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EDITORIAL

> 'True wisdom consists in not departing from nature and in moulding our conduct according to her laws and model'
>
> Seneca

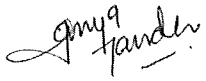
Man is a beautiful creation of nature, complete and flawless. Nature has endowed man with the best of abilities to stay on the top of the ecological pyramid. Man in turn has modeled his world on nature; he has evolved in time with the dynamics of nature; every civilization has looked at nature to answer the pertinent question raised by humanity from time to time.

For centuries man has developed the world in consonance with nature. But with advancement in technology Man has betrayed his partnership with nature. For over a century man has been trying to satiate his greed by over-exploiting natural resources; damaging irreparably, its features; excavating its land for wealth. Nature has hit back, number of times (climate change, flash foods, scarcity of water, scarcity of land, damaged eco-cycle, acid rain etc. etc.) but it seems to be falling on deaf ears.

The crisis is acute and the measures need to be implemented here and now. Environmental concerns have given birth to a new discipline Environmental Jurisprudence. It debates, discusses, questions the prevalent human mind set that believes that nature is subservient to man, whereas, in reality it is the other way round.

Man will cease to be without healthy and thriving nature. Laws such as *Water Prevention and Control of Pollution Act*, 1974; *Air (Prevention and Control of Pollution) Act*, 1981; *The Environment (Protection) Act*, 1986; *The Forest (Conservation) Act*, 1980; *The Wildlife (Protection) Act*, 1972; Article 51 A (g), Fundamental Duty of Every Citizen; and Article 48 A, State has Obligation to Conserve, Protect and Improve the Environment are in place but nothing significant seems to be achieved.

In India the debate takes on a different hue that of development vis-à-vis no development interestingly we are at cross-roads where we can blindly ape the western development model, which in a way is a failure (for they are posed with similar question regarding environment) or develop a new model where development moves hand in hand with respect for environment.



Tanya Mander

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CONTENTS

INTERFERENCE IN VOTER'S CHOICE THROUGH UNDUE INFLUENCE

Dr. Seema Nargotra*

1.1 Introduction

Section 123 (2) of the Representative of People Act, 1951 defines undue influence as any direct or indirect interference or attempt to interfere with the free exercise of any electoral right by a candidate or his agent or any other person with the consent of the candidate or his election agent. This first part of the definition is general and covers all possible forms of undue influence which directly or indirectly interfere or amount to an attempt at such interference with the free exercise of any electoral right. The second part of the definition provides two specific instances of undue influence in Clauses (i) and (ii) of Proviso (a) of Section 123 (2). It states that any of the above said persons shall be 'deemed' to interfere with the free exercise of the electoral right of such candidate or elector within the meaning of this clause who –

(i) threatens any candidate or any elector, or any person in whom a candidate or an elector is interested, with injury of any kind including social ostracism and excommunication or expulsion from any caste or community; or[1]

(ii) induces or attempts to induce a candidate or an elector to believe that he, or any person in whom he is interested, will become or will be rendered an object of divine displeasure or spiritual censure.[2]

The third part of the Section carves out an exception that a declaration of public policy, or a promise of public action, or the mere exercise of a legal right without intent to interfere with an electoral right, shall not be deemed to be interference within the meaning of this clause.[3]

1.1.1 Undue Influence: Difference between Contract Act and the Election Law

The definition of undue influence in Section 123 (2) of the R. P. Act, 1951 is wide in its connotation and differs from the same term defined under the Indian Contract Act 1872.[4] A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.[5] In election law, no special relationship is required in so far as dominance of the will of one person over that of the other is concerned.

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1 *The Representation of the People Act,* 1951, S. 123 (2), Proviso (a) (i).

2 *Id.,* Proviso (a) (ii)

3 *Id.*, Proviso (b).

4 *Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdass Mehra*, AIR. 1975 SC 1788.

5 The *Indian Contract Act,* 1872, *S. 16 (1).*

1.1.2 Object of the Provision

In *Lal Singh Kesrisingh v. Vallabhdas Shankarlal*,[6] the Gujarat High Court stated the object of S. 123(2). The Court observed that this provision is contrived to ensure freedom to the elector to choose a candidate of his own choice. Its object is to prevent persons from deflecting the elector from enjoying that freedom by influencing him in a manner which would be regarded to be undue, that is by creating an atmosphere or situation in which the choice of candidates will be made not on the merits of the candidates or their parties or their programmes but instead selecting them on extraneous considerations such that a selection would affect spiritually adversely them, or their kith and kin or persons in whom they are interested or would create a feeling in them that they would personally stand to gain or lose in matters which do not relate to policies or programmes on which governments are run if they cast their vote in favour of or against a particular candidate.

Elaborating on the scope of Section 123(2), in *Shri Babu Rao Patel v. Dr. Zakir Hussain*,[7] the Supreme Court clarified that the provision is *pari-materia* of Section 171-C of the Indian Penal Code,[8] except that the words "direct or indirect" have been added in Section 123 (2) to indicate the nature of interference. The gist of undue influence at an election consists in voluntary interference or attempt at interference with the free exercise of any electoral right. Any voluntary action "which interferes with or attempts to interfere with such free exercise of electoral right would amount to undue influence.

It is not necessitated by the provision that such interference or attempt to interfere should be by the method of compulsion.[9] There would of course be in such a case, mental compulsion in a sense, but it is not necessary that there should be physical compulsion or that a threat must be actually held out by the person who interferes or attempts to interfere.[10] The first part of Section 123 of the Representation of the People Act, 1951 is general and covers all possible forms of undue influence. Clauses (i) and (ii) of Proviso (a) to Section 123(2) constitute an irrebuttable presumption in view of the usage of the words "shall be deemed". If any of the conditions of these two clauses is established, that will be a case of undue influence and it need not be proved that such interference had resulted in actual success.[11] Thus the actual

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6 AIR 1967 Guj. 62.

7 (1968) 2 SCR 133.

8 The *Indian Penal Code*, 1860, S. 171 (C) reads:

1. Whoever voluntarily interferes or attempts to interfere with the free exercise of any electoral right, commits the offence of undue influence at an election;
2. Without prejudice to the generality of the provision of sub-section (1), whoever –
   (a) threatens any candidate or voter, or any person in whom candidate or voter is I nterested, with injury of any kind, or
   (b) induces or attempts to induce a candidate or voter to believe that he or any person in whom he is interested will become or will be rendered an object of divine displeasure or of spiritual censure;

   shall be deemed to interfere with the free exercise of the electoral right of such candidate or voter within the meaning of sub-section (1).
3. A declaration of public or a promise of public action, or the mere right of a legal right without intend to interfere with an electoral right shall not be deemed to be interference within the meaning of this Section.

9 *Biswanath Upadhyaya v. Haralal Das*, 16 ELR 45.

10 *Jujhar Singh v. Bhairon Lal*, 7 ELR 457; *Shri Baburao Patel v. Dr Zakir Hussain, supra* note 7.

11 *Sardul Singh Caveeshar v. Hukam Singh*, 6 ELR 316.

interference need not be shown. It is not the actual effect produced but its tendency to interfere that is material.[12] However, no presumption can be drawn against a declaration of public policy or a promise of public action or the mere exercise of a legal right if there was no intention to interfere with electoral right.[13] It may be noted that the injuries contemplated in the Provisos are illustrative and not exhaustive. There may be other categories of injuries too.

2.1 Categories of Undue Influence

It is only if it can be proved that the influence was such as to deprive the person affected of his power of free exercise of his will at an election that a case of undue influence under Section 123(2) can be said to be made out. A persuasion which leaves a person free to adopt his own course is not undue influence. The definition of 'undue influence' is thus very wide in its ambit. Specifically it includes a threat of causing physical or social injury and any inducement or attempt to inducement that a voter would incur divine displeasure if he did not vote in a particular way. Apart from these specific categories, generally all kinds of direct or indirect interference or attempts to interfere with the free exercise of any electoral right would amount to undue influence under Section 123(2). Due to this wide ambit of the definition, the courts are confronted with the horrendous task of determination in each case of the actual nature of the threat or inducement and the degree of its influence upon the will of a voter. There is a very thin line dividing the right of a candidate to influence his voter and the same amounting to undue influence hit by the prohibition contained in Section 123(2).

2.1.1 Threat of Injury–Clause (i) of Proviso (a) to Section 123 (2)

Threat to cause injury or actually causing injury is one of the usual modes adopted to interfere in the electoral right by undue influence. The nature and the degree of threat may vary from case to case. As per Section 123(2), the injury caused or threatened to be caused may be physical, social, spiritual or temporal. The Courts determine an allegation of threat by taking into consideration certain factors, viz., - the intention of the person hurling the threat, the degree of its seriousness, and its effect upon the free exercise of will by an elector.

2.1.1.1 Threat en masse through Publication

In Jujhar Singh v. *Bhairon Lal*,[14] a poster was published showing a person, apparently a tenant, tied up to a tree with a rope. By his side stood a *Jagirdar* (landlord) asking his man, holding a whip, to flog the tenant. On the ground lay a woman, seemingly the tenant's wife. To the right hand side in the poster was printed the symbol of "two bullocks, with yoke on" and near the slit there were shown the hands of voters, set to cast their votes in the ballot box. The poster was captioned: '*Jagirdaron ke atyacharon ko khatam karne ke liye Congress ko vote do'* (vote for Congress to put an end to the atrocities of the Jagirdars). The Election Tribunal observed:

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12 *Ambika Saran Singh v. Mahadevanand Giri*, (1969) 3 SCC 492.
13 *Supra* note 3.
14 *Supra* note 10.

> The poster was ... clearly designed not only to catch voters for respondent No. 1, but also, to overawe voters, the majority of whom were men of no better intelligence than ordinary illiterate villagers and to create a feeling of positive prejudice if not of terror as well, in their minds against the petitioner... we accordingly hold that the demonstration or distribution of the poster was an attempt at indirect interference with the free exercise of the electoral right of the voters and therefore amounted to a corrupt practice under section 123 (2) of the ... Act of 1951.[15]

The Tribunal clarified that an attempt to interfere by the method of physical compulsion is not necessary and that even the method of inducement may be sufficient, provided it is so powerful as would deprive the voter of the right to exercise his free will. Thus even mental compulsion may be enough to give rise to undue influence. In the instant case, the poster caused mental compulsion on the voters who were mostly illiterate though there was no physical compulsion.

In *Bachan Singh v. Prithvi Singh*,[16] posters were published bearing the photographs of Prime Minister Mrs. Indira Gandhi, Defence Minister Jagjivan Ram and Foreign Minister Swaran Singh in the first row and in the second row were the photographs of three Chiefs and four Generals of the Armed Forces. The poster carried the caption 'Pillars of Victory'. Below these photographs was printed the Congress symbol of cow and calf. Complaint was made to the Election Commission and the Commission issued directions to the Punjab Congress Committee to withdraw the posters and in pursuance of the said directions, the posters were withdrawn. Undue influence was alleged against the returned Congress candidate.

The allegation was that the publication of the poster not only amounted to the exercise of undue influence within the contemplation of Section 123 (2) but also constituted an attempt to obtain or procure assistance from the members of Armed Forces of the Union for furtherance of the prospects of the returned candidate's election within the purview of Section 123 (7).

The three-judge Bench of the Supreme Court, speaking through Sarkaria, J., observed:

> In one sense even election propaganda carried on vigorously, blaringly and systematically through chrismal leaders or through various media in favour of a candidate by recounting the glories and achievements of that candidate or his political party does meddle with and mould the independent volition of electors... That such a wide construction would not be in consonance with the intendment of the legislature as discernible from Proviso to this Clause... The prefix 'undue' indicates that there must be some abuse of influence. 'Undue influence' is used in contradistinction to 'proper influence'. Construed in the light of the Proviso, clause (2) of section 123 does not bar or penalize legitimate canvassing or appeals to reason or judgment of the voters or other lawful means of persuading voters to vote or not to vote for a candidate. Indeed such proper and peaceful persuasion is the motive force of our democratic process.[17]

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15 *Id.*, at p. 462.
16 AIR 1975 SC 926.
17 *Id.*, at pp. 928-29.

The Supreme Court held that the publication of the poster in no manner interfered or attempted to interfere with the free exercise of the electoral right of any person. There was nothing in it which amounted to a threat of injury or undue inducement as specified by Section 123 (2). On the basis of the above distinction laid down between 'undue influence' and 'proper influence', the Supreme Court held that the publication of the poster was an act of impropriety but not a corrupt practice within the meaning of Section 123 (2).

2.1.1.2 Catchy Slogans

In *Radha Krishna Shukla v. Tara Chand Maheshwar*[18] the allegation was that a catchy slogan '*Jo vote deho jhopariya mein, to joote parihen khopariya mein'* (those who vote for 'hut' would be beaten on their heads with shoes - 'hut' was the symbol of Praja Socialist Party) was shouted at many places by the workers or agents of the respondents with an intention to intimidate the voters. The petitioner contended that the slogan caused undue influence on the voters.

The Election Tribunal, Lucknow, laid down the test that 'before a threat can be considered to amount to undue influence, the question must be put, was it a serious and deliberate threat uttered with the intention of carrying it into effect'. Applying the test, the Tribunal held that the persons who shouted the slogan could not be said to have had any intention of shoe-beating anyone or causing any personal injury to the voters for not rendering support to the respondents. The Tribunal opined that the slogan was shouted just because it contained a catchy phrase and the word '*jhopariya'* rhymed well with the word '*khopariya'*. The slogan was not meant to be taken literally and nobody could have taken it seriously. The Tribunal also turned down the contention of the petitioner for placing reliance on *Jujhar Singh*[19] and observed that both the cases were distinct on facts.

2.1.1.2 Figurative Threat in Public Meetings

In *Maganlal Radhakishan Bagdi* v. *Hari Vishnu Kamath,*[20] the appellant was found to have addressed a public meeting of voters, where he made a statement that irrespective of his victory or defeat in the election, he would see to it that the respondent and another Niranjan Singh who was Praja Socialist Party candidate for the State Assembly were buried deep in the valley of Narmada river and that he would go only after performing their 13th day *Shraadha* ceremony.

The M.P. High Court held that the question whether the threat was intended literally or was used figuratively was one of fact. Confirming the observation of the Tribunal which had observed that it was only used figuratively as meaning the political burial of the respondent and Niranjan Singh, the High Court held that no threat could be deemed to have been intended by the appellant within the meaning of Section 123 (2) of the Representation of the People Act, 1951. Thus a threat made only figuratively and not literally will not amount to corrupt practice.

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18 12 ELR 378.
19 *Supra* note 10.
20 15 ELR 205.

2.1.1.4 Terrorizing the Voters

It is always easy in a caste ridden society to terrorize the deprived classes by the use of physical, social or political power. The common mode applied may be the actual infliction of injuries on some persons or to give threats of physical injury. Threat of physical assault may be given either by setting an example by actually injuring somebody, or it may be contained in the words spoken during campaign or at election meetings or rallies and at polling booths. Sometimes such threats may be contained in the leaflets distributed in the rally. If such physical injury or threat of physical injury is caused/hurled to compel the voters to vote in favour of a particular candidate or to prevent them from exercising their right to vote, that constitutes undue influence and hence amounts to a corrupt practice. It may be a case of voters not allowed to reach the polling station. If such corrupt practice was committed by the candidate or by his election agent or by anybody with the consent of the candidate or of his election agent, then the election will have to be set-aside and it is not necessary to prove that the result of the election was materially affected.

In *Janak Sinha v. Mahant Ram Kishore Das*[21] the Supreme Court found that the voters as well as the respondent and his supporters were assaulted, threatened and terrorized at several places on the polling day and before by the supporters of the appellant. One instance of preventing a voter from exercising his right to vote was held by the trial Court as 'proved'. Confirming the findings of the Patna High Court, the Supreme Court held that when a voter is prevented from exercising his right to vote by the supporters of the appellant and in his presence and no attempt is made by the latter to stop his supporters from so doing, the only inference that can be drawn is that the voter was prevented from voting by the supporters of the appellant with the latter's consent. There was, thus, a direct interference with the free exercise of the electoral right constituting the corrupt practice of undue influence.

In *Ram Sharan Yadav v. Thakur Muneshwar Nath Singh*,[22] the allegation was that the agents and supporters of the returned candidate stopped the voters on way to the polling station and assaulted them, hurled bombs, etc. though the returned candidate was not present on the spot. The Patna High Court set aside the election. Affirming the decision of the High Court and dismissing the appeal, the Supreme Court observed that while insisting on standard of strict proof, the Court should not extend and stretch this doctrine to such an extent as to make it well-nigh impossible to prove an allegation of corrupt practice. Such an approach would defeat and frustrate the very laudable and sacrosanct object of the Act in maintaining purity of the electoral process.

However, in *Surender Singh v. Hardayal Singh*,[23] the Supreme Court took a different view. The allegation was that some persons issued threats to the voters that they would be killed for voting in favour of a particular candidate. It was further alleged that a contesting candidate had given instructions to those persons not to allow the conduct of election meeting of the opposite party at any cost and in pursuance to those instructions, the meeting was disturbed. But in the petition it was not pleaded by the petitioner that the threats were issued to the voters with the consent of the

[21] AIR 1972 SC 359.
[22] AIR 1985 SC 24.
[23] AIR 1985 SC 89.

candidate or on his instructions. In view of these omissions in the pleading, the trial Court held the candidate not guilty of the corrupt practice. The decision of the High Court was confirmed by the Supreme Court. On the appreciation of evidence, the Supreme Court observed thus:

> For establishing the link between the disturbance of the meeting and the returned candidate, the evidence is wholly oral in character and has to be scrutinized with greater rigour. Merely on the statement of some of the witnesses who were party workers or supporters, a charge of corrupt practice could not have been taken as proved.[24]

It is submitted that the disturbance of election meeting should be considered more seriously when apprehension or fear is caused in the minds of the voters that they may be injured if they did not vote in favour of a particular candidate.

In *Lalroukung v. Maokholal Thangjom*,[25] pamphlets were distributed before polling day containing threats that those who oppose the candidate would not be forgotten, nor spared and in the light of this propaganda, voters were assaulted and hooliganism was resorted to at polling stations. The Court held that it was bound to terrorize the voters from coming to the polling station to exercise freely their electoral right and thus amounted to undue influence within the mischief of Section 123(2) of the R.P. Act, 1951.

In *Sushil Singh* v. *Prabhu Narain Yadav*,[26] the allegation was that the returned candidate in collusion with election officials prevented voters from casting their votes. There was no specific statement on the part of the witnesses that they were physically obstructed and not allowed to cast their votes. All the witnesses in a single voice stated that the returned candidate and his supporters threatened them and made them to run. It was alleged that the action of the returned candidate amounted to undue influence. Rejecting the contention, the Allahabad High Court held that there is no evidence whatsoever to establish physical obstructions, displaying of weapons or fire arms or creation of such an atmosphere, which may have reasonably caused apprehension of physical abuse or threat to electors.[27]

It is submitted that in view of the statements of all the witnesses that the returned candidate and his supporters threatened them and made them to run, the approach of the Court seems to be erroneous. The threat may not always be by an armed group.

2.1.2 Threat of Social Ostracism and Excommunication

Under Section 123 (2) (a) (i) of the R.P. Act, 1951, threat of injury also includes social ostracism and excommunication or expulsion from any caste or community. Thus threats hurled by the returned candidate on any candidate or voter of expulsion from caste or community or from social organization may amount to undue influence. Any type of social ostracism or excommunication leads to social boycott of an individual affecting his interests seriously and hence, the threat of social ostracism or ex-communication has the same effect as a threat of physical injury.

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24 *Id.*, at p. 104.
25 (1972) 41 ELR 35 (SC).
26 AIR 2007 All 187.
27 *Id.*, at p. 198.

In *Bhagwan Datt Shastri v. B.N. Singh*,[28] certain leaflets were distributed by the agents of the returned candidate in various villages mentioning that every member belonging to Gond community who would not vote for the returned candidate would be ex-communicated. The Election Tribunal held it a corrupt practice under Section 123(2). Confirming the findings of the tribunal, the Supreme Court dismissed the appeal.

2.1.3 Divine Displeasure or Spiritual Censure – Clause (ii) of Proviso (a) to Section 123 (2)

The secular values enshrined in the Constitution of India postulate complete exclusion of religion or caste or communal element from the electoral process.[29] If religion is used as a means of undue influence by a threat of divine displeasure or there is a threat of social ostracism and excommunication or expulsion from any caste or community, that is prohibited under Section 123 (2) of the Act. Section 123 (2) of the Act was framed keeping in mind the superstitions and God-fearing attitude of a vast majority of illiterate Indian voters. The following cases would explain this:

2.1.3.1 Projecting Rival Candidate / Party as Sinful inviting Divine Displeasure

In *Narbada Prasad v. Chhaganlal*,[30] the allegation was that during the election campaign the returned candidate, who belonged to Jan Sangh party, and his election agent had made speeches in villages declaring that Congress had not abolished cow-slaughter in India, whereas Jan Sangh would do that; and that to vote for Congress was to commit the sin of *gohatya* (cow-slaughter).

Upholding the verdict of the Madhya Pradesh High Court, Hidayatuallah, C.J., on behalf of himself and Grover, J., observed:

> One cannot say that it is wrong to make such propaganda. It would be perfectly legitimate for any party to promise that if it came into power it would abolish cow slaughter. That is not the gravamen of the charge. The gravamen of the charge is that it was added that if the voters voted for the Congress candidate, they would be guilty of the sin of *gohatya* and here the law of election steps in.[31]

The Court added:

> It is not necessary to enlarge upon the fact that cow is venerated in our country by the vast majority of the people and that they believe not only in its utility but its holiness. It is also believed that one of the cardinal sins is that of *gohatya.* Therefore, it is quite obvious that to remind the voters that they would be committing the sin of *gohatya* would be to remind them that they would be objects of divine displeasure or spiritual censure.[32]

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28 AIR 1960 SC 200.

29 *The Representation of the People Act*, 1951 clearly intends to exclude religious issues from the election process. Appeal on the ground of religion, race, caste or community or language or to the religious symbols; or attempt to promote the feeling of enmity or hatred between different classes of citizens of India on these grounds are corrupt practices prohibited under Section 123(3) and (3A) of the Act. There seems to be overlapping in these different forms of use of religion or caste, and the dividing line is very thin. A statement may come within the mischief of more than one head. See also *Shubnath Deogam v. Ram Narain Prasad Yadav*, AIR 1960 SC 148.

30 AIR 1969 SC 395.

31 *Id.*, at p. 400.

32 *Ibid.*

Thus the Supreme Court held that the appellant and his agent attempted to induce the voters to believe that by voting for Congress, they would become objects of divine displeasure or spiritual censure. The Supreme Court reiterated this stand in *Kanti Prasad Jayshanker Yagnik v. Purshottamdas Ranchhoddas Patil.*[33]

However, a different view was taken by the Supreme Court in *Pandit Shree Krishna Selot v. Ramcharan Pujari,*[34] wherein the following words were impugned:

> "Congress Government slaughters the cows. Hindu religion cannot be protected by Congress. If one vote is cast for Congress, it is equal to slaughter of a cow, Congress wants to continue the slaughter of bulls."

Ramaswami, J., for himself and J.C. Shah and A.N. Grover, JJ. took a different view and held that it is only an attack on the Congress Party and no undue influence was exercised upon the voters within the meaning of Section 123 (2) (a) (ii) of the Acts.[35] In this case, the Supreme Court deviated from its previous stand in *Narbada Prasad v. Chhaganlal* which rather was based on all plausible reasoning.

In *Manubhai Nandlal Amorsey v. Popatlal Manilal Joshi,*[36] the Supreme Court reiterated its previous view. In this case, the allegation was that in public meetings held in several places, *Kirtankar* Shambhu Maharaj who was respected for his lectures on Hindu religion, told the electors that voting in favour of Congress was tantamount to the commission of the sin of *gohatya* (cow slaughter) and asked them in the name of 'mother-cow' to take a vow not to vote for the Congress candidate. In pursuance to that, several members of the audience publicly took the vow. The Court observed that the speeches, the status of the speaker and character of the audience are relevant considerations. Shambhu Maharaj was a reputed *Kirtankar* and the audience comprised mostly of the illiterate and orthodox Hindus of the villages; the speech was thus calculated to interfere with the free exercise of the electoral right.

2.1.3.2 Canvassing by Religious Leaders

In *Radhakanta Misra v. Nityananda Mohapatra* [37] one of the allegations was that the respondent and his agents had distributed pamphlets containing copies of a telegram from a Muslim leader Maulana Habibur Rahman, and propaganda was done by them that the Maulana had imposed a condition on all Muslims to vote for the respondent failing which they would be rendered the objects of divine displeasure.

The Division Bench of the Orissa High Court consisting of Rao and Barman, JJ., was divided in its opinion. Relying on the evidence, Barman, J. held that the Maulana was a religious leader of high esteem among the local Muslims of the constituency, so his status was sufficient to prove that he was capable of unduly influencing the minds of the voters. However, Rao, J., disagreeing with Barman, J. held that though Maulana, being an influential member of the then existing Muslim League and had some influence over the Muslims of the constituency, but there was no reliable evidence that he was a religious leader and held influence over the community as such. Some witnesses had stated that Maulana was a Peer having several disciples in the

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33 AIR 1969 SC 1851.
34 (1969) 3 SCC 548.
35 *Id.*, at p. 554.
36 AIR 1996 SC 734.
37 19 ELR 203.

community, but no witness could name any such disciple. Rao, J., observed that even if the Maulana was regarded as Peer and a religious leader of the Muslim community there was nothing wrong in his canvassing for the respondent; the telegram only reflected his sympathies with the respondent.

In view of the division of opinion in the Bench, the matter was referred to and heard by a third judge, Das, J. The learned Judge, on evidence, recognized the status of Maulana as the leader of the Muslim League in that area before independence, as a local Muslim leader and as a learned man. However, the learned judge held that there was no evidence to prove that the Maulana was a religious leader. Das, J., further held that even if it be assumed that the Maulana was a religious leader of the Muslim community, there was nothing wrong in his canvassing for the returned candidate. The telegram only showed that he had full sympathies with the respondent. The stand taken by Das, J. thus conformed to the view of Rao J.

Similarly in *Jagajeevandas Shetty v. Sanjeeva Shetty*,[38] the election was challenged on the ground that the the Hegde (trustee) of the Sri Manjunatha temple in Mangalore who holds the recognition as a mouthpiece of lord Manjunatha is said to have induced voters to believe that they or their families will be rendered an object of divine displeasure or spiritual censure if they do not vote for the respondent. The petitioner contended that Hegde is a person having divine characteristics, that his utterances are invested with infallibility, that he is considered as a talking God and that his injunctions are obeyed without question.

The Election Tribunal, Mangalore, on evidence acknowledged the facts of the fame of the Manjunatha temple and the regard and the veneration the people had for the temple and the deity. However, the Tribunal found the oral evidence about the divine character of the Hegde dubious and made following observations in this regard:

> At the same time it was also proved that the Hegde has a particular seat in the temple wherefrom at the time of the Mahapooja he gives decisions on *hoilus* (plaints), if both parties appear and agree to abide by his decision. He does not issue any injunctions to the people at large but only gives decisions if they seek it at the temple. He himself says that there is no compulsion attached to his decisions in the temple....Whatever may be his position inside the temple, it does not appear that he is looked upon as a sacred personality outside. He is *Jain grahastha* leading a family life. He is not a *sanyasi* nor a religious leader like the *acharyas* or *mathadhipathis*; and having regard to the accepted Hindu notions we find it difficult to believe that he is looked upon as divine or sacred.[39]

The Tribunal acknowledged the Hegde as a man of status in the public life of the district who was associated with different organizations for the development of art, culture, literature, etc., and held that it was not proved that he was in a position to influence the voters. It was also not proved that there was any representation made to the voters that it was part of the Hegde's injunction that if they did not abide by his wishes, they would incur spiritual censure or divine displeasure.

Dismissing the petition, the Tribunal observed that it is clear law that, however eminent a person might be whether in the religious or secular field, he is as much

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38 3 ELR 358.
39 *Id.*, at p. 363.

entitled as any other to take part in election, and to advise or direct electors in the matter of the exercise of their franchise.

However, the Tribunal cautioned that if by use of spiritual authority, threats of divine displeasure or spiritual censure and not mere promises of divine grace are made, that would constitute undue influence and hence would amount to corrupt practice. The mere holding out of an inducement of pious hopes, spiritual benefits, divine pleasure, etc., in the absence of any such spiritual threat would not constitute undue influence. This view of the Mangalore Election Tribunal was later disapproved by the Punjab High Court in *Ram Dial v. Sant Lal*,[40] wherein the Court observed:

> An appeal from a religious head issuing a command to his followers to vote in a particular way by inducement of pious hopes of reward and by promising spiritual benefits, divine pleasures, etc., has implicit in it a suggestion that the followers disobeying such a command are likely to incur divine displeasure and spiritual censure. The view that mere holding out of an inducement of pious hopes, spiritual benefits and divine pleasures would not, in the absence of spiritual threats or censure fall within Section 123 (2) is not correct.[41]

In *Mast Ram v. Harnam Singh Sethi*,[42] the allegation was that the respondent had published and distributed the pamphlets bearing the caption '*Congress Par War Karna Mahan Pap Hai'* (to assail Congress is a sin) under the signature of Dr. Satya Pal, a great public leader and that by publishing such a pamphlet, the respondent attempted to induce and in fact induced the electors to believe that if they did not vote for the respondent, they would be rendered objects of divine displeasure and spiritual censure. The petitioner contended that the word '*Mahan Pap'* in the title of the poster meant that if the electors did not vote for the respondent, they would be rendered objects of divine displeasure or spiritual censure.

The Election Tribunal, Ludhiana, held that "the word '*Pap*' though it originally meant 'sin' has come to be applied to anything ethically undesirable, especially when it is not used by a spiritual or religious leader....."[43] The Tribunal further observed that it was established on evidence that Dr. Satya Pal was not a spiritual leader and the poster hence nowhere meant that not voting for the Congress would bring divine displeasure or spiritual censure within the meaning of Section 123 (2) (a) of the Act and hence its publication did not amount to undue influence.

Sometimes what the religious leaders say during election is not merely the expression of their views but in fact amounts to express *farmans* (commands) or *hukams* (orders) by them to their followers to vote or not to vote for a candidate. In *Ram Dial v. Sant Lal*,[44] such question had arisen before the Supreme Court. In this case, by a *farman*, every Namdhari of Halqa Sirsa was commanded by *Shri Satguru Sacha Padshah* that he should make every effort for the success of Shri Ram Dial, a candidate for the Punjab Legislative Assembly, by giving his own vote and those of his friends and acquaintances.

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40 19 ELR 430.
41 *Id.*, at p. 431.
42 7 ELR 301.
43 *Ibid.*
44 20 ELR 482.

When the petition was first filed before the Election Tribunal, the following allegations were made by the petitioner (Sant Lal) on the basis of the above said *farman*:

i. That there were some personal grievances between the Guru Maharaj Pratap Singh, the religious head of *Namdharis* sect of the Sikhs and Shri Devi Lal, a prominent Congress leader of the constituency who was the chief supporter of the petitioner at the election. Knowing this well, the respondent (Ram Dial) approached him and through him also approached Maharaj Charan Singh, the religious head of the *Radha Swami Samaj*, and got issued *farmans* by both of them to their followers in the constituency to the effect that their *Dharma* enjoined upon them to vote and support the respondent. It was threatened that any of the followers acting against the *farmans* shall have to face the wrath of the Gurus and would be the object of divine displeasure and spiritual censure. These *farmans* of the two Gurus were orally conveyed throughout the constituency and the followers were also threatened with expulsion from the sect and the Samaj if they did not follow the *farmans*.

ii. That Sat Guru Maharaj Pratap Singh himself in the presence of respondent in the big Dewan of his followers preached and commanded that to vote and support respondent was the *Dharma* of all his followers.

iii. That posters to the effect of the *farmans* of Satguru Pratap Singh were also published and distributed by the respondent.

The Election Tribunal held that the first allegation was not proved as no evidence had been produced regarding the oral communication of the *farmans* or regarding threat of expulsion from the sect for disobedience of the *farmans*. The second and the third allegations were held to be proved on evidence. The Tribunal thus held that the illiterate and ignorant villagers, professing *Namdhari* faith, who were voters in the constituency, were subjected to the undue influence of Maharaja Pratap Singh to vote in favour of the respondent (Ram Dial) and, therefore, the election in question could not be considered to be a free and fair election.

In appeal by Ram Dial before a Division Bench of the Punjab High Court, the High Court also accepted the evidence adduced on behalf of the respondent, in particular the pamphlet and its wide distribution. It observed that such commands were intended to convey to the illiterate, ignorant and credulous followers the threat of divine displeasure and spiritual censure for disobedience of their supreme spiritual and religious head. Regarding the contention that the *farman* had been motivated not by religious considerations but by a personal grievance, the High Court held that motive in such circumstances is wholly irrelevant. It observed:

> If the influence exercised by the religious and spiritual head has the effect of creating in the minds of the voters a feeling of divine displeasure or spiritual censure then, whatever the motive, the influence would amount to undue influence.....With this class of villagers (the reference was to followers who were mostly illiterate, ignorant, credulous and unsophisticated villagers), the displeasure of the religious head is usually associated with divine displeasure.[45]

[45] *Supra* note 40 at pp. 449-50.

Finally, Ram Dial filed appeal before the Supreme Court. A 3-Judge Bench of the Supreme Court, comprising of Sinha, Kapoor and Hidayatullah, JJ., affirming the decision of the Punjab High Court, observed:

> ...the crucial words, like *hukam* of Shri Sat Guru Sacha Padshah, etc., have been printed in very bold letters, conveying the distinct impression to the large number of *Namdharis*, who are voters in the constituency that it was a mandate from their spiritual *guru* who wielded great local influence amongst them, that it was their bounden duty, under the strict orders of their religious leader, not only to cast their own votes in favour of the particular candidate, but also to exert their influence amongst their friends and acquaintances in favour of that candidate, and that any infringement of that mandate had implicit in it divine displeasure or spiritual censure.[46]

On the contention of the right to freedom of speech and expression of a religious leader, the Court observed:

> He has a right to express his opinion on the individual merits of the candidates. Such a course of conduct on his part, will only be a use of his great influence amongst a particular section of the voters in the constituency; but it will amount to an abuse of his great influence if the words he uses in a document, or utters in his speeches, leave no choice to the persons addressed by him, in the exercise of their electoral rights.[47]

Thus the Supreme Court, agreeing with the findings of the Tribunal and the Punjab High Court, held that the religious leader by his *farmans* and speeches practically left no free choice to the electors who were threatened by divine displeasure or spiritual censure in case of disobedience of his mandate and thus the case fell within the mischief of Section 123 (2) (a) (ii) of the Act.

In *Jeetmohinder Singh Sidhu v. Mr. K.S. Sidhu, Sr. Advocate*,[48] relying on *Ram Dial v. Sant Lal*, the Punjab and Haryana High Court held that the allegations levelled in the present election petition that the religious head and the political wing of Dera Sacha Sauda had merely asked its followers to vote for Indian National Congress/respondent, without implying that non-obedience will carry divine displeasure, do not attract the provisions of Section 123 (2) of the Act.

In *Mathai Mathew Manjuran v. K.C. Abraham*,[49] the allegation was that ecclesiastical authorities carried on extensive propaganda in the constituency against the petitioner inducing Roman Catholics (who formed over 35 per cent of the voters) not to vote for him on the threat of divine displeasure and spiritual censure. It was alleged that the Archbishop of Verapoly issued a circular which denounced the petitioner's party as "immoral". Non-compliance with the mandates of the circular was said to entail divine displeasure and spiritual censure. The printed copies of circular along with a pamphlet displaying a threat of excommunication of those Catholics, who supported the petitioner, were distributed throughout the constituency.

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46 *Supra* note 44 at p. 492.
47 *Ibid.*
48 CM No.11-E of 2008 (P&H HC) decided on 21 March 2009.
49 10 ELR 376.

The Election Tribunal, Ernakulam, held that the existence of influence or its due exercise over others is not bad in law. It observed:

> Such influence is implicit in human personality and the advantages that wealth, education or way of life may confer on an individual. It is only with the abuse of such influence that the law is concerned and it cannot be said that there has been an abuse simply because influence has been proved and its operation established.[50]

2.1.4 *General Cases of Undue Influence – other than those falling in Proviso (a) Clauses (i) and (ii) - covered under para 1 of Section123 (2)*

In the cases not falling under Proviso (a) but in which the allegations of undue influence were made, the courts have formulated as follows:

2.1.4.1 Tendering of Advice or Persuasion

Mere friendly advice to a candidate by an important party leader or influence arising from the gratitude or esteem will not constitute undue influence unless by that the functioning of a free mind is destroyed.

In *Kataria Takandas Hemraj v. Pinto Frederick Michaell*,[51] pamphlets were distributed wherein an appeal was made to Mahrashtrians not to vote for the Congress candidate as the Congress Government had killed Maharashtrian leaders for demanding a separate Maharashtra State. Photos of martyrs who were killed were attached to the appeal and the appeal carried a statement that the ballot box of the Congress Party was filled with the blood of Maharashtrian martyrs. It was held that it did not amount to undue influence as a candidate had every right to persuade people to vote in his favour. The Court observed that a candidate, or as a matter of fact any person has every right to persuade people to vote in his favour at the election and in that respect he is further entitled to be even critical of the policy and acts of the rival party or its candidate and that may well be legitimate for him to influence the voters, provided he does not transgress the legitimate bounds of criticism.[52]

2.1.4.2 Canvassing by Ministers and Political Parties

Political leadership and parties are supposed to mobilize electoral support from the voters in the elections and play a significant role in modern democracies. The Ministers continue their political affiliations and sometimes they may be office-bearers of political parties. They are entitled to participate in election campaigns. Time and again the question whether canvassing by a Minister would amount to exercise of undue influence by the Minister concerned or not has cropped up before the courts.

In *Shri Baburao Patel v. Dr. Zakir Hussain*,[53] the allegations were that (a) the Prime Minister Mrs. Indira Gandhi wrote a letter addressed to all the electors in which she commended Dr. Zakir Hussain and requested the voters to vote for him in the Presidential election. It was alleged that the Prime Minister being a person of great influence, her writing the letter amounted to undue influence (b) the second

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50 *Id.*, at p. 398.
51 18 ELR. 403.
52 See also *Govinda Bhat v. D. Vittaldas Shetty*, 30 ELR 382.
53 (1968) 2 SCR 133.

allegation was founded on two letters written by Sri Ram Subhag Singh as Chief Whip of the Congress Party to all members of the party in Parliament. The first letter merely explained to members of his party the situation with respect to the election of President and Vice-President which were to be held simultaneously. In the second letter, he had pointed out the manner of election of the President and had also stated that the Congress Party contemplated that Dr. Zakir Hussain should be returned with a thumping majority. He also advised them not to mark the second or any other preference in favour of any other candidate; (c) the third allegation was that the Prime Minister Mrs. Indira Gandhi had deputed certain senior members of her cabinet to the various States to make doubly sure that Dr. Zakir Hussain gets elected. It was contended that sending of the Ministers to various States was to impress upon the members of the electoral college to vote for Dr. Hussain and this amounted to undue influence.

A five-judge Bench of the Supreme Court (Wanchoo, C.J. Bachawat, Ramaswami, Mitter and Hegde, JJ) gave a unanimous verdict in the case. The Supreme Court went thoroughly through the various decisions of various Election Tribunals[54] and arrived at the conclusion that it had been consistently held in this country that it was open to Ministers to canvass for candidates of their party. Such canvassing does not amount to undue influence but is proper use of the Ministers' right to ask the public to support candidates belonging to the Minister's party. The Court observed:

> It is only where a Minister abuses his position as such and goes beyond merely asking for support for candidates belonging to his party that a question of undue influence may arise. But so long as the Minister only asks the electors to vote for a particular candidate belonging to his party and puts forward before the public the merits of his candidate it cannot be said that by merely making such request to the electorate the Minister exercises undue influence. The fact that the Minister's request was addressed in the form of what is called a whip is also immaterial so long as it is clear that there is no compulsion on the electorate to vote.....[55]

In view of the above mentioned principle, the Court examined the various allegations made in the case. Regarding first allegation, rejecting the contention, the Supreme Court held that the fact-that Mrs. Gandhi was the Prime Minister made no difference to her right to make an appeal of that nature to the voters as one of the leaders of the party. The Court found nothing in the letter which could be said to be improper or which could even remotely amount to interference with the free exercise of the electoral right.

Regarding second allegation, the Supreme Court found that the letter was merely a request to members of the party to vote for Dr. Zakir Husain. For direction concerning the marking of preferences, the Supreme Court observed that there was nothing improper if the party members are told in the course of canvassing that it will be better if they only mark their first preference and no other preference when voting is by single transferable vote. Such a request or advice, in the opinion of the Court,

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54 *Linge Gowda v. Shivananjappa* (1953) 6 ELR. 288; *Radhakrishna Shukla v. Tara Chand Maheshwar* (1956) 12 ELR 378; *Dr Y.S. Parmar v. Hira Singh* Pal (1958) 14 ELR 45; *Triloki Singh v. Shivrajwati Nehru* (1958) 16 ELR 324; *Jayalakshmi Devamma v. Janardhan Reddy*, 17 ELR 302.

55 *Supra* note 53 at p. 149.

does not interfere with the free exercise of their electoral right as the electors still will be free to do what they desire in spite of the advice.

