damages in Constitutional tort leads us to the method that is to be adopted to compute them. Are the sums that are payable to be arrived using some logical basis or are they merely in disbursals that are in the nature of ex grata that are an arbitrary figure. But this again was a case where the injury was tangible and manifest.[18] The Supreme Court of India realizing the difficulties faced in estimating Compensation directed in a matter concerning rape that the Central

9. Saheli, a Women's Resources Centre v. Commissioner of Police, Delhi (AIR 1990 SC 513).
10. Rattan Singh v. State of Punjab (AIR 1980 SC 84), see also Maru Ram v. Union of India, (AIR 1980 SC 2147) in which Court observed victimology must fulfill not through barbarity but by compulsory recoupment by the wrongdoer of the damage inflicted not by giving more pain to the offender but by lessening the loss of the forlorn.
11. Kumari v. State of Tamil Nadu (AIR 1992 SC 2096).
12. Nilabati Behera v. State of Orissa (AIR 1993 SC 1960).
13. R.Gandhi v. State of Tamil Nadu (AIR 1989 Madras 205), where the State was made to pay Compensation to those who had suffered damage to property in communal riots. The Courts reasoning was to make the State accountable for the breach of its duty to protect these people and their properties. See also in Inder Puri v. State of Jammu& Kashmir (AIR 1992 J&K 11).
14. Supra note 7.
15. Ganga Das v. State of Orissa, 1993 (2) SCALE 989.
16. Veer Bala v. Delhi Administration, 1993 (2) SCALE 179.
17. Kalavati v. State of Himachal Pradesh (AIR 1989 H.P. 5).
18. S.A. Azad, "Judicial Activism, Indian Judiciary – A Savior of Life and Personal Liberty", AIR 2000 Journal 17.

Government must set up a Criminal Injuries Compensation Board.[19] But this still does not solve the problem of infringement of many Constitutional rights which may not be readily manifest as injuries or may not even be the result of criminal behavior for that matter.

The Supreme Court of India declared in 1983 in a seminal ruling in *Rudal Sah* v. *State of Bihar*,[20] that it could award in appropriate cases, monetary Compensation, where there had been a violation of the guarantee of life and personal liberty under Article 21 of the Indian Constitution by the State. This pronouncement was based on the reasoning that the article would be denuded of its significant content if the power of the Court was limited to passing orders for the release from illegal detention or other orders of a declaratory kind. Therefore an effective way to ensure that the violation of the right could be reasonably prevented and due compliance with the Constitutional mandate could be assured, so the State with the payment of monetary Compensation. This ruling was truly path breaking in several ways. First it was the logical sequel of the Human Rights Litigation in the Supreme Court, in which 'activist' justices ushered in new vistas in the landscape of individual rights and personal liberty, by laying down new jurisprudence which considerably embellished the express human rights guaranteed in the Constitution by judicially incorporating other rights integral to the true enjoyment of these express rights,[21] Second, it made clear in no uncertain terms that lawlessness and violation of human rights on the part of the State would not be countenanced. Third, it improved the capacity and the effectiveness of the Superior Courts of this country in redressing violations of constitutionally guaranteed fundamental and human rights,[22] The decision in Rudal Sah was further reiterated in two other cases,[23] all of which together formed a trilogy in which the Court granted Compensation to citizens whose rights had been violated by the State. These ruling were followed in an important decision of the Andhra Pradesh High Court which discarded the old concept of the defence of Sovereign Immunity.[24] This concept had been in vague in India, Since the days of the vintage decision of the Supreme Court of Calcutta in *P.O Steam Navigation Company* v. *Secretary*,[25] where the State was held not to be liable in cases that fell within the domain of the sovereign immunity. The Andhra Pradesh High Court distinguished this ruling and the decision of the Constitution Bench of the Supreme Court, in *Kasturilal* v. *State of Uttar Pradesh*,[26] which had

19. Delhi Domestic Working Women's Forum v. Union of India, W.P. (Cri) No. 362 of 1993 (SC Oct. 19, 1994).
20. Rudul Sah v. State of Bihar (AIR 1983 SC 1086).
21. Vikram Raghavan, Compensation through Writ Petitions, 6 Student Advoc, 97 (1994). For the list of the various 'concomitant' rights that now form part of the guarantee of Article 21.
22. Vikram Raghavan, "The Compensating Victims of Constitutional Torts: Learning from the Irish Experience", (AIR 1998 Journal 101).
23. Sebastian Hongray v. Union of India (AIR 1984 SC 571) and Bhim Singh v. State of Jammu & Kashmir (AIR 1986 SC 494).
24. Ramakonda Reddy v. State of Andhra Pradesh (AIR 1989 AP 235).
25. P.O Steam Navigation Company v. Secretary,(1868) 5 Bom HCR (App) 1,
26. Kasturi Lal v. State of Uttar Pradesh (AIR 1962 SC 933).

affirmed the steamship case, the Court in Ramakonda, stated that these precedents did not apply to a case in which there was a deprivation of life and personal liberty. Subsequently the Supreme Court in a case which did not involve a question of the breach of fundamental rights, clarified the true scope and ambit of the doctrine of sovereign immunity. According to the Court, the State could invoke this defence only in extreme situations like during war. This new dictum of the Supreme Court has considerably diluted the rigour of the doctrine of sovereign immunity, which was earlier available as a shield against the tortious acts of the Government and its servants[27]. With these ruling the remedy of Compensation for redressing the violation of fundamental rights was firmly established in India and Indian Courts have now been frequently dispensing Compensation in many cases, where the fundamental rights have been shown to have been infringed[28]. This trend has no doubt gone a long way for securing respect for human rights and Constitutional tort in India. But it is not the exclusive prerogative of the Courts in India. In other Jurisdiction, the Judiciary has made similar innovations in order to protect the Constitutional rights of their citizens.

PUBLIC LAW REMEDY

Public law consists of Constitutional law and administrative law. It is concerned with the rights and duties between the individuals and the State. It is the violation and breach of public rights and duties which affect the whole community. The purpose of public law is not only to civilize public power but to assure the citizens that they live under a legal system which aims to protect their interests and preserve their rights. The public law proceeding serves a different purpose than a private law proceedings. The relief of monetary compensation as exemplary damage, in proceeding under Article 32 by Supreme Court or under Article 226 by the High Court, for established infringement of the indefeasible right guaranteed under Article 21, of the Constitution is a remedy available in public. Therefore, when the Court moulds the relief by granting "Compensation in proceedings under Articles 32 or 226 of the Constitution seeking enforcement or protection of fundamental rights[29], it does so under the public law by way of penalizing the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen. The power of the Court to award monetary Compensation by way of exemplary costs or otherwise is now established by the decisions of the Supreme Court[30].

It is a recognized principle of both the Civil and Criminal jurisprudence to punish any individual who infringes the rights of the other individual and also to award monetary Compensation under some circumstances to the victim who was adversely affected

27. N.Nagendra Rao v. State of Andhra Pradesh (AIR 1994 SC 2663).
28. P. Leelakrishnan, "Compensation for Government Lawlessness" 27 *Cochin Univ. L. Rev.* (1992).
29. Article 32 or 226 of Indian Constitution, which grant wide power to higher Courts to protect the fundamental rights.
30. Supra note 19.

by such infringement[31]. The Constitution of India in endowing the High Court and the Supreme Court with writ powers under Arts. 32 and 226 has conferred them for the purpose of enforcement of the rights guaranteed in the Constitution. Writ proceedings are extraordinary in nature and do not take the form of regular proceedings like a civil suit in which a claim for Compensation or damage can be made. Yet, the Court in Rudul Sah,[32] felt compelled to grant a sum of money in the nature of palliatives. Thus a Constitutional remedy was made to partake the character of a civil action akin to a tort through the grant of monetary Compensation.

REMEDY UNDER CRIMINAL PROCEDURE CODE, 1973

In old Code of Criminal Procedure, 1898 contained a provision for restitution in the form of section 545.[33] Now there is only one general law that governs the victim's compensatory rights as mentioned in Criminal Procedure Code, 1973 in Section 357.[34] According to sub-section (3) of Section 357, Compensation can be granted quite liberally and without any restriction. The only limitation of sub-section (3) is it would be awarded where sentence of fine is not imposed. If the sentence of fine is imposed, this section is not applicable. The Apex Court in *Hari Krishan* v. *Sukhbir Singh*[35], highlighting the importance of Section 357(3) of the Criminal Procedure Code, 1973, says, this section is an important provision. This power to award Compensation is not ancillary to other sections but it is in addition thereto. It is a measure of responding appropriately to crime as well as reconciling the victim with the offender.

ROLE OF JUDICIARY FOR GRANTING COMPENSATION

The judiciary has taken a lead role in protection of human rights of victims, especially by granting compensation and also by laying down various guiding principles for subordinate judiciary for dealing with such cases. The Supreme Court and various High Courts have taken lead to overcome these problems. The judicial attitude is changing on this point in good direction and becoming more favourable for grating Compensation to victims.[36] Even in few cases an interim Compensation is also granted. Provisions of Articles 14, 21, 32 and 226 are considered by the Supreme Court for invoking its Compensatory jurisdiction for translating the Declaration of Human Rights into reality. In post independence era the judiciary, being custodian of rights of people, has shown deep concern about protection of human rights of victims.[37]

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31. M.S.V. Srinivas, "Compensation under Arts. 32 and 226 for violation of Human Rights and Fundamental Freedoms" *AIR Journal* 167 (1997).
32. Supra note 19.
33. See Section 545 of Cr.P.C.
34. See Section 357 of Cr.P.C.
35. Hari Krishan v. Sukhbir Singh (AIR 1988 SC 2131).
36. Justice J.S. Verma, "The Constitutional Obligation of the Judiciary", 1997 SCC (J), p. 24.
37. S.N. Jain, "Monetary Compensation for Administrative Wrongs through Article 32" 25 J. *Ind. L. Inst.* 118 (1988)

Today the courts can be moved by filing application/petition/complaint/plains/ counter claims etc. The Constitutional courts, namely, the High Courts and the Supreme Court, have evolved a formula to entertain grievances of the citizens in relation to violation of more sacred fundamental rights embedded in Articles 14, 21 and 22 etc. of the Constitution of India. If the grievances are prima facie found to be substantial or even acting *suo motu* overlooking the technicalities.[38] Article 9(5) of the International Covenant on Civil and Political Rights, 1966, indicates that an enforceable right to Compensation is not alien to the concept of guaranteed rights, as it provides for award of Compensation to the victims who have been unlawfully arrested or detained and to get such Compensation is their enforceable right. On that basis the Supreme Court and High Courts in India are leading to recognize and protect the victims by awarding Compensation.

The Supreme Court express view in *Palaniappa Gounder* v. *State of Tamil Nadu*[39] in this case the accused was convicted for murder and sentenced to death. The High Court of Madras upheld the conviction but reduced the sentence to imprisonment for life, by imposing fine Rs. 20,000/- and directing to pay compensation Rs. 15,000/- out of fine. The Supreme Court held the fine to be unduly excessive and reduced it to Rs. 3000/- and directed to pay it to the dependants of victim. When there is a statutory provision for granting compensation, there is no scope for invoking inherent powers under Section 482 of the Code of Criminal Procedure. The Supreme Court expressed need to consider the propriety and adequacy of fine on the basis of the facts of the case. Another case in *Venkatesh* v. *State of Tamil Nadu*[40], the accused was sentenced to life imprisonment for murder. The High Court altered the conviction and convicted the accused under Section 304 (part-II) of Indian Penal Code inflicted rigorous imprisonment for five years and imposed fine Rs. 3000/- with a direction it pay the same to dependants of victim for compensation. The Supreme Court observed that if a steep sentence of fine is imposed and fine is made payable to widow and unmarried daughter of deceased, it will serve ends of justice. It reduced the sentence of imprisonment to one already undergone and enhanced fine to Rs. 1,00,000/- with a direction to pay compensation Rs. 75,000/- to widow and Rs. 25,000/- to unmarried daughter. Thus, it was laid down that in sentencing process, compensation is one of mitigating factors for reducing the substantive sentence.

REMEDIES THROUGH WRIT PETITION

When the fundamental rights are violated, the aggrieved can approach the writ court under Article 226 of the Constitution by filing writ petition before the Supreme Court and the High Court. Writ is an order of the court issued to a person or authority to do some act or forbear from doing some act. It is necessary to understand the remedy available under Article 32 and 226 of the Constitution in writ petition to the

38. Justice Binod Kumar Roy, "Role of Judiciary in the present day Context" *AIR Journal* 17 (1998).
39. Palaniappa Gounder v. State of Tamil Nadu, AIR 1977 SC 1323.
40. Venkatesh v. State of Tamil Nadu, 1993 Cri LJ 61.

aggrieved in cases of human rights violation. The power of judicial review guaranteed under Article 32 and 226 of the Indian Constitution has been inherited from Britain. Traditionally this Article was used only by persons whose fundamental rights were infringed.[41] After the commencement of Constitution, the High Courts and the Supreme Court were empowered to protect the precious rights of the citizen under Article 226 and Article 32 of the Constitution to give immediate remedy or relief to victim when a citizen's fundamental rights or legal rights are infringed. Writs mentioned under Article 226 were known as prerogative writs. The rights obtained under Article 32[42] and 226 as Constitutional remedy for enforcing fundamental rights are considered as the crowning sections of fundamental rights.[43]

Out of the different kinds of mechanism available in India to enforce and implement law, remedy available through writ court is the important one as it gives immediate remedy to the victim and takes measures to prevent the ongoing human rights violation. The main function of the writ court is in giving quick and immediate remedy for preventing human rights violation but most of the cases become anfractuous due to delay in deciding the cases. Delay in deciding the cases would become a denial of justice to the parties. In the course of an encounter, there is a chance of infringement of rights guaranteed to the citizen. In some cases it may be genuine and justifiable then the citizen is entitled to get remedy for the violation of their rights.[44] Now the restriction has been considerably relaxed by the Supreme Court. In modern use, these rights are available to the citizen; it is the subject who benefits from the writ. Now this legal prerogative is used to ensure a good and lawful government. Now the court has widened the scope of public interest litigation or social interest litigations. So that the public spirited persons can approach the court for the welfare of the poor, socially and economically disadvantaged and weaker sections of the society, who are unable to approach the court for relief when there is infringement of Constitutional and legal rights. The court laid down the guidelines that the poor in India can be treated as petition to enforce their fundamental rights and the court is empowered to grant remedial relief in appropriate cases.

In *People's Union for Civil Liberties* v. *Union of India and another,*[45] in this case writ petition was filed by the People's Union for civil liberties under Article 32 of the Constitution of India for the issuance of a writ of Mandamus or other appropriate writs to institute judicial inquiry into the fake encounter by Imphal police on April 3rd 1991 in which two persons were killed and to take appropriate action against the erring officials and to award compensation to the members of their family. The allegation

41. K.C. Joshi, "Compensation through Writs" 30 *J. Ind. L. Inst* 69 (1988).
42. Dr. B.R. Ambedkar, "Constitutional Assembly Debates", Constitutional Assembly of India, 9th Dec 1984, p 953. During the Constitutional assembly debate, he said that Article 32 is the most important Article in the Constitution and it is the very soul and heart of the Constitution.
43. P. Ishwara Bhat, *Fundamental Rights-A Study of Their Interrelationship* 87 (Eastern Law House Private Ltd., 1st edn., 2004).
44. P.K. Tripathi, "Article 32 and Compensation Conundrum" 2 *SCC* (J) 51 (1984).
45. People's Union for Civil Liberties v. Union of India and another, AIR 1997 SC 1203.

of 'fake encounter' was denied by the government of Manipur. The question in this case is what are the relief measure that should be granted in this writ petition. In this case court disallowing any claim of sovereign immunity, the court referred the case of *Challa Rama Konda*[46] dealing with the liability of the State in which compensation granted for the deprivation of right to life guaranteed under Article 21 by stating that it is so fundamental and basic, non-negotiable, and no compromise is possible.

In *Vishaka & others* v. *State of Rajasthan,*[47] a writ petition had been filed to enforce the fundamental rights of working women under Article 14, 19 and 21 of the Constitution, to prevent sexual harassment in all working women and to make necessary legislation for the protection of women. In this case, the petitioner wanted to lay down some guidelines for the protection of working women and to eradicate this social evil. The cause for filing this petition was due to the alleged brutal gang rape of a social worker in the village of Rajasthan and after that willful delay in investigation and prosecution of the suspected rapists. This writ petition was filed under Article 32 of the Constitution for the enforcement of fundamental right under Article 14, 19 and 21 of the Constitution of India. In this case Supreme Court directed that guidelines and norms would be strictly observed in all workplaces for the preservation of their rights and to enforce guarantee of equality. A suitable legislation is required to protect the rights of the women to live with dignity and to compensate the victim by taking steps, to strengthen and ensure the fundamental right to life and liberty of women. The court had given directions to the central government and the State government to follow certain guidelines and norms to be observed in all work place to protect the rights of working women.

The Apex court made a distinction between public law and private law. Under Article 226 of the Constitution the High Court has been given power and jurisdiction to issue appropriate action for the enforcement of the fundamental rights. So the High Court has jurisdiction not only to grant relief for the breach of enforcement of fundamental rights but also to enforce any other legal rights including the enforcement of public duties by public bodies.

EVOLUTION OF VICTIM COMPENSATION SCHEME

The Universalist views on criminal justice system emphasize on the norms collectively recognized and accepted by all of humanity.[48] The internationally accepted norms where under an individual's criminal acts is accountable are universally binding and applicable across national borders on the premise that crimes committed are not just against individual victims but also against mankind as a whole. The crime against an individual thus transcends and is taken as an assault on humanity itself. It is the concept of the humanity at large as a victim which has essentially characterized 'crimes'

46. Supra note 23.
47. Vishaka & Others v. State of Rajasthan (AIR 1997NSC 3011).
48. The United States of America enacted The Victim of Crime Act, 1984, and The Victims' Rights and Restitution Act of 1990. Similarly South Australia Victim of Crime Act 2001.

on universally accepted principles. The acceptability of this principle was the genesis of Criminal justice system with State dominance and jurisdiction to investigate and adjudicate the 'crime'.

Various international declarations, domestic legislations and Courts across the world recognized the 'victim' and they voiced together for his right of representation, compensation and assistance. In India the principles of compensation to crime victims need to be reviewed and expanded to cover all cases. The compensation should not be limited only to fines, penalties and for feitures realized. The State should accept the principle of providing assistance to victims out of its own funds. The concept of 'Victim Compensation Scheme' got birth by Section 357A which inter alia provides that "every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who, require rehabilitation". Under this provision, even if the accused is not tried but the victim needs to be rehabilitated, the victim may request the State or District Legal Services Authority to award him/her compensation. Section 357A(2) provides on recommendation of court for compensation the district legal service authority or the State legal service authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme provided ,for section 357A sub-section (1), Section 357A (4) provides the rights to victim to proceed for compensation. According to this sub-section where the offender is not traced of identified, but the victim is identified, and where no trial takes place, the victim or his dependents may make an application to the State or the district legal service authority for award of compensation. On getting the application by victim the authority will conduct an enquiry within two months regarding adequate compensation. Sub-section (6) of 357A of the Code of Criminal Procedure explains the duty of the State or District Legal Service Authority as the case be, to alleviate the suffering of victim, order for immediate first aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer in charge of the police station or a Magistrate of the area concerned, or any other interim relief as the appropriate authority deems fits.

CONCLUSION

Protection of human rights has got a wide recognition in the present day world of human rights revolution. Human rights need to be respected, protected and in case of violation they are required to be compensated. The Legislature and Judiciary in India have shown deep concern for promotion and protection of human rights. The Supreme Court has also made the State and its agencies liable for violation of human rights and required them to pay compensation to the victims of illegal detention, custodial death, rape, mass disasters. The Courts are committed to protect human rights of victims by granting compensation and creating obligation on their part to consider issue of compensation at a trial level. The judiciary has been contributing to human rights jurisprudence to protect human rights of the people. In addition to this, India signed

and rectified several agreements and conventions to promote human rights jurisprudence. In India there is no express provision in the Constitution to grant compensation in case of violation of human right. While rectifying International Convention on Civil and Political Rights, India made a specific reservation to the Article 9 (5) which provides to grant compensation in case of human rights violation by the State, the writ court through its judicial activism began to grant ex-gratia payment in case of Constitutional torts. The writ court used Article 21 of the Constitution to enforce rights guaranteed to the people and began to grant compensation in case of human rights violation. The higher courts in India started giving compensation in case of violation of human rights. But there is no rationality in fixing the compensation. Now the compensation is considered on the fact and the circumstances of each case and it is determined by taking into account the nature of the crime, the justness of the claim by the victim, the ability of the accused to pay. The administration of the criminal justice system should be in conformity with the rapid change in the society. So, most of the countries came forward to change their law according to the needs of the time.

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Death Penalty in India: Abolition or Retention

Vandana Tiwari[1]

INTRODUCTION

In all the branches of law, the branch that closely touches and concerns a man in his day-to-day life is criminal law, yet the law is not in a satisfactory state.[2] Many attempts have been made to define crime, but they all fail to identify what kind of act or omission amounts to a crime. Perhaps, this is because of the changing notions about crime from time to time and place to place. The definition and concept of crime varies not only according to the values of a particular group and society, its ideals, faith, religious attitudes, customs, traditions, and taboos, but also according to the form of government, political and economic structure of the society and a number of other factors. For instance, an act, which is a crime today, may not be a crime tomorrow, if the legislature so decides. Crime[3] may be defined as the commission of acts prohibited by penal law, and criminals as persons who commit such acts. On these assumptions, a vast literature has developed about the volume of crime, motivation for crime, prevention of crime, suppression of crime, and methodology for apprehension, adjudication, and reformation of criminals.

Hence, to check and control the crime in the society, importance of punishment cannot be ignored because it is well known that punishment is one of the oldest method of controlling crime and criminality. However, variations in modalities of punishment, namely, severity, uniformity and certainty are noticeable because of variations in general societal reaction to law-breaking. In some societies punishments may be comparatively severe, uniform, swift and definite while in others it may not be so.[4] This accounts for the variations in the use of specific methods of punishment from time to time. An enquiry into various forms of punishments which were in practice in different societies through ages would reveal that forms of punishment were mainly based on deterrence and retribution which have lost all significance in modern penology. The primitive societies did not have well developed agencies of criminal justice administration, therefore, settlement of private wrongs was entirely a

1. Research Scholar, Department of Law, North-Eastern Hill University, Shillong (Meghalaya)
2. Peter Brett, *An Inquiry into Criminal Guilt* 1 (The Law Book Co., Australia, 1963).
3. IPC Section 40 defines "Offence". Crime has not been defined under Indian Penal Code, 1860.
4. Edwin H. Sutherland and Donald R. Cressey, *Principles of Criminology* 255 (Surjeet Publications, 6th edn., 2011).

personal matter and aggrieved party could settle the issue directly with the wrong-doer. In these primitive societies the administration of justice was concern of the common people through their various associations such as Kula, Sreni, Guilds etc. the king was not involved in the administration of justice at that time.

There are several theories of punishment such as deterrent theory, preventive theory, retributive theory, reformative theory, rehabilitative theory and so forth. Deterrent theory of punishment emphasises more on protection of society from offenders by eliminating offenders from society. According to this theory, there are certain objectives of punishment that criminals should be deterred from breaking the law, and deterrent punishment such as death punishment should be an example to society and persons who have tendency to commit similar crime; and that if any one commits such a crime, he will be punished in the same manner. In this way, it prevents people from breaking the law and it reduces the crime rate in the society by elimination of criminals. Therefore, this theory has four justifications (1) Prevention, (2) isolation, (3) elimination and (4) Exemplary threat to potential criminals in the society.[5]

A dispassionate analysis of criminological jurisprudence would reveal that capital/ death punishment is justified only in extreme cases in which a high degree of culpability is involved causing grave danger to society.[6] There has been a long quest of human beings to curb and control deviance and promote conformity to normative behaviour in human culture since times immemorial. Various ways and means have been attempted in this direction. The criminologists, jurists, sociologists and legal professionals have dealt with various aspects of the crime and the penal systems. Death penalty is one of the most debated, ancient forms of punishment in almost every society.[7] The prevalence of death punishment in ancient times is difficult to ascertain precisely, but it seems likely that it was often avoided, sometimes by the alternative of banishment and sometimes by payment of compensation. The earliest and most famous example is Code of Hammurabi[8] which set the different punishment compensation according to the different class/group of victims and perpetrators.[9]

Since the middle age, death sentence was the common practice throughout the world and was inflicted in the case of conviction for large number of crimes including involving property. In England during the 18th century death was the punishment to several specific offences. The penalty was executed in various ways. Several methods of execution of death sentences involved torture, burning at the stake, breaking on the

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5. I.G. Ahmad, "Death Sentence and Criminal Justice in Human Right Perspective" 35 *Ban.L.J.* 8 (2006-07).
6. N.V. Paranjape, *Criminology and Penology* 184 (Central Law Publications, Allahabad, 3rd edn., 2001).
7. Praveen Kumar Jain, " Should Capital Punishment be abolished?" *The Times of India*, June 27, 2004
8. The Code of Hammurabi is a well-preserved Babylonian law code of ancient Mesopotamia, dating back to about 1754 BC, enacted by the sixth Babylonian King Hammurabi. The Code consists of 282 laws, with scaled punishments, adjusting "an eye for an eye, a tooth for a tooth etc.
9. Shantanu Basu, "Article 21 & Capital Punishment in India: An In-depth Perspective" *available at* http://www.no-reply@slideshare.net on 10.02.2016 at 10:00 pm.

wheel, slow strangulation, crushing under elephant's feet, throwing from a cliff, boiling in the oil, stoning to death etc. With the emergence of various principles relating to fair procedure contained in the Constitutions of several democratic countries and with the strong growth of human right movement, such severe death punishments involving torture began to die out since 18th century. Also penalties involving torture disappeared with the idea that punishment by way of death sentence should be swift and humane, whether by guillotine or by hanging.[10]

The death punishment is retributive in character. The object of sentencing should be to see that crime does not go unpunished and the victim of crime as also the society has the satisfaction that justice has been done to it. One of the purposes of law is to calm the community's anger by punishing a criminal. Punishment is primarily satisfaction of private revenge and at the same time an emphatic denounciation of the crime by the society. The criminal law stands to the passion of revenge in much the same relation as marriage to sexual appetite. Retributive punishment tends to control recidivism.[11]

Death penalty has been a mode of punishment since time immemorial, but with progress of civilization death sentence has witnessed humanizing. Now-a-days the punishment of death sentence is known as capital sentence. The infliction of death by an authority as a punishment is called capital punishment. Capital punishment is the practice of deliberately putting to the death of an offender as a measure of social policy. It is imposed by the governing authority of the country. Capital punishment is generally imposed for the foremost, grievous crimes against human society or human beings. It is the maximum quantum of punishment which can be given by law to a criminal, i.e., his life is put to an end by this punishment. In the early age, the provision of this punishment was made only for unlawful homicides and other sexual and religious crimes. The capital punishment is the highest punishment in the penology known to men, which deprives one's life and existence.