Regarding the third allegation, the Court held that all that was done was to canvass support for Dr. Zakir Husain. The Court observed:

> ..... if a leader of the party asks members of his party for whom to vote he is merely canvassing. The voting is after all secret and every elector is free to vote for whomsoever he likes, even though he may have been asked by the leader to vote for a particular candidate.[56]

Expressing the difficulty to earmark the difference between canvassing and exercise of undue influence, the Court observed:

> It is difficult to lay down in general terms where mere canvassing ends and interference or attempt at interference with the free exercisde of any electoral right begins. That is a matter to be determined in each case, but there can be no doubt that if what is done is merely canvassing it would not be undue influence...[57]

Thus mere canvassing by a Minister or a Chief Minister cannot amount to undue influence unless it is shown that the free will of the electorate was interfered with.[58]

2.1.4.3 Challenging Qualifications of Opposite Candidate or Party

Giving call for a debate on questions whether a candidate is qualified to stand or whether a political party is competent to nominate candidates for a particular constituency does not amount to undue influence within the meaning of Section 123(2). In *N.S. Vardhachari v.* G. *Vasantha Pai*,[59] the Court said that candidates in elections are not only entitled to raise political issues, they can also raise social, economic and legal issues. So long as no attack is made on the character of the opponent, it is open to a candidate to raise questions about the qualifications of the contestants.

2.1.4.4 Issuing of Whips

Under the Tenth Schedule to the Constitution, the legislators are bound to act in accordance with the whip issued by their party and omission to follow the same may disqualify them. Before the enactment of the Tenth Schedule, this aspect was considered by the Supreme Court in *Shri Baburao Patel v. Dr Zakir Hussain*[60] the Supreme Court held that the direction by the Chief Whip for making entry with name of Dr, Zakir Hussain in the first preference and leaving the rest of the preferences as unmarked was not undue influence, for the electors were free to do what they desired in spite of the advice. In *Mithilesh Kumar v. R. Venkataraman*,[61] it was alleged that in the Presidential election the Congress (I) party issued a whip to its legislators asking them to cast their votes in favour of Sri R. Venkataraman and it was a threat

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56 *Id.*, at p. 146.
57 *Ibid.*
58 See also *Bachan Singh v. Prithvi Singh*, *Supra* note 16 and *Amir Chand Tota Ram, Delhi v. Smt. Sucheta Kripalani, Delhi*, AIR 1961 P&H 383.
59 AIR 1973 SC 38.
60 *Supra* note 53.
61 AIR 1987 SC 2371; See also *Kaka Joginder Singh Alias Dhartipakar v. K.R. Narayan, Vice-President* (1993) Supp (3) SCC 607.

amounting to undue influence. The petition was dismissed by the Supreme Court on the ground of lack of cause of action.

The approach of the Court in these cases seems to be correct as the political whips are legalized under the Tenth Schedule to the Constitution of India.

2.1.4.5 Statements that are Mere Expression of Opinion

In *Biresh Misra v. Ram Nath Sarma*,[62] the pamphlet made an appeal to the Muslim community in particular and in general to all minority communities that in the coming general election all should try utmost for the success of the Congress and that not to vote for Congress will be like committing betrayal of the country.[63]

The Assam High Court held that a statement 'not to vote for the Congress will be like committing betrayal of the country' was a mere expression of opinion and did not amount to a threat. The Court held that the language of the publication was not such as was likely to interfere with the free exercise of the right of voting. It only stated that the failure to vote for the Congress would be like an act of betrayal of the country. The Court further observed that 'Even if it is said that the failure to vote for a particular candidate will be like committing an offence that by itself will not constitute any threat or interference with the exercise of free right of voting'.[64]

2.1.4.6 Use of False Flag

In *Biswanath Upadhyaya v. Haralal Das*,[65] the returned candidate, during his election campaign, used the flag of Congress party though he belonged to the Progressive party. The Assam High Court held that the use of flag was not illegal and that there was no undue influence.

2.1.4.7 Use of Red Light on Top of the Vehicle

In *Col. Inder Singh* v. *Rangila Ram Rao*,[66] the allegation was that the returned candidate had illegally used red light on the top of his vehicle during election campaign in almost the entire constituency and hence illegally influenced the electors to vote for him in the elections and thus committed the corrupt practice of undue influence. The Punjab and Haryana High Court held that the use of red light on top of a vehicle by itself does not constitute an 'inducement' or 'threat' to influence the discretion of an individual to act in an independent manner. The Court observed that even if the red light is used unauthorisedly by the returned candidate during election, it is not an act of 'inducement' or 'threat'. It may be an illegal act but is incapable of affecting the election result.

It is submitted that the practices of using flag of another party or of using red light on top of the vehicle must be considered as undue influence as in these cases the very purpose behind such canvassing is to create confusion/ fear in the mind of the voters so that they may not freely exercise electoral right on their own judgement.

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62 17 ELR 243.
63 *Id.*, at pp. 249-50.
64 *Supra* note 62 at p. 250.
65 AIR 1958 Ass 97.
66 AIR 2005 HP 11.

3.1 Exception

3.1.1 Declaration of Public Policy, Promise or Public Action during the Eve of Election-Proviso (b) to Section 123(2)

Execution of public works and grants of concessions in a constituency, on the eve of election do not amount to corrupt practice. As has already been observed, a Minister cannot cease to function as such when his election is due.[67] Thus, all benevolent acts of public or civic benefits, without distinction of caste, creed, etc. on the eve of elections, by the Government or the party in power do not raise a presumption that such acts were done with a corrupt motive, unless the contrary is proved. It may be that the case turns out to be that of evil practice but not of corrupt practice of bribery or undue influence.[68] This aspect of the law is covered under Proviso (b) to Section 123(2) which reads as follows:

> A declaration of public policy or promise of public action or mere exercise of the legal right without intent to interfere with an electoral right shall not be deemed to be an interference with the free electoral right.

Proviso (b) of Section 123 (2) thus operates as an exception to the prohibitions under Section 123(2) (a). In other words, clause (b) exempts declaration of public policy or promise of public action or the mere exercise of a legal right without intent to interfere with an electoral right from the mischief of this clause.

In *Radhakrishna Shukla v. Tara Chand Maheshwar*,[69] the Election Tribunal, Lucknow acknowledged the right and privilege of every candidate and every party setting up a candidate to put before the electorate his or its views and programmes so that the electorate may decide which of the rival candidates to prefer. It held that general promises by the agents or workers of a candidate or by the Ministers or Deputy Ministers to redress certain public grievances or to create public amenities like hospitals, if the electors voted for the candidate who had been put by that party, did not amount to bribery or undue influence within the meaning of Section 123(2) of the Act; such promises being promise of public action within the meaning of the Proviso (b) to Section 123 (2). Similar view was expressed by the Punjab High Court in *Ram Phal v. Brahma Prakash*.[70]

In *Upendralal v. Smt. Narainee Devi Jha*,[71] on the eve of election an ordinance was promulgated granting exemption from payment of land revenue in certain cases. It was alleged that more than thirty thousand tenants were benefited by the said measure. The High Court held that the action was general in character and could not amount to undue influence simply because several persons had taken benefit under it. Similarly, promise to procure the cancellation of the allotment of lands to displaced persons,[72] promise by a candidate about writing-off loans due to banks, removal of some taxes and repeal of some laws,[73] promise to traders that the State Sales Tax

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67 *Bhanu Kumar Shastri v. Mohan Lal Sukhadia*, 38 ELR 119.

68 *Ghasi Ram v. Dal Singh*, AIR 1968 SC 1191; *Birendra Chandra Dutta v. J.K. Chaudhary*, 38 ELR 381.

69 12 ELR 378.

70 AIR 1962 Punjab 129. See also *Gangadhar Maithani v. Narendra Singh Bhandari*, 18 ELR 124.

71 AIR 1968 MP 89.

72 *S. Mehar Singh v. Umrao Singh*, AIR 1961 P&H 244.

73 *Mohansingh Laxmansingh v. Bhanwarlal Rajmal Nahata*, AIR 1964 MP 137.

Law would be amended to provide some tax exemptions,[74] are held to be expressly exempted by Proviso (b).

The Supreme Court in *Shiv Kirpal* Singh *v. Shri V. V. Giri*[75] held that the expression 'free exercise of the electoral right' does not mean that voter is not to be influenced. In a democratic society, the candidates and their supporters must naturally be allowed to canvass support by all legitimate means. This exercise of the right by a candidate or his supporters does not interfere or attempt to interfere with the free exercise of the electoral right.

In *Dhartipakar Madan Lal Agarwal v. Rajiv Gandhi*,[76] the Supreme Court reiterated that a candidate, his workers and supporters have every right under the law to canvass for that candidate stating that if elected he would work for the development of the constituency. It observed: 'Declaration of public policy or a promise of public action or promise to develop the constituency in general do not interfere with free exercise of electoral right as the same do not constitute bribery or undue influence.'[77] The Court held that Mrs. lndira Gandhi who was the leader of the Congress party had every right to ask the voters to vote for Rajiv Gandhi and the fact that she was the Prime Minister was irrelevant in the context. Moreover, bargaining or undue influence in making appeal to the voters for casting their votes was not alleged. Thus promises of general nature made by the ministers to redress public grievances or to provide for public amenities for developing the constituency if elected, do not amount to corrupt practice.

In *Ramchandran Kadanappalli v. K.P. Noordeen*,[78] the Kerala High Court held that anything done by a candidate before his nomination as candidate for gaining popularity in the constituency would not come within the ambit of undue influence. It was held to be a candidate's right to nurse his constituency. The view was reiterated in *Kunhumohammed v. T.M. Jacob*[79] that something done by a minister in his constituency with the object of enhancing his election prospects would not be a corrupt practice.

It is submitted that Proviso (b) to Section 123 (2) indirectly provides a cover to the exercise of undue influence by the party in power, which has a definitely upper hand in making big promises.

4.1 Conclusion

The above discussion makes it clear that Section 123 (2) does not strike at the right of a candidate to influence the voters. Political parties and candidates are free to exercise their influence upon the voters in order to garner their support in the election. It is the abuse of influence with which alone the law can deal and that is what Section 123 (2) is meant to prohibit. Influence cannot be said to be abused

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74 *Ram Phal v. Brahma Prakash*, *supra* note 70.
75 AIR 1970 SC 2097.
76 AIR 1987 SC 1577.
77 *Id.*, at p. 1592.
78 AIR 1988 Ker. 141.
79 (1998) KLT 809; Since proviso (b) to section 123 (2) expressly permits such actions, it becomes impossible to demarcate, when expenditure of public money becomes undue influence, because public money should not be spent even for development activities with the object of influencing the voters.

merely on the ground that it exists and operates. In determining undue influence in election cases, the Courts seem to be guided more by the contractual concept of undue influence where the relationship between parties requires that one party should be in a position to dominate the will of another and that dominance by one is exercised over the other in order to obtain consent of that another unduly. But in election cases such relationship is not necessary keeping in view the object of Section 123 (2). In election law, the essence of undue influence is that a person is constrained to do something against his will which but for such influence he would not have done if left to exercise his own judgement.

The judicial decisions clearly demonstrate that the Courts have put a restricted construction on Section 123 (2). The judiciary feels fettered due to lack of evidence in such cases. In cases relating to divine displeasure or spiritual censure, the judges seem to have misconstrued the provision by pronouncing that the religious leader should have had a considerable influence over the electors if a case of undue influence is to be made out. In some cases even the statements of all the witnesses that the returned candidate and his supporters threatened them and made them to run could not satisfy the court. In the absence of written evidence (like posters, pamphlets, leaflets, etc.), the judiciary has, as is the case in most situations, found it difficult to reach to a finding as to the exercise of undue influence. That is why the cases in which the courts have reversed election results are extremely rare. It is only when the allegations are serious and established strictly on evidence that the courts would like to intervene.

LEGISLATIVE & INTERPRETATIVE PROCESS AND INDIAN JUDICIARY

Anupama Goel*

1.1 Introduction

Constitution of India is a unique document inasmuch as despite its length and specificity, it is remarkably flexible and adaptive. Constitution of a country is the supreme law – it is the source of all governmental power, legislative, executive or judicial. It is the law which delineates the regulation and management of power in governmental institutions. Apart from the inter-institutional dynamics, a modern democratic constitution has another important role to play – that is, to provide for fundamental guarantees and freedoms for every individual or community to live with dignity. Our Constitution, which is the result of a lengthy freedom struggle, reinforces the values which the Indian society has upheld for centuries. One of the prime forms of this is the fashion in which the judiciary has exercised varied levels of assertiveness and control over policy-making over the decades.

Despite being the lengthiest constitution in the world, the makers of our Constitution ensured that the flexibility of the Constitution does not get affected due to its specificity. The Indian Constitution can be termed bulky, but by no stretch of imagination can it be termed rigid or unaccommodating. This facet of the Constitution is evident from the constitutional practice over the last 62 years, and in particular, from the manner in which the Supreme Court of India has interpreted the Constitution to suit the needs of the times. Suffice it to say that the Supreme Court of India has, with its ingenuous interpretation, breathed life into a constitution, which would have otherwise meant little for an ordinary citizen of the country.

The Indian Supreme Court has often been dubbed as the strongest judicial institution in the world. The Supreme Court has earned this reputation due to its active and engaging role in enforcement of the fundamental rights guaranteed by the Constitution of India. It is fitting that a country which is the largest democracy in the world, with a severe population-resource imbalance, be blessed by a resilient and independent judiciary like ours. Fundamental freedoms are not only recognised, but also actively enforced by the Indian judiciary, which is the only manner in which a democracy can be given true meaning.

While in the first three decades of this constitutional era, the judiciary generally exercised a step-back approach to policy-making, the following decades saw a stark shift and a more participative approach of the judiciary to making policies. This, the judiciary, led by the Supreme Court of India, did by relaxing the rule of *locus standi*, entertaining Public Interest Litigation and the like. Some authors attribute this attitude of the judiciary to the sheer blow to its image because of its complete inability to act against the excesses of the Emergency.[1]

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1 Upendra Baxi, *Courage, Craft and Contention*, Bombay: N.M. Tripathi, 1985.

The impact of emergency and the case law emerged subsequent thereof, *viz. Maneka Gandhi v. U.O.I.*,[2] on Indian jurisprudence, and indeed the judicial thinking is so deep that it would not be an understatement if one were to say that the Constitution of India was merely conceived in 1950, its birth was in the year 1978. Decades later, we find that Article 21 has become the magician's hat of rights. It is no longer merely a negative obligation on the State to desist from depriving persons their life and personal liberty, but a positive obligation to ensure that persons live with dignity and the high ideals of the Constitution are translated into meaning for an ordinary Indian's humdrum existence.

Post 1978, the Supreme Court of India interpreted liberally and meaningful the Rights charter, and in *S.P. Gupta v. U.O.I.*,[3] the Court relaxed the requirement of *locus standi* in public interest litigation, which was consigned to be a relic of the past. If we look at the text of Article 32, which bestows on every person the right to constitutional remedies, it is found that the requirement of *locus standi* is absent. It states: "The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed." It does not specify *who* is required to approach the Court for enforcement of fundamental rights. Yet, it guarantees the right to get such rights enforced by the Supreme Court, which were earlier denied or ignored due to poverty or disability in a socially or economically disadvantaged position. The techniques devised by the Court in order to ensure percolation of rights enforcement to the remotest corners of the country, include epistolary jurisdiction, which is that the Court can be moved by a mere letter – a formal petition is not a *sine qua non* for invoking the PIL jurisdiction.

Public interest litigation is a way of the constitutional courts engaging with the society at large. In the PIL jurisdiction, the courts do not adopt an adversarial approach. The nature of the judicial process in PIL jurisdiction is best explained in *Upendra Baxi v. State of U.P.*[4]:

> It must be remembered that this is not a litigation of an adversary character undertaken for the purpose of holding the State Government or its officers responsible for making reparation but it is a public interest litigation which involves a collaborative and cooperative effort on the part of the State Government and its officers, the lawyers appearing in the case and the Bench for the purpose of making human rights meaningful for the weaker sections of the community. It marks a step forward in the direction of reaching socio-economic justice to the deprived and vulnerable sections of humanity in this country.

The essence of PIL jurisdiction, nay, all constitutional litigation is equity, which can never be extended to a litigant who attempts to pollute the purity of judicial process.

The present paper is an attempt to re-examine the propriety of the judiciary indulging in policy-making, *via* liberal interpretation to Rights charter with the help of innovations like introducing and acknowledging PIL, epistolary jurisdiction or taking *suo motu* cognizance various maladies in Indian society. To this end, the

2 AIR 1978 SC 594.
3 AIR 1982 SC 149.
4 (1986) 4 SCC 106.

paper has been divided into three parts. In the first part, the theoretical underpinnings of the judiciary's traditional role in a separation of powers Constitution are closely studied, along with a comparison between the structural capabilities of the political branches (chiefly, the legislature) and the judiciary. In the second part, a more pragmatic view of translating this theoretical framework into a more meaningful and tangible reality is advanced. In the third part, there is an attempt to answer the question of whether a legislative exercise undertaken by the judiciary is only legitimised when it is to protect and uphold the rights of the minorities and the downtrodden, or whether law-making by the judiciary *en bloc* is legitimate in our democratic framework.

2.1 Theoretical Foundations

Broadly speaking, there are two forms of decision-making in modern constitutions, *viz.*, legislation and adjudication. In his seminal work on the advantages and limitations of adjudication,[5] Prof. Fuller compares these two forms of decision-making and shows how there are some 'social tasks' that cannot be assigned to courts and other adjudicative agencies, essentially because the issues are 'polycentric' and Courts structurally 'triadic'.

Even if it is conceded that judges possess more specialist knowledge about the issues than the legislators do, structurally legislatures are better equipped to deal with matters of policy than Courts because of two main structural characteristics. Firstly, in contradistinction with the Courts, legislatures tend to be fairly large – in the case of the Indian Parliament – 800 members. This would imply a wide range of opinions, experiences and points of view.

Although the inefficiency and the low standard of debates and discussions in the legislatures are generally used as a criticism against them, it is actually not a criticism because legislatures are fora for *controlled expertise*, which is the second structural characteristic of legislatures. And despite the fact that the majority of the members do not possess specialist knowledge, the minority does, it is this 'expert' minority or a handful of people who have to convince the relatively 'ignorant' or 'amateur' majority for the legislature to adopt a certain policy.[6]

The Supreme Court of India has held that "the essence of the distinction between legislative power and judicial power is that the legislature makes new law which becomes binding on all persons over whom the legislature, exercises legislative power; the judicature applies already existing law in the resolution of disputes between particular parties and Judges may not deviate from this duty."[7] The Court has further defined the core legislative function as "the determination or choice of the legislative policy and of formally enacting that policy into a binding rule of conduct."[8]

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5 Lon L. Fuller, "Forms and Limits of Adjudication", 92 *Harland Law Review*, 353-409 (1978).
6 N.W. Barber, "Prelude to the Separation of Powers", 60 *Columbia Law Journal*, 59-88 (2001), at p. 74.
7 *Indira Gandhi v. Raj Narain*, AIR 1975 SC 2299, per Mathew J., at p. 2374.
8 *Harishankar Bagla v. State of M.P.*, AIR 1954 SC 465, at p. 468.

Waldron, who is well known for developing a jurisprudence of legislation[9] argues that if his four assumptions[10] are satisfied in a society, the society in question ought to settle the disagreements about rights that its members have using its legislative institutions, and the case for consigning such disagreements to judicial tribunals for settlement is weak and unconvincing.[11] According to Waldron, such a settlement in case of disagreements about rights would be plainly undemocratic and even illegitimate.

Given these juristic opinions on the subject, it must be concluded that ordinarily, all policy-making must emanate from the political wings of the government in a democracy. This is not only due to the fact that composition-wise, the judiciary is not democratic (given that in India, we do not have a system of elected judges), but also because the primary task assigned to them is that of interpretation of the law made by the legislature.

3.1 Translating the Theory into Action

In the previous part of the paper, it has been argued that the judiciary must stay away from law-making and stay committed only to its assigned role of construing the laws, because of the structural and compositional distinctions between the political branches of the government and the judiciary. This part of the paper argues however, that adopting such a rigid theoretical framework in practice may create problems.

Under our Constitution, the judiciary has the final word as to the *legality* and *constitutionality* of any action by any authority. This power is derived from the power to issue writs under Articles 32 and 226 of the Constitution, possessed by the Supreme Court and the High Courts respectively. Under these provisions itself, the judiciary has the power of judicial review, which is so crucial to the survival of the rule of law in our country. The working of our Constitution would be very different without this power of reviewing the actions of the political branches with the judiciary.

India is the largest democracy in the world. It is a nation which has a large rural population and a high percentage of her people is illiterate. Additionally, India is developing at a fast pace and rights of different classes of people come into conflict at every stage of this development. Moreover, the political branches have displayed their failure to discharge their functions with great finesse and high levels of efficiency. These branches are well-known for their often callous attitude towards the rights of the common man. In such circumstances, the failure of the other two branches of the State, and the threat posed to the rights of the ordinary citizen,

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9 Jeremy Waldron, *Law and Disagreement*, New York (Oxford), 1999.

10 The four assumptions are: (1) democratically institutions in reasonably good working order, including a representative legislature elected on the principle of universal adult suffrage; (2) a set of judicial institutions in reasonably good working order, set up on a non-representative basis to hear individual lawsuits, settle disputes, and uphold the rule of law; (3) a commitment on the part of most members of the society and most of its officials to the idea of individual and minority rights; and (4) persisting, substantial, and good faith disagreement about rights among the members of the society who are committed to the idea of rights. Plainly, in the case of the Indian society, these four assumptions are satisfied, India being the largest functioning democracy (with a nearly continuous six decade history) and a rights and rule of law conscious judiciary headed by the Supreme Court, an equally rights conscious citizenry which disagrees about their rights.

11 Jeremy Waldron, "The Core of the Case Against Judicial Review", 115 *Yale Law Review*, 1346-1406 (2006).

become two of the most important reasons for the supervisory and monitoring role of the judiciary.

Critics of the judiciary playing such a role usually rely upon the theoretical framework discussed in the previous part, but seldom can the harsh realities be ignored. The Preambular objectives of our Constitution must be upheld, regardless of the authority who upholds it. In order to do so, our higher Courts have stepped in to ensure that these Preambular objectives are sustained wherever there are governmental excesses or inaction. These governmental actions may be active or passive – i.e., either some acts of the government which result in violation of fundamental rights of its citizens; or the government displaying its complete callousness or apathy to persisting violations of fundamental rights. Although there is no clear demarcation between these two, but it may be contended that most developmental activity which results in displacement, loss of livelihood and environmental degradation is a prime example of the active governmental actions,[12] which the judiciary actively steps in to check. On the other hand, instances of the latter usually include failure to check persistent political and civil rights violations, like deplorable conditions of inmates[13] or bonded labour.[14]

4.1 Legitimacy of Judicial Legislation

Be that as it may, the normative question in the present paper is restricted to what the judiciary's approach should be in case there are no prevailing laws pertaining to an issue at hand. The Supreme Court has generally recognised the principle that the judiciary must not indulge in legislation, as that is the job of the legislature.[15] The basic principle is that the primary task of the judiciary is to interpret, and while doing so, it must not indulge in an approach which amounts to judicial legislation.[16] However, while interpreting the law, the judiciary may resort to newer interpretation, and this will not amount to judicial legislation.[17]

However, the moot point in the present paper is whether in the absence of any prevailing legislation regulating a particular subject, the judiciary is empowered to lay down 'guidelines'. Will such an exercise constitute impermissible judicial legislation? The judiciary has laid down guidelines to regulate subjects for which there have been no prevailing legislations in a number of cases.

In the *Inter-Country Adoptions case*,[18] the Court found that there was no statutory enactment regulating adoption of a child by foreign parents and as a consequence, considered appropriate to lay down guidelines in order to cover the existing lacuna in the statute-book. While laying down these guidelines, the Supreme Court drew inspiration from various international documents, such as the Declaration of the Rights of the Child adopted by the United Nations General Assembly on November 20, 1959, apart from considering suggestions and scores of other draft proposals and model laws.

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12 *M.C. Mehta v. Union of India*, (1987) 1 SCC 395 [*Oleum gas leak case*].
13 *Sunil Batra v. Delhi Admn.*, (1978) 4 SCC 494.
14 *Bandhua Mukti Morcha v. Union of India*, (1984) 3 SCC 161.
15 *S.R. Batra v. Taruna Batra*, (2007) 3 SCC 169.
16 *R.M.D. Chamarbaugwalla v. Union of India*, AIR 1957 SC 628; *State of Kerala v. Mathai Verghese*, (1986) 4 SCC 746.
17 *Transport & Dock Workers Union v. Mumbai Port Trust*, (2011) 2 SCC 575.
18 *Lakshmi Kant Pandey v. Union of India*, (1984) 2 SCC 244.

In the landmark case of *Vishaka v. State of Rajasthan*,[19] the Apex Court had to tackle with the menace of sexual harassment of women at workplace. Since there was no statute regulating sexual harassment at workplace then, the Supreme Court laid down various guidelines from international Conventions, chiefly the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). These guidelines have been adopted by the legislature as the Protection of Women from Sexual Harassment at Workplace Act, 2013.[20]

The Court has subsequently used this tool of laying down guidelines in the nature of a legislation as a stop-gap arrangement, till the Parliament enacts a law (popularly known as the *Vishaka technique*) in various cases. The Supreme Court took a serious note of the widespread destruction of the public and private properties due to bandhs and agitations and laid down guidelines.[21] In the pending forest matter *T.N. Godavarman Thirumalpad v. Union of India*,[22] the Supreme Court continues to lay down guidelines concerning almost every aspect of forest conservation in order to safeguard the environment. Most recently, the Supreme Court laid down norms and guidelines in respect of securing permission for passive euthanasia in certain exceptional circumstances.[23] The judgment is especially significant as there are no international conventions to which India is a signatory in this respect, as was the case in *Lakshmi Kant Pandey* and *Vishaka* cases. However, the Court extended a novel interpretation to the "right to life" enshrined in Article 21 – a sea change from its earlier interpretations of the same in respect of the right to die.

However, despite these instances, our Supreme Court has opted for a cautious approach in laying down guidelines only when necessary and in the absence of any existing rules or statute enacted by the executive or the legislature. For instance, a Constitution Bench[24] declined laying down guidelines in respect of providing medical facilities to ex-servicemen, as there was already a scheme framed by the Government in that regard. The Hon'ble Supreme Court, in that epoch-making pronouncement, clarified that guidelines must ordinarily be laid down only to "fill in gaps" in exercise of the Court's plenary powers.

5.1 Conclusion

Our Constitution enshrines the principle of separation of powers for two primary reasons – *firstly*, to prevent concentration of power in one hand and therefore, to avoid tyranny; *secondly*, to promote efficiency by assigning a set of functions. Therefore, it will be wrong to adopt a completely rigid approach to this principle of separation of powers and prohibit any deviation from it. Principles and doctrines are meant to serve some function. The Indian judiciary, while allegedly breaching this principle of separation powers has avoided conflict, has not become tyrannical and ensured efficiency. The primary function of a Constitution is to ensure good administration and protection of fundamental rights of its people. While it is true that there is a certain mechanism set to do so under our Constitution, at the same time, it

19 (1997) 6 SCC 241.
20 Act No. 14 of 2013.
21 *Destruction of Public & Private Properties v. State of A.P.*, (2009) 5 SCC 212.
22 Writ Petition (Civil) No. 202 of 1995.
23 *Aruna Shanbaug v. Union of India*, (2011) 4 SCC 454.
24 *Confederation of Ex-Servicemen Assns. v. Union of India*, (2006) 8 SCC 399.

will be wrong to say that the Supreme Court and the High Courts have gone beyond their mandate in filling in the gaps in the statute-book by laying down of guidelines.

In other words, while laying down such guidelines, the judiciary is not overreaching or usurping the functions exercisable by the other two State organs, but merely plugging in the gaps as an interim arrangement, which may be replaced any time subsequently by the legislature.

Political processes often highlight differences – be those differences in ethnicity, caste, religion, cultural or linguistic. The judicial process seeks to bridge all these, and places the feeling of Indianness on top. The judiciary helps the nation survive and move forward. It does not overreach, but merely oversees.

JUDICIAL ACTIVISM *VIS-A-VIS* SUSTAINABLE DEVELOPMENT: AN APPRAISAL

Shamsher Singh*

1.1 Introduction

Judiciary may be reported as the most sharp-eyed protector of democracy. It is one of the three towers upon which the structure of the constitution is constructed. Undoubtedly, major push towards environment preservation and balanced development in India has started from the Indian judiciary. It will not be wrong to say that environmental variances have created some striking case laws in India. Because, Judiciary courageously and enthusiastically enforcing the law and filled the gap in the field of environment and sustainable development. It facilitated legislators without legislating in ensuring while eagerly watching that the present generation appreciated and advances the quality of life or rather conserves it for upcoming generations. Indian Judiciary has ever assumed the role of defender of the environment and insurer of the fundamental right of life and sustainable development. It has been played important role for advancing the concept of Sustainable Development. The present research highlights the activism of Indian Judiciary in interpreting the cases related to environmental pollution particularly with an emphasize to the concept of Sustainable Development. Before discussing about the judicial activism, it is necessary to take a brief look on international endeavours and constitutional commitments for the preservation of environment and its sustainable development.

1.2 International endeavours and Sustainable Development

Undoubtedly, international community has done a commendable job for the development of concept of sustainable development. Ongoing meetings on the world environment and sustainable development under various gathering born in the past few decades are really marvelous efforts on the part of international community. The voyage of international community about the environment protection and sustainable development has been started even before the Stockholm Declaration Human Environment.[1] The Trial Smelter Arbitration, 1941[2]; International Convention for

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1 The conference is rooted in the idea of regional pollution and acid rain problems of Northern Europe. The UN Conference may rightly be called the *Magna Carta* of Environment. The UN Conference on the Human Environment was held at Stockholm from 5 June to 16 June 1972. The official initiation of the conference began with a letter dated 20th May 1968 from the permanent representative of Sweden to the Secretary-General of United Nations "on the question of convening an international conference on the problems of human environment. (***See;*** UN, ECOSOC, E/446/Add. 1. 1968, 1968, in ECOSOC, official Records, Forty Fifth Session, Annexes Item 12).

2 The Trial Smelter decision extensively promoted the principles of the state responsibility for transboundary pollution. Trial Smelter Arbitration is distinguished as the first international ruling on transborder air pollution, having ingrained the *"polluter pays principle"* (one of the principle of sustainable development) as the basis for dissolving transboundary environmental disputes and remains one of the key basis of global environmental jurisprudence. We can say Trial Smelter Arbitration was an extension of **Justice Blackburn** decision related to rule of strict liability (*Rylands v. Flethcher,* 1868 LR 3HL, 330). Undoubtedly, the strict liability rule is of appreciable

[Footnote No. 2 Contd.]

Prevention of Pollution of Sea by Oil, 1954[3]; Maltese Proposal of 1967[4] and Biosphere Conference, 1968[5] were evident of the above said fact.

From Stockholm Declaration to the United Nations Conference on Sustainable Development (Rio+20), 2012,[6] world community met time and again for achieving the concept of sustainable development. Various legally binding and legally non-binding promises on different issues (like protection of wetlands of international importance especially as waterfowl habitats, protection of ozone layer, protection of environment technology transfer, climate change, forests, sustainable development and biological diversity) concerning sustainable development and environment protection were done by world community at global level. According to the World Commission on Environment and Development (WCED),[7] 1987, human laws need to be reformulated to keep human activities in harmony with the unchanging and universal laws of nature.[8]

Moreover, for the implementation of above said promises Commission on Sustainable Development (CSD)[9] was established in 1992. Agenda 21[10] at the Earth

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[Footnote No. 2 Contd.]

applicability in environment pollution related cases, particularly in those cases where misfortune is generated by leakage of unhealthy substances. For the application of this rule, two conditions must be accomplished:

(1) There must be non-natural use of land.

(2) There must be escape from the land of something, which is likely to cause some harm or mischief if it escapes.

But, Indian Supreme Court in the case of Indian Council for *Enviro-Legal Action v. U.O.I.,* (1996) 3 SCC 212 at pp. 241-256, held that rule of strict liability which is subject to certain exceptions, is not suitable for Indian circumstances ad hence not suitable.

3 *The International Convention for the Prevention of Pollution of the Sea by Oil* was held at London on 12 May 1954. It was intended to take action by common agreement to prevent pollution of the sea by oil. The oil leaking from ships forms a layer on the sea and prevents sun's rays from penetrating deep into the sea. That affects marine fauna and flora as also deep-sea fishing. *(See;* **Shri Sadanand J Harikantra**, *'48th Report of Public Hearing on Environment and Development, Manglore'*, 19th December, 2003, p. 10).

4 In order to resolve these conflicting interests, the concept of sustainable development was mooted in the *Maltese Proposal of 1967* presented in the United Nations General Assembly.

5 Summarizing recurring themes of the Conference, the final report declared that "although some of the changes in the Environment have been taking place for decades or longer, they seem to have reached a threshold of criticism, as in the case of air, soil and water pollution in the industrial countries these problems are now producing concern and a popular demand for correction(See; UNESCO, "Final Report of the Inter-Governmental Conference of Experts on the Scientific Basis for Rational Use and conservation of the Resources of the Biosphere, held at UNESCO House, Paris 4-13 Sept. 1968", SC/MD/9, Paris, 9 Jan. 1969, P-9 (herein after cited as "Final Report on the Biosphere).

6 In this conference, Member States recall the principles of Stockholm Declaration, Rio Declaration, Agenda 21, and Johannesburg Declaration on Sustainable Development of the World Summit on Sustainable Development.

7 WCED was established by the UN General Assembly in 1983 for 'a global agenda for change'. The WCED, chaired by *Gro Harlem Brundtland, (former Prime Minister of Norway)* popularized the term sustainable development in *'Our Common Future',* also known as the 1987 *Brundtland Report.*

8 *See* World Commission on Environment and Development, '*Our Common Future'*, 1987, Oxford University Press, Oxford at p. 330.

9 CSD took responsibility for monitoring the execution of the Johannesburg Plan of Implementation. The CSD reports to ECOSCO (Economic and Social Council) in the UN hierarchy, which means that CSD decisions must be approved by ECOSOC before they can be presented to the General Assembly for Action. Fifty-three states are elected as members of the CSD by ECOSOC, with regional representation so that 13 African states, 11 Asian states, 10 Latin American and Caribbean states, 6 Eastern European states, and 13 Western European and North American states serve at any

[Footnote Nos. 9 and 10 Contd.]

Summit[11] called for the creation of CSD to ensure that the decisions from the conference were implemented.

After the 30 years, in Stockholm, The Johannesburg Summit, 2002 expanded the concept of sustainable development by underlining the necessity of a better amalgamation of three pillars of sustainable development namely of economic development, social development and environment protection. It acknowledged sustainable development as a central element of the international agenda and gave new power to global action to fight poverty and protect the environment. In 2002, to find out the solution of climate change within the context of sustainable development, Delhi Declaration[12] was signed. Further, **New Partnership for Africa's Development (NEPAD) 2003** was accepted by African Heads of State and Government for root out the poverty and to place their nation on a way of sustainable growth and development. NEPAD recognizes that for the fulfillment of goal of sustainable development and environment preservation is the foremost condition. Therefore environment conservation is ambition of the NEPAD. On the same line, **Marrakech Process, 2003**[13] emphasized that we must change our unsustainable consumption and production designs and share to reduce carbon emissions and has made economies resourceful.

Moreover, in Copenhagen Accord, 2009,[14] Cancun Agreement 2010, Durban Conference[15] and recently in the United Nations Conference on Sustainable

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[Footnote Nos. 9 and 10 Contd.]

point in time. Each member serves three years term, staggered so that one-third of the seats are elected annually. Members of international organizations, NGO's and other states may attend meetings as observes. (See; **Elizabeth R. DeSombre**, 'Global Environmental Institutions', Ed. 2006, Published by Rout ledge Taylor & Francis Group, Landon and New York, p. 33)

10 Agenda 21 is a 500 page blue print detailing the 'new global partnership' for sustainable development in the 21st century. In other hand, it is agenda for the world to be pursued in the 21st century for bringing about 'sustainable development in the world'. *Available at http://www.org/documents.multilingual/Defualt.asp?documentid-52*, last accessed 22 May, 2010.

11 *Brundtland Report* led the UN to convene a second global conference, held in 1992 in *Rio de Janeiro (Brazil) - the United Nations Conference on Environment and Development* (UNCED) The *Brundtland Report* led the UN to convene a second global conference[11], held in 1992 in *Rio de Janeiro (Brazil) - the United Nations Conference on Environment and Development* (UNCED). The UNCED is popularly known as *the Earth Summit.* While the focus had once been on the environment and assessing the relevance of the environment in terms of human need, the UNCED' approach was marked contrast. While the focus had once been on the environment and assessing the relevance of the environment in terms of human need, the UNCED' approach was marked contrast. (***See***; **Marie-Claire Cordonier Segger and Ashfaq Khalfan**, *'Sustainable Development Law-Principles, Practices and Prospects'*. 2004, Oxford University Press, p. 20.)

12 The United Nations Framework Convention on Climate Change held at Delhi from Oct. 23- Nov. 7, 2002, where the *Delhi Declaration* was signed. The theme of Delhi Declaration was to place the solution of climate change within the context of sustainable development. The meeting focused on the ratification of the Kyoto Protocol on the reduction of emission of greenhouse gases, which is till to come into force as several key countries have yet to agree. (***See;*** Down to Earth, No. 30, 2002, pp. 30-37.)

13 In Johannesburg Declaration of Sustainable Development, member states admitted that suppression of poverty and change in design of consumption and production are necessary for sustainable development. Chapter-III of Johannesburg Plan of Implementation emphasized on changing unsustainable patterns of consumption and production. Keeping in mind the above facts, a 10 Year Framework of Programme on Sustainable Consumption and Production (10YFP on SCP) was initiated in Marrakech Process, 2003.

14 The main objective of the Copenhagen Accord was to cut down the global temperature below 2 degree Celsius.

Development (Rio+20)[16] world community has met for the preservation of environment and sustainable development.

Above facts clears that, the efforts of international community for achieving the concept of sustainable society is really marvelous. But if we see the other side of the coin, then one can easily say that even after continuous efforts, it was the failure of the international community to bind the developed and developing nations in cutting down the emission of greenhouse gases, because U.S.A, world biggest polluter refuses to sign the above said agreements.

1.3 Constitutional and Legal Commitments for Sustainable Development

Development that is environment friendly and meets the needs of people is motive of constitutional governance. This thing is confirmed from the various laws passed by Parliament and numerous provisions inserted in Constitution of India regarding the protection of environment and sustainable development. Therefore, it cannot refuse that we have unique Constitution of the world, backed by the principles of environment protection and sustainable development.[17]

Apart from Constitutional Provisions, India employs a range of legislative measures,[18] which are supported by Sustainable Development Principles. The objectives of all laws is to create harmony between the environment and development since neither can be sacrificed at the alter of the other.

In the outcome of aforesaid analysis of Constitutional and Legal Provisions, it is clear that the Government of India has taken up number of steps in constitutional, legal and administrative field for the protection of environment from further degradation and for achieving goal of sustainable development. But, the steps taken by the Centre and States so far have not yielded the desired results. Rising level of

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15 At the United Nations Climate Change Conference, Durban, world community gathered again for the implementation of Kyoto Protocol and Cancun agreements. The outcomes included a decision by Parties to adopt a universal legal agreement on climate change as soon as possible, and no later than 2015.

16 Member States recall the principles of Stockholm Declaration, Rio Declaration, Agenda 21, Johannesburg Declaration on Sustainable Development of the World Summit on Sustainable Development.

17 The Indian Constitution adopted in 1950, originally did not deal with environment protection, but some of the Articles like 14, 19, 21,32, 39, 42, 47, 48, 48 A, 49, 51 (A) (g) etc. were there having an indirect impact on environment and reinforcing sustainable development.

18 *Indian Penal Code*, 1860, Ss. 277, 278 and 290, *Criminal Procedure Code*, 1973, Ss. 133, 134, 135, 136, 137, 138, 140, 141, 142, 144. *Environment (Protection) Act*, 1986; *The Environment (Protection) Rules*, 1986; *National Environmental Tribunal Act,* 1995; *The National Environment Appellate Authority Act*, 1997; *The Environment (Siting for Industrial Projects) Rules*, 1999; *The Manufacture, Storage and Import of Hazardous Chemicals Rules,* 1989; *The Public Liability Insurance Act*, 1991; *The Bio-Medical Waste (Management and Handling) Rules*, 1998; *The Recycled Plastics Manufacture and Usage Rules*, 1999; *The Municipal Solid Wastes (Management and Handling) Rules,* 2000; *The Ozone Depleting Substances Rules,* 2000; *The Noise Pollution (Regulation and Control) Rules,* 2000; *The Batteries (Management and Handling) Rules,* 2001; *The Biological Diversity Act,* 2002. *The Water (Prevention and Control of Pollution) Act,* 1974; *the Water (Prevention and Control of Pollution) Rules*, 1975; *the Water (Prevention and Control of Pollution) Cess Act,* 1977; *the Water (Prevention and Control of Pollution) Cess Rules*, 1978; *the Indian Fisheries Act,* 1897. (Pre-Constitutional); *the Rivers Boards Act,* 1958; *the Merchant Shipping Act,* 1958; *the Coastal Regulation Zone Notification*, 1991; *Orient Gas Company Act*, 1857; *Factories Act*, 1948; *the Atomic Energy Act*, 1962; *Air (Prevention and Control of Pollution) Act*, 1981; *the Air (Prevention and Control of Pollution) Rules,* 1982; *the Motor Vehicle Act,* 1988; *The Noise Pollution (Regulation and Control) Rules*, 2000; *The Wild Life (Protection) Act*, 1972; *The Forest (Conservation) Act,* 1980; *The Forest Conservation Rules*, 2003; *The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act,* 2007; *The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Rules,* 2008; *The National Green Tribunal Act*, 2010.

air, water and noise pollution in metropolitan cities, anti-sustainable method of industrialists and water pollution in coastal areas are some examples which proves that India is a country of too many laws with little implementation.