HISTORICAL BACKGROUND OF DEATH PENALTY IN INDIA

An early attempt at abolition of the death penalty took place in pre-independent India, when Sri Gaya Prasad Singh attempted to introduce a Bill abolishing the death penalty for IPC offences in 1931. However, this was defeated.[12] Around the same time in March 1931, following the execution of Bhagat Singh, Sukhdev and Rajguru by the British Government, the Congress moved a resolution in its Karachi session, which

10. Shobharam Sharma, "Execution of Death Penalty in India: Need to Change the Law" XII (1) *Nyaya Deep* (Jan. 2011).
11. Shantanu Jugtawat & Hirdesh Singh, "Capital Punishment: revisiting the Abolition-Retention Debate", *National Law Institute University, Bhopal available at:* http://www.legalserviceindia.com visited on 20.03.2016 at 10:30 pm..
12. Law Commission of India, 35th report, 1967, at para 12, *available at* http:// lawcommissionofindia.nic.in/1-50/report35vol1 and3.pdf visited on 11.12.15 at 20:30pm.
13. Aiyar, Special Correspondent, " it's time death penalty is abolished", *The Hindu*, 7 August 2015, available at http://www.thehindu.com/news/national/its-time-death-penalty-is-abolished-aiyar/ article7509444.ece, visited on 24.08.2015 at 21:00 pm.

included a demand for the abolition of the death penalty.[13] India's Constituent Assembly Debates between 1947 and 1949 also raised questions around the judge-centric nature of the death penalty, arbitrariness in imposition, its discriminatory impact on people living in poverty, and the possibility of error.[14] Dr. Ambedkar was personally in favour of abolition of death penalty. However, he suggested that the issue of the desirability of the death penalty be left to the parliament to legislate on. This suggestion was eventually followed.[15]

A Bill was introduced in the Lok-Sabha in 1956, to abolish the capital punishment which was rejected by the house. Efforts made in the Rajya-Sabha in 1958 and in 1962 were also fruitless.[16]The Law Commission of India released its 35th Report on "Capital Punishment" in 1967, recommending that the death penalty be retained in India. The aforesaid Report also recommended retaining of Section 303 of the Indian Penal Code, which provides for mandatory death penalty. However, the Supreme Court held this to be unconstitutional in 1987 in *Mithu v. State of Punjab*.[17] In 1969 the 41st Report of the Commission on revising and re-acting the Code of Criminal procedure 1898 reiterated the recommendation.[18] In 2003, the Commission released its 187th Report on the "Mode of Execution of Death and Incidental Matters."[19] The Commission had taken up this matter *suo mot* because of the "technological advances in the field of science, technology, medicine, anesthetics" since its 35th Report. This Report did not address the question of whether the death penalty was desirable. Furthermore, it suggested that all death sentence cases be heard by at least a 5-judge bench of the Supreme Court.[20] Again in 2015 the Law Commission of India issued its 262 Report titled, "The death penalty".[21]

The constitutional validity of imposition of death sentence has challenged at many times. First time in 1973, the constitutional validity of capital punishment was challenged in the case of Jagmohan Singh.[22] In this case the petitioner challenged the death sentence on the ground that it was violative of Article 19 and 21, because it did not provide any procedure. The five judges Bench of the Hon'ble Supreme Court held that the choice of awarding death sentence is done in accordance with procedure established

14. See Constituent Assembly Debates on 3 June, 1949, Part II, *available at* http://parliamentofindia.nic.in/Is/debates/vol8p 15.htm visited on 24.08.2015 at 2:00 pm.
15. Constituent Assembly Debates on 3 June, 1949, part II, *available at* http://parliamentofindia.nic.in/Is/debates/Vol8p15.htm visited on 24.08.2015.
16. Praveen Kumar Jain, "Should Capital Punishment be Given Capital Punishment? – A Capital Question", available at www.rsdr.ro/art-1-3-4-2008 visited on 21..03.2016 at 19:00 pm.
17. (1983) 2 SCC 277.
18. Law Commission of India, 41st Report, 1969,at para 26.9, *available at* http://lawcommissionofindia.nic.in/1-50/Report41.pdf p.20 visited on 26.08 2015 at 1:30 pm
19. Law Commission of India, 187th Report, 2003, *available at* http://lawcommissionofindia.nic.in/reports/187th%20report.pdf, visited on 26.08.2015 at 21:00 pm
20. Law Commission of India, 187th Report, 2003, at page 3, *available at* http://lawcommissionofindia.nic.in/reports/18th%20report.pdf visited on 26.08.2015 21 :00 pm.
21. Law Commission of India, 262 Report, 2015, *available at* http://lawcommissionofindia.nic.in visited on 12.10.2015.
22. Jagmohan Singh v. State of U.P., AIR 1973 SC 947.

by law. The judge makes the choice between the capital punishment and imprisonment of life on the basis of circumstances; facts and nature of the crime bring on record during trial. So, capital punishment is not violative of Articles 14, 19 and 21 of the Constitution, hence, it is constitutionally valid. After this decision, the constitutional validity of the death sentence was not open to doubt.

In 1979, again death sentence was challenged in the case of Rajendra Prasad,[23]where Justice V.R. Krishna Iyer held that capital punishment would not be justified unless it was shown that the criminal was dangerous to the society. He held that giving discretion to the judge to make a choice between death sentence and life imprisonment on social reasons under section 354(3) of the Code would be violative of Article 14 of the Constitution of India, which condemns arbitrariness. He pleaded for the abolition of death penalty and retention of it only for punishing "White Collar Criminals." But Justice Sen in his concurrent judgment held that, the question whether the death penalty should be abolished or the scope of Section 302 IPC and Section 354(3) of the Code should be curtailed or not is a question to be decided by the Parliament and not by the court.

In 1980, the Supreme Court overruled the decision of Rajendra Prasad's case in the case of Bachchan Singh[24] withholding that the provision of death sentence under section 302 of IPC as an alternative punishment for murder is not violative of Article 21. The constitutional validity of death sentence were affirmed by the Hon'ble Supreme Court again and again in a series of cases.[25] In case of Shashi Nayar [26] a very desperate and futile attempt was made to get capital punishment declared unconstitutional. The Hon'ble Supreme Court, however, rejected all arguments and held that 'death penalty has a deterrent effect and it does serve a social purpose' and is hence within the framework of the Constitution. Now, it is well settled that capital punishment is constitutionally valid and there is no need to spoil the ink and to waste the time on this issue.[27]

The current wave of reformation in the field of criminal justice system has inspired parliamentarians in India to launch a crusade against capital punishment. They have been constantly struggling to repeal the provisions relating to death penalty from the Penal Code for the past several years. At present, two bills moved by Rajya Sabha members of parliament are relevant to the issue. Kanimozhi has moved a Private Member's Bill demanding the abolition of death penalty,[28] and D. Raja has moved a

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23. Rajendra Prasad v. State of UP, AIR1979 SC 916.
24. Bachchan Singh v.State of Punjab, AIR 1980 SC 898.
25. Machhi Singh v. State of Punjab, AIR 1983 SC 597, Triveniben v. State of Gujarat, AIR1989 SC 1335, Allauddin Mian v. State of Bihar, AIR 1989 SC 1456, Jumman Khan v. State of UP, AIR 1991 SC 345, and Shashi Nayar v. Union of India, AIR 1992 SC 395.
26. Smt. Shashi Nayar v. Union of India, AIR 1992 SC 395.
27. Krishna Pal Malik, *Penology, Victimology & Correctional Administration in India* 74-75 (Allahabad Law Agency, 2012).
28. Special Correspondent, "Kanimozhi to move Bill to abolish", *The Hindu*, July 31, 2015.

Private Member's Bill, asking the Government to declare a moratorium on death sentences pending the abolition of the death penalty.[29] New millennium leads the principle that life-imprisonment is a rule and death sentence is an exception, reiterating the dictum, Hon'ble Supreme Court commutes the death sentence awarded to an accused into life-imprisonment in a number of cases, along with the reasons on which the commutation should appear proper, intending thereby to advocate de-facto abolition of death sentence and strictly jacketing the 'rarest of the rare category.'[30]

DEBATE ON DEATH PENALTY : ABOLITION OR RETENTION

Death punishment has been the subject of an age old debate, between abolitionists and retentionists, although recently the controversy has come in sharp focus. Both the groups are deeply anchored in their antagonistic view. Both firmly and sincerely believed in the right courses of their respective stands, with overtones of sentiment and emotion. Both the camps claim among their eminent thinkers, penologists, sociologists, jurists, judges, legislators, administrators and law enforcement officials. Therefore death punishment is one of those subject of human concern which has given rise to endless debate, whether to abolish death sentence or to retain it is now debatable.

ARGUMENTS IN FAVOUR OF RETENTION OF DEATH PENALTY IN INDIA

Arguments in favour of and against the retention of death sentence can be raised with equal emphasis on either side, which are explained below:

(i) Those in favour of death punishment argue that it is the only method of eliminating the hopeless enemy of society. Why should society support a prisoner, undergoing life imprisonment, with the constant menace of his release and subsequent depredation? Death sentence has got a deterrent value of its own.

(ii) It is further argued by some eminent jurists that if death penalty is properly carried out, it instead of brutalising society, satisfied the sense of justice and protection.

(iii) The supporters of death penalty say that capital punishment is needed as a threat or warning to deter potential murderers and that murderers are too dangerous once they have committed the crime, to be kept alive, since they may kill fellow prisoners or prison personnel and may escape or be ultimately released on parole or pardon. In such case they would again become a menace to the community. Hence, it would be too risky to substitute life imprisonment, so called for the death penalty.

(iv) The protagonists of death sentences argue that to maintain irreformable criminals, who prey upon society, entails heavy financial burden upon tax payers. It is positive and selective agency to wipe out the stock of irreformable criminals.

29. IANS, "Death Penalty: CPI Leader D. Raja moves private member's resolution" *The Economic Times*, July 31st 2015.

30. Bibha Tripathi, " Analyzing Judicial Trend on mitigating Circumstances of Commutal of Death Sentence into Life-Imprisonment" 42 *Ban.L.J.* 81-93 (2013).

(v) The supporters of death punishment further argue that some murders are diabolical in conception and cruel in execution and it would be a travesty of justice not to award the ultimate sentence in such cases. They say that ultimate sin must invite the ultimate sentence.

(vi) The famous criminologists Darwin propounded the doctrine "struggle for existence". This theory says that the animals will be preserved, only if they can fight with their enemy animals and with the nature. Similarly, the society can be preserved only if it can fight with anti-social elements. Death punishment is a selected process to eliminate such anti-social elements. For the healthy existence of good society, it must remove the bad germs, viz., criminals. If they are not removed, such germs will grow and occupy the entire society, and shall destroy the society.

(vii) Generally, the principle of punishment is grown up from a legal demand of the society. Death punishment is one of such demands. If a cruel and brutal minded criminal is not punished, and he is left free to move in the society. It destroys the very structure of the society. Every person will become cruel. Human civilization will become "jungle justice". Nobody will respect law and order. The death punishment was evolved some centuries ago due to legal demand, and still it is continuing, because the majority of human beings accepted it, and conceded to it. It has become legal demand to eliminate the most violent law-breakers.

(viii) In the opinion of the retentionists, death punishment is always given in the 'rarest of the rare' cases. In such cases, the Sessions judge imposes death sentence, if the prosecution proves the guilt beyond reasonable doubt successfully and the witnesses give their evidence perfectly, after the confirmation of High Court. Thereafter the convict may appeal to High Court, if dismissed then to Supreme Court. Still he is having chance of mercy appeal to the President of Governor. So the death punishment should be retained in the statute book.

(ix) It is the only method to eliminate dangerous and habitual criminals and specially recidivist from the society forever. It reduces the unwanted increase of crowd criminals in the various jails.[31]

ARGUMENTS IN FAVOUR OF ABOLITION OF DEATH PENALTY IN INDIA

The provision of death punishment has so many limitations. Hence, the jurists, penologists, criminologists, criminologists, lawyers, etc. severely criticise it. They began to argue that "the crime is a disease, and the germs should be eradicated". For the fault of society, the law should not blame the criminal. Gandhiji was the foremost proposer to abolish capital punishment. He preached Ahimsa. He pleaded that "hate sin, but don't hate the sinner". Some of the important arguments given to abolish the death penalty are as follows:

31. J.P.S. Sirohi, *Criminology and Penology* 259-261 (Allahabad Law Agency, Allahabad,ed. 6th edn., 2013).

(i) The supporters of abolition of death punishment urge that imposing this punishment, neither deter the public nor criminals. They are of the opinion that this type of punishment is neither able to deter the people and nor criminals from doing offences, Therefore, death punishment failed to deter the criminals and peoples.

(ii) Death punishment cannot save the public money. By killing a person, who is a gift of the God, we determine him from the earth and we say that it is economic saving to the public money. It is ridiculous opinion; one cannot calculate the value of human being gifted by the nature and God.

(iii) The hardened criminals, who are kept in prisons for years together, lose their tempers, anger, cruelty, sadism, etc. The prison's life changes him into a chastened person. There are several chances to cause repentance in his mind. There are empirical examples, which show that ninety per cent prisoners repent for their acts done previously. If a criminal is put to death, and is thrown into sky, there are no chances for getting repentance. There are a few people who may commit heinous criminal acts, due to the psychoanalyst opinion that such person has abnormality. It means they are mental patients; such patients must be appropriately treated.

(iv) Law changes from time to time depending upon the circumstances. Up to the 18th century there was slavery system in the entire world, however in 20th century it was abolished. Similarly, there was a great honour to Sati before Lord Bentinck's time, who abolished it, and made it an offence, and the person who abets to do Sati are severely punished. Now almost all areas of India forgot Sati system.

(v) There are several causes, economic, psycho, physical, social, political, etc. causes for a person changed into a criminal. In majority of cases, the root causes for criminal behaviour are within the society. When the society itself is out of order, then why it should blame a person turned into criminal for several reasons? Therefore, by abolishing death punishment, the delinquents must be reformed, and at the same time the society also overhauled.

(vi) Grave injustice may be caused to innocent and poor persons alleged as criminals, by the criminal justice system. Death punishment determines a person from the world permanently. There is no chance of getting him back there may be judicial errors in imposing this punishment on an innocent.

(vii) The supporters of abolition of capital punishment argued that the germs of the crime disease are within the society, viz., socio, economic, physical, mental causes, etc. If these germs are removed from the society no person can turn into offender. For this purpose, the State should provide all kinds of reformative means to the criminals. Reformative theory is becoming more popular in modern therapeutic approach towards criminals aim to treat the criminals and to punish them with the least of so severity.

(viii) It may reasonably be substituted in form of life imprisonment, which at least gave an opportunity to the criminal to improve himself for future.

(ix) The present criminal justice system is unable to prevent the offences. It could not be helpful to the society in establishing peace. Further it also doesn't help the real victims of the criminals. The police and courts concentrate on punishing the criminals only. But what is the position of the victims and their family members? What remedies are available to them? The Supreme Court has observed that it will be a mockery of justice to permit the accused to escape the extreme penalty of law when faced with such evidence and such cruel acts. To give the lesser punishment for the accused would be to render the judicial system of the country suspect. The common man will lose faiths in the courts. In such cases, he understands and appreciates the language of deterrence more than the reformative jargon.[32]

(x) Famous criminologists 'Baccaria' said that State has no right to take away the life of its citizens, which the later has no right to do so himself. 'Baccaria' said that the society has originated by men having the highest authority, how such society can take away the life of a man who is part of it. Life is given by the nature, so it should be taken by the nature only and execution of death sentence is not natural function.

CONCLUSION

A perusal of arguments for and against the retention of death punishment in a penal system makes it abundantly clear that at least its retention in the statute book would better serve the ends of justice; through in practice it may be used sparingly. This approach to capital/death punishment is well reflected in the judicial pronouncements handed down by the Supreme Court ever since the historic Bachchan Singh's case, where the Court laid down the "rarest of the rare case" principle.[33]

The abolition of death sentence will result in deterioration of the situation i.e., peace and security within the state. Whether death sentence has or has not served its desired ends as an effective deterrent is yet a question to which no answer can be ventured with any degree of certainty. The death penalty is not a right; it is a war of nation against a citizen whose destruction is judged to be necessary and useful.

Secondly, the scrapping of death sentence will also not make the ghastly offence of murder disappear. It is, however, falling into more and more disuse by its limited imposition but it may not also be correct to contend that a penalty which is more infrequently imposed becomes valueless, in any protective, prohibitive or deterrent sense. Hence, the limited use is no argument against its retention.

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32. Mahesh v. State of M.P., (1987) 2 SCR 710.
33. Bachchan Singh v. State of Punjab, AIR 1980 SC 898. Earlier, in Jagmohan Singh v. State of U.P., AIR 1973 SC 947 also the Supreme Court held that the death penalty per se is not violative of Art. 19.

15

Reasonable Opportunity and Disciplinary Proceedings: A Study

***Ms. Deepa Baruah*[1]**

INTRODUCTION

Civil servants play a pivotal role in the administration of the country. They belong to the executive wing of the government and largely responsible to run the machinery of the government. It is the ultimate responsibility of the civil servant to implement the policies and decisions of legislature. They are to serve at the pleasure of the President or the Governor under Article 310(1) of the Constitution of India. Service of civil servants can be terminated at a pre-mature stage on the ground of misconduct. However, Article 310 (1) is subject to two mandatory provisions of Article 311(1) and (2). This Article 311 provides the civil servants with protections from politically motivated or vindictive action of the government.

Article 309 of the Constitution of India enables the legislature to legislate in regard to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any state. Thus, the power of the state under Article 309 prescribes to make laws and conditions of service to regulate the disciplinary proceedings against civil servants. It is the obligation of the state to act in conformity with these rules[2]. The opening words of Article 309, "Subject to the provisions of this Constitution…" clearly indicates that the conditions of service laid down by the legislature of the country or prescribed by rules must conform to the mandatory provisions of Article 310, 311, 320 and the fundamental rights enshrined in Part III of the constitution. In a case[3] the Supreme Court held that the prescribed rules under Article 309 should also satisfy the provisions of equal pay for equal work under Article 39(d).

Article 311(1) ensures that no civil servant of the Union of India or an All India Service or State Civil Service can be dismissed or removed from the service by an authority subordinate to that by which he was appointed. Clause (2) of Article 311 mandatorily requires that no dismissal, removal or reduction in rank except after an inquiry held in accordance with principles of natural justice. To make the provisions

1. Research Scholar, Department of Law, Gauhati University (Assam)
2. State of Uttar Pradesh v. Baburam Upadhaya, AIR 1961 SC 751.
3. Bhagwan Das v. State of Haryana (1987) 4 SCC 34.

effective the Government of India has promulgated the CCS(CCA) Rules (1965), Rule14 provides for initiation of disciplinary proceedings and Rule 14(3) provides that when an inquiry is proposed to hold against a civil servant, the first thing that the disciplinary authority shall do is to prepare a charge sheet. Rule 14(4) makes it mandatory that the disciplinary authority shall deliver or cause to be delivered to the government servant a copy of the articles of charge, the statement of the imputations of misconduct or misbehaviour and the supporting documents including a list of witnesses by which each article of charge is proposed to be proved against the delinquent civil servant.

The civil servants by virtue of their crucial role played in the entire administrative activities of the government are required to be accountable to their duties. The Central Civil Service (Conduct) Rules, 1964, contain certain important provisions in relation to conduct of civil servants. The rules of conduct deal with the behaviour of a public servant in his official and individual capacity. A civil servant is bound to conduct himself inaccordance with the specific or implied orders of the government regulating behaviour and conduct which may be in force. The act or conduct of civil servant may amount to misconduct in the following situations;

i. If the act or conduct is prejudicial or likely to be prejudicial to invest or reputation of the master.
ii. If the act or conduct is inconsistent or incompatible with the due or peaceful discharge of his duty to his master.
iii. If the act or misconduct of the servant makes unsafe for the employer to retain him in service.
iv. If the act or misconduct of the servant is so grossly immoral that all reasonable men will say that the employee cannot be trusted.
v. If the servant is abusive or if he disturbs the peace at the place of his employment.

Thus, the government employees are to adhere with certain standards of conduct not only in his official capacity but in private capacity also. The present article is going to focus on two important aspects related to the civil servants namely (i) disciplinary proceedings and (ii) reasonable opportunity of being heard. The object for providing disciplinary proceedings is to punish government servants in case they are found guilty of misconduct, misbehaviour corruption, inefficiency etc. Disciplinary proceedings against the civil servants shall not be instituted violating the prescribed norms. The rules prescribe certain mandatory procedures for holding such proceedings. The Central Civil Services (Classification, Control and Appeal) Rules, 1965, provide for disciplinary proceedings against persons appointed to services and posts under the Union and similar rules have also been framed[4] for the services and posts under the state.

4. Mysore Civil Service (Classification, Control and Appeal) Rules, 1957.

DISCIPLINARY ACTION

Disciplinary Action should be vested in the head of the department because he is the authority who is responsible for the disciplinary efficiency of the department. Instituting disciplinary proceedings is the most common mechanism to proceed against a civil servant. The mandatory requirement of giving a reasonable opportunity to the civil servant to deny the charges must be complied with. Unless and until the inquiry establishes him guilty, no penalty can be imposed. Moreover, there are provisions for appeal in the Administrative Tribunal, then revision in Divisional Bench of High Court and Review in the Supreme Court.

Regarding awarding of time to complete the departmental inquiry the rules are silent. The 2nd Administrative Reform Commission suggested for 10 month 15 days time for cases involving minor penalties whereas 16 months for those cases involving major penalties to be imposed on delinquent civil servant. In India, a civil servant can be penalised only by holding an inquiry under the provisions of the Classification, Control and Appeal Rules, 1965 and these rules prescribe procedures which are to be followed and according to them there are 12 stages in an inquiry. The 1st stage starts with the framing of charges and it comes to an end with the imposition of penalty.

Code of Conduct Discipline applicable to civil servants contain rules and regulations governing the conduct and behaviour of its employees. Conduct rules for civil servants generally relate to the following matters;

i. Maintenance of correct behaviour towards official superiors and loyalty to the state.
ii. Promotion of the integrity of the official by placing restrictions on their involvement in private business, contracting of debts, acquisition and disposal of property etc.
iii. The observance of certain code of ethics in the official and private life.
iv. Regulation of political activities of the public servants including public speaking, writing in the press and publication.

As per the recommendation of the Santhanan Committee in 1964 Central Service Rules are revised which bring the following changes;

i. Every government servant holding supervisory post shall take all possible steps to ensure the integrity and devotion to duty of all government servants working under him.
ii. No government servant shall use his position or influence directly or indirectly to secure employment for and member of his family in any private undertaking.
iii. No government employee shall engage himself or participate in any demonstration which is prejudicial to the interest of sovereignty and integrity of India, the security of state, public order, decency or morality or which involves contempt of court, defamation or incitement to an offence.

iv. No government servant shall join or continue to be a member of any association, the object or activities of which are detrimental to the interest of the sovereignty and integrity of India or public order or morality.

These rules of conduct must be observed by each and every civil servant. In case, he fails to observe the rules, the disciplinary action may be taken against him. Disciplinary action may either be formal or informal. Informal disciplinary action is taken where the offences are difficult to prove, too subtle and too slight to warrant direct and formal action. Assignment of less desirable work, keeping under closer supervision, loss or withholding of privileges are some illustrations of informal disciplinary action. Where the offence is serious and can be legally established then formal disciplinary action can be taken. The Indian Civil Service Rules prescribe the following cases where disciplinary action has to be taken;

i. Censure;
ii. Withholding of increment or promotion including stoppage of the efficiency bar.
iii. Reduction to a lower post or time scale or to a lower stage in a time scale;
iv. Recovery from the pay of the whole or a part of any pecuniary loss caused to government by negligence or the breach of orders;
v. Suspension;
vi. Compulsory retirement;
vii. Removal from service;
viii. Dismissal from service;
ix. Reduction in rank of civil servants.

DISCRETIONARY POWER OF THE DISCIPLINARY AUTHORITY

A disciplinary authority may initiate proceedings according to prescribed procedures of law for imposition of penalty against a civil servant. It is the discretion of the disciplinary authority to decide as to what kind of punishment is to be imposed on delinquent civil servant. In the interest of justice, this discretionary power of the authority has to be exercised objectively keeping in mind the nature and gravity of the charges. The disciplinary authority is to decide a particular penalty specified in relevant rules. The authority has to consider a host of factors while exercising the discretionary power such as nature and gravity of misconduct, past conduct, nature of duties assigned to the delinquent, responsibilities of duties assigned to the civil servant, discipline required to be maintained by him in the department or any previous penalty etc.[5]

There is not any specific provision in the rules indicating the nature of the charges in respect of which the procedure prescribed for imposing major penalties should be adopted and these in respect of which the procedure prescribed for imposing minor

5. Deputy Commissioner, K.V. S. v. J. Hussain, AIR 2014 SC 766.

penalties should be adopted. It is the discretion of the disciplinary authority to decide the penalty having regards to the nature of the charges and initiate inquiry according to the appropriate procedure.

QUANTUM OF PUNISHMENT

In this area also the disciplinary authority enjoys exclusive power as it has to decide about the quantum of punishment awarded to the delinquent. Review of orders[6] passed in disciplinary proceedings reveals that punishment imposed is highly disproportionate to the charges proved. In such case, the only alternative open to the delinquent civil servant to challenge the order of disciplinary proceedings is to approach the judiciary. In exercise of power of judicial review, the court can interfere with the punishment imposed on delinquent civil servant when it is found to be totally irrational or is outrageous in defiance of logic. This limited scope of judicial review is permissible and interference is available only when punishment is shockingly disproportionate. Even when the court finds the punishment to be shocking, arbitrary and disproportionate, the court cannot act as disciplinary authority and impose a particular penalty. The only thing the court can do is to refer the matter back to the disciplinary authority to take appropriate view by imposing lesser punishment.

COMPETENT AUTHORITY FOR DISCIPLINARY PROCEEDINGS

Disciplinary proceedings must be initiated by a competent authority or it can be said that the competent disciplinary authority can institute an inquiry against a government servant. Thus, the inquiry proceedings can be conducted either by an inquiry officer or by the disciplinary authority itself. Any inquiry instituted by a subordinate officer, who is not the disciplinary authority is without jurisdiction. In a case[7], the Supreme Court held that initiation of inquiry can be by an officer subordinate to the appointing authority, but the punishment such as dismissal, removal or reduction in rank shall not be by an authority subordinate to the appointing authority. However, the authority higher than the appointing authority may also act as the disciplinary authority for the purpose of Article 311, provided that the delinquent servant is not deprived of his statutory right of appeal.[8] A new dimension has been added to the principles of natural justice. In a leading case,[9] the Supreme Court has clearly pointed out the distinction between the disciplinary inquiry conducted by the disciplinary authority and by the inquiry officer. In case of disciplinary inquiry conducted by inquiry officer, the principles of natural justice require that the inquiry officer must submit a report of findings in the inquiry to the disciplinary authority and on the basis of that the disciplinary authority is going to take its decision regarding punishment going to be imposed on the delinquent officer. The copy of the report of the inquiry officer is required to be made available to that delinquent servant and he should be given an opportunity to make a representation

6. Jai Bhagawan v. Commr. of Police, AIR 2013 SC 2908
7. Transport Commissioner v. Thiru A. Radhakrishnamurthy, AIR 1951 SC 332.
8. A. Sudhakar v. Post Master General, Hyderabad, (2006) 4 SCC 348.
9. Union of India v. Mohammad Ramzan Khan, AIR 1991 SC 471.

against any adverse remark on it. In subsequent cases the Supreme Court has classified that Ramzan Khan's decision has only prospective application and thereby the already concluded cases are not affected by it.[10]

However, the findings of the inquiry officer are not binding on the disciplinary authority and it can come to its own conclusions, keeping the views of the inquiry officer in mind which shall be final.[11]

JOINT INQUIRY

Normally, an inquiry is instituted against individual civil servant. But in case, where a number of officers belonging to different cadres are jointly involved in misconduct, it is competent for the government to institute joint inquiry against all officers. Regarding who shall be the competent authority in such case, the Supreme Court in *Made Gowda v. State of Mysore*[12], has made it clear that the disciplinary authority which is competent to dismiss the highest officer involved would be the authority competent to institute disciplinary proceedings against all those officers.

RULE OF EVIDENCE FOR DEPARTMENTAL INQUIRY

The rule of evidence applicable to departmental proceedings is different from that which is applicable for trials before the criminal court which are governed by the provisions of the Indian Evidence Act. The Technical Rule relating to the sufficiency of evidence does not have any application in departmental inquiry. The authority while conducting the departmental inquiry should be guided by rules of equity and principles of natural justice and in no case he is bound by the formal rules of evidence.[13]

FINDINGS IN DEPARTMENTAL INQUIRIES

The findings in a departmental inquiry must be specific. It does not matter whether the inquiry is conducted by the disciplinary authority himself or by an inquiry officer. It must be specific for the reason that on the basis of this finding the disciplinary authority has to reach the proper conclusion regarding the proof of the charge and finally the imposition of punishment. Where a charge framed against any government servant more than one part and the disciplinary authority proceeded to state that a part of the charge was proved and if he fails to state with precision as to which part of the charge was established, then it makes the finding defective.[14]

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10. Union of India v. A.K. Chatterjee, (1993) 2 SCC 191; Union of India v. C.L. Verma (1993) 2 SCC 195; See, also Managing Director, Food Corporation of India v. Narendra Kumar Jain (1993) 2 SCC 400.
11. High Court of Judicature at State of Bombay v. Sashikant S. Patil, AIR 2000 SC 22.
12. Krishnamurthy v. State of Karnataka, 1983 (2) Kar LJ 303; Rachaiah v. DIG of Police, 1979 (2) Kar LJ 303.
13. B. V. N. Iyengar v. State of Mysore, (1964) 2 Mys LJ 153; D. Made Gowda v. State of Mysore, 1965 (2) Mys LJ 490.
14. A.L. Kalra v. Project and Equipment Corporation, 1984(2) S.L.R. 446 (SC).

RECORDING OF FINDINGS OF DISCIPLINARY AUTHORITY

It has been already mentioned that the disciplinary authority is not bound by findings of the inquiry officer and he may take a different view. In such case, the disciplinary authority has to record its findings on the charges framed before issuing a show-cause notice. But he is not required to give reasons for his disagreement with the findings of the inquiry officer.

FINDINGS WITHOUT EVIDENCE

When a civil servant is found guilty in a departmental inquiry, the rule requires that the charges must be proved on the basis of evidence adduced at the inquiry. Without evidence, no civil servant can be declared to be guilty of misconduct. A finding based on no evidence cannot be sustained.[15]

SHOW CAUSE NOTICE

It is mandatory for the disciplinary authority to issue a show cause notice to the civil servants after recording the findings of the inquiry and before imposing any one of the major penalties. It is also mandatory that the disciplinary authority should furnish to the delinquent civil servant a copy of the report of the inquiry along with the show-cause notice.

REASONABLE OPPORTUNITY AND DISCIPLINARY PROCEEDING

Reasonable opportunity is one of the important safeguards provided by the Constitution under Article 311(2) to the civil servants. According to this provision a civil servant cannot be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity to defend his case in respect of those charges. It has been found that the provision of clause (2) of Article 311 reflects the principle of natural justice that no man shall be condemned unheard. The opportunity to defend has to be given to the civil servant at the stage of inquiry of charges to defend himself against the proposed dismissal, removal or reduction in rank. It is to be noted that the provision of the clause (2) of the Article 311 does not apply to all cases of termination of service by the government. This protection can be availed only where dismissal, removal or reduction in rank is sought to be inflicted by way of punishment and not otherwise[16]. Prior to the 42nd Amendment Act, 1976, a second opportunity was also required to be given to the civil servant to represent against the punishment proposed as a result of the findings of the inquiry. Now this provision has been excluded.

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15. State of Assam v. Mohan Chandra, AIR 1972 SC 2535; B. Devaraya v. Collector of Central Excise, 1970 Mys LJ SN 112.
16. Shyamlal v. State of U.P., AIR 1954 SC 369; Sukhbans Singh v. State of Punjab, AIR 1962 SC 1711.

In terms of inquiry it is to be noted that inquiry may be conducted either by the disciplinary authority or by an inquiry officer appointed by the disciplinary authority.[17] In *Ramzan Khan's*[18] case the Supreme Court held that in case the inquiry is conducted not by disciplinary authority but by the inquiry office so appointed to that effect, the inquiry officer shall have to submit a report regarding the findings of the case to the disciplinary authority. On the basis of those findings the disciplinary authority will take decision regarding the delinquent servant. The principle of natural justice requires that the report of the inquiry should be made available to the delinquent servant so that the civil servant is provided with an opportunity to defend himself against the punishment going to be imposed on him. In *Khem Chand v. Union of India*[19] the Supreme Court of India has said that reasonable opportunity of being heard envisaged to the government servant by the provision contained in Article 311(2) includes two ways namely:

i. an opportunity to deny his guilt and establish his innocence which he can do only if he is intimated what the charges levelled against him and the allegations on which such charges are based

ii. an opportunity to defend himself by cross examining the witness produced against him and by examining himself on any other witness in support of his defence.

Thus, Clause (2) of Article 311 requires that the delinquent civil servant must be communicated of all the charges against him. For an effective opportunity of hearing it is necessary that the charges must be clear, precise and accurate. Charges framed must be specific and contain allegations on which they are based with complete particulars and details.[20] Next comes the holding of inquiry into the charges. After the charges are communicated to the civil servant a formal inquiry is to be held into those charges. At this stage the following points have to be kept in view;

i. The inquiry officer must give to the delinquent servant personal hearing if it is demanded by him.[21]

ii. The delinquent servant must be given fullest opportunity to deny charges made against him.

iii. All evidence against the delinquent servant must be given in his presence.[22]

iv. The delinquent servant should be given opportunity to adduce all relevant evidence on which he relies and examine witnesses of his defence.

v. The delinquent servant has a right to argue his own case without appointing any lawyer.

17. Sampuran Singh v. State of Punjab, AIR 1982 SC 1407; Coal India Ltd. V. Ananta Saha (2011) 5 SCC 142.
18. Union of India v. Md. Ramzan Khan, AIR 1991 SC 471..
19. Jagannath Pd. Sarma v. State of U.P., AIR 1961 SC 1245.
20. State of U.P. v. Md. Sharif, AIR 1982 SC 937.
21. L.J.P. Shukla v. State of U.P., AIR 2000 SC 2806.
22. State of U.P. v. Saroj Kumar Sinha, AIR 2000 SC 3131.

vi. The inquiry officer while performing function should be an impartial mean without any biasness.

vii. The last stage is report stage where the inquiry officer submit his report in writing by reasons about the findings of the inquiry to the disciplinary officer. But the report may not be binding on the disciplinary authority. Lastly, there may be common inquiry where more than one delinquent officer involves.

However, the opportunity of being heard may be excluded in the following situations;

i. Where the civil servant is dismissed or removed or reduced in rank on the ground of conduct which led to his conviction on a criminal charge;

ii. Where the authority empowered to dismiss, remove or reduce in rank to a civil servant is satisfied that for some reason, to be recorded by the authority in writing, it is not practicable to hold such inquiry;

iii. Where the President or the governor, as the case may be, is satisfied that in the interest of security of the state it is not expedient to hold such inquiry.

CONCLUSION

From the above it is seen that the disciplinary proceedings and reasonable opportunity of being heard are interrelated. Disciplinary proceedings are provided to keep the civil servants in their right form so that the nation can obtain the best of them. Through the provision of Article 311(2), the Constitution of India gives protection to the civil servants against arbitrary action of the government. Both of them are equally necessary for the smooth administration of the country.

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Right to Child Health and National Health Policy, 2017: An Analysis

Ms. Jyotsna Raj[1]

INTRODUCTION

Health is the level of physical and mental wellbeing of a person. Equity in health can be defined as absence of socially unjust or unfair health disparities across different sections of the population. Children are future of a nation and their survival is a mirror that reflects the entire spectrum of socio-economic development. Defining and identifying inequities in health outcomes in terms of child survival is serious matter of concern without which a country's actual development can never be attained.

In India the most awaited National Health Policy 2017 has been passed by the Central Government after facing the challenging task of ensuring affordable, quality medical care to every citizen and a nudge by the Supreme Court in 2016. Although in recent years India's performance regarding child health is not disheartening in spite of low public expenditure on health but the National Health Policy 2017 is yet to pass through the challenge of health inequities in various aspects in India. This new policy set some new targets for e.g., reduction of Infant Mortality Rate, Under-Five Mortality Rate, Neonatal Mortality Rate, Still-birth Rate etc. and aims to raise public healthcare expenditure to 2.5% of GDP[2] from current 1.4%, with more than two-thirds of those resources going towards primary healthcare.

No doubt the National Health Policy 2017 set some good quantitative targets regarding life expectancy, mortality rates etc. but the real challenge would be to meet the targets with health equity across all sections of the population. Children are more vulnerable towards any kind of health hazards as their journey in the life cycle involves the critical components of child survival, child development and child protection. Therefore any kind of inequities in health outcomes and access to health care services in regard to children is a serious issue to be attended by the stakeholders.

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1. Research Scholar; Department of Law, Gauhati University.
2. Government of India, "National Health Policy 2017", (Ministry of Health and Family Welfare, 2017).

THE EVOLUTION OF THE CONCEPT OF HEALTH

Globally the concern over health rights originated only after the holocaust of two world wars. The Constitution of World Health Organization (WHO) in 1948 was the first and foremost attempt by the International Community to promote health, wellbeing, standard of living, medical care, right to security in case of sickness as well as special care and assistance for mothers and children. Along with WHO, the creation of the *United Nations International Children's Emergency Fund (UNICEF), the* Covenant on Economic Social and Cultural Rights 1966, the Universal Declaration of Human Rights 1948, the Convention on the Rights of the Child 1989 brought right to health to another level.

The Constitution of India addresses the issue of public health in Directive Principles of State Policy under Article 39(e) by stating that the state shall direct its policy towards securing that the health and strength of workers, men and women, and the tender age of children are not abused and the citizens are not forced by economic necessity to enter avocations unsuited to their age or strength. The Directive Principles incorporated in Articles 42[3], 47[4], 48A[5] demands for securing just and humane conditions of work and maternity relief, prohibition of intoxicating drinks and drugs which are injurious to health, protection and improvement of environment respectively.

In *Consumer Education and Research Centre* v. *Union of India*[6], the Supreme Court of India, reading Article 21 in conjunction with Articles 39(e), 41[7] and 43[8], concluded that right to health and medical care is a fundamental right in India. Therefore the National Health Policy 2017 is more than a policy for all Indians as this has the greater burden to provide equitable health security to all.

National Health Policy 2017: A Roadmap for Health

The Alma-Ata[9] Declaration of 1978, which was in consonance with UDHR and WHO's Constitution expressed the need for urgent action by all governments, all health and development workers, and the world community to protect and promote Health for All the people of the world. In India the National Health policy of 1983 was formulated with the global vision of 'Health for All by 2000' set in the aftermath of the Alma Ata

3. The State shall make provision for securing just and humane conditions of work and for maternity relief.
4. The state shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the state shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.
5. The State shall Endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.
6. AIR 1987 SC 990.
7. The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.
8. Article 43 of Constitution of India.
9. Now Almati is in Kazakistan.

Declaration.[10] But it remained more as a vision document as it fell short of defining clearly the achievable targets matched by requirement of resources.

The Millennium Declaration 2000 and adoption of a numerous health related Millennium Development Goals (MDGs) at global platform gave encouragement for formulation of a new National Health Policy in 2002. The National Health Policy 2002 recommended for increase of public spending of health from 1 percent to 2 percent within a period of 10 years which was not fulfilled and remained stationary. The NHP 2002 has fallen short of achievements in number of areas like control of non-communicable diseases, securing equitable access to health care services for the poor and marginalized sectors of population and meeting the chronic shortage of qualified health care professionals.

Due to change in health priorities and context of health policies, after 14 long years aiming to provide healthcare in an "assured manner". The National Health Policy 2017 strives to address current and emerging challenges arising from the ever-changing socio-economic, technological and epidemiological scenarios. The policy envisages as its goal the attainment of the highest possible level of health and wellbeing for all at all ages, through a preventive and promotive health care orientation in all developmental policies, and universal access to good quality health care services without anyone having to face financial hardship as a consequence. This would be achieved through increasing access, improving quality and lowering the cost of healthcare delivery.

RISK OF CHILD SURVIVAL: A GROSS VIOLATION OF RIGHT TO HEALTH TOWARDS CHILDREN

Good health is important not only as an end in itself, but also for allowing an individual to enjoy a high quality life and contribute productively to a country's economic and social progress. In the case of *Vincent v. Union of India*[11] the Supreme Court of India emphasized that a healthy body is the very foundation of all human activities and also stated that maintenance and improvement of public health have to rank high as these are indispensable to the very physical existence of the community and on the betterment of these depends the building of the society of which the constitution makers envisaged.

It is the basic right of every child to get quality health facilities before and after their birth so as to prevent and protect themselves from all possible survival risk. The importance of child health is derived from the fact that poor health of infant children, if not corrected in the early days, tends to persist into adulthood.[12] In any country Neo-natal mortality Rate [13] (NM), Infant Mortality Rate[14], Child Mortality Rate[15] is

10. J V R Prasada Rao, "Evolution of National Health Policy in India" 60 *YOJANA* 15 (Feb., 2016).
11. AIR 1987 SC 990.
12. Ranjan Ray, "Child Health in India: Some Inconvenient Facts" 58 *YOJANA* 57 (Feb., 2014).
13. Neo-natal mortality is defined as the number of deaths during the first 28 completed days of life per 1000 live births in a given year or period.
14. Infant Mortality Rate is the number of death of children below the age of 1 year per 1000 live births (UNICEF).
15. Child Mortality is the number of deaths of children of five years of age or younger per 1000 live births (UNICEF).

good indicators of status of health of children, the higher the rate, more the denial of right to health and right to life towards them.

The risk of child survival is mostly dependent on the status of health of the mother, environmental barriers, economic status, social class, education, gender biasness, occupation etc. Children (0-1 year) due to infirmity of age, immaturity of understanding, physical incapability cannot stand for their rights, whether it is health rights or risk of survival remaining totally dependent on their parents and guardians. Therefore any kind of negligence towards their survival by any stakeholders including state should be held liable for violation of their right to life in case of risk of survival.

NATIONAL HEALTH POLICY 2017 AND INEQUITIES IN HEALTH OUTCOMES OF CHILDREN IN INDIA

The term 'Equity' is a derivation from the Roman term '*aquitas'* which means equalization or leveling.[16] The concept of health equity focuses attention on the distribution of resources and other processes that drive a particular kind of health inequality –that is, a systematic inequality in health(or in its social determinants) between more and less advanced social groups, in other words, a health inequality that is unjust or unfair.[17]

Health inequities emerge from a systematically unequal distribution of power, prestige and resources among groups in society, thus defining and identifying health inequities involve analysis with respect to social justice and social determinants of health. To define and identify health inequities among children, one needs to analyze health outcomes in relation with children and various determinants of child health.

India's health system reflects the iniquitous nature of development with respect to child health in spite of experiencing National Health Policies since 1983 and NRHM (National Rural Health Mission) since 2005. As Dreze and Sen report, as a share of GDP[18] and as a share of total health expenditure, public health spending in India is not only well below the world average (only 2.5 percent of GDP), but more disturbingly, nearly half, that in Sub-Saharan Africa and in the Middle East & North Africa.[19]

If public investment in health care does not increase, private investment would, but there is no certainty that this would lead to better health outcomes in terms of child survival as economically and socially backward section of India will not be able to afford it, being the weakest victim. It is usually seen that utilization of health services as well as health status indicators regarding maternal and child health is always better in urban population than slums and rural or tribal population.

16. Aqil Ahmed, *Equity Trust, Mortgage & Specific Relief Act* 2 (Central Law Agency, 14th edn.,2010).
17. Dhananjay W Bansod and Sarang P Pedgannkar "Health Equity in public Health" 58 *YOJANA* 35 (Feb, 2014)
18. Gross Domestic Product (GDP) is a monetary measure of the market value of all final goods and services produced in a period (quarterly or yearly).
19. K Seetha Prabhu , "Health for All" 61 *YOJANA* 20 (July 2017).

DETERMINANTS OF HEALTH OUTCOMES IN RELATION TO CHILD SURVIVAL

The most important social determinants i.e. structural determinants of health iniquities are Income, Gender, Education, Occupation, Social Class, Gender and Ethnicity and their role in determining child survival is discussed below-

1. **Income:** Usually the lower an individual's socioeconomic position, the worse their health. Poverty leads to material deprivation, social exclusion, lack of education, unemployment, limits the choices as a result threaten the health of vulnerable (pregnant woman, newborn child) leading towards risk of death. Occupation is one of the important determinants of socio-economic status of a family which has an important role to play in case of newborn child's health. Poverty has many dimensions which materially affect maternal and newborn child's health for e.g. material deprivation (of food, shelter, sanitation and safe drinking water), social exclusion, lack of education, unemployment, and low income reduces opportunities, limits choices undermine hope and as a result threaten health.[20]
2. **Gender:** Gender as a structural determinant of health operates through different intermediary determinants that influence the maternal and reproductive health of women and their access to care. Gender norms also influence the attitudes towards the use of contraceptives and women's ability to make decisions in family planning. Early marriage and early pregnancy results in high fertility and puts women in risk of pregnancy complications and increasing the infant mortality. Mortality among children born to malnourished, anemic as well as obese mothers is higher. Analysis of the National Family Health Survey (NFHS)-3 data showed that neonatal mortality among children born to mothers with low Body Mass Index (BMI) (<18.5) was slightly higher than those with normal BMI (18.5-24.9).
3. **Education:** Education, particularly woman's education, makes significant difference in utilization of RCH (Reproductive and Child Health) services and health seeking behavior. Education is a decisive factor and it has been found that children born to mothers with at least 8 years of schooling have more chances to survive than children of illiterate mother. Education promotes awareness, when mothers are not aware of available reproductive and child health rights, disparities in health equities increase in society.
4. **Social Class:** Socially backward groups like SC/ST and OBC are usually associated with lower use of reproductive health services and poorer health outcomes. According to the NFHS (National Family Health Survey) 3, the likelihood of receiving any type of ANC (anti-natal care) is lowest among women belonging to SC or ST. Only 18 percent of the births among these women are conducted at a health facility, compared to 51 percent among women, who do not belong to SC, ST, or any OBC.[21]

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20. Supra note 16.
21. Ibid.

India is the home of 104.28 million tribes, as per 2011 census which is about 8.61% of the total population of India, if left abandoned without actual implementation of health care services and policies, India cannot achieve the target provided by the National Health Policy 2017.[22]

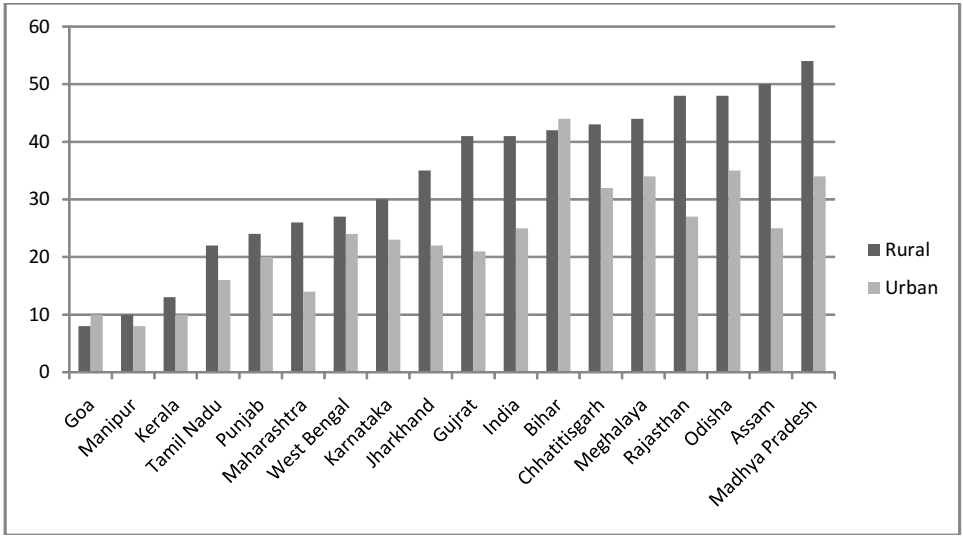
5. **Environmental Factors:** Disparities can be seen in environmental factors such as inadequate water and sanitation, indoor air pollution, overcrowding, poor housing conditions and exposure to vector disease.[23] Lack of awareness regarding health and hygiene regarding maternal and newborns health is a major determinant of poor status of health which evidently increases the risk of child survival. Environmental barriers are mostly faced by people of lower socio-economic class, it becomes difficult for them to access modern health facilities ,due to lack of encouragement from fellow mates, families women from that background do not come forward to save themselves and their children.

   If business in rural India (all total 6.27 lakh villages) can grew at about 11% annually over the last decade[24] why environmental and socio economic barriers for health services cannot be removed by us? To educate them and making them aware of health and hygiene would be first priority with the rest of the society to eradicate environmental barriers towards health rights.