1.4 Judicial Activism and Sustainable Development

The legislature has recently started talking about sustainable development in some of the enactments. But, mainly the acclaim for making sustainable development as fundamental principle of 'Indian Legal System' goes to judiciary. In other words, major initiative towards environmental protection and sustainable development in India has originated from the Indian judiciary. It is the efforts of judiciary that the concept of sustainable development has become the important part of environmental law of our country along with certain other principles such as *Polluters Pays principle*,[19] *Precautionary Principle*,[20] *intergenerational equity*[21] *and Public trust doctrine*.[22] There is no doubt; judicial approach concerning environment protection has been discussed in various studies.[23] Researcher will only discuss the judicial trends in India regarding the concept of environment preservation and sustainable development. Following decisions has given by Apex Court and various High Courts of the country in context of environment protection and sustainable development.

The positive signal of environment protection by Indian judiciary was set out even prior to the inclusion of Article 51-A in our Constitution. Apex Court held that the industries cannot be allowed to run at the expense of public health.[24]

Believing upon the theory of sustainable development, Calcutta High Court in *People United for Better Living in Calcutta-Public v. State of W.B.*[25] observed that there

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19 *The Rio declaration Principle 16 of states* "National authorities shall endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment."

20 This principle has widely been recognized as the most important principle of 'Sustainable Development'. *Principle 15 of the Rio declaration states,* "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." **An interesting comment on the precautionary principle by the Supreme Court of Pakistan is worthy of mention here. The court in *Shehla Zia v. WAPDA*** (PLD 1994 SC 693) **commented:** '*The precautionary policy is to first consider the welfare and the safety of human beings and the environment and then to pick up a policy and execute the plan which is more suited to obviate the possible dangers or make such alternate precautionary measures which may ensure safety. To stick to a particular plan on the basis of old studies or inconclusive research cannot be said to be a policy of prudence or precaution'.*

21 *The Rio Declaration Principle 3.* The main object behind the principle is to ensure that the present generation should not abuse the non-renewable resources so as to deprive the future generation of its benefit.

22 This doctrine is inter-related with doctrine of inter-generational equity. It means natural resources like lakes, rivers, seashore, forests and air are held by the State as a trustee of the public, and can be disposed of only in manner that is consistent with the nature of such a trust.

23 See Shashi Kant, *'Right to Water as Human Right, a Study into Public Trust Doctrine; Privatization and Human Right'* (Prof. S.K. Bhatnagar), Department of Law, Baba Saheb Bhimrao Ambedkar University, Lukhnow.
Vidya Bhaget Negi, *'Environment Protection Laws: A Study of Kinnaur District, H.P'*, Department of Law, Kuruksherta University, Kurukshetra.
Ms. Deepti Singh, *'Precautionary Principle and its Application: An Evolutionary Study'*, Degree Granted by: National Law School of India University, Bangalore, 2007.

24 *Ratlam Municipality v. Vardichand* AIR 1980 SC 1633.

25 AIR 1993 Cal 215, (1993) 1 Cal HN: (1993) 1 Cal LJ 105.

should be a proper balance between the protection of environment and the development processes: the society shall have to advance, but not at the cost of the environment and in the similar tone, the environment shall have to be protected but not at the cost of the development of the society-there shall have to be both development and proper environment and as such, a balance has to be found out and administrative actions ought to proceeded in accordance thereafter.

The same approach was adopted in *Indian Council for Enviro-Legal Action* v. *Union of India*[26] where the Apex Court certify its faith to establish a stabilized development and held that no activities which would ultimately lead to irrational and unsustainable development and ecological devastation should at all be allowed and courts must carefully try to protect the ecology and environment and should shoulder greater responsibility of which the court can have closer awareness and easy checking.

In the case of *Narmada Bachao Andolan* v. *Union of India*,[27] the Supreme Court expounded the theory of Sustainable Development with the view, *'A balance is required to be maintained in the development and protection of environment. Every aspect of development should be based upon sustainability'.*

Here once again, one may refer to the positive approach of the Supreme Court adopted in *Prof. Naydu's Case*[28] where the court gave preference to the human need for drinking water over and above the possible economic benefit that could be created by the industry for the state.

At the same time, the Supreme Court in *Goa* v. *Diksha Holding Pvt. Ltd.*[29] made the society aware about its responsibility towards the future generations so as to allow normal breathing and living in cleaner environment but that does not by itself mean and imply stoppage of all projects. It must be kept in mind that nature will not tolerate after a certain degree of its devastation and it will have its charge definitely, though may not be felt at this moment. Justice Banerjee while expressing his unanimity with justice Pattanaik described that environment is beauty, environment is our sustenance, as such in the event of it's perishes, humanity would perish too, may not be at present but certainly a day or two later.[30]

Both *Naydu* and *Diksha's* judgments have surely established the presence of sustainable development as a fundamental principle of environmental law, though they render a little but material guidance to ensure proper balancing. The decision in Naydu can be used as a precedent holding for primacy of human needs while in *Diksha* holding the decision for giving weight to claims of development where the social interest have no priority.[31] But experimentally speaking, the comparative study of the decisions lead one to submit that if basic human needs are endangered, development issue should be given second place while if such basic human needs are not imperiled, development must be allowed to go ahead.

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26 (1996) 5 SCC 281.
27 2000 (10) SCC664
28 (2001) 2 SCC 62, p. 87.
29 (2001) 2 SCC 97.
30 (2001) 2 SCC 108.
31 J. Talib "Constitutionalising the Problem of Environment" *Indian Law Institute*, Ed. 2000, 5 p. 522.

The Apex Court in *M.C. Mehta v. Union of India*[32] whole-heartedly applied the concept of sustainable development and fixed a time limit for some cities to switch over diesel vehicles to CNG vehicles within specified time limit. The concept also finds support from the Supreme Court in a number of cases[33] where the Supreme Court has realized that ecological factors indisputably are very relevant considerations in construing a developmental process such as town planning etc.

Further, Supreme Court of India in the case of *T.N. Godavarman Thirumulpad* v. *Union of India and Others*[34] had shown the faith on the Principles of Sustainable Development. In this case a Company made a proposal for setting up an alumina refinery in the area of Lanligarh Tehsil of Kalahandi District. In this case mining of bauxite deposits is required to take place on the top of Niyamgiri Hills. Niyamgiri Hills which is only vital wildlife habitat, part of which constitutes elephant corridor and also in the ground that the said project, including mining area, would obstruct the proposed wildlife sanctuary and the residence of certain tribes.

According to CEC, Niyamgiri Hills would be vitally affected if mining is allowed in the above area as Niyamgiri Hills is an important water source for two rivers. The project would also destroy flora and fauna of the entire region and it would result in soil erosion.

But on the other side there is a picture of utter poverty in which the local people (including tribal people) are living in the area concerned. There is no proper housing, hospitals or schools and people are living in poor conditions.

After analyzing both the aspects, the Supreme Court adopted the approach of Sustainable development. Court is not against the project, but it could not take risk of placing an important national asset into hands of applicant company. It is the only safeguard by which we are able to protect nature and sub serve development and the Supreme Court has once again shown the faith on the principles of sustainable development and proves India to be committed with its Principles.

In the case of *Tirupur Dyeing Factory Owners Association v. Noyyal River Ayacutdars Protection Association and Others*,[35] Apex Court held that development of industries, irrigation resources and power projects are necessary to improve employment opportunities and generation of revenue but balance has to maintained between development and preservation of natural resources so as to see that environment is not damaged irreparably, which may in turn cause irreparable damage to economic interests. Tirupur in State of Tamil Nadu is an industrial hub providing employment to 5 lakh persons. A large number of industries had indulged in dyeing and bleaching works at Tirupur area. Undoubtedly, there had been unabated pollution of Noyyal River by discharging the industrial effluents into the river. The Supreme

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32 AIR 2002 SC 1696.

33 *State of H.P. v. Ganesh Wood Products*, (1995) 3 SCC 363; *M.C. Mehta v. Union of India* (1997) 2 SCC 653 (*Taj Trapezium Case); M.C. Mehta v. Union of India and Others* (1996) 4 SCC 351; *M.C. Mehta v. Union of India and Others* (2004) 6 SCC 588; *M.C. Mehta v. Union of India and Others* (2005) 2 SCC 186; *M.C. Mehta v. Kamal Nath and Others* (2005) 1 SCC 388; *Sushanta Tagore and Others v. Union of India and Others* (2005) 3 SCC 16; *Friends Colony Development Committee v. State of Orissa and Others* (2004) 8 SCC 392 Para 27; *Virender Gaur and Others v. State of Haryana and Others* (2004) 8 SCC 733.

34 (2008) 2 SCC 222.

35 (2009) 9 SCC 737.

Court held that such industries can't escape the responsibilities to meet out the expenses of reversing the ecology. They are held bound to meet the expenses of removing the sludge of river and also for cleaning the dam. The Court further held that the principles of "polluter pays" and "precautionary principle" have to be read along with the doctrine of sustainable development.

Moreover, in case of *T.N. Godavarman Thirumulpad v. Union of India and Others*[36] Supreme Court suspended all mining operations in the Aravalli Hill rage. It was stated by the State of Haryana that a complete ban on mining minerals there could cause scarcity of building materials and the construction of roads and buildings and other development activities would be seriously affected. Supreme Court held that any mining activity in Faridabad 600 ha of land within identified or earmarked, shall be subjected to the directions CEC and State of Haryana.

Another sustainable development inspired decision of Apex Court is *M. Nizamudeen* v. *Chemplast Sanmar Limited and Others.*[37] In that case there was handling of hazardous waste/material in Coastal Regulation Zone (CRZ), which is prohibited according to para 2(ii) of Noti. Dt. 19-2-1991 issued by Ministry of Environment and Forests (MoEF). After hearing facts of the case, the Supreme Court, keeping in mind the sustainable development concept, held that the Coastal Zone Management Plan prepared by State Coastal Management Authority and duly approved by MoEF is the relevant plan for identification and classification of CRZ areas. Court further held that 1996 plan for the purposes of demarcation and classification of CRZ area in the State of Tamil Nadu should be treated as final and conclusive.[38] Moreover, Uppanar River and its banks, where the pipelines were laid by Chemplast pass do not fall under CRZ III area. No environment clearance is needed for such pipelines. No infirmity in permission is granted by MoEF or Executive Engineer. Court held that the project concerned had been established by huge investment of appox. Rs. 600 crores, commissioned after obtaining necessary approvals, therefore, interference was justified neither in interest of justice nor in Public Interest.

In the case of *Samaj Parivartana Samudaya & Others* v. *State of Karnataka and Others*,[39] the issue before the Supreme court was whether recommendations given by CEC with regard to (i) Categorization, (ii) Reclamation and Rehabilitation Plans, (iii) Reopening of Category 'A' and B' mines, (iv) Closure/reopening of Category 'C' mines and (v) Future course of action in respect to Category 'C' mines, is arbitrary?

Apex Court held that in light of the discussions that have preceded sanctity of the procedure of laying information and materials before the Court with regard to the extent of illegal mining and other specific details in this regard by means of the Reports of the CEC (Central Empowered Committee) cannot be in doubt. Inter-

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36 (2010) 1 SCC 500.

37 (2010) 4 SCC 240.

38 In Indian Council for Envior-Legal Action Case (1996) 5 SCC 281, the State of Tamil Nadu submitted its Coastal Zone Management Plan to the MoEF on 23-8-1996 which was approved on 27-9-1996 (1996 Plan) containing 31 sheets corresponding to maps for different stretches of the coastline of the State of Tamil Nadu with certain conditions / modifications / classifications. Sheet No. 10 pertains to the coastal stretch of Cuddalore District. From Copy of sheet No. 10 it does not transpire that Uppanar River and its banks where the pipelines pass have tidal influence and come under the CRZ area.

39 AIR 2013 SC 3217 (Para-41).

towards environment and Sustainable Development, so that it may help the speedy and effective justice in environmental cases.[45]

6. Moreover, the introduction of Alternative Dispute Resolution System (ADRS) in environmental disputes is a solution for easy dispute resolution but it has no rightful recognition in environmental legislations. Implementation of ADRS in environmental cases can augment sustainable development. In developed countries the success of ADR in environmental cases has immensely contributed to sustainable development mainly because of the quick positive directions issued to the polluters to implement the safeguards for the larger public good and also by imposing civil penalty.[46] In a country with a vast population of poor people, justice has to be necessarily cheap and expeditious. For this, other modes of settlement are also being encouraged and judicial officers are instructed to promote Alternative Dispute Redressal as a movement especially at the first level of courts where the bulk of poor litigants seek justice.

But still there are a number of hindrances in the way of achieving sustainable society. Our nation is suffering from many problems like hunger, diseases, poverty, exploitation and the like. Over 80 % of our population still does not know from where the next meal is to come from. In a nation where even food preservation has not been achieved, it hardly makes any sense for the people to implement the judicial recommendations in our daily life. To resolve the problem of hunger, the Indian National Food Security Act, 2013 is a positive step.

Last but not the least; researcher concludes that environment and development are two sides of the same coin. Any one of them cannot be sacrificed for the other. Thus, the responsibility lies on the Supreme Court and the various High Courts to deal with these cases with caution of high degree. Judicial activism in the sphere of environment is need of the hour specially when the legislature is lagging behind in bringing lacunae in the existing legal mechanism and administration is still not equipped to meet the challenge.

Apart from judicial activism in the context of environment protection and sustainable development, it is submitted by researcher that, the term eco-friendly should become part of one's everyday vocabulary, because awareness among the people and executive is the only way to achieve the concept of sustainability.

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45 Recently, *the National Green Tribunal Act*, 2010 (NGT) has been passed by the Parliament of India. It is an Act for the establishment of National Green Tribunal for the effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property.
Recently, Central Government appoints Hon'ble Justice Dattatraya Salvi, Judge of Bombay High Court, as the judicial member of the NGT with effect from the 14 February, 2013 for the period of five years or till attains the age of 65 years, whichever is earlier. (Ministry of Environment and Forests notification, New Delhi, 18th November, 2013.S.O.3444(E)).

46 K.K. Geetha, in her paper also represents these views for further details ***See;*** K.K. Geetha, *Scope of Alternate Dispute Resolution in Environmental Disputes-Potential and Limitations* Paper presented at International Conference on 'Contribution of International Environmental Law for Sustainable Development: Global and National Perspective, held on 17-18 February, 2012, Organized by University of Delhi, Delhi in collaboration with Department of Environment, Government of Delhi, Delhi.

HUMAN TRAFFICKING: A CROSS BORDER PHENOMENON

Priya Anand*

1.1 Introduction

Who does not wish for life of freedom; freedom from lack of resources, freedom from starvation, freedom from exploitation etc.? We all do. However, for some people it is not merely a plea to escape from the complexities of life, but a genuine cry for help from the daily life of exploitation both physical and emotional. These people are often victims of human trafficking: a crime so heinous that it treats people (especially women and children) as mere commodities, to be sold and purchased, often repeatedly. Human Trafficking is the face of modern day slavery. It is the reflection of the most inhuman face of the society which prides itself in shielding its women and children from prying eyes, yet so casually turns a blind eye to the suffering of these helpless victims. Trafficking in human beings could be for a variety of reasons: prostitution, marriage, beggary, bonded labour, forced organ donations, adoptions etc. However, the predominant factors are usually sexual and economic reasons. Hence, it has been observed that in most of the cases it is the women and the minor children (of both genders) who are the victims of human trafficking.

2.1 Meaning and Concept

Human trafficking is a difficult term to define for the sole reason that its area has continuously expanded. Earlier the laws of trafficking focussed more on trafficking for the purpose of sexual exploitation, but now it has come to incorporate offences apart from those of sexual nature, like begging, slavery etc. in its ambit of human trafficking. Different organizations and countries have different criteria for judging whether a particular act is an act of human trafficking or not. Not every country has a law against human trafficking. In such countries cases of this nature are mostly prosecuted under abduction or rape. Human Trafficking shares a close relation with the trend of migration. Migration is more frequently done for economic reasons and less for geographical or political reasons.

Often the process of trafficking is projected as migration by the people interested in it. Since poor and vulnerable people (women and children) are more likely to migrate, they are the ones who are most easily trafficked.

The United Nations General Assembly in its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children adopted in 2000,[1] defines human trafficking as, 'The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose

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1 Kathryn Cullen-DuPont, *Human Trafficking*, p. 9.

of exploitation.'[2] According to this Protocol, the consent of the trafficked person does not hold any relevance if the means used to transport them includes fraud, deception, abduction and the like. It defines child as any person below the age of 18 years. The countries who are signatories to this protocol are required to establish methods to investigate and prevent trafficking and to cooperate with the law enforcement agencies of other signatories to identify traffickers and their victims.[3] The Government of India signed the Trafficking Protocol on 12 December 2002.

The Convention on Preventing and Combating Trafficking in Women and Children for Prostitution devised by the South Asian Association for Regional Cooperation (SAARC) in 2002, has also defined the term 'trafficking' as 'the moving, selling or buying of women and children for prostitution within and outside a country for monetary or other considerations with or without the consent of the person subjected to trafficking'. The Government of India has ratified this Convention along with other members of SAARC.[4]

3.1 Legal Framework in India *vis a vis* International Legal Framework

3.1.1 National Framework

Though India is now hailed as a growing power, it is sad to note that this power and its privileges are restricted to a small number of people. Factors like poverty, economic migration and skewed sex ratio have made India a thriving point for human trafficking, both as a starting point and as a final destination. As a start up point, victims of human trafficking are often sent to countries of Middle East on the pretext of good employment. As a destination, it serves as a market for human trafficking from the small towns and villages; and internationally from countries like Nepal and Bangladesh. The country also works as a transit point for the victims of human trafficking from neighbouring countries to other countries.

As a consequence the country's legal system incorporates a wide variety of laws to combat this evil. However, it is disappointing to note that even with such a large number of legislations dealing directly or indirectly with the crime of human trafficking the phenomenon has only increased instead of decreasing. The important laws which deal with human trafficking are:

The Constitution of India

The Constitution of India is based on the notion that each individual has a right to live his or her life with dignity and in the manner specified by the laws of the country. Though the term human trafficking does not find any mention but various

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2 UN Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations convention against transnational organized crime. General Assembly Res. 55/25. New York, NY, United Nations General Assembly, 2000. available at, *http://www.castla.org/templates/files/who-vaw-ht-eng.pdf* (last accessed on 27 January 2014).

3 *Supra* note 1, p. 10.

4 *Draft National Integrated Plan of Action to Prevent and Combat Human Trafficking with Special Focus on Children and Women*, Ministry of Women and Child Development, p. 7, *available at, http://www.protectionproject.org/wp-content/uploads/2010/11/NAP-Draft-India 2006.pdf* (last accessed on 9 February 2014).

Articles provide for life free from exploitation. Articles 23[5] and 24[6] provide for freedom from economic exploitation. Article 14 focuses on equality before law. Article 21 provides for protection of life and personal liberty. These rights are assisted by the Directive Principles of State Policy.

The Immoral Traffic (Prevention) Act, 1956

The Immoral Traffic (Prevention) Act, 1956 (ITPA), which was initially known as the 'Suppression of Immoral Traffic in Women and Girls Act', 1956, is the main legislative tool for preventing and combating trafficking in human beings in India. However, till date, its prime objective has been confined to the sexual exploitation angle, whereby it is designed to inhibit or abolish traffic in women and girls for the purpose of prostitution as an organized means of living.[7] The Act criminalizes the people involved in procurement, trafficking and reaping profit from the trade but in no way does it define 'trafficking' per se in human beings.[8]

Indian Penal Code, 1860

Under the IPC, there are approximately 20 provisions dealing with human trafficking relevant to trafficking and impose criminal penalties for offences like kidnapping, abduction, buying or selling a person for slavery or labour, buying or selling a minor for prostitution, importing or procuring a minor girl, rape, unnatural offences etc. whether directly or indirectly.[9]

Apart from this The Criminal Law (Amendment) Act, 2013, which primarily deals with amendments related to rape and other sexual offences, also includes trafficking in its scope. We now specifically have the new Section 370 which defines the offence of trafficking thus replacing the earlier existing Section 370, which previously dealt with the buying or disposing of any person as a slave.[10] The new Section 370 makes it a criminal offence against anyone who recruits, transports, harbours, transfers or receives a person using certain means, which shall include either or combination of threats, force, coercion, fraud, deception, abduction, abuse of power, or inducement for purposes of exploitation.[11] The term exploitation is not properly defined but includes all forms of sexual and economic exploitation including forcible removal of organs. Punishment now varies between 7 to 10 years' rigorous imprisonment with fine. It is further enhanced and graded depending on whether the victim is an adult or

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5 Prohibition of traffic in human beings and forced labour
(1) Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law
(2) Nothing in this article shall prevent the State 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. *at*, http://indiankanoon.org/doc/1071750/ (last accessed on 9 February 2014).

6 Prohibition of employment of children in factories, etc. No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment *at*, *http://www.lawzonline.com/bareacts/Indian-Constitution/Article24-Constituti on-of-India.html* (last accessed on 9 February 2014).

7 *Supra* note 4, p. 8.

8 *Supra* note 4, p. 8.

9 *Supra* note 4, pp. 7-8.

10 Prabha Kotiswaran, *A Battle Half-Won: India's New Anti-Trafficking Law,* Interdisciplinary Project on Human Trafficking, available at, *http://traffickingroundtable.org/2013/04/a-battle-half-won-indias-new-anti-trafficking-law/* (last accessed on 9 February 2014).

11 *Ibid.*

minor or whether more than one person is trafficked or a minor is trafficked, or whether the trafficker is a repeat offender and whether the trafficker is a police officer or public servant. Section 370A further criminalises anyone who engages a trafficked minor or adult for sexual exploitation.[12]

Besides these laws, the country also offers The Bonded Labour (Abolition) Act, 1976, The Child Labour (Prohibition and Regulation) Act, 1986, The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, The Juvenile Justice Act, 2000, The Transplantation of Human Organs Act, 1994, The Immigration (Carrier's Liability) Act, 2000 and The Prohibition of Child Marriage Act, 2006.[13]

Instead of making it easier so many legislations, with different treatment of the offence of human trafficking has made the application of law concerning it even more confusing. What India requires is a comprehensive legislation with strict application and not a plethora of laws with fragmented versions of each other.

3.1.2 International Framework

Apart from the national laws, India is also influenced by the development in the scope of human trafficking. Internationally we have a number of declarations, conventions and protocols dealing with the crime of human trafficking whether directly or indirectly. However, it is important to note that not all the countries of the world are signatories to these instruments and the issues of sovereignty and territorial jurisdiction plays an important role sometimes to the detriment of the victims of human trafficking. Nevertheless some of the important international instruments designed to prevent and punish human trafficking are:[14]

International Convention for the Suppression of Trafficking of the Women and Children, 1921.

This Treaty prohibits the enticing, or leading away of a female to another country for immoral purposes.

Slavery Convention, 1926.

The State parties are required to discourage all forms of forced labour in the nature or form of slavery for the purpose of exploitation.

Universal Declaration of Human Rights, 1948.

The Declaration lists out the various rights and liberties which everyone human being is entitled to by the virtue of being born. It specifically prohibits slavery in every form and condemns exploitation of every kind.

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12 *Supra* note 10.

13 Sadika Hameed, Sandile Hlatshwayo, et al, *Background Information on Human Trafficking in India*, A supplement to the Human Trafficking in India: Dynamics, Current Efforts, and Intervention Opportunities For The Asia Foundation Report (2010), p. 9, available at, *http://asiafoundation.org/resources/pdfs/StanfordHumanTraffickingIndiaBackground.pdf* (last accessed on 9 February 2014).

14 Sankar Sen and Jayashree Ahuja, *Trafficking in Women and Children: Myths and Realities*, pp. 57–60.

Convention for the Suppression of Trafficking in Persons for Exploitation, Prostitution and others, 1949.

As per this Convention procurement, enticement etc., for the purposes of prostitution is a punishable offence irrespective of the age of the person involved and his or her consent to the same. It has been ratified by India.

International Covenant on Civil and Political Rights, 1966.

It abolishes forced labour and slavery and protects the rights of women and children.

Convention on the Elimination of all forms of Discrimination Against Women, 1979.

Article 6 of the Convention requires the State Parties to take all appropriate measures, including legislation to suppress all forms of trafficking in women. This Convention has been ratified by India.

Tourism Bill of rights and the Tourist Code, 1985.

Adopted by the World Trade Organization, the Code requires the State parties to preclude any possibility of the use of tourism to exploit others for the purpose of prostitution.

Convention on the Rights of Child, 1989.

It requires the State parties to take measures to combat illicit transfer of the children to foreign countries and to protect them from sexual abuse, abduction, sale or trafficking. India has ratified two Optional Protocols to this Convention. They are Optional Protocol on the Involvement of Children in Armed Conflicts and Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography. [15]

United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000.

This Protocol for the first time gives a well meaning definition of the term human trafficking. It does not limit human trafficking to only sexual offences but also includes economic offences within its scope. It requires the State Parties to provide support measures in the form of counselling, housing, medical, psychological and educational help.

4.1 Human Trafficking: An International Problem

Human Trafficking has spread its roots in every nook and corner of the country. However, it does not stop there. The porous borders that the country shares with its neighbours, particularly Nepal and Bangladesh have made it easier to traffick people across borders. The demand and supply pattern for the victims of human trafficking is not limited to the cities and villages of India. It continues even across the borders of the country, with Nepal and Bangladesh being the main sourcing areas outside India and Middle East being the preferred destination of the victims of human trafficking.

[15] *Supra* note 4, pp. 6-7.

The victims both minor children and adults who mostly consist of women are routinely trafficked across the border normally end up as bonded labour or sexual slaves and the men who are trafficked across the border are often lured with false promises of a better source of income and in many cases end donating their organs without their consent. This problem is further aggravated by uncoordinated efforts between the law enforcement authorities of the countries concerned and lack of knowledge and verification against agencies involved in such a heinous crime. The modus operandi adopted by such touts normally fall within two categories, i.e. deception and coercion. In matters of deception they use fraudulent means to trap their victims. Most of the victims in this category belong to the lower strata of the society. Whereas when coercion is used, kidnapping, abduction, rape etc. are used to traffick the victim. The victims in this stratum may belong to both the upper and lower levels of the society.

4.1.1 Policies and Programmes Dealing with Cross Border Human Trafficking

A key anti-trafficking intervention is the UJJAWALA scheme for trafficked women and children. It was launched by the Ministry of Women and Child Development in December 2007.[16] The main components of UJJAWALA Scheme are: Prevention, Rescue, Rehabilitation, Re-integration and Repatriation of the trafficked women and children.[17] The scheme which focuses on females trafficked for the purpose of commercial sexual exploitation is concerned with the following:[18]

- Prevention, which includes the formation of community vigilance groups or adolescent groups, as well as awareness generation. It also sensitises the police, community leaders and other relevant actors involved.
- Focuses on rescue and safe withdrawal of victims.
- Rehabilitation, including the provision of safe shelter, food, clothing, counseling, medical care, legal aid, vocational training and income generation activities.
- Reintegration, involving the restoration of victims into families/communities (where they so desire) and payment of accompanying costs.
- Repatriation, including the provision of support to cross-border victims for their safe returns to their countries of origin.

Internationally India relies on support from 'The United Nations Office on Drugs and Crime, through its Regional Office for South Asia', commonly referred to as UNODC, which has undertaken several Anti-Human Trafficking initiatives to prevent and combat trafficking in South Asia.[19] The government has also floated a

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16 Rebecca Everly, *Preventing and Combating the Trafficking of Girls in India Using Legal Empowerment Strategies*, International Development Law Organization (2011), p. 15, *available at, http://www.idlo.int/Publications/FinalReportGirlsProject.pdf* (last accessed on 9 February 2014).

17 *Ujjawala: A Comprehensive Scheme for Prevention of Trafficking and Rescue, Rehabilitation and Re-integration of Victims of Trafficking for Commercial Sexual Exploitation*, Government of India Ministry of Women and Child Development (2007), p. 3. Available at, *http://wcd.nic.in/SchemeUjjawala/ujjawala.pdf* (last accessed on 9 February 2014).

18 *Supra* note 15.

19 India Country Report to Prevent and Combat Trafficking and Commercial Sexual Exploitation of Children and Women, World Congress III Against Sexual Exploitation of Children and Adolescents (Rio de Janeiro, Brazil, November 2008), United Nations Office on Drugs and Crime, p. 37, available at, *http://www.ungift.org/docs/ungift/pdf/stories/India-country-report.pdf* (last accessed on 13 February 2014).

project on 'Building the capacity and expanding Anti-Human Trafficking Networks for improved support to victims of trafficking'. This project in collaboration and coordination with the regional NGO networks such as the Alliance against Trafficking and Sexual Exploitation of Children (ATSEC) aims to provide greater assistance to victims of trafficking. ATSEC is a network of over 500 NGOs operating mainly in India but also enjoying presence in Pakistan, Bangladesh, Nepal and Sri Lanka.[20]

The UNODC has in collaboration with Ministry of Women and Child Development (MWCD) of the Government of India has also brought about a Protocol on Inter State Rescue and Post Rescue Activities Relating to Persons Trafficked for Commercial Sexual Exploitation. Since the existing national laws focus more on rights and protection to the victims of human trafficking, this Protocol lays down the procedure to be followed in cases of rescue and post rescue of such victims.[21] An ill equipped post rescue procedure may put the whole rescue operation at risk and send the victims back to the hell from where they were rescued.

The Protocol stresses upon the need to have a Nodal Officer, one from the police department and another from the Women and Child or Labour Department of the State. Efforts should be made to publicize their names and telephone numbers in the area so as to make them more accessible.[22] Apart from this, the Protocol emphasises on treatment of the rescued persons as 'victims' and not accused. They should be made aware of their status in the eyes of law, be provided with the legal aid and equal treatment should be meted out to cross border victims as the victims of the host country.[23] Inter-State rescue operations should be conducted jointly. The victims at all times should be segregated from the traffickers.[24] After they are rescued the rescued persons should be given proper counselling and medical aid. They may be further shifted to shelter homes. The host country in consultation with the victim's country of nationality ought to arrange for their repatriation to his/her country.[25]

Hence, after an understanding of various laws and policies following are the steps that can be adopted by the law enforcement agencies along with the assistance of registered NGOs to prevent cross border human trafficking and to protect the victims are:[26]

- Bilateral agreements should be adopted with the neighbouring countries in order to prevent trafficking and to protect the rights and dignity of trafficked persons and to promote their welfare.

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20 *Id.*, p. 38.

21 "Protocol on Inter State Rescue and Post Rescue Activities Relating to Persons Trafficked for Commercial Sexual Exploitation", United Nations Office on Drugs and Crime and Government of India (2007), p. 5, available at, *http://www.unodc.org/documents /southasia/Trainingmanuals/ Protocol_on_Inter_State_Rescue_and_Post_Rescue_Activities. pdf* (last accessed on 13 February 2014).

22 *Id.*, p. 7.

23 *Id.*, pp. 8-9.

24 *Id.*, p. 11.

25 *Id.*, p. 17.

26 *Supra* note 4, pp. 40-41.

- Developing of cooperative arrangements to facilitate the rapid identification of trafficked victims which should also include the sharing and exchange of information in relation to their nationality and residence.
- To ensure judicial cooperation between countries in investigations and judicial processes relating to trafficking and related offences. This cooperation should extend to: identifying and interviewing witnesses with due regard for their safety; identifying, obtaining and preserving evidence; producing and serving the legal documents necessary to secure evidence and witnesses; and the enforcement of judgments of a nation which they are not national of.
- To ensure that requests for extradition for offences related to trafficking are dealt with by the authorities of the requested countries without undue delay.
- To encourage and facilitate cooperation between non-governmental organizations and other civil society organizations in countries of origin, transit and destination. This is particularly important to ensure support and assistance to trafficked victims who are repatriated.

5.1 Conclusion and Suggestions

Cross Border Human trafficking poses series of complexities for the simple reason that it is still not openly acknowledged (even by the government agencies), since it would raise a question mark on their competency. A crime which is brushed aside, dealt with but more so for the purpose of greasing your palm is very difficult to control. Human trafficking is one such area, talked and worked upon more by the Non Government Organizations (NGOs) and less by the government. Under such circumstances it is really difficult to identify the victims and the perpetrators of this heinous crime. Hence, the researcher wishes to suggest some measures. They are:

1. Coordination between the police nationally and the border security forces on the line with all the neighbouring countries is very important.
2. This coordination should also extend to NGOs.
3. Victims of cross border human trafficking should be identified and their families should be informed about their status. However, it is important that sensitivity should be adopted and till the time they are not sent back, their medical examination should be conducted and they should be provided with proper counselling and shelter.
4. Data collection should be done so that repeat offenders can be catalogued and sensitive areas can be tracked.
5. Proper manning of the border areas is very important. There should be qualitative data to differentiate genuine migration from human trafficking.
6. Reporting of every minor bride who leaves or enters the country should be done.
7. The records of various agencies promising better employment should be open for inspection as and when required. They should be able to provide the details of all the persons whom they have provided employment along with the details of their employers.

8. Lastly, strict implementation of all the existing laws would be the most important step in securing the future of millions of victims of human trafficking and at the same time punishing the people behind it.

A crime of this proportion cannot be erased from our society in a few years time, but that gives us no reason as society, as policy makers and as law enforcers to not try. It is hoped that together, we as a community of human beings, who are entitled to a dignified existence first and nation afterwards can work towards creating a world free from such heinous crimes which attacks at the very soul of our existence.

SCIENTIFIC TECHNIQUES IN INVESTIGATION OF CRIMES: A COMPARATIVE ANALYSIS OF USA AND INDIA

Gurmanpreet Kaur*

1.1 Introduction

We are living in an age of science and technology. Scientific invention and discoveries are growing at a rapid pace and science and technology is covering every sphere of life so does the advanced scientific techniques. Such advancements have raised the technological crimes which lead to problems in investigation of cases. In criminal investigation the police and other investigating agencies are more worried about increase in crime and advanced techniques of crime which result in clueless crime. Oral, physical and other evidence can be tampered with or may be destroyed and witness can turn hostile. But with the advanced scientific methods of investigation, such detection can be done with ease.

The main aim of the criminal justice system is to punish the culprit who have committed crime and protect the innocent from wrongful conviction and injustice. It has the potential to sacrifice values of truth and justice. There are three basic points about justice. *Firstly* justice as fairness is framed for democratic society as a fair system of social cooperation between citizens regarded as free and equal. *Secondly* justice as fairness takes subject of political justice to be the basic structure of society i.e., its main political and social institutions and how they fit together into one unified system of cooperation. *Thirdly* justice as fairness is a form of political liberalism.[1] Hence we observe it is very important to understand how the justice can be achieved. In old age method for extracting information from suspects was very difficult as the credibility can be given to such interrogation. But with the advancement in science and technology, or we can say 'scientific era', the scientist have tried and experimented many methods to aid in investigation of crime. The aim of such search is to find out short-cut direct methods, which may produce quick results on one hand and on other hand which may disguise inefficiency of investigating agency. Hence the advancement in science helps in administration of justice with the use of forensic science.

Forensic science can be designed as that scientific discipline which is directed to the recognition, identification, individualization and evaluation of physical evidence by the application of principles and methods of natural sciences for the purposes of administration of criminal justice.[2]

There is deep relation between law and justice, forensic science, forensic scientist. The criminal law recognizes the importance of forensic science which thereby helps in detecting the crimes and criminals.

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1 Yashpal Singh, Mohd. H. Zaidi *DNA Tests in Criminal Investigation, Trial and Paternity Disputes,* Alia Law Agency, Allahabad, 2006, p.1.

2 Satyendra K. Kaul, Mohd. H. Zaidi, *Narcoanalysis, Brain Mapping, Hypnosis and Lie Detector Tests in Interrogation of Suspect* Alia Law Agency, Allahabad, 2008, pp. 9-11.

1.1.1 Modern Scientific Techniques of Criminal Investigation

In old-age method for extracting information from the suspects in the process of criminal investigation was mainly by interrogation. In most of the cases, in view of law enforcing agencies, the suspect remains uncooperative. Interrogation is an art in itself which require many things including skill, knowledge of psychology, intelligence, quick wit and patience, etc. This also requires experience, training and efficiency. When such qualities are lacking, the investigator/interrogator resort to use other methods, including third-degree.

However, since the advent of science era, the scientist have tried and experimented many methods to aid the interrogation to tackle a lying suspect. Search for effective aid for interrogation had been going on for quite some time. The aim for such search is to find out short-cut direct methods, which may produce quick results on one hand and on the other which may camouflage inefficiency of investigating agency. The so-called 'scientific' methods also give some legitimacy to the obtained results in the eyes of generally ignorant public.[3]

The modern and scientific modes of investigation are DNA Fingerprinting, Polygraph, Brain mapping and Narco-analysis. These are discussed as under in this paper.

1.1.2 DNA Fingerprinting

With the advancement in forensic science, DNA evidence has assumed a great significance in recent years as an important tool for law enforcement agencies. It is a scientific technique to link an individual to a crime scene or to exonerate suspects. DNA stands for "Deoxyribonucleic Acid". It is the biological blueprint of life. It can be extracted from a wide range of sources, including blood, hair, saliva, semen, skin, sweat, urine, etc. DNA tests are highly effective because every person's DNA is unique except for identical twins. DNA technique is not only beneficial for law enforcement agencies but also to the society as a whole. The greatest asset of DNA is that it cannot be tampered with. DNA evidence does not decay or disappear over time. Though there is no specific DNA legislation enacted in India, Sections 53, 53A and 54 of the Code of Criminal Procedure, 1973 provide for DNA tests impliedly and they are extensively used in determining criminal problems. DNA fingerprinting can be applied to identify an individual in criminal as well as civil cases. DNA evidence has been used in a number of important cases in India. For example, the *Priyadarshini Matto rape and murder* case, the *Rajiv Gandhi assassination* case, the *CRPF false gang rape* case (Bhongir, Andhra Pradesh) and *N.D. Tiwari Paternity* case.

1.1.3 Polygraph or Lie-Detector Tests

The polygraph test is a very important scientific technique used in the field of criminal investigation for detection of crime and criminals. This technique is used to assess honesty of information given by subjects. The lie detector or polygraph test is an examination, which is conducted on the assumption that the body undergoes certain physical changes when under stress. The heart beat increases; blood pressure

[3] Yawer Qazalbash, *Law of Lie Detectors* Universal Law Publishing Co., New Delhi (2011) p. 23.

goes up, breathing rhythm changes, perspiration increases, etc. A baseline for these physiological characteristics is established by asking the subject questions whose answers the investigators know. Deviation from the baseline for truthfulness is taken as a sign for lie. It is conducted by attaching various probes to the body of the person who is interrogated by the expert. The polygraph test indicates that the person undergoing the tests is speaking lie.

1.1.4 P300 or Brain Mapping Test

Brain mapping is another scientific technique used in forensic science to identify perpetrators of crime by studying brain-wave responses to words or pictures relevant to crime. In this test, the subject is first interviewed and interrogated to find out whether he is concealing any information. Then sensors are attached to the subject's head and the person is seated before computer monitor. He is then shown certain images or made to hear certain sounds. The sensors monitor electrical activity in the brain and register P300 waves, which are generated only if the subject has connection with the stimulus. It does not a measure of guilt or innocence. It is a map showing reactions of the brain to certain target questions and indicates that the person undergoing the tests does possess certain knowledge of the crime in relation to which target questions were put to the accused. During the test, the subject is not asked any questions. The test does not expect an oral response from the accused, which is merely expected to listen to the words.

1.1.5 Narco Analysis or 'Truth Serum' Test

Narcoanalysis is scientific technique used frequently in the recent times in the field of forensic science. Narcoanalysis refers to the practice of administering certain chemical substances (sodium pentothal) to lower a subject's inhibitions, in the hope that the subject will more freely share information and feelings. It is based on the principle that a person is able to lie using his imagination and, under the influence of certain barbiturates, this capacity for imagination is blocked or neutralized by leading the person into a semiconscious state. It becomes difficult for the person to lie and his answers would be restricted to facts he is aware of. It is conducted by injecting 3 grams of sodium pentothal dissolved in 300 ml of distilled water and above solution is administered intravenously along with 10% dextrose over a period of three hours with the help of an anesthetists. The rate of administration is so controlled to drive the suspect slowly into the state of hypnotic trance. The main purpose of this technique is to bring out the 'probative truth' to the surface in a suspect.

2.1 Position in United States of America

In the United States, there are two main tests for admissibility of scientific information from experts. One is *Frye*[4] test, and other is a *'helpfulness'*[5] standard found in the Federal Rules of Evidence. In addition, several states have recently enacted laws that essentially mandate the admission of DNA typing evidence.[6]

4 *Frye v. United States*, 293 F 1013 (DC Cir 1923).
5 *Daubert v. Merrell Dow Pharmaceutical*, 113 S Cr 2786 (1993).
6 DNA Technology in Forensic Science, Committee on DNA Technology in Forensic Science, USA Board of Biology, Commission on Life Science, National Research Council of USA, 1992.

2.1.1 Position of lie detector tests in United States of America

In United States of America, the lie detector test as first attempted to be used in 1923 in Frye case an appellate Court in but the attempt remained unsuccessful. The court refused to admit it and the accused suffered. Reason for the same because it is hearsay, it negates the cross-examination effect, and it tries to eliminate jury system.