6. **Lack of Infrastructure and Manpower:** Social barriers to access, lack of infrastructure and manpower in rural, far-flung areas, urban slums are problems affecting child health which needs to be addressed urgently. Although the National Health Policy 2017 recommends strengthening existing medical colleges and converting district hospitals to new medical colleges to increase number of doctors and specialist, in states with large human resource deficit it would be difficult to develop every under privileged districts with a minimum funds.

Fig.1: State-wise Infant Mortality Rate, 2015

22. P. Srivatsa "Need for New Health care Service for Tribal" 63(9) *Kurukshetra* 25 (July 2015).
23. *Supra* note 19.
24. Uma Ganesh, "Transforming Rural India with Digital Technologies" 58 *YOJANA* 26(February 2014).



Source: SRS Bulletin, 2016[25]

A high Infant Mortality Rate of a state indicates the risk of death to the child within the first year of his/her life which broadly also means unmet health needs and unfavorable environmental factors during birth. India has wide disparity in Infant Mortality Rate among the states according to Sample Registration System records, Goa at 9 and Madhya Pradesh at 50. Underdeveloped states like Madhya Pradesh, Assam, Odisha, Rajasthan, Chhattisgarh, and Bihar bear great burden of Infant mortality whereas developed states like Goa, Manipur, Kerala and Maharashtra have lower IMR (Figure 1). The highest disparities between rural and urban risk of child survival is found in Assam where rural risk (50) is double that of urban risk (25).

According to the new target set by National Health Policy 2017, India is to reduce the Infant Mortality Rate from 37[26] to 28 by 2019, but the real challenge would be to diminish the disparities within and among the states regarding higher risk of children. High neo – natal (less than 29 days of birth) mortality still continues to be a significant contributor to the infant mortality rate in India. Apparently India is performance is quite satisfactory to meet the targets of Millennium Development Goals, but the real and underneath problem India still facing is non-attainment of child health rights which is evident from high disparities between urban and rural infant mortality rates in maximum of the states.

"In India about 0.76 million neonates die every year, highest for any country in the world. The neonatal mortality rate(NMR) of the country did decline from 52 per 1000 live births in 1990 to 29 per 1000 live births in 2012 (SRS 2012) but the rate of decline has been slow, and lags behind that of infant and under-five child mortality rates. The slower decline has led to increase in contribution of neonatal mortality to

25. Some of the states with similar rates are skipped from the list for avoidance of repetition.
26. IMR, India, 2015, recorded by SRS (2016).

infant mortality," according to a report of the Save the Children, a non-governmental organization.[27]

CONCLUSION

The World Health Organization estimated that in 2008, 5.2 million Indians died of non-communicable diseases which accounted for 53 percent of all deaths in the country.[28] In 2015, health inequality resulted in a loss of 24 percent of India's health index value as per the Inequality adjusted Human Development Index computed by the UNDP.[29] The millions of children who die at a tender age due to some preventable diseases, negligence of health professionals, environmental or social barriers, socio-economic inequalities etc are not given the basic human rights i.e. Right to Life and Right to Health.

In recent years India formulated health policies like NRHM, NUHM[30], and ICDS[31] For strengthening maternal and newborns health in spite of lower investment in health sectors in comparison to neighboring countries. There has been a paradigm shift from reproductive and child health to reproductive, maternal, newborn child health and adolescent approach which includes emphasis on spacing through door step delivery of contraceptives, intra-uterine device contraceptives services and sub centers and post delivery family planning services, in addition to ante and post natal care.[32]

India's new National Health Policy 2017 signifies an important shift in government policy towards comprehensive primary health care and is significant for two reasons: firstly, it defines health in terms of wellness rather than as absence of disease and secondly, it brings focus back on primary care and accords a key role to the public sector.[33] Surprisingly, the policy has pushed back the modest goal of spending 2.5 percent of GDP for health to the year 2025 in spite of the fact that expectations from the health sector are increasing.

The National Health Policy 2017 is a ray of hope for Indians to mitigate all kinds of health problems and to lead a healthy future for the country which cannot be attained without minimizing the gap between the policy and implementation, without removing socio- economic barriers and by identifying and analyzing the hidden health inequities across different sections of societies. The Government of India's implementation of the National Health Policy 2017 in letter and spirit is crucial for ensuring India's long cherished goal of health security for all by 2030.

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27. Aarti Dhar , "Steps to Correct Infant Mortality Rate" 63(9) Kurukshetra 14 (July 2015).
28. World Health Organisation Non-communicable Diseases Country profile 2014, available at: http://www.who.int/nmh/publications/ncd_report_full_en.pdf visited on 3/8/2017.
29. UNDP, "Inequality-Adjusted Human Development Index (IHDI)" *available at*: http://www.hdr.undp.org/en/composite/IHDI visited on 3/8/2017.
30. National Urban Health Mission.
31. Integrated Child Development Scheme.
32. Ibid.
33. *Supra* note 19.

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Human Rights and Dignity of Women: A Critical Analysis

***Jayati Kharga*[1]**
***Dr. Abhijeet Deb*[2]**

INTRODUCTION

The Constitution of India confers a catena of rights upon women. Our revered Constitution makers were well aware of the sub-ordinate and backward position of women in our society. They therefore, made conscious efforts for improving the entire situation in favour of women. There is thus not only a Fundamental right to equality conferred upon all, but also an unequivocal prohibition against discriminating only on the ground of sex.[3]

The state is also empowered to make special provisions in favour of women.[4] There are other Fundamental Rights viz, The Right to Life personal Liberty and to Constitutional remedies.[5] Resorting to judicial activism, the Supreme Court has expanded the scope of 'right to life' to new horizons by reading many more rights into it as integral and essential part thereof. Thus, women also have Fundamental right to human (read feminine) dignity,[6] to privacy,[7] to health[8] to primary education,[9] to free legal aid,[10] to speedy-trial[11] et al as adjuncts to right to life. The state is directed to provide for maternity relief to female workers under Article 42 of the Constitution, whereas Article 51- A declares it a Fundamental duty of every Indian citizen to renounce practices derogatory to the dignity of women. Thus, the spirit of gender equality, dignity and justice pervades the entire framework of our Constitution.

The Indian Parliament has enacted the Protection of Human Rights Act 1993; Sec 2(d) defines "Human Rights" to mean 'the rights relating to life, liberty, equality and

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3. See, Article 14, 15 (1) Constitution of India
4. Article 15 (3), Constitution of India
5. See Articles 21, 19 and 32, Constitution of India
6. Francis Coralie v Union Territory of Delhi, AIR 1981 SC 746
7. People's Union for Civil Liberties v. Union of India, AIR 1997 SC 568
8. Indian Council for Enviro-Legal Action v. Union of India (1996) 3 SCC 212
9. J.P.Unnikrishnan v State of Andhra Pradesh, AIR 1993 SC 2178
10. Kadra Pahadia v. State of Bihar, AIR 1981 SC 939
11. Ibid.

dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by Courts in India.'

In view of the generous Constitutional scheme, innumerable laws have either been enacted or amended in the interest of women in India. Similarly, the Indian Courts have also shown a rising a trend towards feminine protection rights. In so far as the treaties or Conventions to which India is a party are concerned, though they do not automatically become part of municipal law, the Courts in India try so to interpret law as to be in consonance with such treaties and Conventions. At this juncture it seems pertinent to make a brief socio-legal review of human rights in India on certain specific gender issues.

CONCEPT OF HUMAN RIGHTS

Since the advent of human civilization, the quest for peace, prosperity and development has been common to all mankind. Laws regulating societies do vary from country to country; however, philosophers and jurists worldwide have always asserted the brooding omnipresence of a higher law. It was termed as *Jus Naturale* for the Romans, *Lex Naturalis* for medieval Christian thinkers, Rita and Dharma for ancient Hindus, and is christened as 'Natural Law' by modern jurists. The recognizing of such superior law led to the evolution of the concept of 'Natural Rights' which were claimed to be inherent, inalienable, immutable and essential in nature. Such rights of groups or individuals whether justifiable or non-justifiable, positive or negative, against the State or any other authority etc. All are in the modern context termed as Human Rights. The 'Charter of United Nations Organization adopted in June 1945 declared one of its objects as to reaffirm faith in Fundamental Human Rights' and its purpose of 'promoting and encouraging respect for Human Rights". The immortal *Magna Carta* (1215), Petition of Rights (1628), Bill of Rights (1689) and Act of settlement (1700) in Great Britain, the Declaration of Independence (1776), and Bill of Rights (1789) in USA and Declaration of the Rights of Man (1791) in France also contained these rights in substance, though not under the rubric of human rights.[12]

INTERNATIONAL POSITION

The 'Universal Declaration of Human Rights, 1948', professes the principle of non-discrimination and proclaims that all human beings are born free and equal in dignity and rights, without any distinctions including that of sex. The International Covenant Economic, Social and Cultural Rights, 1966, the International Covenant on Civil and Political Rights, 1966; a number of regional rights charters, viz. "European Convention for the Protection of Human Rights and Freedoms, 1950; African Charter on Human and People's Rights 1981' and American Convention on Human Rights, 1969' all include provisions for progressive protection and guarantees for women. Attention has also been focused exhaustively on gender issues by the UN and other

12. D.K. Bhatt, "Human Rights and Gender issue: A socio-legal perspective" XXVII (1) *IBR* (2000).

organizations from time to time. Thus, the UN General Assembly unanimously adopted a 'Declaration of Eliminations of Discrimination Against Women" in November 1967, resolving to abolish sex-discriminatory laws and practices to grant women equal rights with men in matters of civil law including absolute interest in property and free choice and consent in marriage. The 'Second World Conference on Human Rights held at Vienna in June, 1993 called for full and equal participation of women in all aspects of public life. Recognising the nature of gender-discrimination as systematic and purposive, the 'Convention on the Elimination of All Forms of Discriminations Against Women (CEDAW), 1981' prohibited all distinctions, restrictions and exclusions impairing or nullifying the enjoyment and exercise by women of Human Rights and Fundamental freedoms.

The issue of women's right to health and control their reproductive capacities were recognised in Cairo's 'International Conference on Population and Development, 1994'. Gender equality was reaffirmed as Fundamental prerequisite for social justice in the "Fourth World Conference on Women' held in 1995 at Beijing. Undoubtedly, discrimination against women is incompatible with human dignity. It is an obstacle to the full development of the potentialities of women in the service of their countries and of humanity. Women have a significant role in the social, political, economic and cultural life and an indispensable part to play in the family, particularly in the rearing of children. Nevertheless, the die-hard patriarchal social systems the world over have sustained bias, prejudices and discriminations against women compelling them to bear perennial travails of disempowerment, subjugation and oppression. As a result crimes against women such as rape, molestation, child sexual abuse, custodial torture, domestic violence sexual harassment at work place et. al., continue as global problems today.

NATIONAL POSITION

The Constitution of India confers a catena of rights upon women. Our revered Constitution makers were well aware of the sub-ordinate and backward position of women in our society. They therefore, made conscious efforts for improving the entire situation in favour of women. There is thus not only a Fundamental right to equality conferred upon all, but also an unequivocal prohibition against discriminating only on the ground of sex.[13]

The state is also empowered to make special provisions in favour of women.[14] The Right to Life and personal Liberty remedied in Constitution.[15] Resorting to judicial activism, the Supreme Court has expanded the scope of 'right to life' to new horizons by reading many more rights into it as integral and essential part thereof. Thus, women

13. See, Article 14, 15 (1) Constitution of India.
14. Article 15 (3), Contitution of India.
15. See Articles 21, 19 and 32, Constitution of India.

also have Fundamental right to human (read feminine) dignity,[16] to privacy,[17] to health[18] to primary education,[19] to free legal aid,[20] to speedy-trial[21] et al as adjuncts to right to life. The state is directed to provide for maternity relief to female workers under Article 42 of the Constitution, whereas Article 51- A declares it a Fundamental duty of every Indian citizen to renounce practices derogatory to the dignity of women. Thus, the spirit of gender equality, dignity and justice pervades the entire framework of our Constitution. The Indian Parliament has enacted the Protection of Human Rights Act 1993; Sec 2(d) defines "Human Rights" to mean 'the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by Courts in India.'

In view of the generous Constitutional scheme, innumerable laws have either been enacted or amended in the interest of women in India. Similarly, the Indian Courts have also shown a rising a trend towards feminine protection rights. In so far as the treaties or Conventions to which India is a party are concerned, though they do not automatically become part of municipal law, the Courts in India try so to interpret law as to be in consonance with such treaties and Conventions.

PROTECTION OF RIGHT TO LIFE AND PERSONAL LIBERTY

The concept of personal liberty had different shades in the world Personal Liberty jurisprudence. It started with 'liberty' then it was restricted by 'personal' and finally a multishape emerged. At the dawn of the Constitution of India the original draft of the liberty clause included the word liberty but later on the world 'personal' was inserted before the word liberty,[22] because the Constituent Assembly never wanted to open flood gate through 'liberty'. It wanted that the concept should be interpreted in its narrow sense. Immediately after the commencement of the Constitution, the Supreme Court was forced with the task of interpreting the concept of Personal Liberty in the very first case on the Fundamental Right.[23]

The majority in the *Gopalan* did not connect the right to personal liberty with the right to freedom of movement and held that these two Fundamental Rights were separately guaranteed by our Constitution. In *Karak Singh's*[24] case the Court struck down regulation 236 (b) of the U.P. Police Regulations as violative of Article 21. Ayyangar, J., for himself and for I am, C.J., Sinha and Mudholakar, J J, read in the concept of personal liberty and unauthorized intrusion into one's residence disturbing sleep and ordinary comfort. The majority Court thus considered the domiciliary visit

16. Francis Coralie v Union Territory of Delhi, AIR 1981 SC 746
17. People's Union for Civil Liberties v. Union of India, AIR 1997 SC 568.
18. Indian Council for Enviro-Legal Action v. Union of India (1996) 3 SCC 212
19. J.P.Unnikrishnan v State of Andhra Pradesh, AIR 1993 SC 2178.
20. Kadra Pahadia v. State of Bihar, AIR 1981 SC 939.
21. Ibid.
22. C.A.D, Vol. III , 1947, 441; See also C.A.D. Vol. VII, 1948, 1001, Quoted in Dwivedi B.P. Dwivedi, *Changing Dimension of Personal Liberty in India* 33 (Wadhawa & Co., Allahabad 1998).
23. Gopalan v State of Madras, AIR 1950 SC 27
24. Kharak Singh v State of UP, AIR 1963 SC 1295, herein after referred to as Kharak Singh.

at night violative of right comfort included in the expression.

Is the right to education included in Article 21 was a question which came up before the Supreme Court in *State of A.P.* v *L. Narendra Nath*,[25] where Mitter, J., considered everyone at liberty to apply for admission. The above case was concerning with admission to the medical college where the number of seats were limited. The Court rejected the claim of the petitioner to get admission however, it observed. "Once it is held that the test is not invalid the deprivation of Personal Liberty, if any in the matter of admission to a medical college was according to procedure established by law".[26] From the above observation it is clear that the Court impliedly conceded the Right to Education into Personal Liberty.

Aftermath of *Maneka's* case expanded the right under Article 21 to include a number of rights into the 'Right to Life and Personal Liberty'. The Court upheld the Right to Education which included participation in the activities of the University Students Union under Article 21.[27] Justice *Deshpandey* following the Maneka's wavelength opined that the expression 'Life and Personal Liberty' in Article 21 included variety of rights. Though not included in part III of the Constitution provided they were necessary for the full development of the personality of the individual.[28]

In *Mohini Jain's*[29] case the Court held the right to get education at all levels included into right to life and personal liberty. In the opinion of Justice Kuldip Singh the state is under an obligation to make endeavor to provide educational facilities.[30] Thus the Court brought in the concept of personal liberty a right to education as enshrined in Article 41. It is submitted that this extended meaning of Article 21 is neither feasible nor warranted in this respect because even the Directive principal in Article 41 takes into account the economic capacity of the state. Fortunately in *Unnikrishan's*[31] case the Court while conceding the right to education implicit in the right to life and personal liberty confined its parameters for children up to the age of fourteen years.

The liberal interpretation of personal liberty in Maneka's case included the dignity of the individual and the worth of the human person. Maneka's wavelength was applied to include the faculties of thinking and feeling into Article 21 and thus the right to live with human dignity was evolved. This right to live was extended to include not only human dignity but also all that goes along with it including the bare necessaries of life.[32]

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25. AIR 1971 SC 2560
26. Id. at 2567
27 A.V. Chandal v Delhi University, AIR 1978 Del. 308
28. Id. at 314
29. Mohini Jain v State of Karnataka, AIR 1992 SC 1858
30. Id. at 1864
31. Unni Krishanan v State of A.P., AIR 1993 SC 2178, 2232, see also , P. Cherriyakoya v Union of India, AIR 1994 Ker 27.
32. AIR 1981 SC 746, 753, See also Ammini E.J. v Union of India, AIR 1995 Ker. 252 (SB) where the life of Christian Women, Cruelly treated and deserted, was held a 'Sub-human life without dignity and Personal Liberty'.

RIGHTS OF WOMEN AGAINST EXPLOITATION AND ABUSE

India is a signatory to ILO conventions and has enacted a plethora of labour and industrial laws aimed at *inter alia* securing healthy and favorable conditions of work. However, all the laws providing for equal remuneration, maternity relief and leave healthy and safe working conditions, minimum wages and overtime wages, fixed working hours, prohibition in hazardous employments etc. are flagrantly violated with impunity with tacit connivance of enforcement agencies.[33] A study covered by Participatory Research in Asia (PRIA) shows that agricultural workers in Gujarat and Tamil Nadu, Cotton pluckers in Punjab, women in Gujarat's tobacco processing, in brass-work in Tamil Nadu and those working in Gujarat's stone quarries mostly suffer from occupational diseases like anemia, dizziness and respiratory and gynecological disorders. Nothing that about 80 percent workers in agricultural and informal sector were women, the study painted a dismal picture of workers conditions. Women workers in Punjab were found suffering from repeated miscarriages stages of pregnancy. The rate of miscarriages, still births and infant mortality was found to be very high.[34] Results of such a study are only illustrative of women workers pathetic conditions in our country.

The Constitution of India prohibits traffic in human being and beggar and other similar forms of forced labour.[35]

"Traffic in human beings" means selling and buying men and women like goods and includes immoral traffic in women and children for immoral or other purposes.[36]

Article 23 protects the individuals not only against the state but also private citizens. It imposes a positive obligation on the states to take steps to abolish evils of "traffic in human beings" and beggar and other similar forms of forced labour. In this context, traffic in human beings includes "*Devadasi system*".[37]

Trafficking in human beings has been prevalent in India for along time in the form of prostitution and selling and purchasing human beings for a price just like vegetables. The Supreme Court in *Vishal Jeet* v. *Union of India*[38] made the following observations on prostitution:

Prostitution always remains as a running sore in the body of civilization and

33. The Apex Court has also taken note of these harsh realities in its judgment. See for instance, Peoples Union for Democratic Rights v. Union of India, AIR 1982 SC 1473.
34. Editorial, *The Hidustan Times*, 24th April, 1995.
35. Article 23, Indian Constitution reads as follows: Prohibition of traffic in human beings and forced labour:
    (i) Traffic in human beings and beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.
    (ii) Nothing in this Article shall prevent the states from imposing compulsory service for public purpose, and in imposing such service the state shall not make any discrimination on grounds only of religion, race, caste or class or any of them.
36. Raj Bahadur v. Legal Remembrancer , AIR 1953 Cal. 522.
37. Vishal Jeet v. Union, AIR 1990 SC 1412.
38. AIR 1990 SC 1412.

destroys all moral values. The causes and evil effects of prostitution maligning the society are so notorious and frightful that none can gain say it. This malignity is daily and hourly threatening the community at large slowly but steadily making its way onwards leaving a track marked with broken hopes. Therefore, the necessity for appropriate and drastic action to eradicate his evil has become apparent.

On the strength of Article 23(1) of the Constitution the legislature has passed the suppression of Immoral Traffic Act, 1956[39] which aims at abolishing the practice of prostitution and other forms of trafficking.[40]

SEXUAL AUTONOMY

Article 21 of the Constitution guarantees free enjoyment of life to its citizens. But the question arises does the right to privacy enshrine in Article 21 gives a married woman sexual autonomy? Or does the right to privacy gives a Hindu married woman right to decide whether, when and how her body is to become vehicle for other human beings certain? Section 9 of the Hindu Marriage Act gives to both Hindu husband and wife a right to apply to Court for restitution of conjugal rights when either the husband or wife has withdrawn from the society of the other.[41] When a decree for restitution of conjugal rights is passed the spouse has to join the company of other spouse and also to have the sexual intercourse which only establishes that the conjugal rights have been resorted to the petitioning spouse. Sexual cohabitation is an inseparable ingredient of a decree for restitution of conjugal rights in the past as it is in the present remains the same which is to coerce though judicial process the unwilling party to have sex against that persons consent and free-will with the decree-holder. There can be no-doubt that a decree of restitution of conjugal rights thus enforced offends the inviolability of the body and the mind subjected to the decree and offends the integrity of such a person's and invades the marital privacy and domestic intimacies of such a person.

It cannot be denied that among the few points that distinguish human existence from that of animals, is the sexual autonomy an individual enjoys to choose his or her partner for a sexual act, sexual expression is so integral to one's personality that it is impossible to conceive of sexuality on any basis except on the basis of consensual participation of the opposite sexes. No relationship between man and woman is more rested on mutual consent and free will and is more intimately and personally forged than sexual relationship.

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39. Now renamed as The Immoral Traffic (Prevention) Act, 1956.
40. This is an act made in pursuance of in the International Convention signed at New York. On the 9th May, 1950 for the prevention of immoral traffic. Recently, the A.P. legislature has enacted the Devdasis (prohibition of Dedication) Act 1988 to prohibit the practice which invariably result in evils like prostitution.
41. When either the husband or wife has without reasonable excuse withdrawn from the society of the other, the aggrieved party may apply by petition to the District Court for restitution of conjugal rights and the Court, on being satisfied the truth of the statements made in such petition and that there is no legal ground why the application should not be granted may decree restitution of conjugal rights accordingly.

The right of woman in sexual autonomy came up before the Andhra Pradesh High Court in *T.Sareetha* v *T. Venkata Subbaiah.*[42] In this case the petition was filed against an order of the subordinate judge under section 9 of the Hindu Marriage Act for restitution of conjugal rights mainly on the ground that the said judge had no jurisdiction to pass the order. The claim of the petitioner was rejected by the High Court. In the mean time she filed another petition challenging the Constitutional validity of section 9 on the ground that it was violative of right to "life, personal liberty and human dignity and decency" under Article 21 of the Constitution.

While deciding the case, the Court took the help of some western writers for purpose of making a clear concept of "privacy". Aided by these definitions, the Court remarked that it could not be admitted that a decree for restitution of conjugal rights constituted the grossed form of violation of an individual's right of privacy. The decree for restitution of conjugal rights denies the woman for free choice whether when and how her body is to become the vehicle for the procreation of another human being. It also deprives a woman of control over choice as to when and by whom the various parts of her body should be allowed to be sensed. Therefore, Article21 of the Constitution is flagrantly violated by a decree of restitution of conjugal rights.[43]

The Supreme Court of America clearly established the proposition that the reproductive choice was Fundamental to an individual's right to privacy[44]. They uphold the individual's reproductive autonomy against the state intrusion and forbid the state from usurping that right without overwhelming social justification. Examining the validity of section 9 of the Hindu Marriage Act in the light of above discussion, the Court held that a Court decree enforcing restitution of conjugal right constitutes the starkest form of government invasion of personal identity and individual's zone of intimate decisions. The victims is stripped of its control over the various part of its body subjected to the humiliating sexual molestation accompanied by a forcible loss of the precious right to decide when if all her body should be allowed to be used to give birth to another human being. Clearly, the victim loses its autonomy of control over intimacies of personal identity.[45]

Accordingly the Court declared Section 9 of the Hindu Marriage Act, as unconstitutional. Because according to the Court remedy of Restitution of Conjugal Rights provided for by that section is a savage and barbarous remedy and it violates the woman's right to privacy and human dignity guaranteed by Article 21 of the Constitution.[46]

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42. AIR 1983 A.P. 356.
43. Id. at 368-369.
44. Id. at 370.
45. Id.
46. This decision was, however, not followed in subsequent cases, See, Harvinder Kaur v Harmander Singh, AIR 1984 Del 66, Saroj Rani v Sudarshan Kumar, AIR 1984 SC 1562.

RIGHT TO FREEDOM

A woman who is a major, has a right to go anywhere and live with anyone she likes. In *Payal Sharma* v. S*uprintendent, Nari Niketan Kalindri Vihar, Agra*,[47] the Court held that a man and woman even without getting married can live together if they wish. This may be regarded immoral by the society but it is not illegal. The Court mentions that there is a difference between law and morality. In this way, the Court took a very modern view and extended the scope of Article 21 to uphold the privacy right of a major woman which included taking of decision on her own with whom to live and go anywhere.

IMMORAL TRAFFIC (PREVENTION) ACT, 1956

The Immoral Traffic in Women and Girls Act 1956[48] was originally enacted in pursuance of an International Convention signed at New York on 9th May 1950. The Act came into force on 1st May 1958. The Act was passed because the Constitution of India under Article 23 of the Constitution prohibits the traffic in human beings and any contravention as well as Article 35 provides that such a law has to be passed by Parliament, as soon as may be, after the commencement of the Constitution. Moreover, though the legislation on the subject of suppression of immoral traffic did exist in a few States but the laws were neither uniform nor do they go far enough. In other States there were no laws on the subject at all. Hence, the Act was passed.

The object of the Act is not to abolish prostitution and make it a criminal offence or to punish a woman because she prostitutes herself, but the purpose of the enactment was to inhibit or abolish commercialized vice namely the sexual exploitation of persons for the purpose of prostitution as an organized means of living, as well as to rescue victims of flesh-trade and those in the moral danger by providing for a rescue and rehabilitative machinery. This was observed in the case of *Re Ratnamala*[49] that the purpose of enactment was to inhibit or abolish commercialized vice, namely, the traffic in women and girls for purpose of prostitution, as an organized means of living. The idea was not to render prostitution *per se* a criminal offence, or to punish a woman merely because she prostitutes herself.

The Act under Sections 3 to 9 imposes reasonable restrictions upon the trade, profession or calling of a prostitute. It makes certain acts of the prostitutes and those connected with prostitution as a criminal offence and, therefore, punishable under the law. Following are the situations wherein the acts of the prostitutes and the persons connected with prostitution becomes criminal and punishable under the law.

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47. AIR 2001 All 254
48. The said Act was radically changed by and now called Immoral Traffic (Prevention) Act, 1956 hereinafter referred to as the Act.
49. AIR 1962 Mad 31 at 33: See also, Bai Shanta v State of Gujarat AIR 1967 GUJ 211.

CONCLUSION

The glorious position of women thus gradually deteriorated due to entry of many social evil customs which continued in society with sanction of *Smritis, Puranas, Sutras* etc. The *Brahmanical* authors of later *Vedic* literature projected what was regarded as ideal for their own class and did not portrayed the actual state of things. The change in societal attitude and effect of frequent invasions of foreign powers again added to existing problems. The *Puranic* literature preached the ascetic ideal and painted women in black colours to fulfill their purpose and to discourage men from marriage.

Due to the influence of religious injunction of later *Vedic* texts Child Marriage system continued. Girls remained uneducated and under *Purdah* system they were confined within the four corners of the husband's house. Remarriage of widow was discontinued. The evil customs of *Sati, Devadasi, Dowry* and female infanticide, etc. Continued in large scale. These evil customs in aggravated crime frame eventually affected the position of women and they were criminally exploited in all works of their lives.

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18

Child Sexual Abuse: Prevention and Protection of Children from Sexual Offences in India

***Dolly Biswas*[1]**

"One day, the fields will stay green
And the earth black, sweet and wet.
Our children will grow tall on that
Earth And they will be free As the
mountain trees and birds."

– ZAMORA

INTRODUCTION

India houses the largest child population in the world with almost 42% of the total population under 18 years of age needless to say the health and security of the country's children is integral to any vision for its progress and development. one of the issues adversely affecting this vision for the country's future generation is the evil of child sexual abuse satisfies released by the national crime records Bureau reveal that there has been a steady increase in sexual crime against children. A 2007 survey by the Ministry of Ministry of women and child development showed that 53% of children in India had been sexually abused.[2] Over 20% of interviewed said they were subjected to severe forms of abuse of those who said they were sexually abused 57% were boys. The study shows that almost 54% children reported having faced one or more forms of sexual abuse. Andhra Pradesh, Bihar, Assam and Delhi reported the highest percentage of such abuse among both boys and girls. It was also found that, most children did not report the matter to anybody.[3]

Children and innocent and helpless guys and therefore need proper care and nourishment during the growing years so that they become useful members of the society. They are the architects of the future of a nation and therefore they should be protected from all kinds of abuse and given opportunities for their all-round development. Despite hectic planning, welfare measures legislative safeguards and

1. Research Scholar, Cooch Behar Panchanan Barma University, Vivekananda Street, Cooch Behar – 736101, West Bengal, India .
2. Dr. Preeti Misra, "Salient Features of the Protection of Children Against Sexual Offences Act, 2012" 6 *Law Exam Times* 33 (2014).
3. Loopholes in POCSO, available at: http://www.legalservicesindia.com/article/article/loopholes-in-pocso-2440-1.html, Visited on January 26, 2018.

administrative actions, a large number of Indian children continue to remain in distress and turmoil.[4]

DEFINITION OF CHILD ABUSE

According to the Black's Law Dictionary, child abuse is defined as any form of cruelty to a child's physical, moral or mental wellbeing. It is also used to describe some forms of sexual attack which may or may not amount to rape. To make it wider, the Black's Law Dictionary defines abuse and neglected children have those children, who are suffering so serious physical or emotional injury inflicted on them, including malnutrition.

According to World Health Organization, child abuse may have varied facet such as physical abuse sexual abuse and neglect.

FORMS OF CHILD ABUSE

There are various forms of child abuse which are discussed in the following:

(i) Physical Abuse: Physical abuse can be understood as inflicting of physical injury upon a child. This may include beating, hitting, punching, shaking, kicking burning or otherwise harming a child. Some of the parents or caretakers may not have intended to hurt the child. It may however be the result of over discipline or physical punishment that is inappropriate for the child's age.[5]

(ii) Sexual Abuse Sexual abuse is inappropriate sexual behavior with a child. It includes folding of the child's genital, making the child fondle the adult's genitals, intercourse, incest, rape, sodomy, exhibitionism and sexual exploitation. To be considered 'child abuse' these acts have to be committed by the person responsible for the care of a child (for example a baby-sitter, a parent, or a daycare provider), or related to the child. If a stranger commits these acts, it would be considered sexual assault and handled solely by the police and criminal courts.[6]

(iii) Emotional Abuse: Emotional abuse is also known as verbal abuse, mental abuse, or psychological maltreatment. It includes acts or the failure to act by parents or caretakers that have caused or could cause, serious behavioral, cognitive, emotional or mental trauma. This can includes parents or care takers using extreme and or bizarre forms of punishment, such as confinement in closet or dark room or being tied to a chair for long periods of time or threatening or terrorizing, a child less severe acts, but no less damaging, are belittling or rejecting treatment, using derogatory terms to describe the child, habitual tendency to blame the child or make him/ her a scapegoat.[7]

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4. Dr. S. K. Chatterjee, *Offences Against Children & Juvenile Offences* 287 (Central Law Publications, Allahabad, 2016).
5. Dr. Nuzhat Parveen Khan, *Child Rights and the Law* 30-33 (Universal Law Publishing Co. Pvt. Ltd., New Delhi, 2012).
6. Ibid.
7. Ibid.

(iv) Neglect: It is the failure to provide for child's basic needs. Neglect can be physical, educational, emotional, physical neglect can include not providing adequate food or clothing, appropriate medical care, supervision, or proper weather protection (heat or cold). It may include abandonment. Educational neglect includes failure to provide appropriate schooling or special educational needs, allowing excessive truancies. Psychological neglect includes the lack of any emotional support and love, never attending to the child, substance abuse including allowing the child to participate in drug and alcohol use.[8]

(v) Sexual Abuse by Parents: One of the most abominable and unfortunate act committed on children by their parents is their sexual abuse. Sexual offences by parents and closed relatives (incest) against their children are the most shocking crimes against humanity, conscience and morality the moral, ethical and social consideration involved in the abuse of children by their parents renders a horrific picture. It is so outrageous for normal sensibilities, so as to trigger public, institutional and judicial reactions of repugnance bordering on violence.[9]

(vi) Abuse by subjecting them to Overwork: It is very often that due to poverty and other social factors a large number of parents push their children into the job market. According to a recent survey that draws up a strategy for rescuing and rehabilitating the working children by National Commission for protection of children, it revealed that almost 80% of the children were living with their parents in Delhi. Their parents are completely dependent on their earnings some of these children even shared experienced of parental corrections. The survey covered 69 areas of tourist importance, places of worship, or around Railway stations. The highest concentration approx. 50% was found in India Gate followed by Shardra, Jama Masjid, Chandni Chowk, Red Fort etc. out of total 2,246 children surveyed nearly 50% where the age group of 9 to 14 years. Around 1,685 children were in the age group of 6 to 14 years, 339 in the age bracket of 14 to 18 years and most vulnerable 0 to 6 age group accounted for 215 children. At least 70% of children survey to were boys.[10]

(vii) Sexual Abuse inside the Institutions: There has been a significant increase in the number of cases of child sexual abuse in Juvenile Institution. Regularly such cases come to light but there is no procedure laid down to deal with cases of child sexual abuse within the institution. Very often superintendent and members of the Managing staff themselves are involved in rape and sexual abuse of inmates (children in the institutions) which goes on unreported most of the time. The victims do not complain for fear of further exploitation and physical abuse. Meek submission of inmates to the illegal activities of the illegal activities of the authorities is equated

8. Dr. Nuzhat Parveen Khan, *Child Rights and the Law* 30-33 (Universal Law Publishing Co. Pvt. Ltd., New Delhi, 2012)
9. Ibid. at 70-71.
10. Ibid.

with their consent. Section 376- C of the Indian Penal Code has been added to deal with such type of custodial rape and seduction.[11]

PREVENTION AND PROTECTION OF CHILD SEXUAL ABUSE UNDER THE PRESENT INDIAN LEGAL REGIME

There are various provisions to protect and prevent the child sexual abuse under the following legal regime in India:

1. **Provisions under the Constitution of India:** Some provisions under Constitution of India are provided for the protection of the children for exploitation and abuse and abuse of course for the Welfare of the children. Article 39 of the Constitution of India provides certain safeguard to the children from exploitation and form the deprivation of the basic human dignity. According to Article 39(e) of the constitution, the state shall in the particular, direct it's policy towards securing that the tender age of the children are not abused and that citizens are not forced by economic necessity to enter avocation unsuited to their age or strength. So, by invoking this provision of Article 39(e) of the Constitution, children can be protected from the abuse of dignity of life which may include sexual abuse. And as preventive measures, under Article 39(f) of the Constitution, the state shall direct its policy towards securing that the children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. So by invoking this provision of Constitution of India, the protection of children and development of their personality may be secured and the children may be protected from exploitation and abuse, committed against them.

   In addition to it, provision of Article 45 of the Constitution may be considered as preventive measures against exploitation of children. Article 45 provides that the states endeavour to provide, within a period of 10 years from the commencement of this constitution, for free and compulsory education for all children until they complete the age of 14 years. This provision of Constitution of India is actually providing the protection of human dignity of children.[12]

2. **The Juvenile Justice Act, 1986:** The Juvenile Justice Act, 1986 was enacted to provide for the care, protection, treatment, development, and rehabilitation of neglected and delinquent children. The Act did not directly deal with child sexual abuse but the definition of a neglected Juvenile included a Juvenile who lived in a brothel or with a prostitute or frequently went to any place used for the purpose of prostitution or was found to associate with any prostitute or who was being was likely to be abused or exploited for immoral or illegal purposes. Such neglected

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11. Ibid at 111
12. Prof. (Dr.) Nirmal Kanti Chakraborty, *Law and Child* 283-284 (R. Cambray & Co. Pvt. Ltd., Kolkata, 2011).

children were produced before a Juvenile welfare board who would, after an inquiry, send the child to a Juvenile home for care, protection, and rehabilitation.[13]

Under the Juvenile Justice Act, 1986, a prostitute's child was automatically a neglected child. The magistrate had the power to segregate the prostitute from her child and place the child in a corrective institution. Besides, under the Act, while males above 18 years were considered adults, the age was reduced to 16 years for females. The Juvenile welfare boards generally were not equipped to deal with the cases of child sexual abuse. The observation whom could not provide special care and treatment for such victimized children.[14]

3. **The Juvenile Justice (Care and Protection of Children) Act, 2000:** Since the Juvenile Justice Act, 1986 has been replaced by the Juvenile Justice (Care and Protection of Children) Act, 2000, such children are now being produced before the child welfare committees which have replaced the Juvenile welfare boards. In practice, at present it appears that there has been a change only in the nomenclature. The actual functioning of the earlier Boards and the present committees remain almost the same.

4. **The Child Marriage Restraint Act, 1929:** Child marriages are dealt by the Child Marriage Restraint Act, 1929 and by the various personal laws. The Indian Majority Act, 1875 lays down the age of majority as 18 years (Section 3).But in case of marriage, dower, divorce and adoption, personal laws of parties regulate the age of majority. In 1929, the pressure exerted by social reformers had forced the British government to pass laws relating to child marriages. Taking into consideration the popular tradition and practices, the British government enacted the Child Marriage Restraint Act, 1929, popularly known as Sharda Act. The Child Marriage Restraint Act, 1929 was an act to restrain the solemnization of child marriages. It was applicable to all Indians, i.e., Hindus Muslims and Christians. It prescribed the minimum age for marriage for both boys and girls. In 1929, the minimum age of the marriage for girls was 15 and for boys it was 18. This position was maintained by the Hindu Marriage Act, 1955 which prescribed the same minimum age of marriage. This Act prohibited the solemnization of child marriages but it did not declared this marriages either void or illegal. The punishment under the Act was very mild. This was a weak legislation and could not achieve the desired results. Child marriage were deeply entrenched in the society as a custom and the Sharda Act failed to make any dent in this practice.[15]

The Child Marriage Restraint (Amendment) Act, 1978 was passed to provide more teeth to the Act and to raise the minimum age of marriage. This Amended Act, 1978 raised the minimum age of marriage by 3 years. It is now 18 year for girls and 21 for boys. Child marriage means a marriage to which either of the

13. Asha Bajpai, *Child Rights in India Law, Policy and Practice* 217-220 (Oxford University Press, New Delhi, 2006).
14. Ibid.
15. Ibid.

contracting parties, i.e., parties whose marriage is or is about to be solemnized [CMRA 1929, 2 section (b)] is a child.[16]

5. **The Indian Penal Code, 1860 :** At present there is, neither a comprehensive law nor a policy to deal with child sexual abuse. The Indian Penal Code deals with the sexual abuse of children in the form of rape. Section 375 defines rape. Section 376 of the Indian Penal Code provides for the punishment of rape which shall not be less than 7 years but which may be for a time that may extend to 10 years, unless the woman raped is his own wife and is not under 12 years of age in which case, he shall be punished with imprisonment for a term which may extend to 2 years or with fine or both.[17]

   The other provisions of IPC that are invoked are related to unnatural practices like Section 377. This is generally invoked when boy children are sexually abused. Section 366-A and 366- B, relate to export and import of girl for prostitution. Under section 366-A and 366- B, the girls should be below 18 years and she should be intentionally induced by the accused to go from any place or to any act that is likely to force her into prostitution.

   A man is said to commit 'rape' who, except in the case hereinafter excepted, has sexual intercourse week a woman under circumstances falling under any of the six following description:

   First- Against her will

   Secondly- With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

   Thirdly, With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

   Fourthly- With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be law fully married.

   Fifthly- With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

   Sixthly- with or without her consent, when she is under 16 years of age.

   Seventhly, When she is unable to communicate consent.

6. **The Prevention of Immoral Traffic Act, 1986 (PITA):** Under Section 8, children, both girls and boys, are given protection from sexual abuse. There are also provision against brothel keeper's words and keeping minor girls. Discretionary powers have been given to magistrates for interim placement of children who are housed in institutions.[18]

16. Ibid.
17. The Indian Penal Code, 1980, s. 376.
18. Supra Note 12.

7. **The Protection of Children from Sexual Offences Act, 2012:** The Protection of Children from Sexual Offences Act (POCSO) was passed by both houses of Parliament on May 22, 2012 and came into effect on November 14, 2012, i.e., on children's Day.
   - **(a) Salient Features of POCSO:** The salient features of the Protection of Children from Sexual Offences Act (POCSO) are as follows[19]:
     - **(i)** It is gender neutral;
     - **(ii)** It makes the reporting of abuse mandatory;
     - **(iii)** It makes the recording of sexual abuse mandatory;
     - **(iv)** It lists all known types of sexual offences toward minors;
     - **(v)** It provides for the protection of minors during the judicial process.
   - **(b) Provisions under the POCSO, 2012:** The following provisions under the Protection of Children from Sexual Offences Act (POCSO) are discussed[20] as followed:
     - **(i)** Police officers must bring every case to the attention of the children welfare committee within 24 hours of receiving a report.
     - **(ii)** They must also be in plain cloth while recording the minor's statement so as to not appear intimidating.
     - **(iii)** The statement must be recorded in the place chosen by the minor in the presence of person that he / she trusts.
     - **(iv)** The medico-legal examination for the collection of forensic evidence must be contacted only by a female doctor, in the presence of a person that the minor trusts.
     - **(v)** Special Courts have been set up to conduct speedy in-camera trial. This Court ensure that-
       a) The minority is not exposed in any way to the accused during the recording of evidence.
       b) The minor identity is not disclosed at any time during the investigation or trial.
       c) The minor is not made to repeat his/her testimony in court that he she can give the testimony using the video link.
       d) The case is disposed within one year from the date of offence being reported.
       e) The defense routes all questions through the judge and is not allowed to ask them in an aggressive manner.
       f) An interpreter, translator, special educator or any other expert is present in court for minor's assistance.
     - **(vi)** Compensation for medical treatment and Rehabilitation is given to a minor who has been sexually abused.

19. Supra Note 1, at p. 34.
20. Ibid.

(c) Provisions of Punishments under POCSO: The following provisions of punishments under POCSO[21]:

i. **Penetrative Sexual Assault:** Penetration that is peno vaginal Peno Oral Peno Urethral Peno Anal fingering or object penetration.
Punishment: Not less than 7 years this may extend to life imprisonment and a fine Section 4.

ii. **Aggravated Penetrative Sexual Assault:** Committed by a person of Trust authority such as a Police Officer.
Punishment: Not less than 10 years this may extend to rigorous life imprisonment and a fine under Section 6.

iii. **Non-penetrative Sexual Assault:** Committed by whoever with a sexual intend-
a) Touches the vagina penis anus or breast of the child;
b) Make the child touch the vagina penis anus or breast of such person or any other person;
c) Does any other act with sexual intent which involves physical contact without penetration.
Punishment: Not less than 3 years may extend to 5 years and a fine under Section 10

iv. **Aggravated Non-penetrative Sexual Assault Committed by a Person of Transfer Authority such as a Police Officer**
Punishment: Not less than 5 years this may extend to 7 years and a fine under Section 10.

v. **Sexual Harassment:** Unwelcome sexual remarks, emails, telephone, calls, taunting, jeering, demand or request for sexual favors.
Punishment: 3 years and a fine under Section 12.

vi. **Use of Minor for Pornography Purpose:** Involving a child in a preparation production and or distribution of pornography via print, electronic, computer or any other technology.
Punishment: 5 years and a fine and in the event of second conviction, 7 years and a fine under Section 14(1).

vii. **Attempt of Offence**
Punishment: 1 year and or fine under Section 18

viii. **Abetment of Offence:** Instigating a person to commit and offence conspiring to commit an offence intentionally aiding an offence
Punishment: same as that of the offence under Section 17

ix. **Failure to Report an Offence**
Punishment: 6 months and or a fine under Section 21.

The Act further makes provision for avoiding the re-victimization of the child at the hand of the judicial system. It provides the special courts that contact that trail in camera and without revealing the Identity of the child, in a manner that is as child

21. Ibid.

friendly as possible. Hence the child may have a parent or other trusted person present at the time of testifying and can call for assistance from an interpreter, special educator, or other professional while giving evidence further the child is not to be call repeatedly to testify in court and may testify through video link rather than in the intimidating environ of the courtroom. Above all, the act stipulates that a case of child sexual abuse must be disposed of within one year from the date of offence is reported.[22]

Another important provision in the Act is that to provide for the special court to determine the amount of compensation to be paid to the child whom has been sexually abused, so that the money can then be used for the child's medical treatment and rehabilitation.[23]

The Act is a welcome piece of legislation, that it recognizes almost every known from of sexual abuse against children as punishable offence leaving little room for ambiguity in its interpretation. Further by providing for a child-friendly judicial process, the Act encourages children who have been victims of sexual abuse to bring their offender.

CONCLUSION AND SUGGESTIONS

From the above discussion it may be said that existing legal resume in India has not yet been fully developed to combat emerging is problem. Even some constitutional provision are there to safeguards the basic human rights and dignity of life of the children specially girl child from various types of exploitations and abuses including sexual abuse. In spite of these, both legislative and constitutional provisions for the protection as well as prevention from the sexual abuse of children, there are no stoppage of such type of incidents of exploitation and abuse. On the other hand number of such cases are alarmingly increasing day by day. It is also imperative that the law operates in a manner that the best intent and well-being of the child are regarded as being of Paramount importance at every stage to ensure the physical emotional and intellectual and social development of the child. But if the child is engaged may be for any cause, in any unlawful sexual activity, or exploitation to do any unlawful sexual practices, or is used in pornographic performances etc., then the future of the nation will become dark. From the following discussion it may be inferred that if the provision of the all act will be strictly followed then our child children could be protected from such sexual offence and could develop a healthy and exploitation free atmosphere.

It is submitted with due respect that adequate measures may be made in India to protect and prevent the child sexual abuse, taking into consideration the following suggestions:

i. The present National Policy on Children, 1974 needs revision and there is a clear and established need for a separate National Children Protection Policy.

22. Ibid.
23. Ibid.

ii. There is also an urgent need of National Legislation to deal with child abuse separately and it should address all forms of sexual abuse including commercial sexual exploitation, child pornography and grooming for sexual purpose. It should also deal with physical abuse including corporal punishments and bullying, economic exploitation of children trafficking of children and also the sale and transfer of children. At the same time every possible steps should be taken for its proper implementation.

iii. There should be a separate scheme for child protection which should identify vulnerable families and children, prevent vulnerabilities and provide services to those in need. The scheme should strengthen statutory support services provided under the Juvenile Justice (Care and Protection of Children) Act, 2000 for children in need of care and protection and children in conflict with law.

iv. Parents are primarily responsible and accountable for the safety and security of the children in their care. At the same time, life skill education of children to enhance their knowledge and capacity to deal with abuse is essential and this should become an integral part of school curriculum.

v. The median should be used to spread awareness on child rights.

vi. Institution under the Juvenile Justice (Care and Protection of Children) Act, 2000 or corrective Institutions and children in conflict with law is in these institutions should be provided with all the opportunities to reform and develop in to responsible citizens. But the present state of the existing institutions leaves a lot to be desired.

vii. The care giver of the institutions established under Juvenile Justice (Care and Protection of Children) Act, 2000 or often abuser also. This behavior of the care giver destroys the faith and trust of the child and completely alienates her/ him from society itself, which should be prevented by strict monitoring and supervision, etc.

viii. The trial of sexual abuse case is conducted in such an insensitive manner that a sexually abused child, rather than being treated for her own trauma, has to fight the adversarial system and end up in being for the traumatized. This should be taken care of and changed.

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19

Electoral System in Indian Democracy: A Brief Overview

***Mr. Saikat Chakraborty*[1]**

INTRODUCTION

The preamble to the Constitution declares India to be a Democratic Republic. Democracy is the basic feature of the Indian Constitution. Democracy is sustained by free and fair elections to the various legislative bodies in the country. It is the cherished privilege of a citizen to participate in the electoral processes which place persons in the seats of power. India has been characterized as the biggest democracy in the world. At a general election, an electorate of millions goes to the polls to elect members for the Lok Sabha, State Legislative Assemblies, and the legislatures of the Union Territories.

In politics elections are ways whereby peoples preferences are aggregated to choose a leader. Choice by elections is now almost inseparable from representative democracy. The activity, election has almost become a part of the nation, not a day passes without an election either for the Parliament, a State Legislature, a Municipal Body, a Panchayat, an Employer/ Employee, Student, Trade Union or a Co-operative Society etc.

The election process provides guidelines to public voting, frequency of election counting of votes, declaration of results and so on. In the twentieth century, most States granted the vote to all, adults who crossed 18 years of age. However, in India people worry about the survival of our social and economic systems. The political system is mixed with loopholes the base level and not only improper but also entangled with the criminalized. Therefore, in the recent days intellectuals started discussing the problems of electoral reforms as never before.

In election common people are making hue and cry by changing their representatives in a manner that has ensured change the government in the states and also at the centre. This phenomenon was supported society groups, and the media and an active judiciary has ushered the demands for accountability of the elected.

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MEANING AND SIGNIFICANCE OF ELECTION

An election is a formal decision-making process by which a population chooses an individual to hold public office. Elections have been the usual mechanism by which modern representative democracy has operated since the 17th century. Elections may fill offices in the legislature, sometimes in the executive and judiciary, and for regional and local government. This process is also used in many other private and business organizations, from clubs to voluntary associations and corporations[2].

The universal use of elections as a tool for selecting representatives in modern representative democracies is in contrast with the practice in the democratic archetype.[3]

The act of choosing or selecting one or more from a greater number of persons, things, courses, or rights and to discharge duties. The choice is open to a debtor who is bound in an alternative obligation to select either one of the alternatives.[4]

After independence, India adopted universal adult suffrage and each adult Indian got the right to vote. Following are some important points which elaborate on the significance of periodic election in a representative democracy;[5]

a. Elections provide ways and platform for the citizens to choose their representatives, choose the party which they want to see at the position of power, ideally based on the policies which they want the state to adapt and follow in governance.
b. Elections also provide a way to punish the government or ruling party. If the people are not satisfied with the performance of the government then they can easily show them the way out in the next election.
c. As the election will be conducted regularly and periodically, in the Indian context once in every 5 years, to ensure their victory, the parties would have to be responsive toward people otherwise they would not be able to win the elections. Regular elections increase responsiveness and accountability of the government.
d. Election provides a platform for political participation to the people. Anybody can fight the election and those who are not fighting at least got involved in the numerous discussions, debates about the policies and programs of the government and parties.
e. Regular elections also bring with them a quality political education. During campaigning the parties present their thoughts, ideas and policies to the masses and in the process make them more educated politically.