However some courts in USA have allowed polygraph test on the basis of principle that "an adequate polygraph in the hands of competent examiner can be an adequate aid in the administration of justice." Most courts in United States applied per se rule of exclusion in not accepting polygraph results on the basis of three principal objections.

a) Polygraphs have not been shown to be sufficiently valid or reliable.

b) Applying Frye test, courts ruled that polygraphs are not generally accepted and this technique remain highly controversial among 'scientific community', thus have yet to achieve general acceptance.

c) A large number of the courts believed and held that the dangers being associated with polygraphs are too great, which include individual's rights and concerns that polygraphs will appropriate the court's traditional role of evaluating credibility by overwhelming the jury and court's mind.[7]

Lately when the courts started to apply *Daubert* standard based validity they retained the discretion of polygraph admissions to courts, rather than using per se does not seem, to have changed the position substantially.[8]

In *Baynes* case[9] the court observed:

> Inconsistency in admitting polygraph evidence on the basis of a stipulation since the stipulation does not little if anything to enhance the reliability of polygraph evidence.

The court refused to permit the parties to the admissibility of the results derived from the process, as it considered the result no better than flipping of a coin.

A few courts in America do not permit polygraph results as substantive evidence, but only allow it to be corroborative evidence or for purpose of impeachment.

In 2005, the 11th Circuit Court of Appeals stated that "polygraph did not enjoy general acceptance from the scientific community."[10] Thus, polygraph is still some distance from being the acceptable criminal investigation tool in the US even there is legislation Employee Polygraph Protection Act, 1988 which prevents employers engaged in inter State commerce from using Lie Detector tests.

2.1.2 Law relating to DNA evidence in USA

In the United States, there are two main tests for admissibility of scientific information from experts. One is *Frye*[11] test, and other is a 'helpfulness'[12] standard

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7 B.S. Nabar, *Forensic Science in Crime Investigation* 3rd edition, p. 342.
8 *United States v. Cordoba*, 104 F 3d 225.
9 *Courts in People v. Baynes*, 88 III 2s 225.
10 *United States of America v. Wyatt Henderson,* 409 F.3d 1293, available at http:// www.usdoj.gov/crt/briefs/henderson.pdf (Last visited on October 3, 2013).
11 *Frye v. United States*, 293 F 1013 (DC Cir 1923).
12 *Daubert v. Merrell Dow Pharmaceutical,* 113 S Cr 2786 (1993).

found in the Federal Rules of Evidence. In addition, several states have recently enacted laws that essentially mandate the admission of DNA typing evidence.[13]

In 1988, the forensic DNA testing community through the Technical Working Group on DNA Analysis Methods (TWGDAM) began to address various issues regarding forensic DNA testing. TWGDAM issued guidelines for quality assurance in DNA analysis. DNA Advisory Board was created by DNA Identification Act 1994- legislation made for establishing or improving DNA testing in forensic laboratories, established standards for forensic DNA testing through a national DNA Advisory Board, and required FBI to establish a national index of convicted offenders' DNA profiles.

2.1.3 DNA Databank in USA

All 50 States in the United States have implemented legislation to create state criminal DNA databases. The Federal Bureau of Investigation (FBI) operates the Combined DNA Index System (CODIS), which comprises a hierarchy of DNA indexes at the local, state and national levels. Local index laboratories upload profiles to the state indexes and the state index laboratories upload profiles to the national index. CODIS holds four separate indices: convicted offenders, crime-scenes, unidentified human remains and relatives of missing persons. There are 19 laboratories in USA which are receiving evidence in 21,621 cases for DNA analysis. 32 public DNA laboratories[14] have been accredited. As of November 2002, CODIS held over 1,224,034 profiles of convicted offenders, and 44,140 crime-scene offenders.[15]

2.3 Law relating to Brain Mapping in USA

Several studies have been conducted with regard to the accuracy and the validity of the brain mapping tests. As with the lie-detector test, the usefulness of the brain-mapping test too is plagued by the varying techniques that are used in the different laboratories.[16] The American Academy of Neurology conducted an extensive study, concluding that the test is "not recommended for use in civil or criminal judicial proceedings."[17] The Society of Nuclear Medicine Brain Imaging Council concluded that the use of neuroimaging in criminal and other types of forensic situations remained especially controversial because there were very few controlled experimental studies.[18]

American Courts have considered the question as to whether the evidence gathered from brain mapping could be admissible in court, and have categorically concluded in the negative. In *State v. Zimmerman*[19] a case of a conviction for murder, the

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13 DNA Technology in Forensic Science, Committee on DNA Technology in Forensic Science, USA Board of Biology, Commission on Life Science, National Research Council of USA, 1992.

14 Report of American Society of Crime Laboratory Directories.

15 Mr. Justice R.K. Abichandani *New Biology & Criminal Investigation (With a Schedule of Model DNA Legislation proposed),* pp. 53-63.

16 Alverson et al, *Brain mapping: Should this controversial evidence be excluded?* Federation Of Insurance & Corporate Counsel Quarterly (1998) available at http://findarticles.com/p/articles/mi_qa3811/is_199801/ai_n8798427 (Last visited on January 9, 2013).

17 *Ibid.*

18 Neurology 277 (1997).

19 1995 WL 254409 (Minn. Ct. App. May 2, 1995).

Arizona Court of Appeals, upheld the decision of the trial court, which had excluded evidence of brain mapping, concluding that the test was not generally accepted in the neurological community. The Minnesota Court of Appeals considered the issue of admissibility of brain-mapping evidence in an unpublished opinion, *Ross v. Schrantz*[20] a case of closed head injury suffered in an automobile accident. The primary evidence of the alleged injury was retrieved through brain mapping. The trial court had granted a motion to exclude evidence of brain mapping, stating that there was no scientific literature to show that the test was reliable or accepted in clinical applications, and that it was not a stand-alone diagnostic tool.[21] Further, the Court stated that the test was only a research tool and could not be accepted.[22]

2.4 Law Relating to Narco-Analysis in United States of America

Narcoanalysis is not widely used in United Nations as an investigating tool. The FBI and other law enforcement agencies prefer other psychological methods in place of narcoanalysis because they consider this test as physical abuse.

The Ninth Circuit Court had excluded a recording of an interview conducted under the influence of sodium pentothal[23] and psychiatric testimony in support of it.[24] The use of sodium amytal (a successor of sodium pentathol) or truth serum narco analysis was prohibited by the New Jersey Supreme Court in *State v. Pitts*[25] on the ground that the results of the tests are not scientifically reliable and that it was possible for the subjects to fill lacunae in stories (known as hyperamnesia) or to believe in false events, or to do a hypnotic recall, whereby thoughts of non-existent events are believed by the subject.[26]

2.4.1 Narcoanalysis and 5th Amendment to US Constitution

5th Amendment of US Constitution is against self-incrimination. A person cannot be compelled to incriminate himself/herself. But recent interpretation of US Supreme Court is that any kind of interrogation including torture can be used against the suspect but the fruit of such techniques will not be used against him/her in a criminal case. But in non-criminal cases, such as deportation case, the evidence could be used.[27]

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20 *Ibid.*

21 *Ibid.*

22 *Ibid.*, the Court relied on the analysis as laid down in *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579 (1993) to reach this conclusion. Under the *Daubert* test, the Court has to determine whether an expert will testify to scientific knowledge and secondly, whether his testimony will assist the trier of fact to understand or determine a fact in issue. The court determined that the second prong of the *Daubert* test could not be met, since the test was used for clinical diagnosis, and would thus not enable it to judicially determine the fact in issue.

23 Till date, sodium pentathol is the ingredient used in narco analysis test conducted by laboratories in India

24 *Lindsey v. United States,* 16 Alaska 268, 237 F.2d 893 (9th Cir.1956).

25 116 N.J. 580, 562 A. 2d 1320 (N.J. 1989).

26 Lakshman Sriram, *Narcoanalysis and Some Hard Facts,* Frontline, Volume 24 - Issue 9, May 05-18, 2007, available at www.hinduonnet.com/fline/fl2409/stories/20070518002109700.htm (Last visited on October 6, 2013).

27 Satyendra K. Kaul, Mohd. H. Zaidi *Narcoanalysis, Brain Mapping, Hypnosis and Lie Detector Tests in interrogation of suspects* Alia Law Agency, Allahabad, 2008, p. 519.

3.1 Legal Provisions Governing Scientific Evidence in India

Black's Law Dictionary[28] defines scientific evidence as fact or opinion evidence that purports to draw on specialized knowledge of a science or to rely on scientific principle for its evidentiary value is called "scientific evidence".

Legal provisions of these evidences are governed by Constitution of India, Code of Criminal Procedure, 1973, Indian Evidence Act, 1872, Identification of Prisoners Act.

3.1.1 The Constitution of India

The Constitution of India is the grundnorm which facilities every kind of rights to its citizens, its Article 20 (3) states that "no person accused of any offence can be compelled to be witness against himself." The question rises whether a person can be compelled to give fingerprints, foot prints, handwriting, blood, serum, semen, etc. for scientifically testing. The Supreme Court held that above materials became evidence only after evaluation, and such evaluation may help accused also. The privilege under clause (3) is confined only to an accused i.e. a person against whom a formal accusation relating to the commission of an offence has been leveled which is in the normal course may result in the prosecution. A person against whom a first information report has been recorded by the police and investigation has been ordered by the Magistrate can claim the benefit of the protection. Further, the guarantee in Article 20 (3) is against the compulsion to be 'a witness'. In *State of Bombay v. Kathi Kalu Oghad*[29] a Bench of the Supreme Court consisting of eleven judges held that:

> It is well established that clause (3) of Article 20 is directed against self-incrimination by the accused person. Self-incrimination must mean conveying information based upon personal knowledge of the person giving the information and cannot include merely the mechanical process of producing documents in court which may throw a light on any of the points in the controversy, but which do not contain any statement of the accused based on his personal knowledge.

The third component of Article 20 (3) is that it is a prohibition only against the compulsion of the accused to give evidence against him. In *Kalawati v. H.P. State*,[30] the Supreme Court held that Article 20 (3) does not apply at all to a case where the confession is made by an accused without any inducement, threat or promise.

In the case of *State of Andhra Pradesh v. Smt. Inapuri Padma and Ors*,[31] the Court by ordering a few suspects to undergo a Narco Analysis test held that the question of putting the test of testimonial compulsion in case of suspects does not arise.

Another requirement of Article 20 (3) is that there should be no compulsion on the accused to give testimony against him. However, in Narco Analysis test, the question of compulsion does not arise because the prior consent of the person who is supposed to undergo such a test is always taken. In fact, the Supreme Court in *State of Bombay*

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28 8th edition, p. 599.
29 AIR 1961 SC 1808.
30 AIR 1953 SC 131.
31 2008 Cri LJ 3992.

v Kathi Kalu Oghad,[32] held that there is no compulsion when a police officer, in investigating a crime against, a certain individual, asks him to do a certain thing. The fact that a person was in police custody when he made the statement is not a foundation for an inference that he was compelled to make the statement. The mere questioning of an accused by a police officer, resulting in a voluntary statement, which may ultimately turn out to be incriminatory, is not compulsion. Considering, all these we can easily conclude that Narco Analysis does not violate Article 20 (3) to the extent that the person undergoing such a test is not compelled to do so; rather it is done with the consent of the person who has full knowledge of such a test.

The third requirement of Article 20 (3) is that the there should be compulsion to give evidence against oneself. Only incriminatory statements are hit by Article 20(3). Whether a statement is incriminatory or not can be ascertained only after the test is conducted and not before it. By conducting Narco Analysis and other tests, the investigating agencies might discover some information which will help them in the investigation of the crime and thus find out the true culprit. In case, during the test, the accused makes a statement that is incriminatory that need not be made admissible in the Court as it is against Article 20 (3), but the rest of the information can definitely be used by the investigating agencies to solve the case. The above discussion very clearly suggests these tests can be conducted without violating Article 20 (3).

3.1.2 Criminal Procedure Code, 1973

Section 156 (1) of the Code of Criminal Procedure which reads "Police officer's power to investigate cognizable cases" states that any officer in charge of a police station without the order of a Magistrate can investigate any cognizable case which a Court has power to inquire into or try under the provisions of Chapter XIII. "Investigation" as defined in Section 2 (h) of Cr.P.C. includes all the proceedings under the Code of Criminal Procedure for the collection of evidence conducted by a Police Officer or by any person (other than a Magistrate) who is authorised by a Magistrate in that behalf. Thus, collection of evidence by Police Officer is permitted under law. Conducting Narcoanalysis Test and other tests on accused is in the process of such evidence by the investigating agency. The Karnataka High Court also made a similar observation in the case of *Smt. Selvi and Ors v. State by Koramangala Police Station*.[33] This provision is also constitutionally valid.

Section 161 (2) of Criminal Procedure Code, 1973 States that "every person is bound to answer truthfully all questions put by the police officer other those questions which may expose him to a criminal charge, penalty or forfeiture." In practice, this section is of no use. Our Indian police compels person to speak. Right to silence is only on papers, then the only safeguards remains that such statement be not admitted in court. Although by then one's personal liberty, privacy, reputation has been violated and every information becomes public knowledge. Opponents of polygraph test argue that causing "minimal bodily harm" is an offence and it becomes more aggravated if committed by police. If narcotics is administered by police to extort criminally incriminating statement, who can check it. If incriminating statements are

[32] AIR 1961 SC 1808.
[33] (2004) 7 Kar LJ 501.

permitted to be procured, who will prevent those police officers who are prone to commit illegal acts?

3.1.3 Indian Evidence Act, 1872

Section 45 also comes into play while dealing with polygraphy. It permits evidence of skilled persons to give statement in respect of certain specified matters including science. Such persons are called experts. In recent judgment of *State v. Chaudhary*,[34] Supreme Court has tried for the induction if new type of scientific evidence. In terms of Section 45 of the Evidence Act "specially skilled" persons are expert. "Special skill" has not been defined but in common parlance it means "knowledge obtained through basic education, experience, research, training and participation in scientific gatherings."

Section 46 of IEA relates to opinion of experts, section 51is about the relevancy of grounds of opinion, and section 159 for refreshing memory. All these sections are relevant for validity of polygraph.

Section 73 of Indian Evidence Act, 1872 which permits comparison of handwriting. The Supreme Court has held that assistance of expert should be obtained as a matter of prudence. However, the Court has ruled that court cannot order taking of specimen signature if the case is not before court for trial.

There is an argent need to re-examine these sections and lows as there is no rule present in the Indian Evidence Act, 1872 and Code of Criminal Procedure, 1973 to manage science and technology issues.[35] Many developed countries have been forced to change their legislation after the introduction of the DNA testing in the legal system. There are certain provisions which are present in the Indian Evidence Act, 1872 such as section 112 which determine child's parentage and states that a child born in a valid marriage between a mother and a man within 280 days of the dissolution of the marriage, and the mother remaining unmarried shows that the child belongs to the man, unless proved otherwise but again no specific provision which would cover modern scientific techniques. DNA analysis is of utmost importance in determining the paternity of a child in the cases of civil disputes. Need of this evidence is most significant in the criminal cases, civil cases, and in the maintenance proceeding in the criminal courts under Section 125 of the Code of Criminal Procedure, 1973. The introduction of the DNA technology has posed serious challenge to some legal and functional rights of an individual such as "Right to privacy", "Right against Self-incrimination". And this is the most important reason why courts sometimes are reluctant in accepting the evidence based on DNA technology. Right to Privacy has been included under Right to Life and Personal liberty or Article 21of the Indian Constitution, and Article 20(3) provides Right against Self-Incrimination which protects an accused person in criminal cases from providing evidences against him or evidence which can make him guilty. But it has been held by the Supreme Court on several occasions that Right to Life and Personal

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34 AIR 1996 SC 1491.

35 Dr. Nirpat Patel, Vidhwansh K Gautaman, ShyamSundar Jangir *The Role of DNA in Criminal Investigation – Admissibility in Indian Legal System and Future Perspectives* International Journal of Humanities and Social Science Invention, Volume 2, July 2013, at pp. 15-21, also available at www.ijhssi.org.

Liberty is not an absolute Right. In *Govind Singh v. State of Madhya Pradesh*,[36] Supreme Court held that a fundamental right must be subject to restriction on the basis of compelling public interest. In another case *Kharak Singh v. State of Uttar Pradesh*,[37] Supreme Court held that Right to privacy is not a guaranteed right under our Constitution. The recent refusal of the Supreme Court to dismiss the Delhi High court's decision ordering veteran congress leader N.D. Tiwari to undergo the DNA test is very important from the viewpoint of the admissibility of such evidence. In this case, Rohit Shekhar has claimed to be the biological son of N.D. Tiwari, but N.D. Tiwari is reluctant to undergo such test stating that it would be the violation of his Right to privacy and would cause him public humiliation. But Supreme Court rejected this point stating when the result of the test would not be revealed to anyone and it would under a sealed envelope, there is no point of getting humiliated. Supreme Court further stated that we want young man to get justice; he should not left without any remedy. It would be very interesting to see that how courts in India would allow the admissibility of DNA technology in the future.

4.1 Drawbacks of Scientific Techniques of Criminal Investigation

The relevance of the contemporary scientific techniques i.e. Narco Analysis, Polygraph Examination and Brain Electrical Activation Profile (BEAP) Test and their applicability in the criminal investigations has been contentious. Apart from the drawbacks which are inherent in the tests themselves, the legal framework is also adequate to deal with this aspect of human rights violation. Some defects are:

- It violates many fundamental rights guaranteed under the Constitution of India, including 'Right to fair trial',[38] 'right against self incrimination', 'right to privacy' and 'right against cruel, inhuman and degrading treatment'.
- The use of these techniques causes 'inquiry' to the person concerned.
- Though India was signatory nation in United Nations Convention Against Torture (CAT) but the legislative development is negligible. Prevention of Torture Bill was introduced but is not passed yet.
- Supreme Court role can be observed in the *Selvi* case where the power of police to coerce the subject into "voluntary" doing some things is well known. But some judgments of Supreme Court are not binding on police, hence violating human rights.
- The scientific research is not sufficient as to these tests have any physical effect or not that has not been stated anywhere.

The Constitution of India provide the provisions of protection of life, liberty and freedom has thoroughly interpreted and Articles 14, 19, 20 and 21 are the best examples for any other Constitutions of the World regarding the Right to Privacy because every aspects has been taken and amendment had been made from time to time.

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36 (1975) 2 SCC 148.
37 AIR 1963 SC 1295.
38 *Nahar Singh Yadav v. Union of India*, MANU/SC/0964/2010.

5.1 Protection in Respect of Conviction for Offences

No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. No person shall be prosecuted and punished for the same offence more than once. No person accused of any offence shall be compelled to be a witness against himself.[39]

Where the accused is compelled to give information it will be an infringement of Article 20 (3) of the Constitution; but there is no such infringement where he gives the information without any compulsion. Therefore, compulsion not being inherent or implicit in the fact of the information having been received from a person in custody, the contention that Section 27 of the Evidence Act necessarily infringes Article 20 (3) cannot be accepted.[40]

The Apex court[41] said that involuntarily subjecting an accused, a suspect or a witness to such techniques violates Article 20(3) of the Constitution of India, which prohibits self-incrimination. Even if a person is subjected to such mode of investigation on consent, the result of the test cannot be an admissible piece of evidence, it said.

5.1.2 Double Jeopardy as Embodied in Article 20 (3)

In *State of Bombay v. S.L. Apte*[42] it has been laid down that if the offences in respect of which prosecutions stated are distinct and different, there is no question of the rule as to double jeopardy as embodied in Article 20 (3) of the Constitution being applicable.

5.1.3 Right to Liberty

Right to Privacy has not been expressly declared as a fundamental right by Indian Constitution, as the Fourth Amendment of US Constitution had explicitly provided, but "the said right is an essential ingredient of personal liberty."[43]

- Article 21 of the Indian Constitution states that no person shall be deprived of his life and personal liberty expect according to procedure established by law.
- In *R. Raj Gopal*'s case Supreme Court held that the right to privacy could be described as the right to be let alone, and a citizen has the right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among others. In this case the learned Judge observed that the expression "life" used in Article 21 cannot be confined only to the taking away life or causing death.
- In India, the word "liberty" has been qualified by the word "personal", indicting thereby that it is only confined to the liberty of person. The other aspects of the term 'liberty' have been provided for in other articles of the Constitution.

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39 The Constitution of India, 1950, Article 20.
40 *State of Bombay v. Kathi Kalu,* 1961 (2) Cri. L.J. 856.
41 *Selvi v. State of Karnataka,* 2004 (7) Kar. L.J. 501.
42 AIR 1961 SC 578.
43 *Kharak Singh v. State of Uttar Pradesh*, AIR 1963 SC 1295; followed by *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

- Thus the right of personal life and liberty provided in article 21 of the Constitution is a right of an individual to be free from restraint or encroachment on his person and personality by the State, whether those restraints or encroachments directly imposed or indirectly imposed through calculated measures as is done by putting individuals to the said tests. No doubt that right to privacy is not absolute right and it can only be cured by "procedure established by law".[44]

5.1.4 Right of Silence is a Part of Privacy

The Maxim *"Nemo Tenetur se Ipsum Accusare"*, means no man not even the accused himself can be compelled to answer any question which may tend to prove him guilty of crime he has been accused of. The right of silence has been granted to the accused from the very beginning and it remains settled law the world over and also the pronouncements by the Supreme Court of India.[45]

6.1 Conclusion

Scientific techniques of investigation have revolutionesd the working of Investigating Authorities these days. Some criminal cases can be solved effectively only with the use of evidence based on various scientific techniques. With the advancement of science and technology, the criminals also act in such a way that no effective clue is left by them at the place of occurrence. To meet the challenges of modern day crime techniques advanced scientific tests such as DNA testing, polygraph tests, lie detector tests are required to identify the real wrongdoers. However, there should be a check on the extent the investigating agencies should be allowed to use these test depending upon how the particular legal system decided to balance the rights of the citizen and the interest of the social security. In our country, crime is mostly the by-product of our socio-economic condition and as such most of the accused of the criminal cases are not habitual offenders, but the victims of the circumstances. Actually poverty, hunger, illiteracy and ignorance about the legal consequences are the basic reasons of crime in our country.

In India, there are no specific laws regarding DNA, Polygraph tests, Brain Mapping, Lie Detector tests. There is an urgent need to regulate these new techniques of investigation. The Indian Evidence Act, 1872 and the Constitution of India should also be amended accordingly to make these laws more effective and admissible in taking evidence. In the United States, several states have recently enacted laws that essentially mandate the admission of DNA, Polygraph evidence. A large number of the courts believed and held that the dangers being associated with these scientific tests are too great, which include individual's rights and concerns that these tests will appropriate the court's traditional role of evaluating credibility by overwhelming the jury and court's mind.[46] The test can have repercussions on the person's health, in which case it is essential to devise a scheme of redressal, which may take effect only if the side-effects are actually observed, for the subject. While it may not unequivocally violate a person's right to privacy if administered correctly, strict procedural safeguards need to be added to prevent its abuse.

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44 *Govind v. State of Madhya Pradesh*, 1975 Cri. L.J. 1111.

45 *Nandini Satpathy v. PL Dani*, AIR 1978 SC 1025; *Ramanlal Bhogilal Shah v. DK Guha*, AIR 1973 SC 1196.

46 B.S. Nabar *Forensic Science in Crime Investigation* 3rd edition, p. 342.

RIGHTS AND REMEDIES FOR THE VICTIMS OF CRIME

Gurneet Singh*

1.1 Introductory

> *Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanism of justice and prompt redress as provided for by national legislation for the harm that they have suffered.*[1]

Any functionary of the Criminal Justice System while dealing with the victim of crime should (a) treat the victim with courtesy and compassion; and (b) respect the victim's dignity and privacy.[2]

Human rights are for all. Once the violation of basic human rights occurs, therein we can find victims. There have been continuous global efforts to reconsider and redefine the position of the victims of crime. Various international documents (as above mentioned) already provide remedy and rights for victims of violations of human rights like the *Universal Declaration of Human Rights* (UDHR) 1948, the *International Covenant on Civil and Political Rights*, 1966, the *International Covenant on Economic Social and Cultural Rights*, 1966, the *International Convention on the Elimination of All Forms of Racial Discrimination,* 1963 and the *Convention on the Rights of the Child*, 1989, the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by United Nations Assembly* (1985). It was introduced by the efforts of the UN Commission on Crime Prevention and Criminal Justice. This commission mainly develops, monitors, and reviews the implementation of the UN Crime Prevention and Criminal Justice Program.[3] From its outset in the 1950s, the Criminal Justice Program has sought to replace retributive criminal justice with more effective and humane policies. Respect for the human rights of offenders and prisoners were key early considerations behind the standards and norms for crime prevention and criminal justice adopted by the UN in subsequent decades.[4] The Committee on Crime Prevention and Control (predecessor to the Crime Commission) widened the Criminal Justice Program's focus to include better treatment for crime victims, resulting in the adoption of the Victims' Declaration by the General Assembly.[5] It insisted on the need to treat victims with compassion and respect for their dignity. One of the striking and progressive features of the Victims' Declaration is that it considers an individual to be a victim, regardless of whether the state identifies, apprehends, prosecutes, or convicts the perpetrator.[6]

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1 The Fourth Principle of the United Nations General Assembly Declaration of Basic Principles of Justice for the Victims of Crime and Abuse of Power, adopted in November, 1985.

2 Section 7 of the *Victims' Rights Act*, 2002 (New Zealand).

3 United Nations, *The Applications of the United Nations Standards and Norms in Crime Prevention and Criminal Justice* (United Nations Office on Drugs and Crimes, 2003).

4 *Ibid.*

5 Subhradipta Sarkar, *the Quest for Victims' Justice in India*, 17 *HRB*16 (2010).

6 *Ibid.*

2.1 Rights and Remedies Available to Victims of Crime

These days across the globe victims of crime are being provided with certain rights as herein after provided:

2.1.1 The Right to Notice/Information

The U.N. Victim Declaration provides for giving necessary information to crime victims. Article 5 of the Declaration states that the victims should be informed of their rights in seeking redress through such mechanisms. Further Article 6 of this Declaration says that the responsiveness of judicial and administrative processes to the needs of victims should be facilitated by: (a) Informing victims of their role and the scope, timing and progress of the proceedings of the disposition of their cases, specially where serious crimes are involved and where they have requested such information. In continuation to this Article 15 further adds that the victims should be informed of the availability of health and social services and other relevant assistance and be readily afforded access to them.

In addition to this, the implementation of U.N. Victim Declaration in Section D of Article 3, recommends the member State to ensure that victims are kept informed of their rights and opportunities with respect to redress from the offender, from third parties or from the states, as well as of progress of the relevant criminal proceedings and of any opportunities that may be involved.

Different jurisdictions have taken different approaches in which the victims can be informed about their rights, responsibilities and protections that are available to them. A number of States have sought to publicize such information in the form of books or brochures outlining the criminal justice system as well as the rights and duties of the victim.

Some States, like Australia, the Netherlands, the United States, and Canada have sought to ensure the providing of information to the victims through police officers, prosecutors, and court staff members etc. In France, the United States and several Canadian provinces, the courts have victim services offices attached to them. Further Countries like India provide for free legal services to the indigents who are not able to pay because of their poverty.[7]

In Scotland, police officers routinely inform most victims (particularly victims of housebreaking, thefts and minor assaults) about the local victim support scheme by provision of a leaflet when they visit in the immediate aftermath of a crime. Information is left with these victims with notes that a victim support visitor will call

[7] See Shapland et al. (1985: 132), in their study of 276 victims of violent crime report: Over half the sample did not know of any way in which to obtain compensation. They were, in many cases, deprived of compensation not because of their own actions or inactions, but because they had no idea that any such system might exist. No one in the criminal justice system had told them anything about it. See also Maguire (1985:546) when he states that it to be a statutory duty of the police to provide every victim with an information sheet about available services, and to officially inform every victim of the outcome of investigation. Many large cities have crime-victim assistance centers that provide financial assistance for certain expenses associated with being a victim. Police should be aware of such assistance if it is available (Burnley, 1990:13). Victims are rarely given information regarding social, legal, or practical services and are often too confused to ask for it; home time later, however, they realize how helpful the services could have been (Waller, 1990:144).

unless victims indicate that they do not wish to be visited.[8] A printed brochure is sometimes provided by the police so that the victim or witness has some information well in advance of any official proceeding. Topics might include the prosecutor's role vis-a-vis the victim; reasons a case may be continued, postponed, or dismissed; the witnesses' responsibilities with respect to defence (Hillenbrand, 1989:330).

In England, the Home Office has introduced a "one stop shop" (OSS) initiative whereby the police become the single source of information to victims throughout the criminal process.[9] Victims are informed by the police about whether a suspect has been charged, whether the charge is altered, the date of any trial, the verdict, and sentence. Initially, the scheme applies only to crimes of domestic burglary, grievous bodily harm and attempted murder, robbery, sexual assault, arson and racially motivated offences.[10]

The National Association of Victim support Schemes (NAVSS) was setup in 1988 to consider the role of the victim/witness in court, issued a circular (20, 1988) to Chief Police Officers, pointing out the benefits both for the welfare of the victim and for the police public relationship, from making a purposeful effort to provide victims with information about progress.

According to Article 4, "Victims should be treated with compassion and respect for their dignity ... " In addition, Code of Conduct for Law Enforcement Officials (1979) also implicitly signifies in Article 2, "... Law enforcement officials shall respect and protect human dignity and maintain and uphold the human right of all persons.

Information is always crucial. Whether it is regarding the happening of a crime in order to the lodging of the FIR with the police or whether we are to inform the accused about his rights or whether we are to inform about the arrest of the accused to his/her relatives or whether it is regarding giving the victim information about his rights and protections that are available. To have the information is one of the Fundamental Right that is even granted by the *Constitution of India*, 1950. Unless a victim is informed of his or her rights, we cannot expect that he/she would be in a position to use them. A victim must be notified of the events and proceedings i.e. like what is happening in the police station or in the court or the trial is at what stage. A victim must have a right to notice of all the stages and important criminal justice hearings.[11] A victim must also be informed in case the court proceeding has been cancelled or rescheduled so that their time would be saved and that they won't suffer any mental pain, stress, inconvenience or agony.

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8 The UN Commission on Crime Prevention, 1998

9 Sammaiah Mundrathi, *Law on Compensation to Victims of Crime and Abuse of Power*, Deep & Deep Publication, 2002

10 The scheme is a welcome move toward ensuring that the difficulties faced by victims. In obtaining information from several different sources are overcome. This scheme is also open to criticism, like many serious crimes (including domestic violence) have been excluded from the scheme and the police will be able only to inform victims of decisions made, not to offer any explanation of them (Zender, 1997:600).

11 Victims want to know whether the offender is caught, what the charges are, whether he or she is in custody or on bail, when the court appearance will be, whether the victim will have to give evidence, whether the offender is convicted and what the sentence is. For the majority of victims in the study of the information they most wanted to received was the outcome of the case whether it be conviction and sentence or just that the offender had not been caught and whether enquiries were or were not being continued (Shapland et al., 1985).

A victim must be notified of an offender's escape or pretrial or post trial release by the court, the transfer of the accused from one prison to the other, the death of the inmate in jail etc. In USA, there is a concept of Automated Notification System that allows registered victims to use there secret PIN in order to find out the status of the accused. Now this system also allows the victim to be automatically informed in the event of a defendant's release, escape or other event.

In India under *the Protection of Women from Domestic Violence Act*, 2005, a police officer, protection officer, service provider or the Magistrate are duty bound to inform the aggrieved person of her rights given below on receipt of complaint against domestic violence or when present at the place of incident or when the incident of domestic violence is reported to him:

(a) Right to make an application for obtaining relief by way of protection order (Section 18) and an order for monetary relief(Section 20), a custody order (Section 21), residence order (Section 19), a compensation order (Section 22) or more than one such orders.

(b) Right to avail services of service providers. Service providers will assist the aggrieved person in drafting the domestic incident report and to provide them medical facilities, accommodation and other services.

(c) Right to the services of protection officers. He will also assist the Magistrate in pursuing the victim's case to provide the victim, compensation and monetary relief.

(d) Right to free legal services under the *Legal Services Authorities Act*, 1987. Again it is the duty of the protection officer to arrange for free legal aid if the victim needs.

(e) Right to file a complaint under Section 498A of the *Indian Penal Code,* 1860.

(f) Right to safe shelter if thrown out of the matrimonial home with the help of protection officers.

(g) In charge shelter home shall provide shelter with the help of protection officer to the aggrieved person on the request of the aggrieved person, protection officer or service provider.

(h) Medical facility shall provide medical aid on request of the aggrieved person, protection officer, and service provider. Right to reside in shared household.

In New Zealand the *Victims' Rights Act*, 2002 has replaced the *Victims of Offences Act*, 1987.[12] The Act imposes clear obligations on specified agencies to provide information and to offer assistance to victims of offences. The Act has given vide range of persons who are defined as victims for the purposes of the Act by including parents and guardians of child victims and close family members of those murdered or rendered incapable. The Act provides of rights of the victims and other provision relating to victims which can be summarized as under:

[12] The *Victim's Rights Act*, 2002 came into force on 18 December, 2002.

(1) Victims should be treated with respect and dignity.[13]

(2) Victims are entitled to know if someone is charged with the offence and what happens in the Court case.[14]

(3) Victims may be needed as witnesses at the trial, but they should not be asked to attend court unnecessarily. If giving evidence, they are entitled to be protected from unnecessary contact with the offender and unnecessary disclosure of their address.[15]

(4) Any harm caused to a victim by the crime should be put before the court when it sentences the offender. A victim who is dissatisfied with the result of the case can ask, but cannot compel, the prosecution to appeal.[16]

(5) Victims are entitled to be told if the offender escapes from the custody or is recaptured. If an offender is jailed and applies for parole, the victim is entitled to have a say before the parole decision is made.[17]

(6) Victims are also entitled to information about how to claim compensation, if eligible, and about health and welfare services available to them.[18]

(7) The persons not strictly victims under the Act may have input into proceedings involving the accused/offender

(8) Right to assistance and information to victims

(9) Meetings between victims and offenders, in accordance with principles of restorative justice.

(10) Prohibits the disclosure of the victim's address and particulars except in particular circumstances.

(11) In all cases a victim impact statement is sought.

(12) Provides comprehensive rights of notification, to victims of certain offences, of the occurrence of specified events.

(13) Provides that victims of certain offences may participate in decision-making processes, such as processes for the offender's release from prison under the *Parole Act*, 2002 or for the deportation of the offender under the *Immigration Act*, 1987.

In November, 2007 the New Zealand Parliament passed amendment to the *Victims of Crime Act*, 2001 that provides legislatively for the appointment of the commissioner for Victim's Rights and states his or her functions. The current functions of the interim Commissioner include[19]:

(1) To advise the Attorney-General on how best to use government resources to help victims of crime.

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13 Michael O'Connell, *Strengthening Victims' Rights in South Australia*, the Victimologist, Newsletter of the World Society of Victimology, Vol. 11, Issue 2, April-June 2008. p. 2

14 *Ibid.*

15 *Id.*, at p. 3.

16 *Ibid.*

17 *Ibid.*

18 *Ibid.*

19 *Ibid.*

(2) To carry-out functions assigned by the Attorney-General such as monitor and report on public officials compliance with the declaration

(3) To be the ex officio member of the Victims of Crime Ministerial Advisory Committee.

(4) To assist victims in their dealings with the prosecution authorities and other government agencies.

(5) To monitor and review the effect of the law and of court practices and procedures on victims.

The Commissioner's new functions will include[20]:

(1) If another Act authorizes or requires the Commissioner to make submissions in any proceedings – to make submissions (either personally or through counsel).

(2) To personally, or through counsel, make submissions at the sentencing stage on the impact of the crime on victims and victims' families in cases resulting in the death or permanent total incapacity of the victim.

(3) To make submissions to the Court of Criminal Appeal on guideline sentencing.

(4) To consult the Director of Public Prosecutions in the interests of the victims in general and in particular cases about matters including victim impact statements and charge bargains.

(5) To consult with the judiciary about court practices and procedures and their effect on victims.

As well, to strengthen victims' rights, the commissioner: will be able to require a public agency or official to consult with him/her regarding steps that may be taken by the agency/official to further the interests of victims; and after such consultation, may, where he/she believes that the agency or official has failed to comply with the declaration of principles, recommend that the agency or official issue a written apology to the relevant victim. The Commissioner is required to have regard for the wishes of the person (victim).[21]

Section 11 of the *Victims' Rights Act*, 2002 (New Zealand) states that a victim must, as soon as practicable after the victim comes into contact with an agency, be given information by the personnel of the agency about programmes, remedies, or services available to the victim through the agency Agency here means:

(a) the Accident Compensation Corporation:

(b) the Department of Child, Youth and Family Services:

(c) the Ministry of Justice:

(d) the Ministry of Social Development:

(e) a DHB (as defined in section 6(1) of the New Zealand Public Health and Disability Act 2000):

(f) the New Zealand Police.

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20 *Id.*, at pp. 3-4.
21 *Id.*, at p. 4.

Further under Section 12 of the Act a victim must, as soon as practicable, be given information by investigating authorities or, as the case requires, by members of court staff, or the prosecutor, about the following matters:

(a) the progress of the investigation of the offence:

(b) the charges laid or reasons for not laying charges, and all changes to the charges laid:

(c) the victim's role as a witness in the prosecution of the offence:

(d) the date and place of each event listed in subsection (2):

(e) every final disposition of all proceedings (at first instance or on appeal (if any)) relating to the offence, for example—

(i) any convictions or pleas of guilty entered, and sentences imposed, in relation to the offence; or

(ii) any acquittal or deemed acquittal or finding that the charge was not proved; but not

(iii) whether the accused or offender is granted bail.

(2) The events referred to in subsection (1) (d) are—

(a) the first appearance in court, in connection with the offence, of the person accused of the offence:

(b) any preliminary hearing relating to the offence:

(c) any defended hearing, or trial, relating to the offence:

(d) any hearings set down for sentencing for the offence:

(e) any hearings of appeals (if any) against conviction of the offence, or against the sentence imposed, or to be imposed, for the offence, or both...

The information can also be given under Section 14 of the Act to a support person of a victim if the victim (a) cannot receive it; or (b) is not, or may not be, capable alone of understanding it. Further Section 16 of the Act applies to the information that identifies, or that may lead to the identification of, the address of the place where the victim lives (for example, his or her postal address, email address, fax number, or phone number). The information may be given in evidence only with the leave of the judicial officer. And in that case the judicial officer must not grant leave unless he is satisfied that the information is directly relevant to the facts in issue in the proceedings and that the evidential value of the information (if any) outweighs any prejudice to the victim's interests, or any harm to the victim, that is likely to be caused by the giving of the information.

Section 34 of the Act deals with the notice of release on bail of the accused or offender to the victim. It provides that the Commissioner of Police must give a victim notice, as soon as practicable, of (a) every release on bail (if any) of the person accused of the offence or, as the case requires, the offender and (b) any terms or conditions of a release of that kind (i) that relate to the safety and security of the victim, or of 1 or more members of his or her immediate family, or of both; or (ii) that require the accused or offender not to associate with, or not to contact, the victim, or 1 or more members of his or her immediate family, or both.

Further Section 35 of the Act provides for notice of temporary release from, or escape or absconding from, or death in, prison detention or home detention, of accused or offender. The Section says that the chief executive of the Department of Corrections must give a victim to whom this section applies (a) reasonable prior notice of the offender's impending—

(i) temporary release from the legal custody of the chief executive of the Department of Corrections, or

(ii) part-time release from custody of that kind, to engage in employment, and

(b) reasonable prior notice of the offender's impending release from prison detention or home detention if the offender does not have a parole eligibility date under Section 20 of the Parole Act, 2002; and

(c) notice, as soon as practicable, of—

(i) every escape from prison detention by the person accused of the offence or the offender; and

(ii) every instance of the offender, being on home detention in a residence, leaving that residence other than in accordance with his or her detention conditions; and

(d) notice, as soon as practicable, of the death in prison detention or home detention of the person accused of the offence or the offender.

Similarly Section 36 of the Act deals with notice of convictions for breaching release or detention conditions and of decisions on recall orders. Further Section 37 of the Act provides for notice of discharge, leave of absence, or escape or death of accused or offender who is compulsorily detained in hospital or facility. Section 39 provides for Notice of proposal to consider making deportation order and of hearing of appeal against deportation order if the Minister of Immigration so proposes. On the same footing under Section 48 of the Act makes a provision that the victim may make submissions on making of deportation order or offender's appeal against deportation order.

In November, 2002 Law Officers agreed there was a need to the Commonwealth Statement of Basic Principles of Justice for Victims of Crime but a number of concerns were raised on the content. Nations that had systems and mechanisms in place supported the Statement. Some nations proposed specific amendments whereas others highlighted issues about the workability of some of the proposed principles. Several nations commented on the proposal to further involve non-government organisations in *the question of redress for the victims arguing*, for instance those non-government organisations should not be allowed active involvement in roles other than the provision of legal aid to victim, other specific concerns were:

(1) The scope of the Statement as the draft applied to victims of all crimes – no matter how serious – which would make in difficult to respect all victims' rights without placing an unnecessary burden on public officials.

(2) The principle that victims' property should be returned promptly should be amended to reflect the law in each nation.

(3) Victims right to be informed about the status of investigations should say that victims are entitled to periodically be told of the general status of investigations and then only to the extent possible given the need to ensure the proper administration of justice.

(4) Consideration should be given to requiring prosecutors to establish pre-trail sessions with victims to take into account the views of victims.

(5) Objections to prosecutors having the ultimate responsibility to tell victims about the status of cases because, among other issues, this could impinge on prosecutors' impartiality.

(6) Making it mandatory for prosecutors to bring the courts' attention victims' views on bail, adjournments, charge-bargains, dismissals and compensation would be onerous – rather prosecutors should have discretion.

(7) The principle that defendants who harass, threaten, injure or otherwise initimidate victims or witnesses should be charged and pursued should be strengthened to include the withdrawal of bail in such cases.

(8) As it is not clear what legal interests victims have, training for judicial officers should focus on victims' needs and interests in general.