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2. Henry M. Robert, *et al., Robert's Rules of Order Newly Revised* 438–446 (PA: Da Capo Press, Philadelphia, 1th edn., 2011).
3. James Wycliffe Headlam, Election by Lot at Athens 1891 12 (Facsimile Publisher, 1stedn., 2015).
4. "Election- Definition & Legal Meaning", *The Law Dictionary, available* at: http:// thelawdictionary.org/election/ visited on 18/8/2017 at 9.30 am.
5. "Significance of elections in Indian democracy" *available at*: https://politiecos.wordpress.com/ 2013/03/28/significance-of-elections-in-indiandemocracy/ visited on 17/8/2017 at 11.30am.

The following is a summary of the process of voting that we should know,

i) People first need to be registered on the Electoral Roll which is a list of eligible voters. They can apply online as well as at the VRECs (Voter Registration & Epic Centers), at designated locations or through a Booth Level Officer.

ii) They will be issued a Voter ID which they need to present at the polling booth.

iii) The responsibility lies on the citizen to be aware of who is standing for elections.

iv) It is also the responsibility of the citizen to find out where the polling booth is in their respective constituency.

v) People can vote on the Electronic Voting Machines.

vi) If they speak only English, they should familiarize themselves with the symbols of the candidates, because the names of the candidates will be listed in alphabetical order in the respective state's language.

vii) All of them have to do is to press the blue button next to their desired candidate's name and symbol. They can also vote NOTA (None of The Above).

ix) They will receive a mark of ink on their finger that signifies that they voted.

x) While it helps identify if we have already voted, it is also a proud symbol we can bear[6].

ELECTION SYSTEM IN BRITISH INDIA

The Principle of representation, and an indirect way of election, was first incorporated in the Indian Councils Act of 1892. The most striking feature of the Councils Act of 1892 was that it cautiously introduced elective element in the Councils. Although the framers of the Act deliberately avoided the use of the word 'election' in the Act but the provisions of the Act contained a scheme which required that all the members of the Legislative Councils were not to be nominated by the Government. Thus the system of indirect election was introduced by the Act of 1892 for the inclusion of non-official members in the Legislative Councils of India.[7]

The Indian Councils Act 1909 (known as Morley-Minto Reforms) constitutes a landmark in the constitutional history of India. The Government of India Act, 1935, for the first time introduced federation in India comprising the Provinces and the Indian States. While under all the previous Government of India Act, the Government of India was unitary, the Act of 1935 prescribed a federal structure for India, distributing legislative and other powers between the Centre and the Provinces. The composition of the Legislatures also underwent a significant change and the principle of bicameralism

6. "Why Should We Vote in India", *available at*: https://www.bankbazaar.com/voter-id/why-should-we-vote-in-india.html visited on 17/8/2017 at 9.00 am.
7. Shehla Gul and Madeha Neelam, "M.A. Jinnah in the Imperial Legislative Council of India, 1910-13 and 1916-19" 66(3/4) *Journal of the Pakistan Historical Society* 175-187 (Jul-Dec, 2018).
8. Ibid.

was introduced at the Centre and some of the Provinces.[8]

INDIAN VOTING HISTORY

The period from 1951-1981, was a time of Old Paper Ballot System. A ticket is a gadget used to cast votes in a decision, and may be a bit of paper used to record choices made by voters. Every voter utilizes one tally, and tallies are not imparted. The voter throws his/her tally in a crate at a surveying station.[9]

Electronic Voting Machines (EVM) demonstrated a significant headway over the Ballot Paper System. Evm's were initially presented in India in 1981 in the Assembly Constituency decisions of Kerala. They were part of the way executed in Indian General and State Elections from 1999 and succeeded over the ticket paper framework totally from 2004 decisions. The Evm's diminish the time in both making a choice and proclaiming the results contrasted with the vote framework.[10]

Notwithstanding, after 2009 general decisions, Evm's were affirmed of altering and having security issues. After decisions of Delhi High Court, Supreme Court and requests from different political gatherings, The Election Commission chose to present Evm's with Voter-confirmed paper review trail (VVPAT) framework in 2013. VVPAT or checked paper record (VPR) is a strategy for giving criticism to voters utilizing a vote less voting framework that permits the voters to check their vote was thrown effectively and recognizes any conceivable race extortion or breakdown, and gives an intends to review the put away electronic results.[11]

Reconstruction in voting has prompted the thought of changing Electronic or E-voting to i-voting. Since, everybody around is Internet-astute, why ought to then voting stay conventionalized. Favorable circumstances of i-Voting incorporate; correctness, unprejudiced notion, untouched openness, accelerating the decision process and top everything, transparency, which in any framework is sure to bring positive results.[12]

In January 2013, the Ministry of Law and Justice, Government of India requested the Twentieth Law Commission to consider the issue of "Electoral Reforms" in its entirety and suggest comprehensive measures for changes in the law.[13]

ELECTORAL LAWS IN INDIA

There are many laws which are prevalent in India relating to election. The Constitution of India is the main basis of our electoral law which is categorically divided as follows, The Constitution of India deals with Part XV of the Constitution of India deals with

9. Jitendra K. Paswan, "The History of Voting in India", *available at*: https://www.linkedin.com/pulse /20140814073904-95862915-the-history-of-votingin-india 13/7/2017 at 9.00am.
10. Ibid.
11. Ibid.
12. Ibid.
13. Law Commission of India, "Report No.255, Electoral Reforms" *available at*: http://lawcommission ofindia.nic.in/reports/Report255.pdf , 18/7/2017 at 1.00pm

elections. It contains six articles (Articles 324 to 329). Under articles 243K and 243ZA of the Constitution of India the elections of the local bodies i.e. Panchayats and Municipalities are held and they are under the responsibility of State Election Commissions.[14]

Besides this there are a number of legislations dealing with the election process in India as:

1. The Representation of the People Act, 1950;
2. The Representation of the People Act, 1951;
3. The Indian Penal Code, 1860;
4. The Delimitation Act, 2002;
5. The Election Commission (Conditions of service of Election Commissioners and Transaction of Business) Act 1991;
6. The Parliament (Prevention of Disqualification) Act, 1959;
7. The Presidential and Vice- Presidential Elections Act, 1952;

THE ROLE OF THE REPRESENTATION OF PEOPLE ACT, 1951

The Representation of People Act, 1951 is an act of Parliament of India to provide for the conduct of elections of the Houses of Parliament and to the House or Houses of the Legislature of each State, the qualifications and disqualifications for membership of those Houses, the corrupt practices and other offences at or in connection with such elections and the decision of doubts and disputes arising out of or in connection with such elections. The Act was enacted by the provisional Parliament under Article 327 of Indian Constitution, before the first general election.

Articles 379 and 394 of Part XXI which contained provisions for provisional parliament and other articles which contained provisions like citizenship, came into force on 26 November 1949, the date in which the constitution was drafted. The provisional parliament enacted the Act vide Act No.43 of 1951 for the first general election conducted on 25 October 1951.

The Representation of the People Bill having been passed by both the Houses of Parliament received the assent of the President on 17th July, 1951. It came on the Statute Book as "The Representation of the People Act, 1951".

Under each of these two Acts, statutory rules were made by the Central Government. These were respectively called the Representation of the People (Preparation of Electoral Rolls) Rules, 1950 and the Representation of the People {Conduct of Elections and Election Petitions) Rules, 195l. It was within the above frame-work of law that the first general elections were held in the country.[15]

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14. Jyotirmoyee Baruah, "A critical analysis of Electoral Reforms in India", *available at*: https://www.academia.edu/35966300/A_critical_analysis_of_Electoral_Reforms_in_India 25/8/2017 at 11.00am.
15. "Salient features of the Representation of Peoples Act" *available at:* http://www.clearias.com/salient-features-of-the-representation-of-peoples-act/, 2/9/2017 at 12.00pm at p. 28.

The details of the parts in Representation of People Act 1951 are as below[16],

1. Part I: Preliminary.
2. Part II: Qualifications and Disqualifications.
3. Part III: Notification of General Elections.
4. Part IV: Administrative Machinery for the Conduct of Elections.
5. Part IV A: Registration of Political Parties.
6. Part V: Conduct of Elections.
7. Part V A: Free Supply of Certain Material to Candidates of Recognised Political Parties.
8. Part VI: Disputes Regarding Elections.
9. Part VII: Corrupt Practices and Electoral Offences.
10. Part VIII: Disqualifications.
11. Part IX: Bye-Elections.
12. Part X: Miscellaneous.
13. Part XI: General.

ELECTION COMMISSION OF INDIA

Part XV of the Constitution deals with elections. It contains six articles viz., articles 324 to 329. Article 324 declares that the superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice-President held under the Constitution, shall be vested in the Election Commission.[17]

Election Commission of India is a permanent Constitutional Body, which was established in accordance with the Constitution on 25th January 1950. The Commission conducts elections in accordance with the constitutional provisions, supplemented by laws made by Parliament.[18]

MULTI MEMBER COMMISSION

On October 2, 1993 the Government issued the ordinance which is now on Act and converted the one man Election Commission in to a multi member commission by appointing two persons as Election Commissioners. The Ordinance provides specifically that the decision of three members Election Commission shall as far as possible, be unanimous. But in case of difference of opinion between the Chief Election Commissioner and other Election Commissioners, the matter shall be decided according to the opinion of the majority.[19]

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16. Ibid.
17. Law Commission of India, "Reform of Electoral Laws" *available at*: http://www.lawcommission ofindia.nic.in/lc170.htm visited on 19/7/2017 at 11.15 am.
18. Dr. Nani Bath, 'Role of the Election Commission of India in strengthening Democracy in India', available at: http://paperroom.ipsa.org/papers/paper_5194.pdf , 3/9/2017 at 5.00pm.
19. Dr. J.N. Pandey, *Constitutional Law of India* 667 (Central Law Agency, 43rd Edition, 2006).

In a significant judgment in *T.N. Seshan* v**.** *Union of India*[20]**,** a five judge Constitution bench of Supreme Court unanimously upheld the validity of the Act equating the status, power and authority of two Election Commissioners with that of CEC, The Chief Election Commissioner Mr. T.N. Seshan had challenge the validity of the Ordinance and the Act on the ground that it was arbitrary, unconstitutional and void. He also alleged that because of his insistence on strict compliance with model Code of conduct by all political parties and strict actions the ruling party at the center was unhappy with him therefore in order to curtail his power the Act was enacted. He also said that they are inconsistent with the scheme of Art. 324 and did not give power to the Parliament to firm rules for transactions of business of Election Commission. It was held that the CEC does not enjoy a status superior to other ECs, as the CEC can only be removed from his office in the like manner and on the like ground as a judge of the Supreme Court and that conditions of service cannot be varied to the disadvantage of the CEC after his appointment, while other ECs can be removed on the recommendation of the CEC, but that is not an indicia for conferring a higher status on CEC.

Some of the major functions of Election Commission of India as follows:

(1) Delimitation, revision and periodic re-demarcation of the constituencies general as well as reserved as directed by the President on the recommendation of the Parliament of India.

(2) Updating and revision of electoral rolls for all elections to ensure fair and free polling and avoid bogus voting.

(3) Recognition of political parties who contest elections at national and regional levels and giving them identity in terms of symbols, etc., to facilitate the mandate of the voters.

(4) Control of the actual conduct of polls through procedures like scrutiny of nomination papers, deposit of fee, campaign ethics, re-poll and counting, etc., in the interest of free and fair elections.

(5) Conduct of administration of election which includes complaints disposal, scrutiny of election expenses, maintenance of poll peace and hearing of election petitions, appeals, etc. It puts a heavy quasi judicial burden on the commission, because the courts are not allowed by the constitution to directly interfere in the conduct of elections. However, the later appeals may go to the courts and the jurisdiction and verdicts or the commission may be challenged.

JUDICIAL ACTIVISM ON ELECTORAL SYSTEM IN INDIA

The Indian judiciary is one of the major organ or pillar of the democratic government. Judiciary has played a vital and important role every time in the society especially in the matter of election.[21]

20. (1995)4 SCC 611.
21. Prof. Dr. Nishtha Jaswal, Dr. Lakhwinder Singh, "Judicial Activism in India" *available at*: https://docs.manupatra.in/newsline/articles/Upload/0BD8AAF5-4031-484F-AB92-2B84EFE0ABCA.pdf visited on 15/9/2017 at 12.30a.m.

In Lily Thomas v. *Union of India & Others*[22], Lily Thomas is an Indian lawyer who has initiated improvement and change to existing laws by filing petitions in India's highest Court and regional Courts. She along with Lucknow based NGO Lok Prahari petitioned in the Supreme Court to strike down section 8(4) of the Representation of the People Act, 1951 to disqualify a legislator immediately when convicted for two or more years' prison.

The Supreme Court ruled that any M.P., M.L.A., or M.L.C. who is convicted of crime and awarded a minimum of two years imprisonment, loses membership of the House with immediate effect.

In *Common Cause, a Registered Society* v. *Union of India*[23], The Supreme Court reversed the burden of proof on the candidate claiming the benefit of the exception created by the Explanation to Section 77, holding that even when expenses are claimed by a party, the (rebuttable) presumption shall be that they have been incurred or authorized by the candidate. The Court noted the expenditure (including that for which the candidate is seeking protection under Explanation I to Section 77 of R.P. Act) in connection with the election of a candidate - to the knowledge of the candidate or his election agent - shall be presumed to have been authorized by the candidate or his election agent. It shall, however, be open to the candidate to rebut the presumption in accordance with law.

In *Shiv Kripal Singh* v. *V.V. Giri*[24], Brief fact of the case is the main ground of attack was undue influence alleged to have been committed by the returned candidate, his supporters and agents. It was alleged that a number of supporters of Shri V.V.Giri with his consent or connivance, published and freely distributed a pamphlet in which very serious allegations were made against Shri Sanjiva Reddy, a rival candidate, which amounted to corrupt practice. The pamphlet allegedly created in the minds of the voters the impressions that were Shri Reddy elected to the office of the President, Rashtrapati Bhavan would become a center of voice and immorality. The Court however, held that there was no evidence whatsoever to show that the respondent had any connection with the pamphlet, or its distribution, or that it was distributed with his knowledge and connivance. A threat to exercise undue influence must be deliberately uttered with the intention of carrying it into effect, and the loss to be inflicted must not be too remote.

In *People's Union for Civil Liberties* v. *Union of India*[25], Three writ petitions under Article 32 of the Constitution of India were filed challenging the validity of the Representation of People (Amendment) Ordinance, 2002. During the pendency of petitions, the Ordinance was repealed and the Representation of the People (3rd amendment) Act, 2002 was notified. Section 33A of amended Act provides that a candidate shall furnish certain information mentioned therein. Section 33B (ibid) provides

22. (2013)7 SCC 653.
23. (1996) 2 SCC 752.
24. AIR 1970 SC 2093.
25. AIR 2013 SC 2363.

that candidate to furnish information only under the Act and the Rules made there under.

The Court held that:

(a) Legislature is entitled to change the law with retrospective effect which forms the basis of a judicial decision by following the limitations in order not to violate the fundamental rights.

(b) The amended Act does not wholly cover the directions issued by the Court.

(c) Right to vote would be meaningless unless the citizens are well informed about the antecedents of a candidate.

(d) The attempt of the Court should be to expand the reach and ambit of the fundamental rights by process of judicial interpretation and it has been done by this Court consistently.

In result, Section 33-B of the amended Act held to be illegal, null and void and petitions disposed of accordingly.

CONCLUSION

Free and Fair elections constitute the foundation of Democracy which reflects the will of the people. The nature of any particular system of law is a reflection of the spirit of people who evolved it. The Constitution of India preserves the rights of every voter. The constitutional provisions provide protection as well as freedom of choice to every voter. The urgency of electoral reforms is further aggravated by the fact that every delay in bringing electoral reforms is infringing the fundamental rights of millions of citizen.[26] Hence it is important to conduct free and fair election so that the people may feel sovereign in the true sense. Despite the best intentions of the drafters of the Constitution and the Members of Parliament at the onset of the Indian Republic, the fear of a nexus between crime and politics was widely expressed from the first general election itself in 1952. Criminal backgrounds are not limited to contesting candidates, but are found among winners as well. Of these 5,253 candidates with serious criminal charges against them, 1,187 went on to winning the elections they contested i.e. 13.5% of the 8,882 winners analysed from 2004 to 2013. Overall, including both serious and non-serious charges, 2,497 (28.4% of the winners) had 9,993 pending criminal cases against them. In the current Lok Sabha, 30% or 162 sitting MPs have criminal cases pending against them, of which about half i.e. 76 have serious criminal cases. Further, the prevalence of MPs with criminal cases pending has increased over time. In 2004, 24% of Lok Sabha MPs had criminal cases pending, which increased to 30% in the 2009 elections. The lack of transparency, secrecy and mounting of corruption has led to create injustice. People need to understand how their own political system works or could work. It is possible through educating the people at large. The government must enable people's active participation at many levels of debate, dialogue

26. Available at: http://www.legalservicesindia.com/article/article/electoral-reform-an-approach-to-effective-democracy-1198-1.html , 14/9/2017 at 9.30 am.

and decision making. This requires tolerant government institutions to take up free and free discussions of policy and change. Such an open atmosphere assisted by freedom of speech democratic institutions, free elections and respect for human rights and ensuring the full participation of women and minorities is likely to require affirmative action. In the present day global world the technology has been growing so fast that an automated and well designed online system broken-down to district level and it can be created without much hassle. The database would be centrally computerized by the Election Commission and each voter/ adult citizen would have a unique bar-coded ID number. This ID number would be for life. However, our system is still plagued by many vices. Our election commission tries its best to weed out the virus of malpractices. It has always devised better systems and is using advanced scientific technologies for maintaining the high reputation of the Indian elections. However, the success of reforms will largely depend upon the will of the political parties to adhere to and implement such reforms. An independent media and an enlightened public opinion have no substitute in pushing through reforms. The Commission has taken several new initiatives in the recent past. Few notable steps and initiatives have already taken by the government with the help of media and other agencies in order to prohibit the criminalization of politics as well as to ensure the free and fair election in the Democratic country of India.

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The Socio Legal Aspect of Surrogacy in Indian Perspective: An Overview

***Rajesh Bhowmik*[1]**

INTRODUCTION

The importance of fertility in human beings is relied on men and women, their fertility to produce children to carry on the family line, as life exists because of procreation. To celebrate this power of procreation, many religions practice fertility rituals. During these fertility rituals, the power of procreation is honoured by worshipping fertility Gods such as Lord Shiva and Lord Kartikeya. In Greek Mythology, 'Eros' was the primitive God of lust, love and intercourse and was worshipped as a fertility deity. Fertility rituals and fertility symbols such as Shiva Lingam, which is the most powerful fertility symbol in Hinduism consists of the critical union of Shiv-Parvati, dominates the Hindu religious practices.[3]

But the destruction, deviation or extinction of this special feature of fertility is considered as a curse for the individual and for the entire family. Ideally, creature has empowered all living beings with the power of production or reproduction. But because of known and unknown natural and scientific effects, this special feature can be found in a vegetative stage and the requirement is to get the solution of the problem specifically for human beings. Reproductive problems are not new rather common in all. Some are curable and some cannot be cured and this state of human existence is considered pathetic since long.[4]

MEANING OF SURROGACY

The word surrogate, from Latin 'surrogatus' means appointed to act in place of. Surrogacy is an arrangement between a woman and a couple or individual to carry and deliver a baby. A surrogate mother is a woman who carries a child for someone else, usually a couple struggling with fertility issues. After the child is born, the surrogate

1. LL.M., Department of Law, Cooch Behar Panchanan Barma University
2. Rachel Cook, Shelley Day Sclater, and Felicity Kaganas (eds.), *Surrogate Motherhood: International Perspectives* 21 (Bloomsbury Publishing, 2003).
3. Vinaya Ghimire, "Hindu Gods and Symbols of Fertility", *available at*: http://vinayaghimire.hubpages.com/hub/fertility-symbols-and-fertility-rituals-in-hinduism (last visited on June 10, 2017)
4. Ibid

mother surrenders it to the people who have hired her. The surrogate mother is also known as 'Gestational Carrier'.[5]

Surrogacy is a method of reproduction whereby a woman agrees to become pregnant and deliver a child for a contracted party. She may be the child's genetic mother (the more traditional form of surrogacy), or she may, as a gestational carrier, carry the pregnancy.[6]

The concept of "rent a uterus" in fact may be readily acceptable in the more analytical frame of the mind with the argument "at least the baby is made with our gametes, even though nourished in a rented body". With sisters, sisters-in-law and even mothers lending a hand or rather a uterus, it received greater acceptability (even if future consequences arouse, it could be solved very easily and the helping hand of near and close relative may not be taken out after delivering the child).[7]

DEFINITIONS

According to Bernard Dickens, Professor of Law at the University of Toronto, an initial difficulty in addressing surrogate motherhood arrangements is that they do not conform to predictable patterns of behaviour, and no legal language exists to describe the human and social relationships that they create.[8]

The Assisted Reproductive Technologies (Regulation) Bill, 2010 defines "surrogacy" as an agreement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention to carry it and hand over the child to the person or persons for whom she is acting as a surrogate.[9]

The Black's Law Dictionary

Surrogate Mother

(i) A woman who carries out the gestational function and gives birth to a child for another, especially a woman who agrees to provide her uterus to carry an embryo throughout pregnancy, typically on behalf of an infertile couple, and who relinquishes any parental rights she may have upon the birth of the child.
   - A surrogate mother may or may not be the genetic mother of a child.

(ii) It categorises surrogacy in two classes— traditional surrogacy and gestational surrogacy. It may be commercial or altruistic, depending upon whether the surrogate receives financial reward for her pregnancy or relinquishment of child. In any of these cases, a number of controversies can arise, as it involves the social, ethical as well as legal issues into it.[10]

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5. Yale Medicine, "Surrogacy" *available at*: https://www.yalemedicine.org/conditions/gestational-surrogacy#:~:text=If%20a%20woman%20is%20una ble,in%20vitro%20fertilization%20(IVF) (last visited n June 19, 2019). AM
6. Ibid.
7. Ibid.
8. Ibid.
9. Ibid.

KINDS OF SURROGACY

There are various kinds of surrogacy practices, such as;

i) **Traditional or Partial Surrogacy:** In traditional surrogacy (also known as the straight method) the surrogate is pregnant with her own biological child, but this child was conceived with the intention of relinquishing the child to be raised by others such as the biological father and possibly his spouse or partner. The child may be conceived via sexual intercourse, home artificial insemination using fresh or frozen or impregnated via IUI (intrauterine insemination), or ICI (intra cervical insemination) which is performed at a fertility clinic. Sperm from the male partner of the "commissioning couple" may be used, or alternatively, sperm from a sperm donor can be used. Donor sperm will, for example, be used if the "commissioning couple" are both female and whether child is commissioned by a single woman.[11]

ii) **Gestational or Total Surrogacy:** In gestational surrogacy (Host method) the surrogate becomes pregnant via embryo transfer with a child of which she is not the biological mother. She may have made an arrangement to relinquish it to the biological mother or father to rise, or to pregnant who is unrelated to the child (e.g. because the child conceived using egg donation, sperm donation or is the result of a donated embryo). The surrogate mother may be called the gestational carrier.[12]

iii) **Altruistic Surrogacy:** Altruistic surrogacy is a situation where the surrogate receives no financial reward for her pregnancy or the relinquishment of the child (although usually all expenses related to the pregnancy and birth are paid by the intended parents such as medical expenses, maternity clothing, and other related expenses).[13]

iv) **Commercial Surrogacy:** It is form of surrogacy in which a gestational carrier is paid to carry a child to maturity in her womb and is usually restored to by higher income infertile couple who can afford the cost involved or people who save and borrow in order to complete their dream of being parents. This procedure is legal in several countries including in India whether due to high international demand and ready availability of poor surrogates it is reaching industry proportions. Commercial surrogacy is sometimes referred to by the emotionally charged and potentially offensive terms "wombs for rent", "outsourced pregnancies" or "baby farms"[14]

In India surrogacy is purely a contractual understanding between the parties. Surrogacy in India is unregulated although The Indian Council of Medical Research (ICMR) has set "national guidelines" to regulate surrogacy, these are simply guidelines.

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10. Ibid.
11. Dr. S.A.K.Azad, "Surrogacy in India – Problems & Law" XL(1) *Indian Bar Review* 63 (2013).
12. Ibid.
13. Ibid.