(9) Victims should only be permitted to make representation at bail hearings, adjournments, charge bargains, dismissal and compensation would be onerous – rather prosecutors should have discretion.

(10) The principle that defendants who harass, threaten, injure or otherwise intimidate victims or witnesses should be charged and pursued should be strengthened to include the withdrawal of bail in such cases.

(11) As it is not clear what legal interests victims have, training for judicial officers should focus on needs and interests in general.

(12) Victims should only be permitted to make representation at bail hearings, adjournments, charge-bargains, charge-withdrawals and compensation where appropriate[22]...

2.1.2 The Right to be Present

The next right to the victim is his/her presence at the trial, sentencing and parole hearings. This right as such in many States in USA has been given with restrictions. These limitations are because that victim's rights might not go against the rights that are granted to the accused. So the victims are granted the right to be present only to the extent that it doesn't interfere with the Constitutional and legal rights of the accused. Further there is a possibility that the justice would not be delivered if the witnesses are allowed to hear the testimony of other witnesses. Thus to ensure a fair trial and proceedings the witnesses are excluded from the criminal trial except during their testimony and deposition.

[22] Michael O' Connell, *Commonwealth Statement of Basic Principles of Justice for Victims of Crime*, The Victimologist, Newsletter of the World Society of Victimology, Vol. 9 Issue 4, May-June 2006.

2.1.3 Awarding Sentence to Offender vis a vis Victim Rights

Sentencing of accused is a matter of great concern to the victim of crime. It humiliates and frustrates a victim of crime when the offender goes unpunished or is let off with a minor punishment and the present system pays no attention and sympathy to the injured. Imposition of the appropriate punishment on the criminal is the duty of the judiciary towards the society in general and the victim of crime in particular. This has already given rise to the incidents of crime for revenge and lawlessness in the form of terrorism which is raising its ugly head to settle private and political scores over the adversary with the barrel of the gun. Dealing with the object of sentencing, The Apex Court has held that the object of sentencing should be to see that crime does not go unpunished and the victim of crime and also the society has the satisfaction that justice has been done to it. In imposing sentence in the absence of specific legislation, judges must consider variety of factors and after considering all those factors and taking an overall view of the situation, impose sentence which they consider to be an appropriate one. Aggravating factors cannot be ignored and similarly mitigating circumstances have also to be taken into consideration.... In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime, the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that the courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminals but also the rights of the victims of the crimes and the society at large while considering imposition of appropriate punishment.[23]

Section 17 of the *Victims' Rights Act*, 2002 (New Zealand) is regarding the victim impact statements in sentencing of the offender. This Section states that the prosecutor must make all reasonable efforts to ensure that information is ascertained from the victim, for submission under Section 21 to the judicial officer sentencing the offender, about the following matters:

(a) any physical injury or emotional harm suffered by the victim through, or by means of, the offence; and

(b) any loss of, or damage to, property suffered by the victim through, or by means of, the offence; and

(c) any other effects of the offence on the victim.

The court explained in R v Nunn[24] that:

> the opinions of the victim, or the surviving members of the family, about the appropriate level of sentence do not provide any sound basis for reassessing a sentence. If the victim feels utterly merciful towards the criminal, and some do, the crime has still been committed and must be punished as it deserves. If the victim is obsessed with vengeance, which can in reality only be assuaged by a very long sentence, as also happens, the punishment cannot be made longer by the court than would otherwise be appropriate. Otherwise cases with identical features would be

23 *Bheru Singh* v *State of Rajasthan* (1994) 2 SCC 467.
24 (1996) 2 Cr App R (S) 136, 140.

> dealt with in widely differing ways leading to improper and unfair disparity, and even in this particular case ... the views of the members of the family of the deceased are not absolutely identical. If carried to its logical conclusion the process would end up by imposing unfair pressures on the victims of crime or the survivors of a crime resulting in death, to play a part in the sentencing process which many of them would find painful and distasteful. This is very far removed from the court being kept properly informed of the anguish and suffering inflicted on the victims by the crime.

In *R v. Hayes*[25] it was held that:

> an essential sentencing consideration was to assess the impact of the particular crime on a particular victim and also, although perhaps rarely, the court was required to consider a refinement of that principle when assessing whether the imposition of a custodial sentence would add to the distress and concern suffered by the victim. That was a factor to which a court had to pay attention. The weight to be attached to it depended on the crime itself and the different facets of the case which the judge had to balance.

2.1.4 Right to Privacy

Privacy[26] has been recognized by the international community as a basic human right. Article 12 of the 1948 Universal Declaration of Human Rights states that no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks. Further Article 17 of the *International Covenant on Civil and Political Rights* also provides for the right of every person to be protected against arbitrary or unlawful interference with his privacy, family, home or correspondence, as well as against unlawful attacks on his honour and reputation. Also Section 'D' of Article 6 of the U.N. Victim Declaration consider state responsibility for taking measures to minimize inconvenience to victims, protect their privacy when necessary. In addition to this Article 4 of the Code of Conduct for Law Enforcement Officials also notifies that matters of a confidential nature in the possession of law enforcement officials shall be kept confidential, unless the performance of duty, or the needs of justice, strictly require otherwise.

2.1.5 The Right to Consult Officials

Country like the USA provides for the obtaining of the views of the victim before entering agreements like plea bargaining or disposing a case. The right to consult the highest public officials has been provided by the State. Like in California, crime victim consultation has been put in the form of a Bill i.e. Victims' Bill of Rights wherein advance notification of a plea agreement has been provided. Further the Bill

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25 *TLR* 5 April 1999.

26 By the nature of their duties, law enforcement officials obtain information which may relate to private lives or be potentially harmful to the interests, and specially the reputation, of others. Great care should be exercised in safeguarding and using such information, which should be disclosed only in the performance of duty or to serve the needs of justice. Any disclosure of such information for other purposes is wholly improper (Lawson, 1996:955).

provides that the victims of crime and their families or dependants have a right to know if a court intends to dispose of a prosecution through the method of plea bargaining. If the victims are not notified regarding this then it is the presumption that they won't have the representation before the court that means that they won't have any sought of participation in the criminal justice system. Nearly 90% of all felony cases in California are disposed of before trial through plea bargaining. It is the duty of the district attorney office to notify a victim of a violent felony or in the event of a homicide, the victim's next of kin, of a pending pretrial disposition before a change of plea is entered before a judge. Even on the request of the victim it is the duty of the office of the District Attorney to notify the victim of any pretrial disposition of any felony. If it is not possible to notify the victim of the pretrial disposition before the change of plea is entered, the District Attorney's Office or the County Probation Department shall notify the victim as soon as possible.[27]

Victims may participate in the criminal justice process by filing a victim impact statement or by consulting with judges or prosecutors before any plea bargains are offered or bail is set. Consultation may also occur before an offender is paroled or sentenced (Davis & Mulford, 2008)

2.1.6 The Right to Protection

This is the foremost right granted almost in all the civilized States across the globe. Victim must be protected by the State. In India, just take an example, the *Protection of Women from the Domestic Violence Act*, 2005 was passed to serve the purposes for which it was enacted viz. protection of women from domestic violence either explicit or dormant because evil existed in several families especially in rural or sub urban areas. The victims may be wives, sisters, mothers, widows, elderly women or any other female relative living in a shared household in domestic relationship: The respondents are males and may also be female relatives of the respondent when the complaining woman is the wife or a person living in married relationship with the respondent. The aggrieved women only are authorized to submit the complaint however her male child may also carry the complaint if he does so along with her mother. The object of this Act is to provide for summary procedure to protect women victims of domestic violence. Some of the exceptions to the general rule included in the Act are given below:

(a) The Magistrate deciding the domestic violence case is given power to execute the orders passed by him without waiting for an application from the aggrieved woman.

(b) The Protection Officer is an officer of the court appointed to assist the court as well as the aggrieved woman. However there exists a harsh provision for his prosecution if he commits any willful breach of duty assigned to him by the Magistrate.

(c) In case if there is no independent and reliable evidence on the file of domestic violence case except that of the aggrieved woman; the Magistrate shall rely her evidence and decide the case on her evidence alone.

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27 1995 Cal. Adv. Legis. Serv. 411 (Deering).

(d) The Magistrate trying the case may not rely only on the individual incident of violence reported to him but shall have to consider the overall circumstances of the case i.e. earlier incidents are to be considered while deciding the latest incident.

2.3 Victim Rights given under Victim-Witness Assistance Programmes

In 1970 Prosecutors initiated victim–witness assistance programs in the U.S.A. in 1972 the first three victim assistance programs in the nation, two of which were rape crisis centers, were founded by volunteers. The first prototypes for what today is victim/witness assistance programs housed in district attorneys' offices were funded in 1974 by the Federal Law Enforcement Assistance Administration. These programs were designed to notify victims of critical dates to their cases and to create separate waiting areas for victims. Some programs began to make social services referrals for victims, providing them with input on criminal justice decisions that involved them, such as bail and pleabargains, notify them about critical points in their cases-not just court dates-and going to court with them. Victim/witness assistance programs continue to provide similar services today.[28] In response to the particular needs of homicide survivors, Families and Friends of Missing Persons was organised in 1974 and Parents of Murdered Children was formed in 1978. Mothers Against Drunk Driving was formed in 1980. These groups provide support for their members and others but also advocate for laws and policy changes that reflect the groups' missions. The National Organisation for Victim Assistance 1975 (NOVA) was established to bring together service providers working for government agencies and nonprofits. NOVA was developed to consolidate the purposes of victims' movement and eventually to hold national conferences and provide training for persons working with crime victims.[29] The probation department in Fresno, California, was the first to instruct its officers to interview victims to find out how the crime impacted them physically, emotionally, socially, and financially. In the continuation to this further in the year 1977 New York State enacts the first "Son of Sam" law to prevent offenders from profiting from telling about their exploits. Last three decades have witnessed the development and expansion of the rights of victims of crime. We are noticing this change as concrete efforts of various organisations, leaders, policy makers etc. world-wide.

In 1980s, the pace of providing victims with certain rights was accelerated. In 1980, Wisconsin became the first State to pass a Victims' Bill of Rights. NOVA, in this vey year started a new policy that included the initiation of a National Compaign for Victim Rights (in this compaign was included a National Victims' Rights Week that was enforced by the then President Ronald Reagan. The then Attorney General, William French Smith created a Task Force on Violent Crime, which recommended for the need of a Presidents' Task Force on Victims of Crime). In the year 1982, under the leadership of President Ronald Reagen, Presidential Task Force on Victims of Crime came into being. The Final Report of Presidential Reagen's Task Force was released in 1982 which provided for increased participation by victims throughout criminal justice proceedings, and restitution in all cases in which victims suffer

[28] Leah E. Daigle, *Victimology*, Sage Publications, California, 2013, p. 9.
[29] *Ibid.*

financial loss.[30] The President's Task Force held six hearings across the country from which 68 recommendations for the betterment of the conditions of victims of crimes were made. Out of the major recommendations were the requirement for Federal legislation to fund state victims' compensation programs and local victim assistance programs, recommendations on the working of the officials for the betterment of the victims of crime and providing of rights to them etc.

In the year 1982, the *Federal Victim Witness Protection Act,* authorised victim restitution and the use of victim impact statements at sentencing in federal cases.[31] The Act mandated that the Attorney General develop and implement guidelines that outlined for officials how to respond to victims and witnesses.[32] Further it suggested standards for fair treatment of victims within the federal court system. It provided for the punishment to anyone who tampers with a witness, victim or informant. The Act required that officials should not disclose the names and addresses of victims and witnesses As a result of the recommendation by the Presidents' Task Force, the *Victims of Crime Act*, 1984 (VOCA) came into picture which provided for the implementation of the recommendations of the Task Force regarding compensation, restitution and assistance. Not all the victims, however, are eligible for compensation from the Crime Victims Fund. Only victims of rape, assault, child sexual abuse, drunk driving, domestic violence and homicide are eligible, since these crimes are known to create undue hardships for victims...some programs have expanded coverage to include crime scene clean-up, transportation costs to receive treatment, moving expenses, housekeeping costs, and child-care costs (Klein, 2010). This Act created the Office for Victims of Crime in the Department of Justice and established the Crime Victim Fund. It provided for redistribution of monies levied from federal offenders to states, funding local aid to victims.[33] The Act provides federal subsidies to state victim compensation and assistance programs. The Task Force recommended changes in the Constitution and in federal and state laws to guarantee victims' rights. The property damage and loss are not compensable expences (Office for Victims of Crime, 2012). Then the Child Victims' Bill of Rights 1990 came into picture which provided that the proceedings be explained in language children can understand. The Bill further provided for certain rights of children like a victims' advocate can be present at interviews, hearings and trial, a right to have a secured waiting area at trial, right that certain personal information kept private unless otherwise specified by the child or guardian etc.[34] Afterwards in 1990 the U.S. Congress passed the *Victims' Rights and Restitution Act* which provided for certain rights like notification of court proceedings and the right to attend the proceedings, the right to know and to have a notice or information regarding the changes in a defendants' detention status, the right to consult with prosecutors and the basic right of protection against the

30 Presidential Task Force on Victims of Crime, Final Report (Washington, DC: Government Printing Office, 1982).

31 96 Stat. 1248 (1982).

32 *Supra* note 28 at p. 79.

33 98 Stat. 2170 (1984). *Constitutionalizing Crime Victims' rights*, Criminal Law Bulletin 33, No. 5 (1997): 395-423, 398; Barbara E. Smith and Susan W. Hillenbrand, *Making Victims Whole Again: Restitution, Victim-Offender Reconciliation Programs, and Compensation*, in *Victims of Crime,* 2nd edition, eds. Robert C. Davis, Arthur Lurigio, and Wesley Skogan (Thousand Oaks: Sage Publications, 1999), pp. 247-249.

34 *Supra* note 28 at p. 82.

offender.[35] It also provides for the right to be reasonably protected from the accused, reasonable, accurate and timely notice of any public proceeding involving the crime or any release or escape of the accused and to not be excluded from such proceedings, ne reasonably heard at any public proceedings involving release, plea or sentencing, confer with the Attorney for the Government in the case, full and timely restitution as provided by law, proceedings free from unreasonable delay, be treated with fairness and with respect for the victims' dignity and privacy. In continuation to this, the *Violent Crime Control and Law Enforcement Act*, 1994 was passed which advocated basic rights for victims like right to speak at sentencing hearings, mandatory restitution in sexual assault cases, etc.[36] This Act further included the *Violence against Women Act*, 1994. The Act (the *Violent Crime Control and Law Enforcement Act*, 1994) allocated $ 1.6 Billion to fight violence against women. It included money for victims' services advocates and for rape education and community prevention programs.[37] Then the *Violence Against Women Act*, 1994 provided $1 Billion to programs designed to reduce and respond to violence against women. The Act increased funding for victim compensation programs and established a national sex offender registry.[38] Further in the year 1996 and 1997 the *Antiterrorism and Effective Death Penalty Act* (made restitution mandatory in violent crimes) and the *Victims Rights Clarification Act* (victim's rights were clarified regarding the participation of the victim in the trial of their offender, also provided for victim impact statement during sentencing of capital and noncapital sentencing) were respectively passed by U.S. Congress which strengthened and expanded victims' rights.[39] In 1998, a publication called *New Directions from the Field: Victims' Rights and Services for the 21st Century* was released by the then General Attorney Janet Reno and the Office for Victims of Crime. It reviewed the status of the recommendations made by the Presidents' Task Force. Further it included nearly about 250 recommendations for the providing the victim services and victims' rights advocacy. Some of the victim rights are like the right to be present at trial, the right to be provided with a waiting area that is separate from the offender and people associated with the offender, the right to be notified of key events in the criminal justice process, the right to testify at the parole hearings, the right to be informed of the rights, the right to be informed of the compensation programs, the right to be treated with human dignity and respect etc. In 2004 Congress enacts the *Crime Victims' Rights Act*, which pledges fair treatment and opportunities for input in federal court proceedings. The *Crime Victims' Rights Act*, 2004 is a part of the *Justice for All Act*, 2004. Then in 2005 a group of 18 members of Congress forms a Victim's Rights Caucus.[40]

Slightly less than half of U.S. States give all victims rights (Howley & Dorris, 2007). In all states, the right to compensation, notification of rights (The right to notification allows victims to stay apprised of events in their cases. Notification is important for

35 104 Stat. 4820 (1990).
36 108 Stat. 1796 (1994).
37 *Supra* note 28 at p. 82.
38 *Supra* note 28 at p. 82.
39 110 Stat. 1214(1996); 111 Stat. 12 (1997).
40 SOURCE: Galaway and Hudson, 1981; Schneider, 1982; Lamborn, 1985; National Organization for Victim Assistance (NOVA), 1989, 1995; Dussich, 2003; Walker, 2003; Garlock, 2007; Rothstein, 2008; and Dussich, 2009a; 2009b.

victims at various steps in the criminal justice process. In some jurisdictions, victims have the right to be notified when their offender is arrested and released from custody after arrest, such as on bail. Victims may also have the right to be notified about the time and place of court proceedings and any changes made to originally scheduled proceedings. Notification may also be given if the offender has a parole hearing and when the offender is released from custody at the end of a criminal sanction. Notification responsibilities may be placed on law enforcement, the prosecutor, and the correctional system. To make notification more systematic and reliable, some jurisdictions use automated notification systems to update victims (through letters or phone calls) about changes in their cases. These systems are often also set up so that a victim can call to receive updates. Victims of federal crimes can register to participate in the national automated victim notification system[41]), notification of court appearances, the ability to submit victim impact statements before sentencing are granted to at least some victim classes (Deess, 1999). Other common rights given to victims in the majority of states are the right to restitution, to be treated with dignity and respect, to attend court and sentence hearings, and to consult with court personnel before plea bargains are offered or defendants released from custody (Davis & Mulford, 2008) other rights extended to victims are the right to protection and the right to a speedy trial, importantly, some states explicitly protect victims' jobs while they exercise their right to participate in the criminal justice system. These protections may include having the prosecutor intervene with the employer on behalf of the victim or prohibiting employers from penalizing or firing a victim for taking time from work to participate (National Centre for Victims of Crime, 2009).[42]

The U.S. Constitution has no such wording that provides the victims with rights on the other hand we find many rights of the suspected persons. Although this omission has been identified by some as deserving remedy, others argue that victims' rights do not have a place in our Constitution (Wallace, 1997). Concerns have also been expressed that providing victims with rights will create a burden on our already overburdened criminal justice system. (Davis & Mulford, 2008).[43]

2.3.1 Right of Restitution

According to the Black's Law Dictionary restitution is the act of restoring someone to a position he or she would have been in without the wrongdoing. In the criminal law cases, the courts can order the defendants to pay a crime victim for costs relating to physical injury, mental health counselling, lost property or lost wages or destroyed property etc. the payment of restitution to the victims of crime is of great importance that can be a key factor in rehabilitation of victims of crime.

In ancient times the victimized persons themselves used to choose punishment to the offenders and if possible inflict the same themselves. With the development of the society, right of vengeance of the individual victim transformed from individual to the group to which he belonged and aggression on the individual was considered as an act of aggression on the entire group. With the emergence of the barter economy,

41 *Supra* note 28 at p. 77.
42 *Supra* note 28 at p. 76.
43 *Supra* note 28 at p. 79.

the society accepted money or goods as symbolic compensation and restitution of crime in place of awarding punishment themselves.

Victims of war and accidents have the right to claim restitution or compensation under the relevant statutes. However, there is no such right available to other victims though in some cases compensation is awarded at the discretion of the court. Some statutory provisions have been added in the *Code of Criminal Procedure*, 1973 (India) after its amendment from time to time. However, further amendments are required to make compensation as a right to the victim of crime.

2.3.2 The Right to Address the Court

In the USA this right has been provided at the various stages of the criminal justice administration like the pretrial release or bail hearing. Views of the victims provide the court with the plenty of information as to what sought of conditions are required to be imposed on the accused on his release so that it won't be detriment to the right to life of the victim or it might not pose any serious threat to the victim. But there are some practical problems in the notification of such arrest to the victim. In some cases the accused is arrested for a few hours and then he is to be released and the victim is not notified in that case the victim has no say regarding the pretrial release of the accused.

In the USA many of the States allow the victim to give views on the appropriate sentence. There is also a provision for the Victim Impact Statement to be given by the victims or survivors of homicide assault or the guardian in case of the minor victim, physically incapacitated.

The right to make statements was first adopted in 1976 in Fresno, California in the form of the Victim Impact Statement (VIS). The VIS can be produced by the direct victim or can be submitted by the relatives or family members of the victim who are indirectly affected by the offence. The VIS is either submitted in writing or presented orally (victim allocution). The victim can enter a VIS at sentencing, parole hearings, the victim may be allowed to make VIS during bail hearings, pretrial release hearings, and plea bargaining hearings (National Center for Victims of Crime, 1999). Importantly, despite the victims' wishes, the VIS is used only as information and may impact the court's decision, but not always. As noted by the Minnesota Court of Appeals[44] the victim's wishes are important, they are not the only consideration or determination in the prosecutor's decision to bring a case to trial.[45]

2.3.3 Corroboration of the Victim in Cases of Sexual Offences

The general rule in rape cases is that there may be corroboration of the complainant's story by independent evidence, but this corroboration would naturally depend on the facts and circumstances of each case. It may be in the form of injuries on the private or other parts of the complainant's body or that of the accused, conditions of clothes worn by her or the accused, seminal or blood stains on her or on the accused's body or clothes or on the place of the incident. But all this is changing now. A woman who is a victim of rape cannot be described as an accomplice. The Supreme Court of India

44 *State v. Johnson* (1993), 86, 323.
45 *Supra* note 28 at p. 86.

has observed that the court cannot cling to a fossil formula and insist on corroboration testimony. Judicial response to human rights cannot be blunted by legal bigotry.[46] The Court in other case further stated that in the Indian setting, refusal to act on the testimony of sexual assault in the absence of corroboration as a rule is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. She would be conscious of the danger of being ostracized by the society including her own family members, relatives, friends and neighbourers. On principle the evidence of a victim of sexual assault stands at par with evidence of an injured witness. If the evidence of a victim does not suffer from any basic infirmity and the probability does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration except for the medical evidence where the same can be expected to be forthcoming. There is however, this qualification may be insisted upon when a woman having attained majority is found in a compromising position and there is likelihood of her having leveled such an accusation on account of the instinct of self-preservation or when the probability factor is found to be out of tune.[47]

2.4 Conclusion

The history of crime is as old as mankind and crime existed since the dawn of civilization. The primitive societies have some basic customs which were respected by all members of the society. 'A tooth for tooth and eye for eye', the theory of retribution/retaliation/vengeance etc. was present in some of the primitive societies. As civilization advanced, new ideas regarding individual rights and duties towards his fellow human beings developed and crime was considered as crime against society and the State. One of the basic criticism against the present system is that it has failed to protect the society against rising incidents of crime. The Adversarial or the accusatorial Criminal Justice System tends to take victim for granted and is more concerned with the offender. However, in these days efforts are being made to seek justice to the victims of crime who were previously forgotten.

46 *Rafique v. State* AIR 1981 SC 559.
47 *Bharwada Bhoginbhai Hirjibhai v. State* AIR 1983 SC 753.

CHILD TRAFFICKING: IS INDIA WELL EQUIPPED?

Hemangini Sharma*

1.1 Introduction

It is the need of every society to protect the child from all possible harm, because it is the only way to the former's growth, progress and existence. History stands evidence to the efforts made by different countries of the world to protect the child which emanated into various legislations and enactments, which provided respite to the child to an extent. In India, concrete efforts by way of legislations or enactments to protect the child did not materialize until the Constitution of India came into force on January 26, 1950. It includes provisions relating to survival, protection and development of children in Part III[1] and Part IV.[2] Apart from these, India is also party to a few major International Declarations relating to the protection and welfare of the child. Inspite of the efforts of the legislature and establishment of various implementing machineries both at the Central and State level, crime against the Indian child continues unabated. The sole reason for this is the child is voiceless, vulnerable and under-represented. Child welfare legislations are made by the adults, and the child has no role to play in such processes. The adult mind does not completely understand the psychology of the child and the efforts made by them to protect the child from the harshness of the world outside remains half hearted. The child, by virtue of his age and vulnerability cannot be subject to rules and regulations applicable to adults and members of other social category. They are unique in their own sense and the sensitivity of their world has to be understood in an objective manner. Failure to do this remains a major cause of concern.

1.1.1 Child Trafficking

Human trafficking is described as a phenomenon that has been and continues to be practiced for centuries. It is a global crisis that is inevitably linked to the current globalization of the sex industries involving women and children. Till recently this phenomenon was neither expressly explained, nor was there any specific legal provision to stop it. The CRC[3] was the first international treaty that placed a comprehensive legal obligation on state parties to protect children from all forms of sexual exploitation and abuse. This obligation is also an important landmark because it implicitly recognizes that sexual exploitation of children is likely to occur in every country in the world. The CRC is supplemented by two Optional Protocols – one addresses the sale of children, child prostitution and child pornography,[4] and the other the involvement of children in armed conflict.[5] These Protocols were adopted

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1 Constitution of India, 1950, Fundamental Rights.

2 *Id.*, Constitution of India, 1950.

3 *Convention on the Rights of the Child* (adopted and entered into force 2 September 1990) 1577 UNTS 3.

4 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (adopted 25 May 2000, entered into force on 18 January 2002) 2171 UNTS 227.

5 *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict* (adopted 25 May 2000, entered into force on 12 February 2002) 2173 UNTS 222.

by the United Nations General Assembly on 25 May 2000 and entered into force on 18 January 2002. By October 2008, it had been ratified by 129 States.[6] India is a party to the CRC, as well as the Optional Protocol on the sale of children.

The movement against trafficking gained momentum once a concrete definition of the word trafficking had been formulated. The United Nation Convention against Transnational Organized Crime (2000) for the first time defined 'human trafficking'.[7] The Protocols adopted by the UN General Assembly in the same year, also known as the 'Palermo Protocols' define who is a 'child'.[8] Reading both these definitions together, the legal parameters of child trafficking can be comprehended.

1.1.2 Dynamics and Concepts in Human/Child Trafficking

a. Definition

The definition of trafficking has different dimensions to it. Before endeavoring to understand the magnitude of this problem, the fundamental question that arises is who is considered to be a child as there is no unanimity in the legal definition of the child in India, and varies with specific legislations. Under the Child Labour (Protection and Regulation) Act, 1986, child means a person who has not completed fourteen years of age. Under the Juvenile Justice (Care and Protection) Act, 2000, the age is 18 years for both boys and girls.[9] The Convention on the Rights of the Child (CRC) defines a child as "every human being below the age of 18 years."[10] For the sake of convenience, the age of child will be considered to be 18 in this paper.

b. The Game of Demand and Supply

The economic factors of demand and supply play an important role in child trafficking. Before looking into the various sectors which are thriving on the trafficked child, it is important to understand the demand and supply of human beings, which are also referred to as 'push and pull' factors. This method has been adopted by the United Nations and various researches across the globe because it is not only relevant to look at trafficking within the context of labour market realities, but also because the people involved in trafficking, traffickers and victims, are in many ways two sides of the same coin. Understanding this phenomenon will immensely help in formulating appropriate measures so that the right people are targeted in an accurate manner.

According to the United Nations[11] trafficked people are often called the *'supply'* side of trafficking. They are a factor of production when their labour is exploited. For example, a rural community with high levels of unemployment may have a 'supply'

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6 (--) *Handbook on the Optional Protocol on the sale of children, child prostitution and child pornography* (UNICEF Innocenti Research Centre 2009) *www.unicef.org* available at *http://www.unicef-irc.org/publications/pdf/optional_protocol_eng.pdf*, (visited on February 4, 2013).

7 United Nations Convention against Transnational Organized Crime and the Protocols thereto (adopted 15 November 2000, entered into force on 29 September 2003) 2225 UNTS 209.

8 *Ibid.*

9 Section 2 (k).

10 Article 1.

11 (--) 'Training manual to fight trafficking in children for labour, sexual and other forms of exploitation Text Book 1' (2009) *www.unicef.org* available at *http://www.unicef.org/protection/Textbook_1.pdf*, (viewed on February 15, 2013.)

of young people desperate to find work and these adolescents may be recruited by traffickers into exploitation in a nearby city in factories producing clothes. The community impacted by unemployment is effectively 'supplying' the children. The people buying the clothes are creating 'demand'. But this demand is for the clothes, not the children, and this is an important distinction. The true 'demand' for children comes from the factory operator who is trying to keep prices low and therefore profit margins robust and who is willing to take trafficked children in order to do that. It is also coming from the traffickers, who hope to make money out of trafficking the children.

At this stage, it is important to distinguish between *consumer (or primary)* demand and *derived demand* by exploiters, and recognize that they occur at different points of the trafficking chain. In case of ***consumer demand***, it is generated directly by people who actively or passively buy the products or services of trafficked labour. For example tourists buy cheap T-shirt made by a trafficked child in a sweatshop. Research suggests that most of this kind of demand does not directly influence the trafficking — for example, the tourist buying a cheap T-shirt does not specially ask traffickers to exploit children and so cannot be said to be an 'accomplice' in the trafficking.

Derived demand is a different issue because it is generated by the people who stand to make a profit from the trafficking. These mostly include pimps and brothel owners, the various intermediaries involved in trafficking, corrupt factory owners or farmers who exploit trafficked labour to keep their costs down, prices low and profits flowing.

c. Different Sectors

Trafficking is generally understood as sale of human beings for the purposes of sexual activities. According to the 2002 - 2003 Report on Trafficking of Women and Children in India[12] a large number of children are trafficked not only for sex 'trade' but also for other forms of non-sex-based exploitation that includes servitude of different types, viz. *domestic labour, industrial labour, agricultural labour, begging, organ trade, camel jockeying, false marriage,* etc.

The NHRC report revealed that the child is preferred in these sectors as they can be made to work on minimal wages. Also they can be controlled by threats and physical torture, which is difficult in case of an adult. Since the child is helpless in the face of such employers, the latter has absolutely no concern regarding their living conditions. *Circus* is another industry that flourishes on trafficked children. Not only these children are sexually exploited by the workers, they are also made to work beyond their physical and mental capacity. Another devastating activity that has been identified to promote child trafficking is *camel jockeying*. Only very young boys are trafficked to serve as camel jockeys. They have to be young and small-built in order to be light on the camel's back. They are tied to the backs of the camels so that they do not jump off in fright during races. The ropes that are used to bind the children to the camels sometimes unfasten and they are thrown off the camel and dragged between its legs over stones and sand. The boys are also underfed to reduce the

[12] P.M Nair, 'A Report on Trafficking in Women and Children in India' (2002-2003) *www.nhrc.nic.in* available at *http://nhrc.nic.in/Documents/ReportonTrafficking.pdf* (viewed on 10 February, 2013).

burden on the camel. Children who fall to the ground are often trampled to death by other camels on the track.[13] The destination country is generally the United Arab Emirates.

Various studies indicate children are also trafficked for the purpose of *begging*. Amongst them, children with physical disabilities are the ones to be most exposed. Poverty coupled with physical disabilities are the ideal combinations for children to be trafficked. As a disabled child induce more sympathy among the almsgivers, it puts the child beggar at a serious risk of being deliberately maimed in order to increase his or her earning potential. Most of the times parents who cannot feed their child rent them out to these beggars, and earn money. The child is not only trafficked to beg in India, but also abroad. For instance there is a demand for supply of children to beg during Haj in Saudi Arabia.[14]

Adoption is another disturbing activity for which the child is trafficked. The NHRC report[15] reveal a few startling facts regarding the same. The need for giving up children for adoption arises in situations where the biological parents or near relatives are not able to look after the child or when the child is abandoned, with no trace of the parents. Indians are not very enthusiastic about adopting children, and even when they do adopt, the preference is for boys rather than a girl child. In contrast, because of widespread unavailability of children for adoption in developed countries, there is great demand for Indian children for adoption and this has prompted many undesirable organizations and unscrupulous individuals to become active in trafficking of children for adoption. In this context, the Supreme Court Ruling in the case of Laxmikant *Pandey* v. *Union of India*[16] is worth mentioning, pursuant to which the Ministry of Social Justice and Empowerment set up the Central Adoption Resource Agency (CARA), which regulates and monitors the working of recognized social/child welfare agencies in both in-country and intra country adoptions and provides guidelines for the adoption processes to be followed.

The Report also indicates that traffickers lure poor people, including children, to donate their organs by offering big sums of money. The donors, usually children are categorized by their blood groups and thereafter, lawyers file false affidavits on behalf of the donors as well as the recipients. The operating doctors conduct laboratory tests for the donors in a diagnostic centre and charge between Rs.75,000 to Rs.1,25,000 as fees for conducting illegal kidney transplants. The donors get only about 15 to 20 thousand rupees for donating a kidney and most of the money is pocketed by the traffickers and their middlemen. Most people die due to lack of proper care. The child, specially the girl child is also *trafficked for marriage*. This is done through an unscrupulous team of brokers, who keep an eye on 'prospective brides', especially Arab nationals. The parents, who in most cases are poor and are reluctant to shoulder the burden of a girl, are lured and convinced for such an arrangement. The family does not have the scope to check the credibility of the groom, the only contact person is the broker. After some time, the 'groom' leaves the child at the mercy of the brokers, who make profit by selling them to different

13 *Ibid.*
14 *Id.*, at p. 4.
15 *Ibid.*
16 1984 (2) SCC 244.

brothels across the country. The parents remain ignorant about the entire situation, and even if they come to know, remain silent, since they are ignorant of their rights. Hyderabad is one common destination for such traffickers.

Another sector which has added immensely to the anguish of the child is the system of *bonded labour*. The Supreme Court in the case of *Bandhua Mukti Morch* v. *Union of India*[17] made strong comments against this system and strongly emphasized that such outrage against humanity has to be wiped out. Inspite of that, instances where in return for money advance or credit, a person has pledged his labour or that of a child for an indefinite period of time continues. Children, thus become commodities in the process. Parents pledge them like chattels to pay off their debts. The initial loan for bondage may be diminutive, but due to illiteracy, the borrowing family is unable to understand the interest calculations of the loan-givers. Written agreements are viewed as unnecessary and interest rates are exorbitantly high.

d. Sex tourism and the child

With the dawn of the era of technological advancement, our country has attained new heights. But the devastating consequences of such progress cannot be undermined, especially when the victim is an innocent child. Apart from the above mentioned traditional sectors, the new-age development is child sex tourism, and India is the haven for pedophiles.[18] These people travel to under-developed and developing countries to gratify their unnatural lust. India being one of the most preferred tourist destinations, this business has attained serious dimensions and the traffickers have been making exorbitant profits. The anonymity enjoyed by these pedophiles, the urge and excitement to gratify their lust and the poverty and vulnerability of the targeted victims enable such activities to flourish.

The most targeted places in India for sex tourism are Goa, Tamil Nadu, Kerala etc. The NHRC report reveals that the most common form of modus operandi is by *running orphanages*, where the children in the garb of being taken care of are subjected to ghastly sexual activities and abuse. In yet another case, a Dutch national set up an orphanage called 'Little Home' in Poonjeri village, 3 Km. from Mahabalipuram in Kanchipuram district in Tamil Nadu. There were 42 school children in the age group of 10-20 years in the orphanage. Heum, the Dutch national used to drug the children and subject them to sexual abuse. His crimes were exposed when one of the children escaped and filed a complaint with the police. During the police investigation it transpired that in the name of charity, Heum, with the help of his wife, had been abusing the inmates of the orphanage over the past eight years. He also entertained a large number of foreigners at his place, and allowed them to sexually exploit the children.

Another modus operandi is the claim to be producers of films and documentaries, the ghastly consequence of which is child pornography. Various such cases have been busted by NGOs in and around Mumbai, where such people were caught in the act of producing pornographic materials with minor children. Astonishingly, the people involved hold high positions in the so-called civilized society. The pornographic material once completed is then circulated through the internet, which in turn attracts

17 AIR 1984 SC 802.

18 Adults who are attracted to pr-pubic children for sexual gratification.

the pedophiles, and sex tourism gets a boost. Thus it is a vicious circle and the urgent need of the hour is to break it at any cost.

There are various factors which have contributed to the growth of child sex tourism. Prominent amongst them, as highlighted by the Report are as follows:

1. The feeling among foreign tourists that children of third world countries can be exploited and that the chances of detection are slender.
2. A belief that children are less likely to have contracted sexually transmitted diseases and hence sex with them is safe.
3. The mistaken notion that sex with virgin girls cures HIV.
4. That government of many developing countries, with a view to encourage tourism, turn a blind eye to this problem.

1.2 The legal regime

The body of laws seeking to prevent trafficking both nationally and internationally is enormous. The international treaties, conventions and protocols preventing trafficking in human beings are as follows:

I. International Agreement for Suppression of White Slave Traffic, 1904[19]

II. International Convention for Suppression of White Slave Traffic, 1910[20]

III. International Convention for the Suppression of the Traffic of the Women and Children, 1921[21]

IV. Slavery Convention, 1926[22]

V. International Labour Organisation Forced Labour Convention, 1930[23]

VI. Universal Declaration of Human Rights, 1948[24]

VII. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949[25]

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19 The agreement was formulated with the intention of securing to women of full age who have suffered abuse or compulsion, as also under-age girls, effective protection against criminal traffic known as the "White Slave Traffic".

20 This convention criminalized procurement, enticement or leading away of a woman or girl under the age of 21, even with her consent for immoral purposes irrespective of the fact that the various acts constituting the offence may have been committed in different countries.

21 The treaty prohibits the enticing or leading away of a woman or girl for immoral purposes, to be carried out in another country.

22 States Parties are enjoined to discourage all forms of forced labour. Slavery means control over another person, without full informed consent, for the purpose of exploitation.

23 Article 1 of this convention calls for suppression of the use of forced or compulsory labour in all its forms within the shortest possible period.

24 Article 4 of the Declaration prohibits all forms of slavery and the slave trade. Article 13 recognizes the right of persons to freedom of movement and residence and Article 15 recognizes the right to nationality.

25 This convention is a compilation of four previous international conventions (Conventions of 1904, 1910, 1921 and 1933). This convention made procurement, enticement, etc. for purposes of prostitution punishable irrespective of the age of the person involved and his/her consent to the same (Article 1). Brothel keeping was also denounced to be illegal and punishable (Article 2). The convention provided for repatriation (Article 19) and rehabilitation (Article 20) measures. However, the 1949 Convention is limited to trafficking for prostitution and related activities.

VIII. Supplementary Convention on the Abolition of Slavery, Slave Trade and Institutions and Practices of Slavery, 1956 (Slavery Convention)[26]

IX. Abolition of Forced Labour Convention, ILO, 1957[27]

X. International Covenant on Civil and Political Rights, 1966[28]

XI. International Convention on Economic, Social and Cultural Rights (ICESCR) 1966[29]

XII. Minimum Age Convention, 1973[30]

XIII. Convention on the Elimination of all forms of Discrimination against Women, 1979[31] (CEDAW)

XIV. Tourism Bill of Rights and the Tourist Code 1985[32]

XV. Convention on the Rights of the Child, 1989[33]

XVI. The ILO Convention 182 on the Worst Forms of Child Labour (1998)[34]

XVII. UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000[35]

XVIII. United Nations Convention Against Transnational Organized Crime, 2000.[36]

XIX. Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography 2002.[37]

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26 This convention condemned a variety of slavery-like practices, including debt bondage and forced marriage. States Parties undertook to establish suitable minimum ages of marriage and registration of marriages.

27 Under this convention, States Parties undertook to suppress any form of forced or compulsory labour as a means of political coercion, economic development, labour discipline, or racial, social, national or religious discrimination.

28 Forced labour and slavery are prohibited by Article 8 of the ICCPR. Article 24 outlines the rights of children.

29 Article 10 of this convention stipulates that States are responsible for protecting children from exploitation and must lay down the minimum age for their employment.

30 The aim of this convention was to prohibit and regulate child labour and restrict engagement of children in hazardous work.

31 Article 6 of CEDAW requires States Parties to take all appropriate measures, including legislation, to suppress all forms of traffic in women.

32 Adopted by the WTO, the Code enjoins that the State should preclude any possibility of the use of tourism to exploit others for purposes of prostitution.

33 Article 11 requires States Parties to take measures to combat the illicit transfer and non return of children abroad. Under Article 34 and 35, States Parties must take appropriate national, bilateral and multilateral steps to protect the child from all forms of sexual exploitation and sexual abuse as also to prevent the abduction, sale of or traffic in children.

34 Article 3 of this Convention defines the worst forms of child labour comprising all manifestations of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and servitude and forced or compulsory labour, etc.

35 The UN Trafficking Protocol seeks to create a global language to define trafficking in persons, especially women and children, assist victims of trafficking, and prevent trafficking in persons. It supplements the United Nations Convention against Transnational Organized Crime, 2000, *supra* note 46.

36 Article 3(a) of the Convention defines 'trafficking in persons' as *"the recruitment, transportation, transfer, harbouring or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation".*

37 *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict* (adopted 25 May 2000, entered into force on 12 February 2002) 2173 UNTS 222.

The National laws for protecting the child against trafficking are as follows:

I. The Child Marriage Restraint Act, 1929[38]

II. The Indian Penal Code, 1860: Relevant provisions under the Indian Penal Code are Sections 293, 317, 354, 359, 361, 363, 365, 366A, 366B, 369, 370, 371, 372, 373, 375, 376, 377 and 509.

III. The Constitution of India, 1950[39]

IV. The Immoral Traffic (Prevention) Act, 1956[40]

V. Probation of Offenders Act, 1958[41]

VI. The Bonded Labour System (Abolition) Act, 1976[42]

VII. The Child labour (Prohibition and Regulation) Act, 1986[43]

VIII. The Transplantation of Human Organ Act, 1994.[44]

XI. The Information Technology Act, 2000[45]

X. The Juvenile Justice (Care and Protection of Children) Act, 2000[46]

XI. Goa Children's Act, 2003[47]

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38 It defines the terms 'child marriage', 'child', 'contracting parties', 'minors', etc. It sets down the legal age of marriage as 18 years for girls and 21 years for boys. The Act empowers the court to issue injunctions prohibiting child marriage.

39 Article 23 (1), prohibits trafficking in human beings and forced labour. This right is enforceable against the State and private citizens.

40 Previously this legislation was known as the Suppression of Immoral Traffic in Women and Girls Act, 1956 (SITA). It was enacted under Article 35 of the Indian Constitution with the object of inhibiting or abolishing the immoral traffic in women and girls. It was also in pursuance of the Trafficking Convention, which India signed on 9 May 1950. The Act aimed to rescue exploited women and girls, to prevent deterioration of public morals and to stamp out the evil of prostitution, which was rampant in various parts of the country. Owing to the realization that the social evil needed to be curbed and that existing provisions failed to do so SITA was drastically amended and renamed to the current legislation.

41 The Act puts a restriction on the court, forbidding the imprisonment of any offender below the age of 21 years, who has not committed an offence punishable with imprisonment for life, unless the circumstances of the case or nature of the offence requires that the offender be punished.

42 It defines the terms 'advance', 'agreement', 'ascendant or descendant', 'bonded debt', 'bonded labour', 'bonded labour system' and provides for initiating appropriate action.

43 It prohibits employment of children in the specific occupations set forth in Part A of the schedule of the Act. The Act lays down the conditions of work of the children. As per the Act, no child shall work for more than three hours before he or she has had an interval of rest for at least one hour.

44 The two-fold objectives of this Act are: (a) to provide for the regulation of removal, storage and transplantation of human organs for therapeutic purposes and (b) to prevent commercial dealings in human organs. The Act also provides for regulation and registration of hospitals engaged in removal, storage and transplantation of human organs.

45 It extends throughout India and also has extra-territorial jurisdiction. Section 67 penalizes the publication or transmission of any material, in electronic form, which is lascivious; or appeals to prurient interests; or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied therein.

46 This Act was passed in consonance with the Convention on the Rights of the Child, to consolidate and amend the law relating to juveniles in conflict with law and children in need of care and protection. The definition specifically includes the child who is found vulnerable and is, therefore, likely to be inducted into trafficking. The focus of the Act is to provide for proper care, protection and treatment by catering to the child's development needs and by adopting a child-friendly approach in the adjudication and disposition of matters in the best interests of children and for their ultimate rehabilitation through various institutions established under the Act.

47 This Act was notified in the Official Gazette in July 14, 2003 to curb the ever increasing menace of child trafficking in Goa.

XII. The Protection of Children from Sexual Offences Act, 2012[48]

Besides these, the following legislations also find mention here, which seeks to do away with the system of devdasis:

I. The Karnataka Devadasi (Prohibition of Dedication) Act, 1982[49]

II. Andhra Pradesh Devadasi (Prohibiting Dedication) Act, 1989[50]

2.1 Analysis and Conclusion

The foregoing discussion amply illustrates the child law regime both at the national and international level. The international treaties and protocols have let to the birth of various national legislations pertaining to the protection of the child. The Constitution of India, the mother law of our country, guarantees the right to life under Article 21, which describes the right to live life with dignity and honour and not mere animal existence. Various child related legislations have been drafted and various policies have been formulated by the government from time to time. This shows the awareness regarding child rights both at the national and international level, but such awareness is not enough. The child, especially in India continues to suffer in silence.

The basic discrepancy that arises in the entire child law regime is the age of the child. The Child Labour (Protection and Regulation) Act, 1986 (CLPRA) defines a child to be a person who is below 14 years of age. Other legislations such as the Juvenile Justice Act, 2000 define a child to be under 18 years of age. The Convention on Rights of the Child (CRC) defines a child to be below 18 years. The Constitution of India under Article 24 prohibits the employment of children below 14 years to be employed in factories, mines or other hazardous employment. The reason for this maybe comprehended as employing the child with certain restrictions on his working conditions and environment for economic development of the country, which has been grossly violated since the very beginning, and is still being violated. The task is to put an absolute stop to this mayhem. Another mammoth problem is the employment of the child in the formal and informal sectors. In the formal sector, there has been a reduction in the employment of children in the categories of work listed as hazardous. But the informal sector still thrives on child labour. On August 1, 2006 the Ministry of Labour added domestic servants, workers in dhabas, tea shops etc. as hazardous occupation. But Ministry has overlooked the areas concerning bonded child labour including slavery, prostitution, drug trafficking etc. which continues unabated.

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48 This Act defines any person below 18 years as a child and is gender neutral. It provides precise definitions of different forms of sexual abuse, including penetrative and non-penetrative sexual assault, sexual harassment and pornography. The punishment prescribed is graded as per the offence, with a maximum term of rigorous imprisonment for life for certain offences.

49 Mysore was the first state in pre-independent India to take steps against this practice. In 1924, the Indian Penal Code was amended and sections 372 and 373 declared as illegal, the practice of dedicating girls for the ultimate purpose of engaging them in prostitution. This Act declares unlawful, the very act of dedication, whether the dedication is done with or without the consent of the dedicated woman.

50 Under the provisions of this Act, whosoever performs, promotes, abets or takes part in a dedication ceremony is liable to punishment with imprisonment for three years and fine.

In case of trafficking, there is a plethora of national and international laws that seek to protect the child from such evil, as has been discussed above. The Courts have also played an active role addressing the rights of the child and framing guidelines regarding the same. In this context, the cases of *Vishal Jeet v. Union of India*[51] and *Gaurav Jain v. Union of India*[52] needs special reference wherein the Supreme Court gave detailed guidelines on the issue of commercial sexual exploitation, which was instrumental in initiating government action for the same.

An analysis of the various legislations, treaties and conventions would give an impression that the child is protected from all possible harm and exploitation. But the ground reality depicts a different picture. The basic problem arises in implementing these laws. Various enforcement machineries have been set up both at the national and state level under these legislations, but they are yet to function effectively. The police force plays an important role here, but sadly, in most cases the protector turns into the predator. There have been innumerable instances where the police have physically and sexually abused children who have been rescued from the clutches of law breakers. According to a report published by the Human Rights Watch[53] the children are mistreated not only by the police, but by medical professionals as well, who pay no heed to the process to be followed while examining a child. In most of the cases, the police ignore the complaints of abuse by children, which is one of the main reasons why such cases are not registered in the first place.

Awareness amongst people is of utmost importance, along with effective functioning of the law enforcing agencies. Even after the horrifying Delhi rape case, which evoked enormous response nationwide, the newspapers even today are full or reports of child abuse from different parts of the country. It is high time for the nation as a whole to take cognizance of the same and rise up to the occasion.

51 1990 (3) SCC 318.
52 AIR 1997 SC 3021.
53 "Breaking the Silence: Child Sex Abuse in India" available at *www.hrw.org/sites/default/files/reports/india0113ForUpload.pfd*, visited on February 20, 2013.

NATIONALITY AND EXTRADITION

Saroj Chhabra*

1.1 Introduction

The right to nationality has traditionally underscored the realisation of many other rights under international law, as generally a person relies on his state of nationality to acknowledge and uphold his rights vis-à-vis other states in any dispute.[1] The fundamental importance of the right to nationality has been described by Supreme Court of the United States in *Perez v. Brownell*,[2] Chief Justice Warren states;

> Citizenship is man's basic right, for it is nothing less than the right to have rights. Remove this priceless possession and there remains a stateless person, disgraced and degraded in the eyes of his countrymen. He has no lawful claim to protection from any nation and no nation may assert right on his behalf. His very existence is at sufferance of the state within whose borders it happens to be.

The right of nationality is enshrined in Article 15 of the Universal Declaration of Human Rights[3] (1948) states that:

> No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Provisions in subsequent human rights Conventions, such as Article 5(d) (iii) of the International Convention on Elimination of All Forms of Racial Discrimination[4] 1965 and the International Covenant on Civil and Political Rights[5] 1966, confirmed the importance of the right to nationality. Similar provisions are found in regional human rights instruments, such as Article 20 of the American Convention on Human Rights[6] 1969, which provides:

> Every person has the right to a nationality. Every person has a right to the nationality of the state in whose territory he was born if he does not have a right to any other nationality. No one shall be arbitrarily deprived of his nationality or of the right to change it.

Nationality was defined by the International American Court of Human Rights in *Castillo Petruzzi v. Peru*[7] as 'the political and legal bond that links a person to a given state and binds him to it with ties of loyalty and fidelity, entitling him to diplomatic protection from that state'.

The nationality plays a very important role in extradition proceedings. The controversy over the surrender of national is a question of immense significance here.

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1 Natalie Klein and Lise Barry, "A Human Rights Perspective on Diplomatic Protection: David Hicks and His Dual Nationality" *Australian Journal of Human Rights*, Vol.13, No.4, January 2007, pp. 1-32.

2 366 U.S. 44 (1958).

3 *United Nation General Assembly Resolution*, 217 A (III), 10 December 1948.

4 *United Nation General Assembly Resolution,* 2106 (XX), 21 December 1965.

5 *United Nation General Assembly Resolution*, 2200 A (XXI), 16 December 1966.

6 Adopted by the Inter-American Specialized Conference on Human Rights held at San Jose, Costa Rica, 22 November 1969.

7 (1999) IACHR 6.

1.2 Extradition of own Nationals

Extradition refers to the delivery of a person, who is suspected or has been convicted of a crime, by a country or other jurisdiction where the person has taken refuge to the country or jurisdiction that asserts legal authority over said person. The purpose of extradition is to prevent criminals who flee a jurisdiction to escape from punishment for an offence they have been accused or convicted of.[8] In many cases a person after committing a crime in a foreign country flees back to his own country. Whether a state would extradite such person i.e. its own nationals, to a state where crime has been committed is a controversial point and practice of states considerably differs on it. The disagreement over the surrender of a national is as old as the notion of extradition itself. There is little exaggeration in asserting that the problems surrounding the non-extradition of nationals are as old as extradition itself. Its origin can be traced back to ancient times. Whether consistently or not, the practice of refusing, the surrender of one's nationals has been maintained by many countries for centuries. Not with standing all of the convincing arguments against it, as well as the proposals to modify state policies with respect to this form of international co-operation in criminal matters, there is nothing to indicate that it will soon be abandoned. Most states seem to be unmoved by the compelling arguments proposed by international criminal law scholars in favour of relaxing the strict prohibition of the extradition of nationality by either allowing a "conditional surrender" or even a total departure from practice.[9]

Unlike political offense exception or exclusion of military and fiscal offences, the exemption of nationals from being extradited has to do with the person rather than with the offence.[10] One of the most common Articles of international extradition treaties is that which relieves a state from a duty to extradite a criminal who is one of its nationals. The provision takes two forms. In one it is provided that nationals of the requested party may not be surrendered. In other it is provided that the contracting parties 'shall be under no obligation to surrender their nationals'. The former (which is more common) thus presents an absolute bar to the extradition of a state's own nationals, while the latter is usually regarded as allowing discretion to the requested state to grant or refuse a request for the extradition of one of its own nationals.[11] Thus the exemption of nationals takes two forms: absolute and qualified and it is found in the constitution of a given country, in extradition treaties, or in its municipal laws. Viewed in this light states can easily be divided in two groups: those states which exempt their nationals from extradition relying on *Greco-Roman* heritage which has become an integral part of their law and states which apply the Common Law System and accept the principle of the surrender of all persons including their own nationals except where otherwise provided for in their own national laws or treaty provisions.[12]

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8 Aftab Alam, "Extradition and Human Rights" *Indian Journal of International Law,* Vol.48, January-March 2008, pp. 87-104.

9 Michael Plachta "(Non) Extradition of Nationals: A Never Ending Story?" *Emory International Law Review,* Vol. 13, No.77, *Spring*, 1999, available at: https://www.unodc.org/tldb/.../Biblio_Extradition_Plachta_1999.doc (last assessed on 14 February 2014).

10 M. Cherif Bassiouni, *International Extradition and World Public Order,* A.W Sijthoff, Chicago, 1974, p. 435.

11 I.A Shearer, *Extradition in International Law,* Oceana Publications, U.K., 1971, p. 94.

12 Satyadev Bedi, Extradition : *A Treatise on the Laws Relevant to the Fugitive Offenders Within and With the Commonwealth Countries,* William S Hein & Co., New York, 2002, p. 173.

1.3 Absolute Exemption of Nationals

Many states are traditionally strongly opposed to extraditing their own nationals. This attitude and practice are commonly based on or confirmed in national legislation (often of a constitutional rank) granting nationals the right to remain in the territory of the state not to be extradited or expelled.[13]

The history of the practice of non extradition of nationals can be traced back to the ancient times. The studies reveal that Greek city states did not use to surrender their own citizen and the same practice was observed by the Italian cities. Similarly Roman citizens were not normally surrendered to foreign states. In those times extradition was more a matter of grace than of an obligation and was only exceptionally formalized in a treaty. Moreover, conditions in the ancient world were such that to remove a subject from his own state for punishment in another was tantamount to abandoning him to an unpleasant and probably permanent exile if not death[14]

As a result of these circumstances it was natural for the national states not to surrender their national to foreign jurisdiction when there was doubt about the person's chances of being judged properly and impartially in the court of another state. Nussabum asserts that the religious rivalries between Roman Catholics and Protestants in Europe, at that time were mainly responsible for the denial of extradition of nationals because it was felt that Catholics would never receive fair treatment at the hand of Protestant Courts and vice-versa.[15] The first treaty in which an express exemption of nationals appeared was in the treaty of 1834 between France and Belgium. French treaty practice after 1844 uniformly excluded the extradition of the requested state's own nationals. France in real sense led the world in the matter of extradition and its practice with regard to was widely emulated. Of the total of 163 extradition treaties printed in the League of Nations Treaty Series and first 550 volumes of the United Nation Treaty Series, 98 except the nationals of the requested state absolutely, 57 give to the requested state a discretionary right to refuse to surrender its nationals, while only eight provide for extradition regardless of nationality of fugitive.[16]

Thus, it can be concluded here that the nationality as an exception to extradition has its origin in the sovereign authority of the ruler to control his subjects and the lack of trust in other legal systems. The traditionally voiced reasons in support of this exception are following:

I. The fugitive ought not to be withdrawn from his judges;

II. The state owes its subjects the protection of its laws;

III. It is impossible to have complete confidence in the justice meted out by a foreign state, especially with regard to a foreigner; and

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13 Zsuzsanna Deen Racsmany and Judge Rob Blekxtoon "The Decline of the Nationality Exception in European Extradition? The Impact of the Regulation (Non) Surrender of Nationality Dual Criminality under the European Arrest warrant", *European Journal of Crime, Criminal Law and Criminal Justice,* Vol. 13, No. 3, 2005, pp. 317-364, available at: *www.asser.nl/default.aspx?site_id=8&level1=10790...textid* (last assessed on 13 February 2014).

14 Sir Travers Twiss, *The Law of Nations,* Oxford University Press, London, 1861, p. 95.

15 Arthur Nussbaum, *A Concise History of the Law of Nations*, Macmillan, New York, 1947, p. 208.

16 *Supra* note 13 at 96.

IV. It is disadvantageous to be tried in a foreign language separated from friends, resource and character witness.[17]

Under existing international practice a state is assumed to have practically unlimited legal control over its nationals. Thus, nationality is the legal basis for the exemption of citizens from extradition because allegiance and protection go together and if the states demand obedience from their subjects it is natural for the national to expect from their government's protection not to be delivered up to the foreign state.[18]

Admittedly, on examination of the legislations adopted by various countries reveals that practically all the states exercise penal jurisdiction on the principle of nationality. However, states which derive their jurisdiction from Civil Law assert a competence which is substantially more comprehensive than that exercised by states adopting Common Law System. Naturally, therefore, national codes, laws and rules of the various Countries categorically prohibit the extradition of nationals. For example, Argentina Extradition Law of 1885, Article-13; Finland, Extradition Law, 1970, Article-2; France Extradition Law, 1927, Article-15; Netherlands Extradition Law of 1875 as amended in 1967, Article-4.[19] This principle has been expressly incorporated in the constitution of certain states. For example constitution of Afghanistan, Article 27; Brazil, Article 150(19); Cyprus, Article 14; German Democratic Republic, Article 10; Federal Republic of Germany, Article 16(2); Greece, Article 8 and Luxemburg, Article 13.[20] The same objective is achieved by other states by defining extradition as "the surrender of aliens." These states do not speak of nationals but only deal with aliens.[21] The statutes of certain states oppose extradition of nationals as a national policy but the contrary may expressly be provided for in an international treaty or convention.

There are various multilateral Conventions, Codes and Projects which contain provisions prohibiting the extradition of nationals of the signatory parties and make it obligatory for them to take action against them for crimes with which they are charged and thus bind the state, not to allow the nationality of the accused in any way to impede punishment. Few treaties among them require a mention i.e. The Draft Extradition Convention approved by the International Law Commission in 1928, Second International Law Penal Treaty signed at Montevideo in 1940, Inter American Draft Convention, 1973 make the similar provisions that "The nationality of the person sought may not be invoked as a ground for denying extradition except when the law of the requested state establishes the contrary".[22]

Thus here it may be concluded that the absolute prohibition of nationals, from extradition proceedings by the municipal laws of these states, does not confer immunity upon the fugitive offenders who after committing the crime in foreign land or jurisdiction take refuge in their homelands. The principle of *"aut dedre aut*

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17 Sharon A. Williams, "Nationality, Double Jeopardy, Prescription and the Death Sentence as Bases for Refusing Extradition", 62 *International Review on Penal Laws,* Vol. 62, No. 2, 1999, pp. 254-70.

18 Satyadev Bedi, *Extradition in International Law and Practice,* Discovery Publishing House, New Delhi, 1999, p. 176.

19 *Id.,* at p. 204.

20 *Id.,* at p. 205.

21 *Belgium Extradition Law* of 1874, Article 1; *Nether land Extradition Law* of 1875 as amended in 1967, *Poland Extradition Law* of 1875, Article 4.

22 Article 8.

judicare" (extradite or prosecute) should be implemented to bring fugitive offenders to justice.[23] The factor behind the implementation of the principle is that the rule of personal jurisdiction allows an offender to be prosecuted in his home state for crimes committed abroad provided these crimes are cognizable and punishable by the law of the *locus delicti* and law of the home country. A prosecution be instituted at the instance of the prosecuting authorities of the fugitives own state acting on material supplied by foreign authorities. The laws of various countries provide for the exercise of such jurisdiction.[24]

1.4 Practice followed by Common Law Countries

On the other hand there are other states, which adopt a different approach towards the criminal jurisdiction based upon the principle of territorial jurisdiction that the states being sovereign are competent to prosecute and punish for the crimes committed within their territories. This territorial principle finds expression in all the modern codes.

The practice of excluding the extradition of one's own nationals has never been favoured officially by Great Britain, whose first treaty was with the United States in 1794 which applied to all persons irrespective of their nationality. So also did the next two treaties with one the United States (1842) and the other with France (1843).[25] The territoriality of a crime is the founding stone in the penal jurisprudence of British Commonwealth countries, which vests in each state exclusive jurisdiction with respect to any crime committed within its territorial limits irrespective of the nationality of the alleged offender or accused involved.[26] Thus the countries which adhere to this rule primarily are the countries of the British Commonwealth nations or the states which have either continued in force the imperial Extradition Act, 1870 or have substantially re-enacted it as these states have broadly speaking accepted their succession to British treaties.[27] These states include Australia, Bangladesh, Burma, Canada, Ghana, India, Jamaica, Kenya, Malawi, Malaysia, New Zealand, Tanzania, Nigeria, Pakistan, South Africa, Trinidad, Tobago, Uganda, Zambia and others which do not reject in principle the extradition of their citizens to foreign countries. The same is true with America and Israel.[28]

The policy is fully reflected in the national statutes of such state. They do not make any distinction between national and foreign criminals. The provisions of these statutes refer to fugitive criminal and not aliens alone For example, Australia Extradition Act, 1966, Art 16; Çanada Extradition Act, 1972, Article 10; Great Britain Extradition Act, 1870 Article 10; Indian Extradition Act 1962 Chapter II; Israel Extradition Act 1954 Article 3; Pakistan Extradition Act, 1972, Article 10.[29] These countries have prescribed only one condition that extradition can only take

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23 *Resource Material Series* No. 57, 114th International Training Course Reports of Seminar, Topic 2, "Refusal of Mutual Legal Assistance or Extradition" 191, available at : *http:/unafei.org.jp/enuh/pdf/pdf_rms/* (Last assessed on 14 January 2014).

24 *Supra* note 17 at pp. 179-180.

25 Ivan A Shearer, "Non- Extradition of Nationals: A Review and a Proposal" *Adelaide Law Review,* Vol. 2, No. 3, 1966, pp. 273-309, available at: *http://digital.library.adelaide.edu.au/dspace/bitstream/2440/14932/1/alr_V2n3_1966_SheNon* visited on 28 December 2013).

26 *Supra* note 11 at p. 122.

27 *Supra* note 10 at p. 96.

28 *Id.*

29 *Supra* note 11 at p. 181.

place after the signing of the treaty with the requesting country because under the laws of these countries the executive does not possess any power to dispose of the liberty of an individual in the absence of definite statute to implement that treaty. Thus these countries do not ordinarily exempt their nationals from the operation of extradition treaties because the main reason of these treaties is to achieve international peace, security and co-operation against criminals who are considered as enemies of any civilized society.

In one more authoritative case of *Neely v. Hinkel.*[30] Mr. Justice Halarn speaking for the Supreme Court said:

> . . . We are reminded of the fact that the appellant is the citizen of the United States. But this citizenship does not give him an immunity to commit crime in other countries, nor entitles him to demand a right for trial in any other mode then that allowed to its own people by the country whose laws he has violated and from whose justice he has fled. When an American citizen commits a crime in a foreign country, he cannot complain if requested to submit such to modes of trial and o such punishment as the law of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United States.

Judicial decisions pronounced by the courts of these countries also confirm this principle. They never try to create any hindrance in the way of the executive department of the state as they hold that their duty is to recognize the obligations imposed by such treaties and to interpret them accordingly whenever there is a controversy between the two states.

In *Charlton v. Kelly*[31] the Supreme Court of the United States reaffirmed this principle as it stated:

> That word 'persons' etymologically includes citizens as well as those who are not, can hardly be debatable. The treaty contains no reservations of citizens of the country of asylum. The contention is that an express exclusion of citizens or subjects is not necessary as by implication, from accepted principles of public law, persons who are citizens of the asylum country are excluded from extradition conventions unless expressly included.

1.5 Recent Developments

Recent media reports have highlighted the risk that criminals could evade justice through naturalization. If the state does not extradite its citizens and is unable or unwilling to prosecute them, then the grant of nationality could amount to providing sanctuary.[32]

In fact, presumably few judges would have serious moral objections today to granting the extradition of fellow nationals for serious crimes committed abroad, which are obviously criminal offences wherever in the world they are committed if

30 180 U.S. 109 (1900).
31 229 U.S. 447 (1913).
32 Zsuzsanna, Deen - Racsmany, "A New Passport to Impunity? Non Extradition of Naturalized Citizens Versus Criminal Justice" *Journal of International Criminal Justice*, Vol. 2, No. 3, pp. 761-784, 2004 available *at: http://jicj.oxfordjournals.org/content/2/3/761.abstract* (Last assessed on 13 January 2014).

prosecution abroad had (procedural) advantages and due process safeguards were provided. Moreover, people doing legal or illegal business in abroad may be expected to have acquired sufficient knowledge of legal system of the state where they are active ('When in Rome, do as the Romans do') raising little sympathy in extradition proceedings if they knowingly commit crimes at the seat of their business and flee home.[33] While the statutes of the nationality exception is still unsettled in customary international law and its moral and practical utility remains debatable, most extradition treaties at least permit the contracting parties to refuse handing over their own nationals. Article 4(a) of the United Nations Model Treaty on Extradition, 1990, enables a requested state to refuse extradition of its own nationals, but includes "prosecution in lieu" alternatives. This is an optional ground. The revised manual Model Treaty on Extradition, 2004, also gives the option to the requested state to surrender or refuse the extradition on the basis of nationality but recommends that option 2 given in Article 11 which states that 'Extradition shall not be refused on the ground that the person sought is a national of [country adopting the law]' should be followed. However, the international treaty practice is that nationality of the requested person is a ground for optional referral in some treaties and mandatory in others.[34]

Similarly the European Convention on Extradition concluded within the Council of Europe in 1957[35] also confirms the right of contracting parties to refuse extradition of their nationals. The Benelux Treaty on Extradition and Mutual Assistance in Criminal Matters signed in 1962 similarly prevents the extradition of nationals of the contracting parties.

In contrast, the Convention on Extradition between members states of the European Union drafted in 1966 ambitiously attempted to reverse the traditional regime relating to the nationality exception. Its Article 7 declares that:

> Extradition may not be refused on the ground that the person claimed is a national of the requested member state within the meaning of the Article 6 of the European Convention on Extradition.

It should be noted that due to French and Italian failure to ratify the convention, it has not entered into force. As on 1 January 2004, the European Arrest Warrant suspended this convention in accordance with Article 31 (1) (d) of the frame work decision. The European Arrest Warrant constitutes an ambitious attempt to curb for what has now been accepted as the sovereign right of states to refuse extradition of their nationals. It goes further than other instruments in its restriction of nationality exception.[36]

1.6 Conclusion

It may be concluded that exception of non-extradition for nationals jeopardizes international efforts to fight transnational organized crime. Thus it is important to note that:

- States should take giant strides towards enacting the laws that allow their national to be extradited.

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33 *Supra* note 12.
34 *Supra* note 22 at 190.
35 Article 6 (1) (a).
36 *Supra* note 12.

- States can extradite their own nationals for trial abroad on condition that convicted fugitive offenders will serve their sentences in their respective countries.
- Extradition of a national can be allowed with the consent of the offender.
- Surrender of nationals can be considered as a new form of bringing fugitive to face justice. This enabled many offenders who committed crimes in Yugoslavia and Rwanda to be tried before the Adhoc International Criminal Court for the Former Yugoslavia[37] and the Adhoc International Criminal Court for Rwanda[38] respectively.
- The Principle of *Aut dedre aut judicare* (extradite or prosecute) should be implemented to bring fugitive offenders to justice. If the possibility of an offender's impunity is recognized as the most serious danger caused by the practice of non-extradition of nationals then from the point of criminal justice it should not matter in the territory of which state he/she is prosecuted and punished as long as justice is done.[39]

To adhere too strictly to the non extradition of nationals impedes the spirit of extradition and attempts to narrow the loopholes, is snatched by the fugitive offender to escape from justice, particularly if the refusal to extradite is not in the line with the rule *' aut dedere aut judicare'*. And even if the principle is applied to counter the refusal of extradition, questions still arise especially with regard to the promptness and sufficiency of evidences of crime scene as well the enthusiasm of requested state to prosecute. Thus it will be better for the advancement in the effectiveness of extradition as an international measure of cooperation in suppression of crime that the nationality should not be considered as a ground for the refusal of extradition.

37 Established under the *United Nations Security Council Resolution,* 827 on 25 May 1993.
38 Established under the *United Nations Security Council Resolution,* 955 on 8 November 1994.
39 *Supra* note 22 at para 191.

LEGALISING PASSIVE EUTHANASIA: A STUDY OF THE RECOMMENDATIONS OF SUPREME COURT AND LAW COMMISSION OF INDIA

Dr. (Mrs.) Nishtha Jaswal*
Manpreet Kaur**

1.1 Introduction

A hundred years ago, when medicine and medical technology had not invented the artificial methods of keeping a terminally ill patient alive by medical treatment, including by means of ventilators and artificial feeding, such patients were meeting their death on account of natural causes. Today, it is accepted, a terminally ill person has a common law right to refuse modern medical procedures and allow nature to take its own course, as was done in good old times. It is well-settled law in all countries that a terminally ill patient who is conscious and is competent, can take an 'informed decision' to die a natural death and direct that he or she be not given medical treatment which may merely prolong life. There are currently a large number of such patients who have reached a stage in their illness when according to well-informed body of medical opinion, there are no chances of recovery. But modern medicine and technology may yet enable such patients to prolong life to no purpose and during such prolongation, patients could go through extreme pain and suffering. Several such patients prefer palliative care for reducing pain and suffering and do not want medical treatment which will merely prolong life or postpone death.[1]

The word 'Euthanasia' is a derivative from the Greek words '*eu*' and '*thanotos*' which literally mean "good death". It is otherwise described as mercy killing. The death of a terminally ill patient is accelerated through active or passive means in order to relieve such patient of pain or suffering. The distinction has been highlighted in the decision of the Supreme Court of India in *Aruna Ramachandra Shanbaug* vs. *Union of India.*[2] Active euthanasia involves taking specific steps such as injecting the patient with a lethal substance e.g. Sodium Pentothal which causes the person to go in deep sleep in a few seconds and the person dies painlessly in sleep, thus it amounts to killing a person by a positive act in order to end suffering of a person in a state of terminal illness. It is considered to be a crime all over the world (irrespective of the will of the patient) except where permitted by legislation. In India too, active euthanasia is illegal and a crime under Section 302 or 304 of the Indian Penal Code (IPC). Physician assisted suicide is a crime under Section 306 IPC (abetment to suicide).

Passive euthanasia, otherwise known as 'negative euthanasia', however, stands on a different footing. It involves withholding of medical treatment or withholding life support system for continuance of life e.g., withholding of antibiotic where without

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1 The pertinent observations were made by the then Chairman of the Law Commission in the forwarding letter dated 28 August 2006 addressed to the then Law Minister in Law Commission's 196th Report, 2006.

2 AIR 2011 SC 1290.

doing it, the patient is likely to die or removing the heart–lung machine from a patient in coma. The core point of distinction between active and passive euthanasia is that in active euthanasia, something is done to end the patient's life while in passive euthanasia, something is not done that would have preserved the patient's life. The Supreme Court graphically said in *Aruna's* case, that "while we usually applaud someone who saves another person's life, we do not normally condemn someone for failing to do so".[3]

The Supreme Court pointed out that according to the proponents of Euthanasia, while we can debate whether active euthanasia should be legal, there cannot be any doubt about passive euthanasia as "you cannot prosecute someone for failing to save a life". The Supreme Court then repelled the view that the distinction is valid and in doing so, relied on the landmark English decision of House of Lords in *Airedale NHS Trust v. Bland.*[4]

Passive euthanasia is further classified as voluntary and non-voluntary. Voluntary euthanasia is where the consent is taken from the patient. In non-voluntary euthanasia, the consent is unavailable on account of the condition of the patient, for example, when he is in coma. In *Aruna's* case, the Supreme Court was concerned with non-voluntary passive euthanasia because the patient was in coma.

2.1 The Euthanasia Debate

Euthanasia involves a conflict between the sanctity of life and personal autonomy, the welfare of the many and the welfare of the individual, the relief of pain and the prolongation and preservation of life.

2.1.1 Arguments for Legalizing Euthanasia

Those in favour of euthanasia argue that:

i. Most individuals fear the process of dying rather than the terminal event of death which they realise is an inevitable end of life. They fear the indignity of being hooked on to life support machines and other forms of treatment when all such treatment is futile and death is inevitable.

ii. The person involved is in great or unbearable pain.

iii. There should be quality of life rather than sanctity of life. People should not be forced to stay alive. We put animals out of their misery, we can do it for human beings. And neither the law nor medical ethics requires that "everything be done" to keep a person alive.

iv. It is a human right born of self-determination and is the ultimate act of democracy. Freedom of choice is a fundamental principle for liberal democracies and free market systems.[5] Not allowing euthanasia would come

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3 *Id.*, at para 45.

4 (1993) 1 All ER 821.

5 Stanford Encyclopdia of Philosophy (1996). An English poet, William Ernest Henley wrote: "...I am the master of my fate, I am the captain of my soul." *P.R.Rathinam v. Union of India* AIR 1994 SC 1844 at 1847.

down to forcing people to suffer against their will, which would be cruel and a negation of their human rights and dignity.[6]

v. One of the most important issues here is the right to donate body organs before the disease affects them.[7]

vi. Requests for euthanasia are a "rational" decision, given the circumstances of terminal illness, pain, increased disability, and fears of becoming (or continuing to be) a burden to family and friends.[8]

vii. Those who favour euthanasia emphasize on the economic costs and human resources. Today in many countries there is shortage of hospital space. The energy of doctors and hospital beds should be used for the benefit of other patients who have a better chance of recovery and to whom the said facilities would be of greater value.

2.2 Arguments against Legalizing Euthanasia

Pro-life people argue that:

i. One does not have the right to die; one only has the right to live. How can it be a right if one is using it to give up his/her rights? They regard that human life is precious and special, possibly sacred and a gift from God and only God has the right to take it away.[9] When one cannot create, one should not destroy.[10] Somewhere down the line we may end up violating the right to life while legalizing the right to death.[11]

ii. Interest in euthanasia or physician assisted suicide appears to be more a function of psychological and social factors (e.g. depression, social support, fears of becoming a burden to one's family/friends) than of physical factors (e.g. pain, symptom distress, disease status).[12] Moreover, modern medicine has the ability to control pain.

iii. "Brain death" and "death" are not identical and equivalent. If they were identical and equivalent, there would not be a need for the term "brain death".[13] Moreover, it is believed that sometimes patients in a vegetative state due to head injury or a variety of brain diseases are not sure-fire cases

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6 Shreyas Kasliwal, "Should Euthanasia Be Legalised in India?", (2003) *PL WebJour* 16, available at *www.ebcindia.com/lawyer/articles/592.htm* (Accessed on 15.3.09).

7 The case of *Venkatesh* is one of the cases where someone of their free will wanted to donate their organs, to serve a noble cause and wasn't allowed to do so. *Infra note* 47. In another recent case in which, a three year old brain dead girl, Tamanna who had met with a road accident in Bangalore on 20 January 2009, created history as she ended up saving three lives, including that of a 21-month-old boy, with timely transplant of her organs through a well-coordinated effort by doctors. Her father, who got injured in the accident, signed the papers for donating his daughter's organs from the hospital bed. "Brain-dead girl saves three lives", *The Tribune*, 26 January 2009 at p. 2.

8 Harvey Chochinov, William Breitbart, *Handbook of Psychiatry in Palliative Medicine,* 52 (2000).

9 S.J. Holmes, *Life & Morals*, 161 (1948).

10 Sumantra Sinha, "Euthanasia, Suicide & Theology" *Delhi Law Review (Students Edition)*, 122 (2005).

11 B. Jyoti Kiran &Shiladitya Goswami, "Right to Die- Legal and Moral Aspects", available at *www.legalservicesindia.com.* (Accessed on 17.1.09).

12 *Supra* note 8 at p. 57.

13 Nikhil Aggarwal, "Euthanasia – A Theological Approach", available at *www.legalservicesindia.com.* (Accessed on 15.1.09). For counter arguments, see, Ian Kennedy, "Switching off Life Support Machines: The Legal Implications" reprinted in *Treat Me Right, Essays in Medical Law and Ethics,* (1988), pp. 351-2.

for euthanasia. There have been cases where comatose patients maintained on life support systems for months have miraculously swung back to recovery and resumed life. Euthanasia is therefore totally unjustified.[14]

iv. Patients may experience emotional and psychological pressure to consent to voluntary euthanasia rather than be a financial burden on their families. If legalized, it would be misused by people to fulfill selfish interests. Many people support the right of a terminally ill patient to die - but what if the right becomes an obligation? And what of the potential for abuse by impatient heirs?[15] Permitting voluntary euthanasia would, over the years lead to a slide down the slippery slope and eventually we would end up permitting even non-voluntary and involuntary euthanasia.[16]

v. Euthanasia/physician-assisted suicide violates medical ethics. Duty of doctor is to give life and not to take it.[17]

vi. In a welfare state, providing a better health care is the responsibility of the state and nobody, even at his deathbed can be denied this facility.

vii. Prohibition of intentional killing is the cornerstone of law and of social relationships. It protects each one of us impartially, embodying the belief that all are equal, whether they are young or old, fit or sick, able or disabled.[18]

viii. Legalising euthanasia will deface the precious human life and hence it is against morality[19] and greater common good. Legalizing euthanasia is a mere political tactic. The ultimate goal is a much broader death license. Moreover they emphasize on the non-feasibility of implementation of laws governing euthanasia. Request for euthanasia or assisted suicide is typically a cry for help. It is in reality a call for counseling, assistance, and positive alternatives as solutions for very real problems.[20]

3.1 The Law Commission of India 196th Report, 2006

The Law Commission of India, in its 196th Report titled "Medical Treatment to Terminally Ill Patients (Protection of Patients and Medical Practitioners)", had in its opening remarks clarified in unmistakable terms that the Commission was not dealing with "euthanasia" or "assisted suicide" which are unlawful but the Commission was dealing with a different matter, i.e., "withholding life-support measures to patients terminally ill and universally in all countries, such withdrawal is treated as lawful". Time and again, it was pointed out by the Commission that

14 Kannamma Raman, "The Right to a Dignified Death- Need for Debate", *IJME* 4(1) 1996.
15 *Supra* note 13.
16 *Supra* note 10 at p. 125.
17 Dr. Shalini Marwaha, "Euthanasia, Personal Autonomy and Human rights: An Intricate Legal And Moral Global Perspective", *GNDU Law Journal*, Vol. 13, (2004) 95-103 at p. 103.
18 Report of the House of Lords Select Committee on Medical Ethics, HL Paper 21-1, Para 237 (1994), cited in Sheila A M Mclean, *Assisted Dying: Reflections on the Need for Law Reform*, 10 (2007). Also see, *Supra* note 13.
19 *Supra* note 17 at p. 102.
20 Terminally ill patients who desire death are depressed and depression is treatable in those with terminal illness. Pro-life people say that, "You don't solve problems by getting rid of the people to whom the problems happen. The more difficult but humane solution to human suffering is to address the problems." Visit *www.euthanasia.com/debate.html* (Accessed on 23.2.09).

withdrawal of life support to patients is very much different from euthanasia and assisted suicide, a distinction which has been sharply focused in *Aruna's* case as well. *Aruna's* case preferred to use the compendious expression – "passive euthanasia".

The 17th Law Commission of India took up the subject for consideration at the instance of Indian Society of Critical Care Medicine, Mumbai which held a Seminar attended by medical and legal experts. The Law Commission studied a vast literature on the subject before the preparation of report. The Law Commission also clarified that 'Euthanasia' and 'Assisted Suicide' must continue to be offences under our law. The scope of the inquiry was, therefore, confined to examining the various legal concepts applicable to 'withdrawal of life support measures' and to suggest the manner and circumstances in which the medical profession could take decisions for withdrawal of life support if it was in the 'best interests' of the patient. Further, question arose as to in what circumstances a patient can refuse to take treatment and ask for withdrawal or withholding of life support measure, if it was an informed decision.

Passive Euthanasia has been advocated by the Law Commission of India in the 196th Report both in the case of competent patients and incompetent patients who are terminally ill. The Report of the Law Commission stated the fundamental principle that a terminally ill but competent patient has a right to refuse treatment including discontinuance of life sustaining measures and the same is binding on the doctor, "provided that the decision of the patient is an 'informed decision'. The Commission gave definitions of various relevant words like, 'Patient', 'Terminal illness', 'competent patient', 'incompetent patient', 'informed decision', 'Medical Treatment', 'Best Interests' etc.

The Law Commission of India clarified that where a competent patient takes an 'informed decision' to allow nature to have its course, the patient is, under common law, not guilty of attempt to commit suicide under section 309, IPC, nor is the doctor who omits to give treatment, guilty of abetting suicide under section 306, IPC or of culpable homicide under section 299 read with Section 304, IPC.

As far as (i) incompetent patients and (ii) competent patients who have not taken 'informed decision', a doctor can take a decision to withhold or withdraw 'medical treatment' if that is in the 'best interests' of the patient and is based on the opinion of a body of three medical experts. The 'best interest' test, stated by the Law Commission, is based on the test laid down in Bolam's case.

The procedure for the constitution of the body of experts has been set out in detail. The Director General of Health Services in relation to Union territories and the Directors of Medical Services in the States should prepare that panel and notify the same. The requirement of maintaining a register by the doctor attending on the patient has been laid down in Section 8 of the proposed Bill. The register shall contain all the relevant details regarding the patient and the treatment being given to the patient, and should also contain the opinion of the doctor as to whether the patient is competent or incompetent, the views of the experts and what is in the best interests of the incompetent patient. The medical practitioner shall then inform the patient (if he is conscious) and the parents or other close relatives or next friend who can

approach the High Court by filing a Original Petition which shall be heard by a Division Bench of the High Court (vide Section 12 of the said Bill). Certain procedural aspects relating to the hearing and disposal of the OP have been laid down. If no order of the High Court has been received within the period of 15 days, it is permissible for the medical practitioner to withhold or withdraw further treatment pursuant to the decision he has already taken in the best interests of the patient. However, he can continue to extend palliative care to the patient. The Medical Council of India has been enjoined to issue the guidelines from time to time for the guidance of medical practitioners in the matter of withholding or withdrawing the medical treatment to competent or incompetent patients suffering from terminal illness (vide Section 14). The Law Commission, was not in favour of recognizing the advance medical directive even if it is in writing.

The Law Commission brought out two important aspects concerning passive euthanasia. First, the observations in *Gian Kaur* vs. *State of Punjab*[21] which is a Constitution Bench decision. In that case the Supreme Court upheld the constitutional validity of both Section 306 and 309 of Indian Penal Code whereunder the abetment to suicide and attempt to suicide are made punishable. In the context of Section 306, the Supreme Court touched upon the subject of withdrawal of life support. *Airedale's*[22] case was also cited in that judgment. The Supreme Court reiterated the proposition that euthanasia can only be legalized by enacting a suitable law. However, the distinction pointed out in Airedale between euthanasia which can be legalized by legislation and withdrawal of life support which is permissible in certain circumstances was recognized by the Supreme Court in *Gian Kaur's* case.