There are no stipulations as to what happens if this surrogacy contract is violated.[15]

India is emerging as a leader in International surrogacy and a destination in surrogacy related fertility tourism. Since commercial surrogacy has been legalised by Supreme Court in the Japanese case of Baby Manji Yamada in the year 2008. Indians surrogates have been increasingly popular with fertile couples in industrialised nations because of relatively low cost. Indian clinics are at the same time becoming more competitive, not just in the pricing, but in the hiring and retention of Indian females as surrogates. Clinics charge patients between $ 10000 to $ 28000 for complete package including fertilization, the surrogate's fee and the delivery of baby at a hospital.[16]

ELIGIBILITY CRITERIA FOR A SURROGATE MOTHER

The question that who can be a surrogate to beget a child for another is a very complex question to answer because of its sensitivity and also because of the various issues which it raises. This is due to the fact that each and every woman has the right to act as a surrogate for another or has the right to rent her womb which can be traced to right to personal liberty and privacy, property right over body and right to enjoy benefits of developments in science and technology. However, the indiscriminate use of this right by each and every woman will raise a bundle of legal issues. For example, if an unmarried girl chooses to exercise this right it would come into conflict with public morality and also raise the issue whether it will amount to prostitution. Likewise, if married woman opts to be a surrogate for another it may be criticized as adultery. Further, if postmenopausal woman acts as a surrogate it may affect the health of the child as well as health of the woman. Therefore it is essential to determine who can be a surrogate mother i.e. it is necessary to identify the eligibility criteria for exercising this right. However some of the countries have mentioned a few conditions regarding who can be a surrogate. Different countries have given different conditions for being a surrogate and since there is no uniformity with respect to these conditions, it is essential to examine all these legislations of different countries in order to arrive at a proper eligibility criterion suitable to Indian situations.[17]

i) **Single Woman:** A single woman may include an unmarried girl, divorced woman and a widow. An unmarried girl becoming pregnant and giving birth to a child is considered as a taboo in Indian society and if it is for the purpose of gaining money by acting as a surrogate, it would be considered as an immoral activity. It may be considered as prostitution and may affect the future life and marriage prospects of the girl. Further such indiscriminate use of surrogacy would create situation of unmarried mothers in the society and it is an unacceptable situation in India. In countries which have legislations regulating surrogacy, the right to act

14. Ibid
15. Rekha P. Pahuja, "Problem of Surrogacy – A Critical Study" XII (2) *Nayaya Deep* 113 (2011).
16. Ibid.
17. Anesh V. Pillai , "Surrogacy under Indian legal system: Legal and Human Rights Concerns", *available at*: https://dyuthi.cusat.ac.in/xmlui/bitstream/handle/purl/5066/Dyuthi-T2129.pdf?sequence=4 (last visited on June 8, 2019).

as a surrogate is restricted only to woman who has at least one child of her own. However most of these legislations are silent with respect to marital status of the surrogate and some of the legislations are specific.[18]

ii) **Married Women:** Among the various categories of women, those women who are married are most eligible to act as a surrogate. However the question that primarily arises is, whether it will amount to adultery and secondly whether the consent of the husband is required. With respect to the first question, most of the legislations mention that the surrogate woman must have at least one child and their marital status is irrelevant. This means that a surrogate woman can be married or unmarried. Moreover, the express recognition that a woman who has a child can act as a surrogate shows that, it would not amount to adultery. In India, the ICMR Guidelines specifically declare that, the artificial reproductive technology used for married woman with the consent of the husband does not amount to adultery on part of the wife or the donor.[19]

With respect to the consent of husband most of the legislations are silent. However in India the proposed ART Bill, 2010 under section 34 (16) states that, in the event that the woman intending to be a surrogate is married, the consent of her spouse shall be required before she may act as such surrogate. The ICMR Guideline states that, the artificial insemination by donor without the husband's consent can be a ground for divorce or judicial separation. It is submitted that the same condition can be applicable to a surrogate woman also.[20]

iii) **Post Menopausal Woman:** There have been many instances of post menopausal women acting as a surrogate to beget a child for another. For example, the 61 year old Kristine Casey gave birth to a male baby in 2010. Likewise 56 year old Jaci Dalenberg gave birth to triplet girls in 2008. It is argued that surrogacy acting as a surrogate at this age may affect the health of the child as well as the health of the surrogate. Considering this aspect most of the countries have fixed an upper age limit for the surrogate. For example, in Russia the upper age limit is 35 years old and in Ukraine it is 40 years[21].

From the above discussion it can be summarized that, a woman can be allowed to act as a surrogate only if she satisfies the following eligibility criteria:

i) **Age Limit:** A woman acting as a surrogate must be between 25 – 45 years of age.

ii) **Marital Status:** Surrogate woman must be married and they should obtain consent of their husband if he is alive. An unmarried girl should not be allowed to be a surrogate; however divorced as well as a widows can be allowed.

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18. Ibid.
19. The ICMR Guidelines, R. 3.16.2.
20. Ibid.
21. "Surrogate Grandmother Gave Birth to Her own Daughter s Triplets", *The Telegraph*, Nov. 11, 2008, *available at*: http://www.telegraph.co.uk/news/worldnews/northamerica/usa/3441499/Surrogategrandmothergave-birth-to-her-own-daughters-triplets.html (last visited on June 8, 2017).

iii) **Fitness:** Surrogate woman must be mentally and physically fit for carrying a child to a full term and must be free from any disability which adversely affects this capacity. She must also be free from any hereditary and communicable diseases etc.

iv) **Previous Experience:** It is desirable that the woman acting as a surrogate must have at least one child before participating in surrogacy. This will help to avoid the problems related to first pregnancy.

v) **Family Relatives:** Relatives can be allowed only if they are having the status of a sister or sister-in-law with the intended parents and only for gestational surrogacy.

vi) **Maximum Limit:** A woman can be allowed to act as a surrogate up to a maximum of three times including her own child.

Any legislation dealing with regulation of surrogacy should consider these criteria's while determining the eligibility of a woman to act as a surrogate.[22]

ANCIENT INDIAN SURROGACY

Mythological surrogate mothers in India are well known. Yashoda played mother to Lord Krishna though Devki and Vasudeva were biological parents. Gandhari made Dhiriarasthra the proud father of 100 children though she had no biological relation with them.[23]

Bhawan Vyasha too found out that there were 101 cells that were normal in the mass. He then developed these cells and that is how the Kauravas were born.[24]

There are also many other existences where it has been found the child was produced without the female. Once such example was when Sage Gautama produced two children Kripa and Kripi, with his own semen. These were test –tube babies. In similar manner Drona was also produced by Sage Bharadwaj. Drona was the teacher of Kauravas and Pandayas. Even the birth of Drihtadyumna and Draupadi was also born without the sexual relation, this shows the supernatural powers of the ancient Rishis. Dronacharaya and King Draupada were enemies and therefore King Draupada asked the Rishis to make a child who could kill his enemy. The Rishis produced a child which was made out of his semen in a Yajnakunda from which Drihtadyumna and Draupadi. Even Bhagvad Gita too has existence of child born without sexual relation. The story narrates that even Lord Krishna was born without any kind of sexual relation. Kansh the maternal uncle of Krishna heard a announcement through the angles that he will be killed by his sister's eight child. Kansh on the other hand decided to kill all the children born out of his sister Devki. So, it was then the seventh pregnancy, the baby from Devki's womb was transferred to Rohini's womb, to prevent the child from killing by Kansh.[25]

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22. *Supra* note 17
23. *Supra* note 5
24. Ibid

However, in Islam second largest followed religion, surrogacy was prohibited, because they believed that evils may arise out of surrogacy. Islams terms it as 'Haraam' (forbidden) as a woman gets impregnated with someone's sperm is injected into the woman's womb other than her husband. According to Muslim Law it is unlawful to implant the embryo or sperm into the womb of the woman.[26]

According to Dr.Abd-al-Azeem at Mat'ani of al –Azhar University, renting wombs in one of the innovations of western civilisation, which is purely materialistic civilisation which does not, gave any weigh to moral values and principles. Perhaps, the most compelling evidence supporting this view is the ayah in Surah-al- Mujadalah (52:2) where the Holy Quran says: "their mothers are only those who conceived them and gave birth to them (Waladana hum)."[27]

MODERN INDIAN SURROGACY

India's much known Dr. Subhas Mukhopadhyay produced the world's second test-tube- baby, Kanupriya Agarwal alias 'Durga' the girl who was brought into the world by the doctor. Both Dr. Mukhopadhyay and British scientists Robert G Edwards and Patrick Steptoe creators of the world's first test-tube-baby-started work at the same time. The Indian baby was born on October 3, 1978, just 67 days after Marie Louise Brown was born on July 25, 1978. However, unfortunately Dr. Mukhopadhyay was prevented from carrying out further work on in vitro fertilisation and was transferred away from Kolkata. He was also prevented from going to Tokyo to present a paper. Frustrated and in failing health, Mukhopadhyay killed himself on June 19, 1981. According to scientific records, "Harsha" who was born on August 16, 1986 became the first human test-tube-baby of India. The credit for this achievement went to T.C. Anand Kumar, director of Institute for Research in Reproduction (IRR) of Indian Council of Medical Research (ICMR). In 1997, he went to Kolkata to participate in a Science Congress. It was there that all the research documents of Mukhopadhyay were handed over to him. After meticulously scrutinising and having discussions with Durga's parents, he became certain that Mukhopadhyay was the architect of first human test-tube-baby in India. In T.E. Anand Kumar's initiative, Mukhopadhyay was mentioned as the architect of the first Indian test tube-baby in a document related to the subject of artificial intercourse in ICMR.[28]

LAWS RELATING TO SURROGACY IN INDIA

Legislation made to facilitate and regularize such surrogacy agreements should recognize a surrogate child to be the legitimate child of the commissioning parent(s) without there being any need for adoption or even declaration of guardian. A legitimate child born by way of surrogacy agreements will have all the rights i.e., the rights of a natural born child with relation to the commissioning parents. The birth certificate of

25. Ibid
26. Ibid
27. Ibid

the surrogate child should contain the name(s) of the commissioning parent(s) only. Right to privacy of donor as well as surrogate mother should be protected. Sex-selective surrogacy should be prohibited. Cases of abortions should be governed by the Medical Termination of Pregnancy Act, 1971.[29]

JUDICIAL APPROACHES TOWARDS SURROGACY

India, surreptitiously, has become a booming centre of a fertility market with its "reproductive tourism" industry reportedly estimated at Rs. 25,000 crores in present value (US Dollars 5,000 million). Clinically called "Assisted Reproductive Technology" (ART), it has been in vogue in India since 1978 and today more or less estimated 2, 00,000 clinics across the country offer artificial insemination, IFV and surrogacy. So much so, in the recent decision of the Supreme Court on 29th September, 2008 in Baby Manji Yamada's[30] case it was observed that "commercial surrogacy" reaching "industry proportions is sometimes referred to by the emotionally charged and potentially offensive terms wombs for rent, outsourced pregnancies or baby farms." It is presumably considered legitimate because no Indian law prohibits surrogacy. But then, as a retort, no law permits surrogacy either. However, the changing face of law is now going to usher in a new rent-a-womb law as India is set to be the only country in the world to legalise commercial surrogacy.[31]

The complicated case of Japanese Baby Manji born on 25th July, 2008 to an Indian surrogate mother with IVF technology upon fertilisation of her Japanese parents' eggs and sperms in Tokyo and the embryo being implanted in Ahmedabad, triggered off complex knotty issues. The Japanese biological parents divorced and the mother disowned the infant upon its birth in India. The grandmother of the infant petitioned the Supreme Court challenging the directions given by the Rajasthan High Court relating to production and custody of baby Manji Yamada. Her request to the apex court for permission for the infant to travel with her and for issuance of a passport under consideration with the Central Government was directed to be disposed off expeditiously. Following the directions of the Supreme Court dated 29th September, 2008, the Regional Passport Officer in Jaipur issued an "Identity Certificate" to the baby on 01st November, 2008. Thereupon, the grandmother Emiko Yamada flew out to Japan with the baby. A Pandora's box has opened with a floodgate of questions and issues related to ethics

28. Ibid
29. "Laws relating to surrogacy in India" *available at*: http://acmlegal.org/category.php?id=1(last visited on (June 8, 2017).
30. JT 2008 (11) SC 150
31. Anil Malhotra & Ranjit Malhotra, *Surrogacy in India*, (Universal Law Publishing House, 2nd edn., 2016).

and legality surrounding surrogacy with Japanese ***Baby Manji's[32] case*** and even her citizenship status remained unclear.[33]

In *Jan Balaz v. Anand Municipality*[34] the Gujarat High Court conferred Indian citizenship on two twin babies fathered through commercial surrogacy by a German National in Anand district in Gujarat. This landmark case conferred an Indian born child by way of surrogacy all the rights which an Indian citizen enjoys.

In *Suresh Kumar Koushal v. NAZ Foundation*[35], on 11th December, 2013 the Supreme Court has set aside the Delhi High Court judgment and has held that section 377 IPC does not suffer from any constitutional infirmity. The Apex Court has held that "notwithstanding this verdict, the competent legislature shall be free to consider the desirability and propriety of deleting section 377, IPC from the statute book or amend the same as per the suggestion made by the Attorney General." Initially, there was no bar to gay couples hiring a surrogate mother to deliver children for gay couples in India. However, new Indian Visa Regulations dated 9th July, 2012, issued by the Ministry of Home Affairs, Government of India, require that only a foreign couple i.e. a duly married man and woman whose marriage should have sustained for at least two years will be allowed to visit India for commencing surrogacy on medical and not tourist visas upon fulfilling conditions prescribed therein. These new medical Indian visa regulations have become effective w.e.f. 15th November, 2012. Hence, single persons, gay parents and unmarried partners will no longer be allowed to come to India on Tourist visas for surrogacy purposes. However, thereafter, on 5th February, 2013, a limited relaxation in such matters has been permitted on a case to case basis by Ministry of Home Affairs only in respect of cases where the surrogacy had already been commissioned and children born out of surrogate arrangements were due to be born or have been born in the year 2013 only. However, thereafter, infants born from such surrogate arrangements to foreign parents will not be granted Indian citizenship and henceforth no surrogate arrangements for single persons, gay parents and unmarried partners will be allowed in India.[36]

In *K. Kalaiselvi v. Chennai Port Trust, Represented by the Chairman, Chennai*[37]

Maternity Benefit Act, 1961, Madras Port Trust (Leave) Regulations, 1987, sanction of maternity leave to surrogate worker were discussed in this case. The petitioner was working as an Assistant Superintendent in respondent/Port Trust who requested the respondent for sanction of maternity leave to look after newly born girl child and reimburse medical expenses and also to issue FMI Card incorporating newly born child through representation. The respondent cancelled leave granted for a period of 59 days and rejected request for inclusion of female child in FMI card. Hence, the

32. JT 2008 (11) SC 150
33. *Supra* note 31
34. AIR 2010 Guj. 21
35. AIR 2014 SC 563
36. *Supra* note 31
37. 2013 (2) CTC 400

instant writ petition was filed. The main issue involved was whether the petitioner working in the Chennai Port Trust was entitled to avail maternity leave similar to that of leave provided under Rule 3-A of the Regulations in the absence of any legal provision and even in case where she gets the child through an arrangement by 'surrogate parents'.[38]

The Madras High Court did not find anything immoral and unethical about petitioner having obtained a child through surrogate arrangement. When once it was admitted that said minor child was daughter of petitioner and at the time of application, she was only one day old, she was entitled for leave akin to persons who are granted leave in terms of Rule 3-A of the Regulations. Even in case of adoption, adoptive mother did not give birth to child, but yet necessity of bonding of mother with adoptive child was recognized by Central Govt. It was held that the petitioner was entitled for leave in terms of Rule 3-A of the Regulations. Thus, respondent was directed to grant leave to petitioner in terms of Rule 3-A of the Regulations recognizing child obtained through surrogate procedure. The petition was thus allowed. The decision of this case raises an issue whether a surrogate mother, if in government job, enters into a surrogacy agreement, is entitled to special surrogacy leave in Indian scenario?[39]

In Re Melissa's[40] *case,* Mrs. Whitehead's claim of the right to companionship of her child was dropped as her right to companionship had been restored by partly order allowing her the visitation rights. As far as Mr. Stern was concerned, the Court refused to give an all-encompassing definition to his claim to the right to procreation simply because it reasoned that giving him the right would be to refuse Mrs. Whitehead the same right. The Court held that the right to procreate very simply is the right to have natural children, whether through sexual intercourse or artificial insemination and it is no more than that. The Court further held that Mr. Stern has not been deprived of that right because the right of procreation is best understood and protected if confined to its essentials, and that when dealing with rights concerning the resulting child, different interests come into play. There is nothing in our culture or society that suggests a fundamental right on the part of the father to the custody of the child as part of his right to procreate when opposed by the claim of the mother to the same child.[41]

On the other hand, the impact of Baby Melissa's case in New Jersey is that surrogacy contracts are void and payment of money for surrogacy is 'perhaps' criminal. The judgment also states that a woman could 'volunteer' to become a surrogate but on the condition that she is given the right to assert her parental rights.[42]

In 2009, New Jersey Superior Court ruled in *A.G.R. vs. D.R.H & S.H.*[43] and held

38. Supra note 16
39. Ibid
40. 537 A.2d 1227 (N.J. 1988)
41. Supra note 37
42. Ibid
43. No. FD-09-1838—07 (N.J. Super. Ct. Chi. Div., Dec. 23, 2009)

that In re Baby Melissa case applies to gestational surrogacy as well as traditional surrogacy cases. In A.G.R. case the intended parents were a homosexual male couple. They created an embryo using an anonymous donor ovum and the sperm of one of the husbands. The sister of the other husband carried the embryo to term and originally delivered the child to her brother, but a year later she asserted her own parental rights even though she was not genetically related to the child. Judge Francis Schultz relied on *In re Baby Melissa*[44] to recognize the gestational mother as the child's legal mother. However, a later ruling in 2011 awarded full custody to the biological father.[45]

CONCLUSION AND SUGGESTIONS

(i) Considering the importance of having a child in all societies as well as the fact that childlessness has serious adverse impact on the life of such couples/individuals, the right to procreation must extend to include the right to access to assisted human reproductive technologies for begetting a child.

(ii) In view of the increasing instances of cross-border surrogacy practices, it is necessary that international community must come to a consensus regarding the legality of such practices so as to avoid hardships to the intended parents/parent and surrogate child.

(iii) In order to deal with any dispute relating to surrogacy and surrogacy contracts, states shall establish a designated court comprising of legal and medical experts.

To conclude it can be said that Surrogacy is unique chance for childless partners to give a birth to their own child. With the help of surrogacy a woman can become a mother even if she is not capable to bearing a child (for instance, when she has a rudimentary or removed uterus). In this case the method of in vitro fertilization helps to achieve the development of several embryos from parents' reproductive cells which are implanted (transferred) to surrogate mother's uterus that is able to bear and give a birth to child. Actually, the surrogate mother bears a baby that is genetically a child of those people who provided the genetic materials.

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44. 537 A.2d 1227 (N.J. 1988)
45. Supra note 37

21

A Study of the Impact of Climate Change on Agro-Biodiversity in Eastern Himalayan Region

***Indrani Kundu*[1]**

INTRODUCTION

Eastern Himalayas comprise of the tracts of Darjeeling hills, Sikkim, Arunachal Pradesh and eastern Bhutan. Important rivers that flow through these regions are Brahmaputra River and its tributaries through Assam, Teesta through Darjeeling Hills and Sikkim while Manas river drains Bhutan and a part of Arunachal Pradesh. This region can be divided into four climatic regions, i.e. arctic, sub-arctic, temperate, subtropical, and warm tropical. The forests are moist, dense, evergreen, semi-evergreen, or temperate.[2] Throughout the year the humidity of this region is high because of its higher level of precipitation. This region has become a home of several breeds of birds, variety of animals and different species of trees due to its biodiversity. The sloping terrain of Himalayan region has confided the source of economic activities to traditional farming, animal husbandry while some of them are engaged in forestry and tourism business. However, forestry, agriculture and animal husbandry are never enough to meet the economic need of a place. Therefore, besides, the primary sources of income, several developmental works are also carried on in this region by the Indian Government in order to provide alternative way to the primary sources of earning. Amongst developmental works Teesta Low Dam Hydroelectric Project by the Ministry of Power, Government of India demands special mention.[3]

The geographical position of Eastern Himalayan Region has made it vulnerable to environmental disasters. While some think that developmental activities may give rise to several environmental issues, Indian Judiciary time and again has pronounced judgment in favour of 'Sustainable Development'. However, the undeniable fact is

1. Assistant Professor, Department of Law, University of North Bengal, Darjeeling, West Bengal, INDIA

2. Introduction of the geographical area of Eastern Himalayas, available at http://edugreen.teri.res.in/explore/life/eastern.htm (visited on 14.05.2018).

3. Teesta Low Dam Hydroelectric Project by the Government of India, Memorandum of it is available at https://powermin.nic.in/sites/default/files/uploadsTLD_STAGE_III_HE_PROJECT_WEST_BENGAL_132MW. pdf (visited on 16.05.2018)

climate change has started effecting the ecosystem of Eastern Himalayan region resulting into loss of habitat and species, soil erosion, pollution etc.

Climate change denotes change in climate due to human intervention. Issue related to climate change has become a global concern and synonymous to development. The United Nations Framework Convention on Climate Change has confirmed that growing human intervention is the main reason of increasing greenhouse gas. The increase in greenhouse gas makes earth's surface warmer and also adversely effects natural ecosystem and humankind.[4]

INTERNATIONAL INSTRUMENTS FOR CLIMATE CHANGE

Climate change is an inevitable consequence of development. Earth's temperature depends on the balance between the energy entering and leaving the planet's system. Earth gets warmer when it absorbs the heat that comes from Sun. Earth avoids warming when this energy is reflected back. If this energy is released back into space then Earth cools down.[5] Temperature on this planet increases when the atmosphere traps the heat radiating from earth to space. It has been proved that this energy is trapped within the planet when the amount of certain gases increases within the atmosphere. These gases are known as Greenhouse gas.[6]

The main reason of the emission of greenhouse gas is human activities in developed and developing countries. The emission of greenhouse gases is the main reason of Global Warming which in turn causes climate to change its nature.

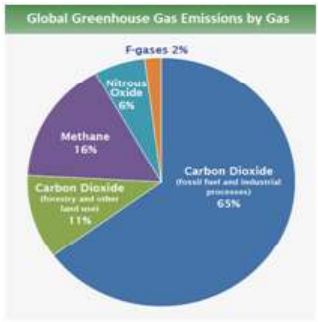

Fig. 1. Percentage of greenhouse gases so emitted.[7]

4. United Nations Framework Convention on Climate Change, *available at* https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf (visited on 02.06.2018).
5. Causes of climate change, available at https://19january2017snapshot.epa.gov/climate changescience/causes-climate-change_.html (visited on 20.05.2018)
6. Harmful effect of Greenhouse gas, available at https://climate.nasa.gov/causes/ visited on 20.05.2018)
7. Percentage of emitted greenhouse gases. Available at IPCC (2014) based on global emissions from 2010. Details about the sources included in these estimates can be found in https://www.ipcc.ch/ report/ar5/wg3/(visited on 20.05.2018).

The first ever convention on the conservation of environment was the United Nations Conference on Environment in 1972 which is also known as the Stockholm Conference. The Stockholm Conference was held to proclaim that co-operation between the stakeholders for the preservation of environment is necessary in order to enjoy the right to life. The Conference was able to result into the formation of 26 Principles for the preservation of environment.[8]

United Nations Convention on Biological Diversity held at Rio de Janeiro in 1992 has reaffirmed the sovereign right over the biological resources within its territory.[9] This Convention has reiterated sustainable use of biological resources for the developmental work and equitable sharing of its benefits.

Paris Agreement is the first Convention which tries to address the climate change issue with the help of developing countries. The convention has also recognised that increased use of greenhouse gases is one of the causes for the climate change. Therefore, there has to be an effort to reduce the use of greenhouse gases globally. This Agreement came into force in 2016. India is a signatory of this Agreement. It has also ratified the Agreement and the same has come into force in India in November, 2016.[10]

The preamble of Kyoto Protocol to the United Nations Framework Convention on Climate Change shows that this protocol is an extension of United Nations Framework Convention on Climate Change, 1992. The Kyoto Protocol implemented the objectives of UNFCC, 1992 in order to address global warming by reducing the concentration of greenhouse gases in the atmosphere. The main objective of this protocol was to control the emission of greenhouse gases.[11]

Montreal Protocol was finalized in 1987. Montreal Protocol on Substance that Deplete the Ozone Layer is an environmental treaty entered into the international community in order to save human health and the environment by phasing out man made chemicals. This protocol is assumed to be the first successful treaty because of its universal ratification by the international community. In October, 2016 the parties to the Montreal Protocol has adopted Kigali amendment to decrease the production and consumption of hydrofluorocarbons (HFCs) worldwide. HFC is one of the gases for ozone layer depletion.[12]

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8. Stockholm Conference. Available at http://bemonaco2011.stakeholderforum.org/index.php?option=com_content&view=article&id=47&Itemid=64 (visited on 20.05.2018).
9. Principle 2 of Rio Declaration, 1992. Full text available at http://www.culturalrights.net/descargas/drets_culturals411.pdf (visited on 27. 05.2018)
10. Original full text of Paris Agreement, available at https://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf (visited on 29.05.2018)
11. Original full text of Kyoto Protocol, available at https://unfccc.int/resource/docs/convkp/kpeng.pdf (visited on 29.05.2018).
12. Montreal protocol, available at https://www.unido.org/sites/default/files/2013-04/MPB_portfolio_25y_0.pdf (visited on 29.05.2018).

III. NATIONAL INSTRUMENT FOR CLIMATE CHANGE

There was no express provision regarding protection of environment in the Constitution of India. However, with the growing concern for the environment protection two new Articles were introduced through 42nd Amendment in 1976. Articles 48 A and 51 A (g) have been inserted through 42nd Amendment. Article 48 A of the Constitution of India is a directive in nature to the State that the State must endeavour to protect, improve and safeguard the environment. While Article 51 A (g) of the Constitution of India imposes duty fundamental in nature upon its citizens to protect and improve natural environment including forest, lake and wild life. Prior to the insertion of both these Articles Indian Judiciary has interpreted Article 21 of the Constitution of India in order to ensure protection of environment through several judgments.

The Biological Diversity Act, 2002 has been operative in India since 2003. The object of enacting the Act is to conserve biological diversity, ensuring sustainable use of its components and fair and equitable sharing of its benefits arising out of genetic resources. This Act has also emphasised that India is a party to the Convention on Biological Diversity held at Rio de Janeiro in 1992.

The use of biological resources can take place for the following purposes-

i. Commercial use,

ii. Research purpose,

iii. Bio survey and Bio- utilization,

iv. Transfer of Research and application for Intellectual Property Rights.

Section 3 of this Act has prohibited following persons to undertake Bio-diversity activities without prior approval-

i. A non-citizen,

ii. A non-resident Indian,

iii. A body corporate, association or organisation which has not been incorporated in India under any law in force for the time being and which has a non-Indian participant.

Section 18 of the Act has provided for the establishment of National Bio-diversity Authority and State Bio-diversity Board. This Act has also permitted appeal to the National Green Tribunal if necessary.

The Wild Life (Protection) Act, 1972 has also prohibited hunting of wild animals and picking, uprooting of specified plants without permission.[13] This Act also has the power to declare any area as sanctuary if it is found to have adequate ecological, faunal, flora, geomorphological, natural or zoological significance.

The Indian Forest Act, 1927 empowers the State Government to declare any area

13. Chapter III of Wile Life (Protection) Act, 1972 has prohibited hunting of wild animals. Chapter III-A of this Act has provided provision for the protection of specified plants.

as Reserved Forest.[14] The Act has provided a list of activities which are prohibited within the area protected under this Act.[15]

IV. AGRO-BIODIVERSITY IN EASTERN HIMALAYAN REGION

Agricultural biodiversity or Agro-biodiversity is biological diversity which includes variety of plants and animals appropriate for agriculture. Agro-biodiversity is an effort of farmers in selection, breeding and developing appropriate production system and method.[16] Conservation of agro-biodiversity means to ensure that the genetic resources of various crops and plants are not lost. Agro-biological diversity has been addressed in the 3rd session of the Convention on Biological Diversity in 1992.

India, like any other tropical country, is bestowed with a variety of agro-ecosystems differentiated by features like climate, soil, crop variation etc. Indigenous farmers and local population contribute in selecting, conserving and sustainable use of these genetic resources of plants. There are crops which can only be yielded, cultivated and /or grown in a particular ecosystem.[17]

Eastern Himalayan Region has shown a large number of plant endemism in India, for example Squash, a vegetable, is only cultivated in Darjeeling. A medicinal plant Aconitum Ferox which is antidote of poison grows in abundance in the high altitude of Darjeeling, West Bengal.[18] The quality of Tea grown in the hills of Darjeeling is different from the quality of Tea produced in other parts of India. Biological diversity in Darjeeling is the reason behind the 'muscatel flavour' of Darjeeling Tea and distinguishes it from any other tea that is being produced anywhere in India. Large cardamom is another crop which is grown under Himalayan alder in the hills of Darjeeling, Sikkim, Nepal and Bhutan. The production of large cardamom in the undulating land of Eastern Himalaya helps conserving soil and water, retaining fertility of soil.[19]

Thus, mountain eco-system is the rich repository of biological diversity. The hotspot of Eastern Himalaya is also a home of different tribes and colourful sub-tribes who are the bio-harvesters and managers of agro-ecosystem in this region. These

14. Section 3 of Chapter II of the Indian Forest Act, 1927.
15. Sec 26 of the Indian Forest Act, 1927- Acts prohibited in such forests.
16. Meaning of Agro-biodiversity, available at https://www.giz.de/expertise/downloads/giz2014-enagrobiodiversity.pdf (visited on 30.05.2018).
17. Prof. S. Kannaiyan, 'AGROBIODIVERSITY AND ACCESS AND BENEFIT SHARING', Presidential address delivered during National Consultation Workshop held at Annamalai University, Annamalai Nagar on 19 – 20th July, 2007, *available at* http://nbaindia.org/uploaded/docs/abs-190707.pdf (visited on 01.06.2018).
18. List of top five medicinal plant grown in Darjeeling, available at http://www.dreamwanderlust.com/articles/top-5-medicinal-plants-in-himalayan-region-and-theirmedicinal-benefits-20130407 (visited on 01.06.2018).
19. Production of Large Cardamom in Eastern Himalaya and Traditional Knowledge involved in it, available at http://www.niscair.res.in/sciencecommunication/researchjournals/rejour/ijtk/Fulltextsearch/2009/January%202009/IJTK-Vol%208(1)-%20January%202009-%20pp%2017-22.htm (visited on 02.06.2018)

tribes are known for their indigenous methods of agriculture which they use to produce food despite the undulating hilly and ecologically fragile terrain. This indigenous method of harvesting is also known as Traditional Knowledge. Traditional Knowledge is exclusive of a geographical area and invented as a practice by indigenous people or the local community for harvesting and raising animal husbandry.[20] A survey in 2013-2015 in this area has unveiled that some tribes have transformed their terrain into a productive land. These tribes are also found to maintain community forest where they also keep different species of animals. Jhum/ shifting cultivation, Kitchen gardens are indigenous and significant farming practices of these tribes which have been evolved as a response to their environment.[21]

Jhum/Shifting cultivation is a farming pattern emerged from centuries of experimentation by the indigenous people of hilly region in order to produce food products. It is often known as Swidden agriculture. This farming pattern involves multicropping system where more than 30 crops are cultivated on the same land on a rotational basis. In shifting cultivation lands are made ready for cultivation by slashing and burning forest areas. This is basically turning forest based food gathering to agriculture based food production. In this practice the farmer cultivate several crops on a rotational basis as it is believed that it would help regenerating fertility of soil. Shifting cultivation is an innovation which is mainly found in mountains where options as to land for cultivation is limited compared to plain region.[22]

Kitchen garden is a process of farming in a small plot attached to the homestead land. In rural areas these kitchen gardens are sources of food crops and vegetables for subsistence. In Eastern Himalayan region, especially in Sikkim, many schools have taken up kitchen gardening as an extra-curricular activity.[23]

Home gardens in hilly regions are supposed to be rich in bio-diversity due to its climate and non-use of chemical products. In the Himalayan region in Nepal home gardens are having 21-50 diverse species per household, as the survey shows.[24]

V. EFFECT OF CLIMATE CHANGE ON AGRO-BIODIVERSITY

Biological, socio cultural, environmental and economic variation has led to a different agro-ecosystem in Eastern Himalayan Region. Moreover, indigenous methods of farming of local community has added to such diverse species of crop husbandry and animal husbandry.

20. Traditional Knowledge, *available at* https://en.wikipedia.org/wiki/Animal_husbandry (visited on 02.06.2018).
21. Indigenous farming practices by the tribes in Eastern Himalayan region, *available at* www.academia.edu/33494430/Tribal_agriculture_tradition_in_transition_in_the_Indian_Eastern_Himalaya.pdf (visited on 01.06.2018).
22. Shifting cultivation, available at http://shodhganga.inflibnet.ac.in/bitstream/10603/48775/11/11%20chapter%204.pdf (visited on 03.06.2018).
23. Kitchen gardening by the students of Sakyong Senior Secondary School, West Sikkim, available at http://www.sikkimexpress.com/NewsDetails?ContentID=10686 (visited on 05.06.2018).
24. R. Gautam, *et al*, "Home gardens in Nepal" Proceedings of a National Workshop, Pokhara, Nepal, 6-7 August, 2004, Local Initiatives for Biodiversity, Research and Development (LI-BIRD), (2004).

However, surveys done at micro level have shown that due to change in climate a series of changes occurred in the use of land which has adversely effected the quality of crops grown in this region.[25] Mountain eco-system is already fragile which makes it more vulnerable to climate change.

Climate Change Impacts according to United Nations Framework convention on Climate Change means 'changes in the physical environment or biota resulting from climate change which have significant deleterious effects on the composition, resilience or productivity of natural and managed ecosystems or on the operation of socio-economic systems or on human health welfare'.[26]

Chayote is a vegetable grown in Darjeeling hill. Recent study has shown that the change in climate has impacted the quality and quality of Chayote production in Darjeeling. The quantity of water in Chayote of 203 gram is 191.3 gram.[27] Study shows that the increase in temperature is causing drying up of the water contains in chayote. The increase in the loss of water in Chayote results into the decrease in the weight of the vegetable.[28] Chayote can not grow on dry soil. However, the erratic pattern of rainfall causes the soil to dry up which is effecting the production of Chayote. A study of rainfall in for the year of 2017 shows that Darjeeling, Kalimpong, Kurseong and Sikkim received one day, one day, five days, and eight days of significant rainfall respectively in the month of June, 2017. The chart shows that the Eastern Himalayan region is effected by the change in climate and that has affected the average rainfall in this region.[29]

The production of large cardamom in Sikkim has come under threat due to the climate change. A survey done in a part of Sikkim has shown that 95% of the respondents is of the view that during the flowering season of large cardamom i.e. May-June erratic rainfall is causing flowers to fall and decay. 4.5% of the respondents has observed the climate being dried up while the other 4.5% has observed wetter weather in high altitude. Around 66% of respondents observed a change in the snowfall in the area of study. Snowfall which was a yearly phenomenon 15-20 years ago has become rare for last 4-5 years. While being asked about the indicators of climate change the respondents have listed the following indicators which indicates change in climate, these are-

a. Emergence of disease and pests,

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25. R.K. Maikhuri, K.S. Rao, "Changing scenario of Himalayan agroecosystems: loss of agrobiodiversity, an indicator of environmental change in Central Himalaya, India" 21(1) *Environmentalist* 23-39 (March, 2001).
26. UNFCCC, "Climate Change" *available at* https://unfccc.int/resource/docs/publications/impacts.pdf (visited on 05.06.2018).
27. Nutritional fact of Chayote, *available at* https://www.eatthismuch.com/food/view/chayote,1932/ (visited on 05.06.2018).
28. Effect of temperature on Chayote, *available at* http://hillagricrepository.co.in/2682/1/13589.pdf (visited on 05.06.2018).
29. Chart of average rainfall for the month of June, 2017, *available at* http://savethehills.blogspot.com/2017/07/rainfall-data-of-jun2017-for-darjeeling.html (visited on 05.06.2018).

b. Erratic and scanty rainfall,

c. Altered seasons for flowering of large cardamom plants,

d. Rising temperature across cardamom growing elevation.

The above mentioned factors are contributing to the less production of large cardamom in Sikkim.[30]

Tea production in Darjeeling is another sector which has been adversely effected due to climate change. Availability of natural factors required for tea production in Darjeeling has made Darjeeling Tea famous for its 'Muscatel Flavour' & 'Exquisite Banquet'. Darjeeling has never lacked in rainfall which is required for production of tea. 50-60 mm rainfall is required for tea production. However, a study of average rainfall in the month of June, 2017 shows that Darjeeling received required amount of rainfall only for one day in that entire month.[31] This chart shows that the pattern of rainfall in Darjeeling has been effected due to the change in climate. Factors brought about by the climate change such as increase in temperature, increase in CO2 concentration in the ambience, disease incidence, altered rainfall pattern have definitely affected the production of tea. A study conducted by the Darjeeling Tea Research and Development Centre shows that there is a sharp decline in tea production in 2012 compared to the amount of tea produced in 1993. In 1993 the productivity of green leaf was 1828.47 kg/ha which has come down to 1061.12 kg/ha in 2012. The table provided in the study has also shown that there is a decrease in the amount of rainfall in 2012 compared to 1993.[32]

High altitude of Eastern Himalayan region is the home of medicinal and aromatic plants. These medicinal and aromatic plants are not immune to climatic changes. Alpine region is accounted for 62% of medicinal plants species due to its climate. However, it has been found that these medicinal plants have been shifted to higher altitudes due to the increased temperature. Increased temperature, elevation of plants from lowest summit to highest summit has decreased the quantity of several species of medicinal plants.[33]

A study conducted in Darjeeling area to understand the status of medicinal plant in this region has disclosed an alarming status. The report shows that some of the medicinal plants are already extinguished, while some are critically rare. Extinction and/or vulnerability of medicinal plant has affected the traditional folk medicine practice

30. Effect of Climate Change on Large Cardamom production, a study by the International Centre for Integrated Mountain Development, available at http://lib.icimod.org/record/29729/files/WP14—2.pdf (visited on 05.06.2018).
31. Chart of average rainfall for the month of June, 2017, available at http://savethehills.blogspot.com/2017/07/rainfall-data-of-jun2017-for-darjeeling.html (visited on 05.06.2018).
32. Report of the Study conducted by the Darjeeling Tea Research and Development Centre, available at http://gifre.org/library/upload/volume/174180vol2413gjbahs.pdf (visited on 06.06.2018).
33. Report of Study on the effect of climate change on Medicinal and Aromatic Plants, *available at* http://www.ijrap.net/admin/php/uploads/798_pdf.pdf (visited on 06.06.2018)

in Darjeeling. Due to anthropogenic activities the traditional knowledge of this region is extinguishing.[34]

In Sikkim traditional varieties of rice species have been extinguished due to climate change.[35] Decline in the production of orange in Sikkim has also been observed.

VI. CONCLUSION

Climate change has effected mountain ecosystem in two ways, in one way it has altered the local weather which invites extreme weather hazards and in other way it has effected food products which people need for their subsistence. Recent trend of production of crops, vegetables and medicinal plants in Eastern Himalayan region has shown that developmental activities have impacted agricultural biodiversity of Eastern Himalayan Region. Indigenous people have found out modern methodology of farming in order to cope up with such developmental activity. However, in this process of adaptation, traditional knowledge of farming is at stake. Factors like increase in population, demand for more food crops and vegetables have also played an important role in adapting new methods of farming.

Thus, taking necessary steps as to conserve mountain agro-biodiversity is the need of the hour. One way of conserving agro-biodiversity in Eastern Himalayan region could be domestification of medicinal plants and vegetables. It is already known that most of the households in mountain practise kitchen farming. Rare and critically rare medicinal plants and vegetables can be cultivated in kitchen garden through indigenous method of farming.

There are some places in mountain which are more vulnerable than the rest of places and less adaptive to any change. Therefore, the conservation strategy in Eastern Himalayan region can not be uniform. It has to vary from one place to another depending upon the adaptability of that place.

Climate change is a reality which is felt through erratic pattern of rainfall, increased temperature, extreme weather hazards and its adverse effects can not be reversed. Thus, it has to be found out that how to tackle this situation. Following are some ways to cope up with this situation-

i. Educating and making mountain people aware about the climate change and its effect,

ii. Encouraging mountain people to follow indigenous methods of farming,

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34. D. R. Chhetri, "Current Status of ethno-medicinal plants in the Darjeeling Himalaya", *available at* http://14.139.206.50:8080/jspui/bitstream/1/3832/1/Current%20status%20of%20ethnomedical%20plants%20in%20the%20Darjeeling%20Himalaya.pdf (visited on 06.06.2018).

35. "Climate Change and Sustainability of Agrodiversity in Traditional farming" available at http://www.sikenvis.nic.in/writereaddata12Chapter_Climate_Change_and_Sustainability_of_Agrodiversity_in_Traditional_farming.pdf (visited on 06.06.2018)

iii. Encouraging local people to follow traditional knowledge of treatment and produce different species of medicinal plants,

iv. Encouraging local people to nurture variety of species of domesticated animals,

v. Encouraging local people to practice kitchen farming,

Development is an aspect which can not be overlooked. However, development and conservation of ecosystem should co-exist. Thus, sustainable development can be the only way of conserving agro-biodiversity of Eastern Himalayan region.

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Book Review

ISLAMIC LAW AND THE MUSLIM WORLD-THEORY AND PRACTICE (2015). By Zishan Misbani, Koros Press Limited, London, UK. Pp. v+346, ISBN-978-1-78163-618-3.

Islamic civilization, since the time of Prophet Mohammad until now, is firmly founded on the concept of 'Rule of Law'. Islam is a complete package, a complete message and way of life. To fraction it into its component, then examine them individually will yield little or no understanding of Islam's holistic whole. However when viewed from a comprehensive perspective by any fair person, Islam will be found sensible in all its aspects and practices.

The author of this book under review believes that the study of Islamic law can be a forbidding prospect for those entering the field for the first time. The book is devoted to a discussion of Islamic law in its pre-modern natural habit and explains how the law was transformed and ultimately dismantled during the colonial period. It charts recent developments and the struggle of the Islamists to negotiate changes which have been the law emerge as a primarily textual entity focused on fixed punishments and ritual requirements.

The World today has become one large village. Muslims and Non-Muslims live side by side and have to learn about one another, share commonalities and respect differences. At this time more than one and half billion Muslims live in this village. We should keep in mind here that only Sovereign Muslim states / Governments have the authority to implement Islamic law.

This survey of Islamic law combines Western and Islamic views and describes the relationship between the original theories of Islamic law and the views of contemporary Islamic writers. Covering the key topics in the area- including the history, sources and formation of Islamic law, the legal mechanisms, and the contemporary context- it is strong in its coverage of the modern perspective, which particularly marks this book out from other texts in this field. The aim is to provide the student with a background understanding of Islamic law and access to the complexity of the Islamic legal system.

The book emphasizes on the synthesis of fundamental ideas of the Islamic law in the modern senses.

The scheme of this book is divided into nine chapters. The first chapter deals with Islamic Legal Theory and Islamic movements. This chapter provides an overview of Classical Islamic Legal Theory and explores the political and economic context of modern Islamic movements in the Middle East. The dramatic transformations to the political, legal and economic system of the Middle East in the nineteenth and twentieth century left the legacy of systematic secularization, centralization of authority, and westernization. Modern Islamic political movements are faced with political, legal and economic institutions that are thoroughly entrenched in this legacy. Islamists calling generally for a return to Shari'a must, when governing, resolve a myriad of questions defining how to actually implement Shari'a in the current political and economic context.

In the second Chapter titled "Islamic Law: Liberty and Emancipation in contemporary World, the author elaborate the concept of liberty and emancipation in a very descriptive and elaborate manner. In this Chapter the author explained the concept of Blasphemy through a detailed discussion of various verses of Quran. In concluding part of this Chapter the author emphasized on the importance of reforming the attitudes towards inter-religious relationships can be resolved.

In the third chapter of this book titled "Islamic Law in promoting Social Peace" the author have raised the question of Islam's role in providing social peace for contemporary society. In this chapter the author expresses his concern about the degrading religious influence on moral behaviour in society. The author points a clear image of Islamic concept of justice, fair play and benevolence in treating the less fortunate sections of society. God forbids all that is considered wrong by universal standards, like indecent behavior, affront, insult and indeed all social evils.

In the fourth chapter titled "A Historical Perspective of Islamic Rule of Law". Islamic law is very poorly understood. Few people know much about its content or about the means by which it is supposed to achieve results. Islamic law has meant different things to different people. Its application too has varied enormously. In this chapter the author considered certain criteria about how Islamic law has fared. In this process the author described the concept of Govt. accountability, Equal access to justice and the political process, efficiency of the legal and political system, clear laws, protection of fundamental rights, property rights under Islamic law.

The fifth chapter named "Islam and Modernity". Some societies may have become modern in the sense of adopting a rational system of thought and a secular way of life, but are still not completely modern. In this chapter the author has taken an initiative to describe the foundational principles of modernity and their relation to religion. This chapter is mainly a historiography of the journey of Islam religion towards modernization.

Sixth chapter titled "Islamic views on International Law". The relevance of Islamic International Law is very limited in the contemporary Muslim World. This chapter covers all aspects of Islamic International law, contemporary notions and practices of Muslim countries and various international treaties.

Seventh chapter headed "The Position of Women in Islamic Countries" discusses the position of women in Islamic societies with special focus on Egypt, Yemen, Mali, Bangladesh and Sudan. The author in this chapter describes the position of women under Islamic law and looks at the relationship between women's position and the religious texts of Islam. This chapter deals with the general rules of divorce, inheritance, economic and property rights in Muslim countries.

Eighth chapter named "Islam and Secularism". The author through this chapter pushes the social scientists, scholars and political thinkers rethink the meanings of secularism and its relationship to state and society. In this chapter the author emphasized on the urgent need of establishing secularism is Muslim countries.

The ninth chapter titled as "The 20th Century Islamic Legal Reform of The Family Law with the Focus on Oman's Response to Modernity". The author in this Chapter discussed various revivalist movements, starting in the 18th century. The author in concluding part of this chapter explores the development of both classical Islamic jurisprudence and contemporary scholarly approaches to the reformation of Shari'a Law in accordance with the socio-economic changes in Muslim societies.

Tenth Chapter of this book emphasized on the future of Islamic Law in British Commonwealth Territories in Africa. The author in this chapter expressed his concern about the future of Islamic law in various Commonwealth countries like Ghana, Sierra Leone, Uganda, Nyasaland, Somaliland, Kenya, Zazibar, Gambia And Tanganyika.

The eleventh chapter titled "Modern Islam versus Islamic Modernity". Islam and modernity is that the modern Islam is definable in the entire World are familiar with the fact of modernity whereas Islamic modernity can merely be existent in Islamic territories. As per the author the best formula to construct a lucid dialogue between Islam and West is recognizing the sacred symbolism of both sides.

In the Twelfth chapter "Islam in a Modern State : Democracy and the Concept of Shura the author very beautifully presented that how the modern democratic process can be a practical mechanism for securing human rights and dignity of human being by implementing the concept of Shura and achieving the goals and principles of Shari'a in a modern Islamic state. By interpreting several verses of Quran the author explains how Islam supports democracy and he also suggests that Muslims should not develop unrealistic fears about a democratic process in a contemporary Islamic state as the message of Islam is always to convince not to impose.

Thirteenth chapter says about the "Change and Authority in Islamic Law: The Islamic Law of Inheritance in Modern Muslim States". This chapter mainly concentrates mainly on the Islamic Law of Inheritance. Islamic law of Inheritance is a complicated system of rules. In this chapter the author with due precision on one hand praised the Muslim law of inheritance and on the other hand criticized it on several grounds. The author also explains the current position of the Islamic Law of Inheritance in Modern Muslim countries.

Chapter fourteen says about "Reformation of Islamic Thought". The author starts this chapter by showing the cultural diversity of the so-called 'Muslim World' prior to the process of colonization, when Islam was introduced to the World beyond Arabia. In the second phase of this chapter the author explains the revivalism and reformation of Islamic thought in the Islamic countries of the World.

Fifteenth Chapter titled as "Reformation of Islamic Thought in the 19th century". This chapter as can easily be understood by its title deals with the reformation of Islamic thought in the 19th century when the political and cultural interaction between the western and the Islamic Worlds raised many basic issues. To explain the 19th century reformation the author has taken an initiative to rethink the meaning of the Quran and while doing this the author relate the Islamic law with the concept of science and rationalism.

The next chapter sixteen deals with the next phase of reformation that is the "Reformation of Islamic thought in the twentieth Century". This chapter deals with the reformation of Islamic thought during the 20th century and the introduction of the concept of modern national state, particularly in Egypt and turkey. This chapter analyzes the ongoing debate in the Muslim World between opponents of modernity and Islamism. It focuses on issues like law, democracy, civil society, women's rights, freedom of religion, freedom of thought, minority rights and the position of the sacred texts. The debate on "Islam and Modernity' in Egypt, Turkey, Indonesia, India and Iran has also been discussed in this chapter.

In the 17th chapter the author says about "The relationship between the Waqf Institution in Islamic Law and The Rule of Law in the Middle East". This chapter reviews the historical background of trust in the common law system and in Islamic law and considers basic principles of Waqf law under Islamic law. Then the chapter gates the Waqf institution as an economic instrument in the history of the Middle East, and examines the relationship between Waqf and the rule of law in Middle Eastern Legal System.

The eighteenth chapter attempts "Towards Social Change in Islam". The crisis of Muslim societies are facing is multidimensional in nature. The western thinkers generally presented prejudiced and biased views about Islam. They have concluded that Islam is against change and development; therefore it is the main cause of Muslim drawbackness. In this chapter the author deals with how one can bring social change according to Islam and the author suggests that change according to Islam and the author suggests that change in Islam, takes place in the elements of society, which include individuals, activities and relationships, Shari'ah laws and universe.

The last chapter deals with the concept of "Changing the Individuals". According to the author no change would take place in any society without changing what is within the heart soul and mind of its individuals. Islam gives more emphasize to change the individual of a society. The author describes Islam as a way of life that guides human being to the right way, which satisfies their spiritual as well as material needs.

Although the book have been written painstakingly and is difficult to fault, but to some extent the book has certain limitations. The study is somewhat restricted by the limited availability of literature and data, there are certain little mistakes in chapterization and lastly the contents of various chapters of this book are somewhat repetitive in nature.

Despite the above mentioned limitations the book is a significant contribution on a very important topic of contemporary relevance and it is hoped that it will find a place in the libraries of lawyers, academicians and social scientists and policy makers. This book is carefully designed and neatly edited. Taking in to consideration of the price, the quality of the editorial work, the expertise I strongly believe that this book should be a must possession.

Finally, the depth of the author's knowledge is reflected in his approach to the subject and his clear, concise and to appropriate degree, a comprehensive analysis. This book gives a well pointed, simple and concise picture of Islamic laws and it's evolution till date. The analysis conducted by the author is relevant and precise. The work done by the author is laudable and would be ideal for academic purposes.

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