Another significant observation made in the same case while dealing with Article 21 of the Constitution is that these are not cases of extinguishing life but only of accelerating conclusion of the process of natural death which has already commenced. And the debate even in such cases to permit physician-assisted termination of life is inconclusive.

Another approach of the Law Commission is from the stand point of the "General Exceptions" contained in Indian Penal Code. Some of these provisions were relied upon to demonstrate that the doctor acting on the basis of a desire expressed by the patient suffering from terminal illness or acting in the best interest of a patient in coma or PVS state etc. shall not be deemed to have committed a crime. After discussing the various 'exceptions', the Law Commission concluded that Section 76 - 79 of the Indian Penal Code are more appropriate than Section 88 and there is no offence under Section 299 read with Section 304 of IPC.[23]

Section 76, it was clarified, was attracted to a case of withholding or withdrawal of medical treatment at the instance of a competent patient who decides not to have the treatment. Section 79, it was stated, applies to the doctor's action in the case of both competent and incompetent patients. Then, it was observed that where a medical

21 AIR 1996 SC 946.

22 *Supra* note 4.

23 Section 76 says that "nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of mistake of law in good faith believes himself to be, bound by law to do it". Section 79 enacts the exception as follows: "nothing is an offence which is done by any person who is justified by law or by reason of mistake of fact, and not by reason of mistake of law, in good faith believes himself to be justified by law in doing it.

practitioner is under a duty at common law to obey refusal of a patient who is an adult and who is competent, to take medical treatment, he cannot be accused of gross negligence resulting in the death of a person within the above parameters. Likewise, it was pointed out that in the case of an incompetent patient or a patient who is not in a position to take informed decision, if the doctor decides to withhold or withdraw the treatment in the best interests of patient, based upon the opinion of experts then such withholding or withdrawal cannot be said to be a grossly negligent act. Section 304-A of I.P.C. will not therefore be attracted.[24]

At the same time, the Commission, by way of abundant caution, suggested the introduction of a Section (Section 11) in the proposed Bill to the effect that the act or omission by the doctor in such situations is lawful. On the point of criminal liability, the Law Commission also referred to the holding in *Airedale*[25] (UK) and *Cruzan*[26] (US) that the omission of the doctor in giving or continuing the medical treatment did not amount to an offence.

Coming to civil liability in torts, the Law Commission after referring to *Jacob Mathew v. State of Punjab*[27] and *Bolam*[28] relied on the proposition stated in Halsbury's of England[29] that if the doctor had acted in accordance with the practice accepted as proper by a responsible body of medical men skilled in that particular art, even though a body of adverse opinion also existed among medical men, he is not guilty of negligence.

4.1 The Supreme Court on Passive Euthanasia in *Aruna Shanbaug's* Case

The Supreme Court in *Aruna's* case has put its seal of approval on (non-voluntary) passive euthanasia subject to the safeguards laid down in the judgment. The case of Aruna Ramachandra Shanbaug is the first case in India which deliberated at length on 'euthanasia'. The Supreme Court, while making it clear that passive euthanasia is permissible in our country as in other countries, proceeded to lay down the safeguards and guidelines to be observed in the case of a terminally ill patient who is not in a position to signify consent on account of physical or mental predicaments such as irreversible coma and unsound mind. It was held that a close relation or a 'surrogate' cannot take a decision to discontinue or withdraw artificial life sustaining measures and that the High Court's approval has to be sought to adopt such a course. The High Court in its turn will have to obtain the opinion of three medical experts. In that case, Aruna Shanbaug was in Persistent Vegetative State (PVS for short) for more than three decades and the Court found that there was a little possibility of coming out of PVS. However, the Court pointed out that she was not dead. She was abandoned by her family and was being looked after by staff of KEM Hospital in which she worked earlier as staff nurse. The Court started the discussion by pointing out the distinction between active and passive euthanasia and observed that "the

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24 The Law Commission relied on the decision of Supreme Court in *Jacob Mathew's* case in which it was pointed out in the context of gross negligence under 304-A, that it must be established that no medical professional in his ordinary senses and prudence could have done or failed to do the thing which was attributed to the accused doctor.

25 *Supra* note 4.

26 *Cruzan v. Director, Missouri Department of Health* 497 U.S. 261 (1990).

27 2005 (6) SCC 1.

28 1957 (1) WLR 582.

29 4th Edition, Volume 30, (para 35).

general legal position all over the world seems to be that while active euthanasia is illegal unless there is legislation permitting it, passive euthanasia is legal even without legislation provided certain conditions and safeguards are maintained". The distinctive feature of PVS, it was pointed out, is that brain stem remains active and functioning while the cortex has lost its function and activity. The Supreme Court addressed the question when a person can be said to be dead. It was answered by saying that "one is dead when one's brain is dead". Brain death is different from PVS. It was concluded that a present day understanding of death as the irreversible end of life must imply total brain failure such that neither breathing nor circulation is possible any more.

After referring extensively to the opinions expressed in Airedale case, the Supreme Court stated that the law in U.K. is fairly well-settled that in the case of incompetent patient, if the doctors act on the basis of informed medical opinion and withdraw the artificial life support system, the said act cannot be regarded as a crime. The question was then posed as to who is to decide what the patient's best interest is where he or she is in a Persistent Vegetative State (PVS). It was then answered by holding that although the wishes of the parents, spouse or other close relatives and the opinion of the attending doctors should carry due weight, it is not decisive and it is ultimately for the Court to decide as parens patriae as to what is in the best interest of the patient. The High Court has been entrusted with this responsibility. The Court as a representative of sovereign as parens patriae will adopt the same standard which a reasonable and responsible parent would do. The same is the standard for a 'surrogate' as well. But, there is no decision-making role to a 'surrogate' or anyone else except the High Court, as per the decision in *Aruna's* case.

Coming to Indian law on the subject, it was pointed out that in *Gian Kaur's case*, the Supreme Court approvingly referred to the view taken by House of Lords in *Airedale* case on the point that Euthanasia can be made lawful only by legislation. But it was not clarified who can decide whether life support should be discontinued in the case of an incompetent person e.g. a person in coma or PVS. This vexed question has been arising often in India because there are a large number of cases where persons go into coma (due to an accident or some other reason) or for some other reason are unable to give consent, and then the question arises as to who should give consent for withdrawal of life support. And if it is left solely to the patient's relatives or to the doctors or next friend to decide whether to withdraw the life support of an incompetent person, there is always a risk in our country that this may be misused by some unscrupulous persons who wish to inherit or otherwise grab property of the patient.

Proceeding to discuss the question whether life support system (which is done by feeding her) should be withdrawn and at whose instance, the Supreme Court laid down the law by observing that there is no statutory provision in our country as to the legal procedure for withdrawing life support to a person in PVS or who is otherwise incompetent to take a decision in this connection. Passive Euthanasia should be permitted in our country in certain situations, and not that it should never be permitted. Hence, following the technique used in *Vishaka* case, the Supreme Court laid down the law in this connection which will continue to be the law until Parliament makes law on the subject.

It laid down the following guidelines for withdrawal of life support system:

(i) A decision to discontinue life support could be taken either by the parents or the spouse or other close relatives, or in the absence of any of them, such a decision could be taken even by a person or a body of persons acting as a next friend, the doctors attending the patient. However, the decision should be taken bona fide in the best interest of the patient. Aruna Shanbaug's parents were dead and other close relatives were not interested in her ever since she had the unfortunate assault on her. It was the KEM hospital staff, who had been amazingly caring for her day and night for so many long years, who really were her next friends, and not Ms. Pinky though the court appreciated the splendid social spirit she had shown. However, assuming that the KEM hospital staff at some future time changed its mind, it would have to apply to the Bombay High Court for approval of the decision to withdraw life support.

(ii) Such a decision required approval from the High Court concerned as laid down in Airedale's case. This was also in consonance with the doctrine of parens patriae. The High Court could grant approval for withdrawal of life support to such an incompetent person under Article 226 of the Constitution on an application filed by the near relatives or next friend or the doctors/hospital staff.

(iii) The Chief Justice of the High Court should constitute a Bench of at least two Judges who should decide to grant approval or not. Before doing so the Bench should seek the opinion of a committee of three reputed doctors, preferably a neurologist, a psychiatrist and a physician, to be nominated by it after consulting such medical authorities/medical practitioners as it may deem fit. For that purpose, a panel of doctors in every city may be prepared by the High Court in consultation with the State Government/Union Territory and their fees for this purpose may be fixed.

(vi) The committee of doctors should carefully examine the patient and also consult the record of the patient as well as taking the views of the hospital staff and submit its report to the High Court Bench.

(vii) The High Court Bench shall also issue notice to the State and close relatives e.g. parents, spouse, brothers/sisters etc. of the patient, and in their absence his/her next friend, and supply a copy of the report of the doctor's committee to them as soon as it was available. After hearing them, the High Court bench should give its verdict speedily at the earliest, assigning specific reasons in accordance with the principle of `best interest of the patient', since delay in the matter might result in causing great mental agony to the relatives and persons close to the patient. The views of the near relatives and committee of doctors should be given due weight by the High Court before pronouncing a final verdict which shall not be summary in nature.

5.1 A Contrast between Recommendations of Supreme Court and Law Commission

The main difference between the recommendations of the Law Commission (in 196th Report) and the law laid down by the Supreme Court lies in the fact that the Law

Commission suggested enactment of an enabling provision for seeking declaratory relief before the High Court whereas the Supreme Court made it mandatory to get clearance from the High Court to give effect to the decision to withdraw life support to an incompetent patient. The opinion of the Committee of experts should be obtained by the High Court, as per the Supreme Court's judgment whereas according to the Law Commission's recommendations, the attending medical practitioner will have to obtain the experts' opinion from an approved panel of medical experts before taking a decision to withdraw/withhold medical treatment to such patient. In such an event, it would be open to the patient, relations, etc. to approach the High Court for an appropriate declaratory relief.

6.1 The Law Commission 241st Report, 2012

The question before the Law Commission, in the aftermath of *Aruna*'s case was whether parliament should enact a law on the subject permitting passive euthanasia in the case of terminally ill patients – both competent to express the desire and incompetent to express the wish or to take an informed decision. If so, what should be the modalities of legislation? This is exactly the reason why the Government of India speaking through the Minister for Law and Justice had referred the matter to the Law Commission of India. In the letter dated 20 April 2011 addressed by the Hon'ble Minister, after referring to the observations made by the Supreme Court in *Aruna's* case, had requested the Commission "to give its considered report on the feasibility of making legislation on euthanasia taking into account the earlier 196th Report of the Law Commission."

Both the Supreme Court and Law Commission felt sufficient justification for allowing passive euthanasia in principle, falling in line with most of the countries in the world. There was an elaborate reference to the legal position obtaining in other countries, the best medical practices and the law laid down in series of authoritative pronouncements in UK and USA. The Supreme Court as well as the Commission considered it to be no crime and found no objection from legal or constitutional point of view.

According to the Commission, rational and humane considerations fully justify the endorsement of passive euthanasia. Moral or philosophical notions and attitude towards passive euthanasia may vary but it can be safely said that the preponderance of view is that such considerations do not come in the way of relieving the dying man of his intractable suffering, lingering pain, anguish and misery. The principle of sanctity to human life which is an integral part of Article 21, the right to self-determination on a matter of life and death which is also an offshoot of Article 21, the right to privacy which is another facet of Article 21 and incidentally the duty of doctor in critical situations – all these considerations which may seem to clash with each other if a disintegrated view of Article 21 is taken – do arise. A fair balance has to be struck and a holistic approach has to be taken.

Therefore, the Commission had a fresh look of the entire matter and in 2012, in its 241st report titled "Passive Euthanasia - A Relook", reached the conclusion that a legislation on the subject is desirable. Such legislation while approving the passive euthanasia should introduce safeguards to be followed in the case of such patients who are not in a position to express their desire or give consent (incompetent

patients). As regards the procedure and safeguards to be adopted, the Commission inclined to follow substantially the opinion of the Supreme Court in preference to the Law Commission's view in its 196th Report. However, many other provisions proposed by the Law Commission in its 196th Report have been usefully adopted. A revised draft Bill has been prepared by the Commission in 2012. A brief summary of recommendations of the Commission is as follows:

(1) Passive euthanasia, which is allowed in many countries, shall have legal recognition in our country too subject to certain safeguards, as suggested by the 17th Law Commission of India and as held by the Supreme Court in *Aruna Ramachandra's* case. It is not objectionable from legal and constitutional point of view.

(2) A competent adult patient has the right to insist that there should be no invasive medical treatment by way of artificial life sustaining measures / treatment and such decision is binding on the doctors / hospital attending on such patient provided that the doctor is satisfied that the patient has taken an 'informed decision' based on free exercise of his or her will. The same rule will apply to a minor above 16 years of age who has expressed his or her wish not to have such treatment provided the consent has been given by the major spouse and one of the parents of such minor patient.

(3) As regards an incompetent patient such as a person in irreversible coma or in Persistent Vegetative State and a competent patient who has not taken an 'informed decision', the doctor's or relatives' decision to withhold or withdraw the medical treatment is not final. The relatives, next friend, or the doctors concerned / hospital management shall get the clearance from the High Court for withdrawing or withholding the life sustaining treatment. In this respect, the recommendations of Law Commission in 196th report is somewhat different. The Law Commission proposed an enabling provision to move the High Court.

(4) The High Court shall take a decision after obtaining the opinion of a panel of three medical experts and after ascertaining the wishes of the relatives of the patient. The High Court, as parens patriae will take an appropriate decision having regard to the best interests of the patient.

(5) Provisions are introduced for protection of medical practitioners and others who act according to the wishes of the competent patient or the order of the High Court from criminal or civil action. Further, a competent patient (who is terminally ill) refusing medical treatment shall not be deemed to be guilty of any offence under any law.

(6) The procedure for preparation of panels has been set out broadly in conformity with the recommendations of 17th Law Commission. Advance medical directive given by the patient before his illness is not valid.

(7) Notwithstanding that medical treatment has been withheld or withdrawn in accordance with the provisions referred to above, palliative care can be extended to the competent and incompetent patients. The Governments have to devise schemes for palliative care at affordable cost to terminally ill patients undergoing intractable suffering.

(8) The Medical Council of India is to required issue guidelines in the matter of withholding or withdrawing of medical treatment to competent or incompetent patients suffering from terminal illness.

(9) Accordingly, the Medical Treatment of Terminally Ill Patients (Protection of Patients and Medical Practitioners) Bill, 2006, drafted by the 17th Law Commission in the 196th Report has been modified and the revised Bill is practically an amalgam of the earlier recommendations of the Law Commission and the views / directions of the Supreme Court in *Aruna Ramachandra* case.

7.1 Conclusion and Suggestions

The question of recognizing and legalizing euthanasia is being debated all over the world. The views for and against rest on philosophical, moral, ethical and legal perspectives. In India too, many from the legal and medical profession and academia have expressed the view that euthanasia should be legalized. For example, V. R. Jayadevan pleads for ushering in an era of active euthanasia. The following pertinent observations made by him on the subject of legalizing active euthanasia may usefully be quoted:

> The trend of the decisions of both the US and English courts reveals that the common law systems continue to proscribe active euthanasia as an offence. At the same time, many realize that active euthanasia is gaining relevance in the modern world. The objections to legalizing active euthanasia are based on religious principles, professional and ethical aspects and the fear of misuse. But, it cannot be forgotten that it was by overruling similar objections that abortion was legalized and later raised as an ingredient of the right to privacy. It is submitted that just like abortion, the modern societies demand the right to assisted suicide.[30]

The path breaking judgment in *Aruna Ramachandra* and the directives given therein has become the law of the land. The Law Commission of India too made a fervent plea for legal recognition to be given to passive euthanasia subject to certain safeguards. But, in our country, things are not that simple. One has to take into consideration not the interest of a few but all, whose lives will positively or negatively be affected by such a decision. It is an extremely important question because of the unfortunate low level of ethical standards to which our society has descended, its raw and widespread commercialization, and the rampant corruption, and hence, the Court has to be very cautious that unscrupulous persons who wish to inherit the property of someone may not get him eliminated by some crooked method.[31]

If the family is unable to take care of the patient, then it should be the responsibility of the State to take care of its citizens in such state of health. There should be adoption and proper implementation of national health policies to provide more humane end-of-care for the dying. But in really genuine cases, where life of a person is unworthy of living and subject to strict and foolproof procedures and conditions as is laid down by the Law Commission in 2012 by reconciling the recommendations of

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30 V. R. Jaydevan, "Right of the Alive [who] but has no Life at all – Crossing the Rubicon from Suicide to Active Euthanasia" (2011) 53 JILI 437 at p. 471.

31 *Supra* note 2 at p. 1327.

the hon'ble Supreme Court in *Aruna's* case and 17th Law Commission, euthanasia may be allowed as necessary exception only in rarest of rare cases, in passive form only. Necessary safeguards should be made to ensure the protection of doctors who perform such euthanasia in consonance with the guidelines.

Moreover, palliative care to the terminally ill patients beyond the stage of recovery is an allied aspect which needs to be taken care of by the Governments. Making palliative care affordable and free for the needy people, training of doctors and medical students in pain-treatment and palliative care are the needs of the day. The medical profession apart from giving effect to passive euthanasia where necessary must ensure that the dying patient receives proper care in a peaceful environment inside or outside the hospital. The stumbling blocks in the way of palliative care have to be removed, if necessary, by changing the rules dealing with narcotic drugs. There is every need for the Governments to frame Schemes extending palliative care to terminally ill patients undergoing grave suffering and pain. The palliative care seems to be a neglected area at present. This situation should not continue for long. It is needless to state that patients who are economically handicapped or those belonging to weaker sections of the society should come up for special focus in any such Scheme.

Thus, it is the right time that a policy decision is taken by our Parliament. But before going into that direction a national debate on the issue is advisable to have a complete view of all the aspects related to this very sensitive and delicate issue which while requiring a humanistic approach, also requires great care and caution to prevent misuse.

HARSH REALITY OF FEMALE FOETICIDE AND INFANTICIDE IN INDIA

Ruchi Sapahia*

Oh, god, I beg of you, I touch your feet time and again, in the next birth don't give me a daughter, give me hell instead.

—An old folk song of Uttar Pradesh.

These lines reflect the mentality of our society, how we treat our women and girl children.

Every form of life, whether human or otherwise, has the right to live in this beautiful world. The right to life has been enshrined as a fundamental right in the Constitution of India and in the constitution of most of the countries of the world. The Universal Declaration of Human Rights, 1948 too has recognized the right to life as an important human right. Our Constitution has moved a step further and declared that right to live with human dignity without any discrimination is an important fundamental right.[1]

Despite such salutary constitutional provisions and safe-guards, women in India have suffered a lot and have swallowed innumerable atrocities for so many generations. Women of all caste and creed in India face various kinds of problems or atrocities or crimes in their homes, schools, colleges, working place, at their in-laws and in the society before birth, at birth and during their lives. Some of the nefarious crimes are denial of basic human rights, denial of right to take birth, economic exploitation, genital mutilation, foeticide and infanticide, economic exploitation, child marriage, sexual crimes, dowry, dowry deaths etc.[2]

In fact female infanticide and female foeticide are the two sides of the same coin. In both the cases the life in a female human life-form is snuffed out upon determination of its sex. The only difference is the timing of the decision to take out the life or extinguish the right to life of the fetus or of the infant by the family.[3]

Women have been the subject of discrimination, deprivation, intimidation, unjust and humiliating treatment in the society throughout our history (with an exception-Vedic period). The difference is only in the forms that differed from time to time and from society to society. They are considered inferior and immaterial to their counterpart (men). They enjoy secondary status and are subjugated to the male. They are subjected to various ordeals and are deprived of the basic rights of existence in the society and in this world.[4] They are always expected to follow the directions and fulfill the wishes of their superior i.e. the men. They are considered persons whose

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1 Diaz, A.A, *Amniocentesis and Female Foeticide* Bulletin of the Indian Federation of Medical Guild (1988).

2 Patel, V, *Indian Women's Struggle To Survive: Campaign Against Foeticide* Eastern Book Company, Nagpur (1994).

3 Gangrade, K.D., "Sex Determination - A Critique" *Journal of Social Change*, Vol. 18, No. 3 (1988).

4 Krishna Kumar, A., "Female Infanticide Beyond Symptoms: Will the Government Measures Help?" *Frontline*, December 4 (1992).

duty is to act on the advice of males, serve them, please and take care of them. According to a great Hindu philosopher Manu, the woman is under the protection of her father during her childhood, under her husband during her marriage and under her son when she gets old. She at no time can leave their protection. They are given such an ideal role as to live at the mercy of the husband and die at his pyre.[5]

Female foeticide was present earlier also but this has increased in multiple due to advancement in science and technology. Though India has a history of skewed female sex ratio, what we are witnessing today is the systematic extermination of the female child, with the modern ultra sound machines serving as an instrument of murder. Today the sex of the child can be determined very easily and during early months of the pregnancy. Narrow minded people have very cleverly misused the modern technology which in fact should have been used for the welfare of human kind.

Female foeticide is a danger and a menace to humanity. It can destroy the very foundation of society and damage the smooth running of life for humans on earth. It will create a situation that forces men to commit immoral and unethical acts and ultimately lead to physiological and psychological distortion. It is necessary to stop it as early as possible if the human race is to continue and humans are to live in a dignified manner in this world.[6]

Despite a law banning sex selective abortion is in force for more than a decade, as many as half a million female fetuses are aborted each year in the country. Female foeticide scientifically means and is a process where a perfectly healthy female fetus is aborted about 18 weeks or more of the gestation period just because she happens to be a female. The same fetus would have seen the light of the day if it were a male. This kind of thinking is not just unethical but also inhuman and cruel. They are throttled, poisoned or drowned in a bucket of water if they happen to take birth in this world.[7]

These crimes hinder the progress of a girl child and destroy her confidence and self. Female foeticide makes sure that the existence of a girl is completely taken off from the world. This practice has plagued the minds of humans for long. This problem is a riddle for most of the rational human beings. Female foeticide is a heinous crime and is an indicator of violence against them.

The world of the girl child is promising yet gloomy, hopeful yet in despair. The woman is the hand that rocks the cradle, is the procreator and mother of tomorrow who shapes the destiny of civilization. Such is the tragic irony of fate that a beautiful creation such as a girl child is today one of the gravest concerns facing humanity, with a volley of seminars, conferences, events, summits and gatherings held for the cause with topmost leaders at the helm.[8]

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5 Giriraj, R, *Changing Attitude to Female Infanticide in Salem* Journal Social Welfare, Vol. 50, No. 11 February (2004).

6 Chunkath, S.R., and V.B. Athreya, "Female Infanticide in Tamil Nadu: Some Evidence" *Economic and Political Weekly*, Vol. XXXII (17) (1997).

7 Kulkarni, S., *Pre-natal Sex Determination Tests and Female Foeticide in Bombay City,* The Foundation for Research in Community Health, Bombay (1986).

8 *The Pre-conception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994: Answers to Frequently Asked Questions.* A Handbook, Eastern Book Company, Nagpur (1999).

There are many factors and causes behind this practice of female foeticide. The reasons for the elimination of girl child are similar and different at the same time depending upon the geographical location in which it is practiced.

The worst gender ratios indicating gross violation of women rights are found in south and East Asian countries and India is a part of it. The sex ratio in many parts of the country has dropped dramatically over the years. The girls have not vanished overnight.[9] The decades of sex determination tests, female foeticide and infanticide that have acquired genocide proportions are finally catching up with the states in India. Because of lack of availability of sufficient girls for marriage the grooms (e.g. Haryana) travel miles away for seeking brides from as far away as Kerala to change their single status.[10] The various organs of the society have failed to effectively implement the *Preconception and Prenatal Diagnostic Techniques Act, 1994* so that female foeticide can be controlled and eradicated and sex ratio be brought under control.

Many people justify the practice of female foeticide on various grounds especially by saying that it keeps the rising population under control and that the people who cannot afford to give dowry to their daughter at the time of her marriage will be saved.[11]

India was the first country to adopt family planning as an official programme to reduce the birth rate and keep the population explosion under control. But the population of the country is still growing due to desire of having a son by almost every parent. The sex determination machines have provided an easy way out to know whether the mother is pregnant with a baby boy or not. If the foetus is not according to the wishes of the family then the same can be removed by the doctors very easily.[12]

The abortion was punishable under the Indian Penal Code but the same was legalized with the passing of Medical Termination of Pregnancy Act, 1971. This Act along with its revised rules was envisaged as a milestone in the modernization of Indian society through laws. The doctors are against the ban on amniocentesis because it will lead to an underground practice in the field.[13]

Female foeticide is a thriving industry in India. According to a UNICEF report, 7000 cases of female foeticide take place every day here. The practice is rampant. Private clinics with ultrasound machines and other advanced and latest technologies are doing brisk business, making a complete mockery of our laws. The people pay money to know the sex of an unborn child and more money to abort the female child. The modern technology has reached even the remote areas through facilities like mobile clinics. It is necessary to change the mindset of people and enable them to throw off the yoke of unhealthy and inhuman traditions. Here, they are required to

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9 George, S.A., Rajaratnam B.D. Miller, "Female Infanticide in Rural South India", *Economic and Political Weekly*, Vol. XXVII, No. 22 (1991).

10 Desai, N., *Born to Die*, The Indian Post, 7th October, Bombay (1988).

11 Vishwanath, L.S., "Female Foeticide and Infanticide" *Economic and Political Weekly*, Vol. 36, No. 35, September 1-7 (2001).

12 Kolloor, T.M., *Female Infanticide: A Psychological Analysis*, Grass Roots (1990).

13 Mangai, A., "Cultural Intervention through Theatre: Case Study of a Play on Female Infanticide/Foeticide", *Economic and Political Weekly*, Vol. 33, No. 44, October 31 - November 6 (1998).

liberate themselves from ruthless and detrimental traditional bonds and develop humane qualities in the true sense. People are under constant social pressure to produce a son that impels them to commit this type of acts.[14]

The causes or the reasons for female foeticide are embedded deep in the edifice of society. The society will suffer rigorous effects of female foeticide like:

1. Devaluation of girl child will give impetus to the practice of them being married at a very young age.
2. Increase in the number of child brides contributes to the poor status of women as they are less likely to finish school or develop job skills before marriage.
3. There will be increase in acts of violence against women of all ages e.g. molestation, eve-teasing, rape, abduction and trafficking.
4. Arranging a suitable bride for the boy would get difficult.
5. Women will be forced into polyandry or being 'shared' by the brothers as is reported from some parts of the country.
6. Unbalanced sex ratio spells economic and social disaster and an uncertain future and poor quality of life for the surviving girls and their families.

1.1 Factors Leading To Female Foeticide

1.1.1 Socio Cultural Factor

It is the most important factor in Indian society which contributes to the rising problem of female foeticide. It is believed that only a son can carry the family lineage, only he can light the pyre of his parents so that they can be sent to heavenly abode, after his marriage he'll live with them and would be their support especially during their old age unlike their daughter, and only a son can inherit the property etc.

1.1.2 Economic Factor

Female foeticide is done to avoid the financial burden which the family will face during their daughters marriage for paying the dowry. In India they are considered as 'paraya-dhan'. They think that all the money spent or investment made on a daughter will go waste as the result or the benefit would be reaped by some other house or people where their daughter is married off.

1.1.3 Other Factors

Not giving birth to a baby boy is considered a great deficiency in a female's body unlike what the medical science says (that it is the X/Y chromosome of the boy which is the deciding factor for the birth of a male or female child) in Indian society even today. Lack of education and awareness, not seeing the logic and morals also contribute to this problem.

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[14] Bose, Ashish, Curbing Female Foeticide: Doctors, Governments and Civil Society Ensure Failure, *Economic and Political Weekly*, Vol. 37, No. 8, February 23–March 1(2002).

2.1 Case-Laws

The honourable Supreme Court of India reprimanded the government for not doing enough to prevent the scourge of female foeticide. Even the simple measures like registration of ultrasound machines and appointment of officers at the district and sub-district level to monitor the implementation of the Act and setting up of the advisory boards of experts was not fully implemented and done. For effective monitoring by central government, the states were required to submit quarterly reports of action taken by them which was not done and most of the states were lagging behind. The Court directed the states to implement the Act and to prosecute those clinics, centers and laboratories which aid and abet identification of foetus illegally.[15]

2.1.1 CEHAT v. Union of India

The Supreme Court of India further gave directions to issue advertisements to create awareness in the public that there should not be any discrimination between male and female child and to publish annually the reports of appropriate authorities for the information of the public.[16]

Apart from the judicial principles laid by the Supreme Court of India in plethora of cases, India has also ratified various international conventions and human rights instruments committed to secure equal rights of women like the *Convention on Elimination of All Forms of Discrimination Against Women, the Mexico Plan of Action, the Nairobi Forward Looking Strategies, the Beijing Declaration, platform for Action and the Outcome Document adopted by the United Nations General Assembly session on Gender Equality and Development and Peace* for the 21st century etc.[17]

The Indian Penal Code, 1860 contains several provisions to deal with the rights of the unborn and infants. It makes certain acts punishable under sections 316 (act resulting in death of an unborn child), 317 (mother or father abandoning the child), 318 (secretly disposing body of child intentionally), 312 without analyzing the threat to the life of the woman), 313 (without the consent of the woman), 314 (trying to cause miscarriage and thereby causing death, 315 (an act done to prevent a child from being born or born alive concealing the birth of a child). Certain provisions proved to be draconian especially where unwanted pregnancy arising out of rape, adultery or failure of contraceptives could not be terminated.[18] As a result risky methods of abortion were adopted resulting in injury to health and life of the woman. To set right this lacuna, the Medical Termination of Pregnancy Act, 1971 was passed which legalized the medical termination of pregnancy in certain situations like if there is a risk to the life of the pregnant woman, a grave injury to her physical or mental health or a substantial risk of the child being born abnormal or handicapped. However this

15 *CEHAT v. Union of India,* (2001) 5 SCC 577.
16 *CEHAT v. Union of India,* (2003) 8 SCC 398.
17 Sunita, & Roy, T.K., "Sex-Selective Abortions in India" *Population and Development Review,* Vol. 28 (4) (2002).
18 Bandewar, S., "*Abortion Services and Providers' Perceptions: Gender Dimensions" Economic and Political Weekly,* Vol. XXXVIII, No. 21, May 24-30 (2003).

Act has been misused to a large extent for determining and for sex selective abortions.[19]

It is high time that people as a whole and each and every individual irrespective of the caste, creed religion and community stands up for the social evil and take an oath to abolish it. The government and other nongovernmental organizations also have to take a stand in this regard so that this menace can be stopped. There is a need to ponder on following issues-

1. Focus on the humanist, scientific and rational approach and a move away from the traditional teachings which support discrimination.
2. Empowerment of women and measures to deal with other discriminatory practices such as dowry, child marriage sati etc.
3. A strong and effective ethical code for the doctors and the investigating agencies.
4. An effective and simple mechanism for registering the complaints especially for women who generally feel very hesitant to come out of their homes.
5. Wide publicity and generation of awareness amongst the people through various means like media, newspaper, seminars, skits, plays, non-governmental organizations etc.
6. Regular appraisal and assessment of the indicators of the status of women such as sex ratio, female mortality, literacy rate, economic and political participation etc.
7. Erosion of gender bias needs an urgent call.
8. Sensitisation of the Indian society about sex selection tests, the laws on this issue etc.
9. Highlighting the achievements of successful women from different walks of life.
10. E-governance modules that can help identify ultrasound clinics and nursing homes carrying out illegal sex determination tests.

3.1 Suggestions

1. One of the least recognized causes for female foeticide and infanticide is the lack of proper social security measures in India for the female child as well as the elderly citizens who think that only their son will help them financially in their old age. Once the state initiates adequate social security measures and alleviates their fear of being uncared for, the obsession for a son will decrease and also the sex ratio will become stable.
2. Free schooling, food clothing and medical facilities can also help the parents in sharing their burden of raising their girl child.
3. There should be reservation for girls or women in jobs so that it can be seen as an opportunity to raise them and who would be economically independent

[19] Sabu M. George and Ranbir S. Dahiya, "Female Foeticide in Rural Haryana", *Economic and Political Weekly*, Vol. 33, No. 32, August 8-14 (1998).

and helpful in looking after them at their old age like in some states reservation has been made in schools for teachers and in Panchayat Elections for women.

4. The religious and spiritual leaders should play their role in solving this issue by motivating the society and encouraging the girl child to perform the last rites of their parents.
5. There should be strict and effective implementation of the laws. The perpetrators of the crime should be punished. The license of the medical practitioner who violates the law should be cancelled and they should be sent behind the bars.
6. The laws relating to inheritance to the property of the parents must be strengthened and implemented in reality.
7. Records pertaining to all foeticide conducted by a diagnostic centre, hospital, nursing home or a clinic should be made available to the government and to the general public.
8. The defaulters name should be widely publicized so that it can have a deterrent effect on the potential defaulters. The clouds of secrecy should be removed.

4.1 Conclusion

In our country there is hypocrisy. On the one hand we worship goddess Durga and treat or worship a little girl as Devi and on the other hand practice the evil of female foeticide and infanticide and deny her the basic right of taking birth, of existence and basic human rights to live with human dignity. If this crime is not stopped then the women will become an endangered species. We need to get rid of male chauvinism and treat the girl child as the gift of god. We need to get our logics clear. We need to get rid of our thinking where we believe that having a daughter and investing in her education and spending money on her marriage is like 'watering your neighbour's lawn'. We have to stop giving our girls second-class treatment. They should be given adequate medical and health care facilities, proper nutrition and education, save them from physical and sexual abuse. We need to imbibe the sayings of Guru Nanak Dev Ji (Sikh Guru) who said,

From the woman is our birth, in the woman's womb are we shaped;

To the woman we are engaged, to the woman we are wedded;

The woman is our friend and from the woman is the family;

If one woman dies, we seek another; through the woman are the bonds of the world;

Why call woman evil that gives birth to kings?

From the woman comes the woman, without woman there is none;

O, Nanak, god alone is the one who is independent of the woman (because he is unborn).

LEGAL REGIME OF ACCESS AND BENEFIT SHARING IN INDIA

Alka Bharati*

The issue of access to Genetic resources and benefit sharing became an issue of International Concern from the past two decades. This Concept of Access and Benefit Sharing is directly linked to the conservation and protection of the Biological diversity along with regulating the IPR monopoly. In the era of biotechnology two basic questions emerge as a concern, one is the legal, as well as socio-ethical impact of patentability and other one is related to the proprietary right over genetic resources. The Intellectual property rights are certain legally enforceable rights granted to individuals or corporate bodies to have monopolistic ownership or control over the things emanating from the exercise of human brain such as thoughts, ideas and information especially regarding new inventions, innovations and processes.[1] Novelty or new invention in a particular field is the basic criteria for the grant of patent under the IPR regime. In other words it's a formal kind of invention which is recognized under the Intellectual Property Rights. More protection is accorded to these IPR's when direct recognition is granted to it under the WTO agreement on Trade related aspects of IPR. But this issue cannot be understood in isolation. It has several socio-legal and more significantly economic implications when it is referred in the context of bio-diversity inclusive of genetic resources and Traditional knowledge. IPR are directly linked to bio-prospecting in the form of new research and inventions and unregulated IPR protection and consequential grant of patent can lead to bio-piracy which is the negative form of bio-prospecting.[2]

1.1 Pre-IPR Regime

Prior to the IPR protection particularly the concept of patent itself the Bio-diversity was an open access regime. But the proprietary rights over genetic resources only emerged as a concern due to over exploitation of these resources consequently affecting the Bio-diversity and environment and global eco-system. The status of Property was conferred to the genetic resources by the Convention on Biological Diversity in 1992 (hereinafter referred as CBD). It is having three prime objectives:-

I Conservation of bio-logical diversity

II Sustainable utilization of bio-logical diversity

III Fair and equitable sharing of benefits

Prior to Convention on Biological Diversity the Food and Agriculture Organization adopted a non-binding treaty i.e. International understanding on Plant genetic

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1 P. Pushpagandhan, "Biodiversity and Emerging Benefit Sharing Arrangement – Challenges And Opportunities for India" PINSA B68 (2002) at p. 305.

2 Bioprospecting is the search for bio-logical resources with actual or potential value for the development into potential commercial application. This concept is based on the legal premise that the nation's states have sovereign rights over their bio-logical resources. So basically it is the use of biological resources for commercial purposes.

resources for food and agriculture in 1983. It promulgates the free access to genetic resources and recognizes the GR's and Bio-diversity as a common heritage of mankind. But this international instrument has to recognize the IPR protection granted for new plant varieties under the agencies of International Union for Protection of New Plant Varieties (IUPOV). Due to these recently emerged controversies and unrest in the field of Intellectual property rights the Convention on Bio-logical Diversity emphasizes upon the sovereign rights of the state over its Bio-logical resources though earlier it was recognized as an open access regime. This step was necessary because unregulated access is resulting into loss of bio-diversity and environmental degradation.

The developing Countries are the major targets for bio-prospecting because they are rich in natural resources thereby flourishing the pharmaceutical, bio-medical and cosmetic industries. The associated Traditional knowledge is also used by the technologically advanced nations due to the unregulated open access regime. But the holders and protector of Traditional knowledge are getting nothing in return. In this sense bio-prospecting is resulting into bio-piracy. So, these Genetic resources are conferred the status of property by the Bio-logical Diversity Act, 1992 to regulate the access of Genetic resources and thereby sharing the benefit arising out the utilization of such resources with the holders of traditional knowledge.

2.1 Convention on Bio-Logical Diversity, 1992

The convention on Bio-logical Diversity is a significant international instrument and it provides an elaborate institutional framework for the member Countries for the protection and Conservation of Bio-diversity. The objectives of CBD are provided under Article 1 of this Convention which is as follows:-

> "The conservation of biological diversity and sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of Genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies taking into account all rights over those resources and to technologies and by appropriate funding."

"Access to genetic resources means the permission to physically obtain and subsequently to use the genetic resources."[3] The term of Benefit Sharing implies that the benefit arising out of the use of genetic resources and associated Traditional Knowledge. To carry this obligation the states are conferred with the sovereign rights over the genetic resources, so that they can regulate the access as well as provide proper mechanism for benefit sharing which arise out of the utilization of genetic resources. The CBD recognizes the contribution of indigenous people for the conservation and sustainable use of bio-diversity. It states:-

> Respect, preserve and maintain knowledge, innovation and practices of indigenous and local communities embodying traditional life styles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and

[3] Access means the acquisition of bio-logical resources, there derivatives, traditional Knowledge, innovations, technologies or practices and refers to the granting of permission to enter an area for the purpose of sampling, collecting, surveying and acquiring genetic resources for general exploitation for scientific or commercial purposes.

practices and encourage the equitable sharing of benefits arising from the utilization of such knowledge, innovations and practices.[4]

So, CBD recognizes the permanent sovereign rights over the genetic resources and recognizes it as a property.[5] Under article 1 of the convention of bio-logical diversity the prime focus was given to fair and equitable sharing of Benefit out of the utilization of genetic resources but the term Benefit - Sharing has not been defined in the convention. It is totally left up to the discretion of sovereign states that what mechanism they has to devise to regulate the access of genetic resources and thereby sharing the benefits from the utilization of these resources. The basic objective of the ABS system is to enhance the positive implications of bio-prospecting. If bio-prospecting is free from bio-piracy than it can address some very important issues as farmers rights, economic value addition to bio-diversity, standardization of traditional knowledge, upliftment of the rural and tribal communities through the introduction of new and innovative ideas in the field of bio-technology. So, CBD does not deny the protection of new invention rather it emphasize that the access to genetic resources should not be unregulated and the indigenous community should be given the appropriate benefits arising by the use of those genetic resources and associated traditional knowledge. A balanced approach has to be done in the economic value of the IPR's as well as the maintenance of ecosystem and sustainable use of bio-diversity which is a common concern of mankind.

Further a closer examination of the ABS system is mandatory as well as the holders of traditional knowledge should be made aware about their rights under the National and International instruments because economic benefits from traditional knowledge are very nominal but if it is linked to ABS then it can be an effective tool for poverty reduction and sustainable development.[6]

There are multiplicities of actors at the international level which address the issue of Access and benefit sharing of Genetic resources. But below mentioned three International instruments are significant in this regard:-

I. Convention on Bio-logical Diversity (1992)

II. Bonn guidelines on Access to Genetic resources and fair and equitable sharing of the benefits Arising from their utilization, 2002

III. The very recent Nagoya Protocol on access to genetic resources and the fair and equitable Sharing of benefits arising from their utilization (2010).

There are other International Instruments as well which recognizes the Rights of the indigenous peoples.[7] Convention on bio-logical diversity has been discussed with its

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4 Article 8 (J) of Convention on Bio-logical Diversity.

5 Article 15.1 of the CBD recognizes the sovereign rights of states over their natural resources; the authority of National Governments to determine access to genetic resources.

6 Benefit Sharing is the sharing of whatever accrues from the utilization of biological resources, technologies, innovation or practices and all forms of compensation for the use of genetic resources whether monetary or non-monetary.

7 One is the United Nations Declaration on the Rights of Indigenous Peoples which states that these peoples have the right *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP, 2007).*

[Footnote No. 7 Contd.]

three major objectives. As emphasized earlier TRIPS agreement of WTO has been having an agenda of protection of IPR's worldwide. It makes it obligatory for the member states to bring the legislations in conformity with the TRIPS.[8] But CBD is a different form of a legislation which is based on the ethical premise of ecological balance and sustainable use of bio-diversity rather than the pure economic concerns. So, it also recognizes the rights of Traditional Communities over their Traditional Knowledge in the form of IPR's because Traditional Knowledge implies significant use of Bio-diversity. So, CBD also recognizes the informal types o IPR's possessed by the indigenous communities and it stipulates that if a formal kind of invention is done with the access of genetic resources and the associated Traditional Knowledge then the possessor of that Traditional Knowledge should be given the benefit accordingly.[9]

3.1 The Bonn Guidelines

The second significant International Instrument is the Bonn guidelines on Access to bio-logical resources and fair and equitable sharing of benefits arising out of their utilization. Though the guidelines are non-binding in nature but it lays down the comprehensive framework regarding the access and benefit sharing process thereby facilitating the sustainable utilization of bio-diversity and promoting its conservation. For the proper implementation of the goals enshrined in the CBD the Bonn guidelines were adopted by the member states. There guidelines are intended to provide proper administration of the ABS process because CBD is silent on the

[Footnote No. 7 Contd.]

Indigenous peoples have the right:
To maintain, control, protect and develop their traditional knowledge including manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora (Article 31 (1)); To maintain, control, protect and develop their intellectual property over this traditional knowledge (Article 31 (1)); To determine and develop their own priorities and strategies for the development and use of their lands, territories and other resources (Article 32 (1)); To be consulted in good faith with the State, through the Indigenous peoples' own representatives, to obtain their free, prior and informed consent before the approval of any project affecting their lands, territories or natural resources, especially where this concerns the development, utilization or exploitation of mineral, water or other resources (Article 32 (2)); To have effective mechanisms provided to them for just and fair redress (including compensation) for activities affecting their lands, territories or natural resources, especially where this concerns the development, utilization or exploitation of mineral, water or other resources as well as appropriate measures to mitigate or make less the severe any adverse environmental, economic, social, cultural or spiritual impact (Article 32 (3)); and To have redress, by means of restitution (that is, having restored what has been lost or taken away) or compensation, for lands, territories or natural resources which they have traditionally owned or otherwise occupied or used, which have been confiscated, taken, occupied, used or damaged without their free, prior or informed consent (Article 28 (1)). To participate equitably in the sharing of benefits that arise from the use of plant genetic resources for food and agriculture (see Article 9.2 (b)); To participate in the making of decisions at the national level on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture; and benefits that arise from the use of plant genetic resources for food and agriculture. To benefits that arise from the use of plant genetic resources for food and agriculture.

8 Article 7 of the TRIPS Agreement stipulates that "The Protection and in Enforcement of Intellectual Property Rights should contribute to the promotion of technological, innovation and to the transfer and dissemination of technology, to the Mutual Advantage of Producers and Users of Technological Knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations".

9 Monetary benefits include access fees, research funding, license fees, and joint ownership of intellectual property rights. Non-monetary benefit implies the participation in scientific research and development of genetic resources.

mechanism of ABS and due to these loopholes the unregulated access to Genetic resources continued to exist. So, these non-binding guidelines are in the form of assistance for the member states for the implementation of ABS.

3.1.1 PIC and MAT mechanism under the CBD and Bonn Guidelines

Article 15.4 and Article 15.5 of the Convention of Bio-logical Diversity emphasize upon the prior informed consent and mutually agreed terms to facilitate access of genetic resources. It is also stipulated under Article 16.5 that the grant of patent should be supporting and do not run counter to the objectives of CBD. It also provides about the active participation of the developing countries in the innovative processes in the field of Bio-technology and thereby promoting the fair and equitable sharing of benefits from such access. But what should be the mechanism to regulate the access is not provided under the CBD. This right is vested with the Sovereign states to decide the limits of access. Though CBD envisages the provisions regarding MAT and PIC but it does not provide the practical mechanism for it.[10] So the Bonn guideline has been adopted to facilitate the provisions enumerated under CBD.

The guidelines provide that competent national authorities should be established for regulating the grant of access and sharing of benefits along with the negotiation process on PIC and MAT, the proper evaluation and monitoring of ABS agreement, for the enforcement of ABS process while addressing the interest and issue of various stockholders involved in such process. It is also an imperative upon the member states to address the issue of indigenous and local communities and enhance their participation through awareness and negotiations. The users of genetic resources should respect the customs and traditions of the local communities and they should obtain the consent prior to the access. Participation of various stockholders and consideration of their views during the negotiations on MAT and sharing of genetic resources is also another important mandate in these guidelines. So, the proper National authorities should derive a mechanism for prior informed consent (PIC) in a transparent and certain manner. As compared to the CBD, the Bonn guidelines provide a more flexible and comprehensive framework for the implementation of the ABS system. But due to the Non-binding nature of these guidelines the member countries are free to derive their own legislative mechanism regarding the PIC and MAT.

4.1 Nagoya Protocol

The gaps in the CBD and the non-binding nature of the Bonn guidelines have lead to the adoption of the recent international instrument on the issue of ABS and that is Nagoya Protocol. It clearly stipulates what Benefit Sharing is and how it has to be utilized what mechanism should be devised to have the access of Genetic Resources and to share the benefit on mutually agreed terms with prior informed consent. The Nagoya Protocol is obligatory and legally binding international instruments on the parties as compared to the Bonn guidelines. As stated earlier the CBD is silent on MAT and PIC, the Bonn Guidelines are not having the binding effect. So, it is the domestic legislation of the concerned country which has to lay down the rules for

[10] Article 15 (5) of CBD requires the prior informed consent (PIC) of the contracting party providing genetic resources. Article 15 (4) defines the mutually agreed terms as the conditions on which both parties agree and which make the process effective, transparent and legally binding.

negotiation for the ABS process.[11] Now the question for determination is whether the CBD and Bonn Guidelines failed to provide a sound ABS Mechanism and further what are the reasons for the same? Secondly how the Nagoya Protocol is effective in this task. The basic objective of the Nagoya Protocol is the fair and equitable sharing of benefits arising from the utilization of genetic resources, appropriate transfer of relevant technologies and appropriate funding.[12] The Scope of Nagoya Protocol is Co-terminus with Article 15 of CBD regarding associated traditional knowledge and benefit arising from their Utilization.[13]

5.1 The Indian Bio-Logical Diversity Act, 2002

To achieve the objectives of the convention of Bio-logical diversity the Bio-logical Diversity Act, 2002 was enacted by Government of India. There are three bodies which oversees the proper implementation of the Act.

I. National Bio-diversity Authority (NBA)

II. State Bio-diversity Boards

III. Biodiversity Management Committee

The NBA deals with matters relating to requests for access to bioresearches and associated traditional knowledge by foreign individuals, institutions or companies, and all matters relating to transfer of results of research to any foreigner; imposition of terms and conditions to secure equitable sharing of benefits, establish sovereign rights over the bioresearches of India and approval for seeking any form of Intellectual Property Rights (IPRs) in or outside India for an invention based on research or information pertaining to a biological resource and associated Traditional Knowledge obtained from India. SBBs deal with matters relating to access to bioresearches by Indians for commercial purposes and restrict any activity which violates the objectives of conservation, sustainable use and equitable sharing of benefits. The mandate of the BMCs is conservation, sustainable use, and documentation of biodiversity and chronicling of knowledge relating to biodiversity. BMCs shall be consulted by the National Biodiversity Authority and State Biodiversity Boards on matters relating to use of biological resources and associated knowledge within their jurisdiction. There are provisions under the Act to safeguard the interest of indigenous peoples and the Indian citizens are allowed to do research within the country for any purpose other than commercial use. The same facility has been given to Traditional physicians as vaids and hakims. The Royalties received by the NBA is deposited in National Bio-diversity Fund and used for the conservation of bio-diversity and the development of the areas from where the resources have been accessed. The National Biodiversity Authority also performs functions such as laying down the procedures and guidelines to govern the activities such as access and benefit sharing and Intellectual Property Rights.[14]

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11 MS Suneetha and Balakrishnan Pishupati, "Benefit sharing in ABS: Options and Elaborations", UNU – IAS Report, 2009, p. 224.

12 Article 1 of the Nagoya Protocol or Access to Genetic Resources and the fair and equitable sharing of Benefit arising from their utilization, 2010.

13 *Id.*

14 This function is in consonance with Article 8 (j) of CBD.

The authority also coordinates the ABS activities of the SBB and BMC by providing them with technical assistance and guidance. NBA advises the government on matters relating to the conservation of biodiversity, sustainable use of its components and equitable sharing of benefits arising out of the utilization of biological resources, select the areas of biodiversity importance under the Act and perform other functions as may be necessary to carry out the provisions of the Act. The NBA on behalf of the Government of India takes measures to protect the biological diversity of the country as well as oppose the grant of intellectual property rights to any foreign country on any biological resource obtained from India or knowledge associated with such biological resource. The proper examination of the ABS provisions and their effective implementation in India is dealt with in the Biological Diversity Act 2002.[15] This Act provides for regulated access to biological and genetic resources by bonafide users for scientific research, commercial uses, conservation and other sustainable uses. NBA is the national competent authority to take all decisions pertaining to ABS, including prior informed consent process, approval for access and transfer of biological resources and scientific research results and technologies to foreign citizens, companies and non-resident Indians (NRIs), prior approval for applying for IPRs based on biological resources or traditional knowledge obtained from India, fixing criteria for benefit sharing, approval of third party transfer of accessed biological resources and traditional knowledge, and several other matters related to conservation and protection of bio diversity.[16]

5.1.1 Procedure regarding access to Genetic resources and associated Traditional knowledge under the Act

The Act is having following provisions for the access of genetic resources and associated traditional knowledge:

I Access to biological resources and traditional knowledge to foreign citizens, companies and NRIs based on 'prior approval of NBA' (Section 3, 4, 6 of the Act)

II Access is permitted to Indian citizens, companies, associations and other organizations registered in India on the basis of 'prior intimation to the State Biodiversity Board' (Section 7)

III Exemption of prior approval or intimation for local people and communities, including growers and cultivators of biodiversity, and *vaids* and *hakims,* practicing indigenous medicines (Section 7of the Act).

Applicants seeking access to biological resources and traditional knowledge are required to submit an application with fee of INR 10,000/- Once the application is approved for access, an agreement has to be signed by the applicant for access of bio resources. The NBA through appropriate consultation mechanisms, approves the applications and communicates its decision to grant access or otherwise to the applicant within a period of six months from the date of receipt of the application. The Authority is required to communicate the grant of access to the applicant in the form of a written agreement duly signed by an authorized official of the Authority

15 National Brodoning Authroity Act, 2002, Ss 3, 4, 5.

16 Venkatraman K., "Access and Benefit Sharing and the Biological Diversity Act of India: A Progress Report", *Asian Biotechnology and Development Review*, Vol. 10, No. 3, pp. 69-80.

and the applicant. The rule 14 also stipulates the Authority to provide reasons in writing in cases of rejection of an application and give reasonable opportunity to the applicant to appeal. The Authority shall publicize the approval granted through print or electronic media and also shall monitor the compliance of the conditions agreed to at the time of accordance of approval of grant for access, by the applicant.[17]

5.2.2 Procedure regarding Revocation of access

Revocation of access granted to an applicant will be done only on the basis of any complaint or *suo moto* if there is violation of the provisions of the Act or conditions on which the approval was granted, non-compliance of the terms of the agreement, failure to comply with any of the condition of access granted and on account of overriding public interest or for protection of environment and conservation of biodiversity.[18] After having withdrawn the access permit, the Authority is required to send an order of revocation to the concerned Biodiversity Management Committee and the State Biodiversity Board for prohibiting the access and to assess the damage, if any, caused and recover the damages.

The Act imposes certain restrictions on request related to access to biological resources and Traditional Knowledge if the request is on endangered taxa, endemic and rare taxa, likely adverse effects on the livelihood of the local people, adverse and irrecoverable environmental impact, cause genetic erosion or affect ecosystem function and purpose contrary to national interests and other related international agreements The Act does not permit any person to transfer the results of any research relating to biological resources obtained from India for monetary consideration to foreign nationals, companies or non resident Indians (NRIs) without the prior approval of the Authority. The Authority within a period of three months from the receipt of an application shall take a decision on it. In case of approval Authority shall communicate the approval for transfer of research results to the applicant in the form of a written agreement duly signed by an authorized official. Section 6 of the Act and Rule 18 (1-6) lay down the procedure for prior approval before applying for IPR.

5.3.3 Benefit Sharing Mechanism under the Act

The Act insists upon including appropriate benefit sharing provisions in the access agreement and mutually agreed terms related to access and transfer of biological resources or knowledge occurring in or obtained from India for commercial use, bio-survey, bio-utilization or any other monetary purposes.[19] While granting approvals for access, NBA will impose terms and conditions so as to secure equitable sharing of benefits. These benefits include grant of joint ownership of intellectual property rights to the National Biodiversity Authority, or where benefit claimers are identified, to such benefit claimers. Transfer of technology; association of Indian scientists, benefit claimers and the local people with research and development in biological resources and bio-survey and bio-utilization; setting up of venture capital fund for aiding the cause of benefit claimers; payment of monetary compensation and other non-monetary benefits to the benefit claimers are some other areas of vital importance.

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17 *www.nbaindia.org*
18 Bio-Diversity Rules 2004, Rule 15 (1).
19 *Supra* note 18 Section 21 S. 21.

The Biological Diversity Act provides for setting up of biodiversity funds at national, state and local levels. Benefits will be given directly to individuals or group of individuals only in cases where biological resources or associated knowledge are accessed directly through them. In all other cases, monetary benefits will be deposited in the Biodiversity Fund which in turn is used for the conservation and development of biological resources and socio-economic development of areas from where resources have been accessed. The time frame and quantum of benefits to be shared shall be decided on case-to-case basis on mutually agreed terms between the applicants, authority, local bodies. The benefit sharing includes direct payment to persons or group of individuals through district administration, if the biological material or knowledge is accessed from specific individuals or organizations. In cases where such individuals or organizations could not be identified, the monetary benefits shall be paid to the National Biodiversity Fund. Five percent of the benefits shall be earmarked for the Authority or State Biodiversity Board towards the administrative service charges. The ABS procedures stipulated under the Bio logical Diversity Act, 2002 are in line with the provisions of international laws and policies, particularly CBD and the Bonn Guidelines. The entire procedures as described in the Act can contribute substantially to facilitate an international regime of ABS on genetic resources and traditional knowledge.[20]

5.6 Conclusion

It can be inferred from the above discussion that India is committed to fulfill its obligations envisaged in the convention of Bio-logical Diversity regarding the fair and equitable sharing of benefits and sustainable use of Bio-diversity. The Bio-logical Diversity Act seeks to regulate the Commercial utilization of Genetic Resources including research of bio-logical resources and associated Traditional Knowledge by providing a comprehensive mechanism regarding the Access and Benefit sharing regime. But in a developing Country like India there are several challenges for the Implementation of this process. There is a need to raise the level of awareness along with the keen examination of the ABS issues. The question of ownership over genetic resources is not certain. Besides this there are multiple stakeholders which create complexity in ABS agreements, so a precise mechanism should be devised to address the interests of indigenous community. India has set a global example regarding the ABS provisions even before the establishment of CBD. The Kani tribe case from Kerala is the vibrant example for this where a anti-fatigue drug called "jeevani"was prepared from the help of Traditional Knowledge of the Tribal Community and it was recognized for providing the Genetic Resources and associated Traditional Knowledge. Proper awareness about the Concept of ABS, sharing of technology in the form of non-monetary benefits, recognition of Traditional Knowledge under the IPR Regime, addressing the concern of various stakeholders through their participation, strengthening of the human resources, financial capacity building along with the proper institutional framework are some of the positive steps for the realization and proper implementation of the access and benefit sharing regime.

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20 *Supra* note 16.

LEGAL STATUS OF LIVE-IN-RELATIONSHIPS

-Anju*

With changing social norms of legitimacy in every society, including ours, what was illegitimate in the past may be legitimate today.

– Honourable Justice A.K. Ganguly in Revanasiddappa *v.* Mallikarjun[1]

Marriage is a sacred or contractual relationship in India. Marriage, as its legal consequences confers status of husband and wife, entitles both the persons to cohabit; the children born out of a legal wedlock have legitimacy as legal heir; the wife and sometimes the husband also is entitled to maintenance during and after the dissolution of marriage. To avoid these obligations and to enjoy the benefit of living together, the concept of live-in relations has come into picture. Live in relationship provides for a life free from responsibility and commitment unlike as in a marriage.[2] Cohabitation or live-in relationships in India though not illegal, is considered socially and morally improper. Cohabitation is prevalent mostly among the people living in metro cities in India.[3] It promotes lack of discipline and commitment, and tend to dilute the family-based system that safeguards the interests of the wife and children. Comprehensive peace in society is unimaginable without a strong and peaceful family system. Any social practice, once buffeted with a legal scaffolding, gained legitimacy over a period of time. When the legal line between marriage and cohabitation gets blurred, only the fear of social stigma can restrain people from opting for live-in relationships. Society needs to bolster the institution of marriage which is a bulwark against disorder and anarchy.[4]

1.1 Live in Relationship Defined

Live in relationship is a living arrangement. It is "an arrangement of living under which the couples which are unmarried live together to conduct a long-going relationship similarly as in marriage". In this relationship an unmarried couple lives together under the same roof in a way it resembles a marriage, but without getting married legally. This form of relationship does not thrust the typical responsibilities of a married life on the individuals living together. The foundation of live in relationship is individual freedom.

No specific law recognizes a live in relationships in India. No legislation is there to define the rights and obligations of the parties and the status of children born to such couples. A live–in relationship is not recognized by *Hindu Marriage Act*, 1955 or any other statute. In the absence of any law to define the status of live in relationships the Courts have taken the view that where a man and a woman live together as husband and wife for a long term, the law will presume that they were legally married unless

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1 2011 (2) UJ 1342 (SC).

2 *http://www.gangothri.org/?q=node/33* accessed on 29.01.2014

3 *http://en.wikipedia.org/wiki/Cohabitation_in_India* accessed on 29.01.2014

4 Geethu Issac, V.N. Mukundarajan at *http://www.thehindu.com/opinion/letters/livein-relationships/article5411360.ece* accessed on 29.01.2014

proved contrary. *The Protection of Women from Domestic Violence Act* 2005 provides for the protection, maintenance and right of palimony to a live-in partner, if she complains.[5]

2.1 Live-in Relationship Vis-a-Vis Marriage

India is still looked by the world as a country where marriage occupies a sacramental position both philosophically and practically. The phrase 'common law wife' was used to signify legal rights as that of a wife enjoyed by a woman living with a man without marriage. The transformation in the life styles towards western style has definitely brought the need of 'common law wife' in India as well. Live-in-relationships are not new in our society. The only difference is that now people have become open about it. Former they were known as "maitray karars" in which people of two opposite sex would enter into a written agreement to be friends, live together and look after each other. A change is visible in our society from arranged marriages to love marriages and now to 'live-in-relationships'. If an analysis is made of need of such relationships, *avoiding responsibility* would emerge as the prime reason. The lack of commitment, the disrespect of social bonds and the lack of tolerance in relationships have given rise to alternative to marriages. Joel D Block, a leading Psychologist at New York has differentiated between three kinds of relationships on the basis of assumed obligations. "Going together implies sexual exclusivity; living together adds to this an agreement to *combine* living routines and marriage the implication of permanence. Living arrangements are the *midpoint* between the least restrictive (going with someone) and the most complex (the marriage). The very nature of the closeness allows a couple to provide with feedback so that they may recognize and modify relationship-defeating behaviours. It contains an element of convenience.[6]"

3.1 Common Law Marriage

Common-law marriage also known as sui juris marriage, informal marriage or marriage by habit and repute, is an irregular form of marriage that can be legally contracted in an extremely limited number of jurisdictions. The original concept of a common-law marriage is a marriage that is considered valid by both partners, but has not been formally registered with a state or church registry, or a formal religious service. In effect, the act of the couple representing themselves to others as being married acts as the evidence that they are married. In jurisdictions recognizing common-law marriages, such a marriage is not legally distinct from a traditional ceremonial marriage enacted through a civil or religious ceremony in terms of the couple's rights and obligations to one another.[7]

The term *common-law marriage* is often used incorrectly to describe various types of domestic partnerships or to refer to cohabiting couples. Although these interpersonal statuses like *sui juris* or informal marriage are often called "common-law marriage" they differ from true common law marriage in that they are not legally recognized as "marriages" but are a parallel interpersonal status, known in most jurisdictions as "domestic partnership", "registered partnership", "conjugal union", "civil union", etc.

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5 *Supra* note 2.

6 Bhumika Sharma, 'Live in relationship: The Indian Perspective', *Indian Law Journal* at *http://www.indialawjournal.com/volume2/issue_2/article_by_saakshi.html* accessed on 29.01.2014.

7 *http://en.wikipedia.org/wiki/Common-law_marriage* (accessed on 17 February 2014).

In Canada, for instance, the term "common-law marriage" is widely used to describe cohabiting relationships; while these do grant couples many of the rights and responsibilities of a marriage (laws vary by province), these are not marriages; couples in common-law partnerships are not legally considered married, although for many purposes (such as taxes, financial claims, etc.) they are treated as if they were. Similarly, the term "common-law marriage" is used in England and Australia to describe *de facto* relationships. A *de facto* relationship is not a common-law marriage. In Australia the term *de facto relationship* is often used to refer to relationships between any two persons who are not married but are effectively living in certain domestic circumstances.

4.1 Indian Legislations

No law at present deal with the concept of live-in-relationships and their legality. Still even in the absence of a specific legislation on the subject, it is praise-worthy that under *The Protection of Women from Domestic Violence Act*, 2005, all benefits are bestowed on woman living in such kind of arrangement by reason of being covered within the term "domestic relationship" under Section 2(f).[8] *The Protection of Women from Domestic Violence Act*, 2005 considers females who are not formally married, but are living with a male person in a relationship, which is in the nature of marriage, also akin to wife, though not equivalent to wife. Section 2(f) of the Act defines domestic relationship which means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family. Thus, the definition of domestic relationship includes not only the relationship of marriage but also a relationship `in the nature of marriage.[9] However, under the *Hindu Marriage Act* 1955, children born out of such relationships are considered to be legitimate and have been granted the right to succession,[10] Section 16 of *Hindu Marriage Act* 1955 confers a limited legitimacy to children of void and annulled voidable marriages.

If we propose to enact a law to regulate live-in-relationships, though it would grant rights to parties to it but at the same time it would also impose obligations on them. Couples prefer to choose it only to have no responsibility of any sort, but if it is guided by some law, then it would not be so readily preferred. To consider of enacting a law on the lines of provisions in other countries may not be successful as their relationships are granted sanction mainly to legalize gay relationship. In India, since it would not be socially permissible to have relationship between persons of same sex, the law enacted for them by the countries cannot act as guiding force.[11]

5.1 International Law

The law No. 99-944 legalizing civil unions (the *pacte civil de solidarité* or PACS) was introduced in France in 1999 and was signed into law by the French President on 17 May 2013 which makes provisions for "civil solidarity pacts" allowing couples

8 *Ibid.*
9 *Supra* note 2.
10 Anjali Agarwal, "Live in Lelationships and its Impact on the Institution of Marriage in India" at *http://www.westminsterlawreview.org/wlr19.php* accessed on 17 February 2014.
11 *Supra* note 7.

(even of same sex) to enter into a union and be entitled to the same rights as married couples in such areas as income tax, inheritance, housing and social welfare. Couples, who want to enter into such a relationship may sign up before a court clerk and can revoke the contract unilaterally or by bilaterally with a simple declaration, made in writing, which gives the partner three months' notice. Article 147, of the Family Code, Philippines provides that when a man and a woman who are capacitated to marry each other, live exclusively with each other as husband and wife without the benefit of marriage or under a void marriage, their wages and salaries shall be owned by them in equal shares and the property acquired by both of them through their work or industry shall be governed by the rules on co-ownership.[12]

In Ontario, the Ontario Family Law Act specifically recognizes common law spouses in §29, dealing with spousal support issues; the requirements are living together for no less than three years or having a child in common and having "cohabited in a relationship of some permanence". The three years must be continuous, although a breakup of a few days during the period will not affect a person's status as common law. The law apparently doesn't require both parties to give informed consent to incurring responsibilities to another's debts, or losing control over one's wealth. No married person may become eligible to begin the three-year countdown to have a recognized common law spouse until divorce from the first spouse occurs.[13]

In British Columbia, a person who has lived and cohabited with another person, for a period of at least two years is considered a common law spouse, unless one or both of them were married to another person during this time, according to the "Estate Administration Act". This creates an automatic right to wealth or property accumulated, and will also make each spouse automatically responsible for half the other's debt, whether they helped incur it or not.

In Scotland, Under Scots law in 2006, "marriage by cohabitation with habit and repute", was abolished in the Family Law (Scotland) Act 2006. Until that act had come into force, Scotland remained the only European jurisdiction never to have totally abolished the old-style common law marriage.

In United States, Common-law marriages can certainly be contracted in nine states (Alabama, Colorado, Iowa, Kansas, Montana, Rhode Island, South Carolina, Texas, and Utah) and the District of Columbia. Otherwise, common-law marriages can no longer be contracted in any of the other states. All states, however, recognize common-law marriages that were validly contracted in other states, under the full faith and credit clause of the U.S. Constitution, principles of comity and their rules forchoice of law and conflict of laws. In California, for example, a marriage validly contracted in another jurisdiction is valid even if it could not be legally contracted within California.[14]

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12 Lionel Lesur and Lisa A. Linsky, 'France allows same sex marraiges' at *http://www.mwe.com/France-Allows-Same-Sex-Marriages-06-11-2013/* accessed on 7 August 2014.

13 *http://en.wikipedia.org/wiki/Common-law_marriage* accessed on 13 August 2014.

14 *Ibid.*

6.1 Judicial Attitude

Protection of Women from Domestic Violence Act 2005 recognises "relationship in the nature of marriage" and protects female partners from domestic violence. Such partners can claim monetary and other reliefs under the Act as under:

6.1.1 Marriage

The Hon'ble Supreme Court in *Lata Singh v. State of U.P.*[15] held that the live-in relationship is permissible only in unmarried persons of heterosexual sex of the age of majority. The brothers of Lata Singh had alleged that she was mentally unfit when they had protested her marriage. However this was held to be untrue when she was examined by doctors. The live-in relationship if continued for such a long time, cannot be termed as a "walk in and walk out" relationship; there has to be a presumption of marriage between them.[16] In *Gokal Chand v. Parvin Kumari*[17] the court cautioned that the couple would not get legitimacy, if the evidence of them living together was rebuttable. These decisions only served to recognize marriages which were doubted, on the basis that a long-term live-in relationship existed. However the courts did not recognize live-in relationships as independent of the institution of marriage, that is the presumption of marriage was a key element.

In *S.P.S. Balasubramanyam v. Suruttayan*[18] the Hon'ble Supreme Court held that if a man and woman are living under the same roof and cohabiting for a number of years, there will be a presumption under Section 114 of the Indian *Evidence Act* 1872 that they live as husband and wife and the children born to them will not be illegitimate. This decision suggested that the law treats long live-in relationships as good as marriages. The courts could subsequently interpret live-in relations to mean "living together as husband and wife" to exclude those who enter into a live-in relationship "by choice" without intending to be married, as that is still a matter of doubt and debate.[19]

6.1.2 Maintenance

The Supreme Court in *Yamunabai Anantrao Adhav v. Anantrao Shivram Adhav*[20] held that where a man having a living lawfully wedded wife marries another woman, his second "wife" had no claim to maintenance under Section 125 of the Code of Criminal Procedure, 1973, even though she might be unaware of his earlier marriage. The Court refused to give any recognition to the fact that they had lived together even if their marriage was void. The man was allowed to take advantage of this, although he had failed to disclose his earlier marriage. The Supreme Court held that it would not grant any rights to the woman in such a live-in relationship "of circumstance". In *Malti v. State of U.P.*,[21] the Allahabad High Court held that a woman living with a man could not be equated as his "wife". In this case, the woman was a cook in the man's house and she stayed with him and shared an intimate

15 (2006) 5 SCC 475.
16 *Madan Mohan Singh v. Rajni Kant,* (2010) 9 SCC 209.
17 AIR 1952 SC 231.
18 1992 Supp (2) SCC 304.
19 Vijender Kumar, "Live-In Relationship : Impact on Marriage and Family Institutions", (2012) 4 SCC J-19 at pp. J-19.
20 (1988) 1 SCC 530.
21 2000 Cri LJ 4170 (All).

relationship. The Court however refused to extend the meaning of the word "wife" as denoted in Section 125 of the Code of Criminal Procedure to include such a live-in partner's maintenance claims.

In *Savitaben Somabhai Bhatiya v. State of Gujarat*,[22] the Hon'ble Supreme Court went further to the extent of observing that the fact that the respondent was treating the appellant as his wife "is really inconsequential because it is the intention of the legislature which is relevant and not the attitude of the party". Even the plea that the appellant was not informed about the respondent's earlier marriage, when she married him, is of "no avail", because the principle of estoppel[23] cannot be pressed into service to defeat the provisions of Section 125 of the Code of Criminal Procedure. Thus, as per the present provisions of Section 125, there is no escape from the conclusion that the expression "wife" refers only to the "legally wedded wife". Hence, the Court granted maintenance to the child and not to the second wife. Under the law a second wife whose marriage is void on account of the survival of the first marriage is not a legally wedded wife, and is, therefore, not entitled to maintenance under this provision.[24]

In *Narinder Pal Kaur Chawla v. Manjeet Singh Chawla*,[25] the Court took a liberal view and stated that the second wife has a right to claim maintenance under the Hindu Adoptions and Maintenance Act, 1956. In this case the husband had not disclosed the facts of his first marriage and married the appellant and maintained a relationship with her for 14 years as husband and wife. The Court also took support from the provisions of *the Protection of Women from Domestic Violence Act*, 2005, and held that if we do not give maintenance to the second wife it would amount to giving premium to the respondent for defrauding the appellant.[26]

The Supreme Court in *Rameshchandra Rampratapji Daga v. Rameshwari Rameshchandra Daga*[27] tried to distinguish between the "legality" and "morality" of relationships. Here the Hon'ble Supreme Court observed that keeping into consideration the present state of statutory law, a bigamous marriage may be declared illegal because it contravenes the provisions of the *Hindu Marriage Act*, 1955 but it cannot be said to be immoral so as to deny even the right of alimony or maintenance to spouse.

The increasing incidents of live-in relationships, especially those which occur "by circumstance", however ensured that the need for reforms was recognized. In 2003, the Malimath Committee Report on "Reforms in the Criminal Justice System" suggested an amendment of the word "wife" in Section 125 of the Code of Criminal Procedure to include a woman who is "living in" with a man for a "reasonable period". Ironically, back in 1985, the Supreme Court in *Sumitra Devi v. Bhikan Choudhary*[28] had held that where a man and woman were cohabiting for a long time

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22 (2005) 3 SCC 636.

23 "Estoppel.- When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing", Section 115, Indian *Evidence Act*, 1872.

24 *Vimala v. Veeraswamy*, (1991) 2 SCC 375.

25 AIR 2008 Del 7.

26 *Suresh Khullar v. Vijay Kumar Khullar*, AIR 2008 Del 1.

27 (2005) 2 SCC 33.

28 (1985) 1 SCC 637.

and were treated by society as husband and wife, marriage is to be presumed for awarding maintenance. However, the courts have not extended this principle to include purported live-in partners. Significantly, *the Protection of Women from Domestic Violence Act* 2005 became the first statute to give live-in partners the same recognition as married couples. The protection under this Act does not qualify live-in partners to get the same benefit under personal law.

In *M. Palani v. Meenakshi*[29] the respondent had filed a claim for maintenance of Rs 10,000 for food, clothes, shelter and other basic necessities from the plaintiff, who had been in a live-in relationship with her. The said application was filed under Section 20 read with Section 26 of *Protection of Women from Domestic Violence Act*, 2005. The petitioner contended that the respondent was not entitled to any maintenance since they had not lived together at any point of time. They had only indulged in consensual sexual intercourse sometimes as friends, without any thought of marriage. He hence contended that mere proximity at some time for the sake of mutual pleasure (as in their case) could not be called a "domestic relationship" to invite the application of *the Protection of Women from Domestic Violence Act*, 2005. The Madras High Court looked into the definition of "domestic relationship" as given in Section 2(f) of *the Protection of Women from Domestic Violence Act*, 2005[30] which did not specify that the couple should have lived together for a particular period for the relationship to be a domestic relationship. The Court held that "at least at the time of having sex by them, they shared household and lived together". The Court further held that the provisions of the Act would apply even in such a case; hence, a maintenance claim under the Act was upheld. Thus the provisions of the Act would apply even in those cases where man and woman share a frequent sexual relationship, even if there is no express intention to a long-term commitment from either party. While some may see this as a weapon which may be used by a woman to seek vengeance on a man, if he walks out of a soured live-in relationship, a larger issue of protecting the rights and vulnerability of the "other" woman has been partially addressed by allowing such claims.[31]

Partners in a live-in relationship do not enjoy an automatic right of inheritance to the property of their partner. The Hindu Succession Act 1956 does not specify succession rights to even a mistress living with a male Hindu. However, the Supreme Court in *Vidhyadhari v. Sukhrana Bai*[32] created a hope for persons living together as husband and wife by providing that those who have been in a live-in relationship for a reasonably long period of time can receive property in inheritance from a live-in partner. In this case property of a Hindu male, upon his death (intestate), was given to a woman with whom he enjoyed a live-in relationship, even though he had a legally wedded wife alive.[33]

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29 AIR 2008 Mad 162.

30 A relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family, Section 2 (f), *Protection of Women from Domestic Violence Act*, 2005.

31 *Pyla Mutyalamma v. Pyla Suri Demudu,* (2011) 12 SCC 189.

32 (2008) 2 SCC 238.

33 *Revanasiddappa v. Mallikarjun,* (2011) 11 SCC 1.

In *Indra Sarma v. V.K.V. Sarma*,[34] The question of law to be decided by Hon'ble court was whether a live-in relationship of a woman with a married man knowing his marital status would amount to a "relationship in the nature of marriage" falling within the definition of "domestic relationship" under Section 2(f) of *the Protection of Women from Domestic Violence Act*, 2005 and thereby disruption of such a relationship by failure to maintain a women involved in such a relationship amounts to "domestic violence" within the meaning of Section 3 of the DV Act?

In order to arrive at any conclusion, Hon'ble court looked into various aspects of marital relation and live in relation and also gone through various rulings from courts of different counties. Thereafter, it promulgated some factors to look into for testing under what circumstances a live-in relationship will fall within the expression "relationship in the nature of marriage" under Section 2(f) of the DV Act. The guidelines, of course, are not exhaustive, but will definitely give some insight to such relationship:

- Duration of period of relationship - Section 2(f) of the DV Act has used the expression "at any point of time", which means a reasonable period of time to maintain and continue a relationship which may vary from case to case, depending upon the fact situation.
- Shared household - The expression has been defined under Section 2(s) of the DV Act and it means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household.
- Pooling of Resources and Financial Arrangements - Supporting each other, or any one of them, financially, sharing bank accounts, acquiring immovable properties in joint names or in the name of the woman, long term investments in business, shares in separate and joint names, so as to have a long standing relationship, may be a guiding factor.
- Domestic Arrangements - Entrusting the responsibility, especially on the woman to run the home, do the household activities like cleaning, cooking, maintaining or upkeeping the house, etc. is an indication of a relationship in the nature of marriage.
- Sexual Relationship - Marriage like relationship refers to sexual relationship, not just for pleasure, but for emotional and intimate relationship, for procreation of children, so as to give emotional support, companionship and also material affection, caring etc.
- Children - Having children is a strong indication of a relationship in the nature of marriage. Parties, therefore, intend to have a long standing

[34] Criminal Appeal No. 2009 of 2013 arising out of Special Leave Petition (Criminal) No. 4895 of 2012.

relationship. Sharing the responsibility for bringing up and supporting them is also a strong indication.

- Socialization in Public - Holding out to the public and socializing with friends, relations and others, as if they are husband and wife is a strong circumstance to hold the relationship is in the nature of marriage.
- Intention and conduct of the parties - Common intention of parties as to what their relationship is to be and to involve, and as to their respective roles and responsibilities, primarily determines the nature of that relationship.

Finally the question of law to be decided was answered as a woman having been fully aware of the fact that the person with whom she is having live-in relation is a married person, cannot have entered into a "live-in relationship in the nature of marriage" specially where parties do not project or conduct themselves to be husband and wife before friends, relatives and society and the status of women in this situation is of a concubine. Hence she cannot claim maintenance under Domestic Violence Act, 2005.[35]

6.1.3 Divorce

Women in live-in relationships are not recognized by their husband's surname, for any legal or financial matters including opening a bank account, submission of income tax return, applying for loans, etc. They retain their identity as an individual and are not recognized as a "wife" or a "domestic partner". Consequently live-in couples can separate informally without any formal divorce or the intervention of a court. In case of live-in relationship, it is not possible to have a formal divorce in law among partners. The careful scrutiny of the existing matrimonial laws indicates that unless this kind of relationship is not recognized in law the partners cannot be allowed to separate formally. It looks like it is easy to get into live-in relationship whether "by choice" or "by circumstance" but difficult to get out of this relationship formally. Whereas the consequences of this relationship are left unanswered in law, for example, there is no law in place which deals with the division and protection of their separate or joint property on separation.[36]

7.1 Status of children from live-in relationships

There is an increasing trend of couples entering into live-in relationships, not as a precursor but rather a substitute of a formal marriage. Such long-term commitments often include procreation of children. In live-ins "by circumstance", the partners may procreate believing that he/she will become legally married. Either way various legal issues arise about the status and rights of such children, born out of legal wedlock, in comparison to those born in marriages. Following are the key issues for consideration.

7.1.1 Legitimacy of children

Section 112 of the Indian *Evidence Act*, 1872 provides that legitimacy of a child is proved only if he or she was born during the continuance of a valid marriage between

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35 Goutam Prasad, 'Supreme Court of India- Leading Judgements' at *http://gplawsolutions.blogspot.in/2014/01/indra-sharma-vs-vkv-sharma-domestic.html* accessed on 13 August 2014.

36 *Supra* note 19.

his mother and father. Mohammedan (Muslim) law too recognizes only those children, who are the offspring between a man and his wife as legitimate children. Thus children born from a live-in relationship were "illegitimate" in the eye of existing law. However the Supreme Court in *Tulsa v. Durghatiya*[37] held that children born out of such a relationship will no more be considered illegitimate. Again in *Vidhyadhari v. Sukhrana Bai*,[38] the Hon'ble Supreme Court held that even if a person had contracted into second marriage during the subsistence of his first marriage, children from the second marriage would still be legitimate though the second marriage would be void as they are legitimate under section 16 of the *Hindu Marriage Act* 1955.

7.1.2 Maintenance rights of children

A legitimate son, son of predeceased son or the son of predeceased son of predeceased son, so long as he is minor, and a legitimate unmarried daughter or unmarried daughter of the predeceased son or the unmarried daughter of a predeceased son of predeceased son, so long as she remains unmarried, shall be maintained as dependants by his or her father or the estate of his or her deceased father.[39] But children from live-in relationships do not enjoy this right under the Hindu Adoptions and Maintenance Act 1956, whereas Section 125 of the Code of Criminal Procedure provides maintenance to children whether legitimate or illegitimate while they are minors and after they attain majority where such child is unable to maintain themselves.

7.1.3 Guardianship and custodial rights

In Hindu law, after the marriage of a man to a girl who is a legal minor, the husband is the legal guardian of his wife as a minor and is entitled to her custody. The mere fact that she is a minor will not disentitle her from claiming such custody to the exclusion of her parents. Where the father and the mother are not married to each other and a child is born to such parents, the mother and not the father has the parental responsibility for the child. Section 6(a) of the Hindu Minority and Guardianship Act 1956 provides the father as the natural guardian of his minor legitimate children and the mother becomes the natural guardian "in his absence" i.e. where he is incapable of acting as the guardian.[40] Section 6(b) of the Hindu Minority and Guardianship Act 1956 provides the mother as the natural guardianship over any illegitimate children she has. Under Muslim law, the father is the natural guardian and the mother does not become the natural guardian even after his death. Muslim law does not provide for the guardianship of illegitimate children, but it has come to be established through case law that it will be vested in the mother. While deciding a matter on custody, the court takes into account the welfare, age, sex and the wishes of the child as well as the wishes of his parents; the welfare of the child shall be the paramount consideration.[41] This applies even in custody cases involving children from live-in relationships.

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37 (2008) 4 SCC 520.
38 (2008) 2 SCC 238.
39 The *Hindu Adoptions and Maintenance Act*, 1956, S. 21.
40 *Githa Hariharan v. RBI*, (1999) 2 SCC 228.
41 Section 13, The *Hindu Minority and Guardianship Act*, 1956.

7.1.4 Inheritance rights of children

Under Hindu law, an illegitimate child inherits the property of his/her mother only and not of putative father, whereas under Sharia law, such a child cannot even inherit from his mother. If children from a live-in relationship were to still be considered "illegitimate", inheritance from the father's estate would be barred. In fact, where the live-in relationship has not subsisted for a reasonable period of time, the courts would not consider a child from such relationship to be legitimate, thereby barring his/her inheritance. However, where the live-in relationship satisfies this condition, a child being "legitimate" can inherit from both the parents. In *Revanasiddappav. Mallikarjun*,[42] the Hon'ble Supreme Court granted the inheritance to the four children born from the woman with whom the man shared a live-in relationship, calling them "his legal heirs". The Court has thus ensured that no child born from a live-in relationship of a reasonable period may be denied their inheritance.[43]

7.1.5 Conclusion and Suggestion

The Hon'ble Supreme Court has ruled that a live-in relationship is not a crime or sin. But can it be a substitute for marriage? In this age of violence and discrimination against women, encouraging the live-in culture is ultimately abusive to women. Marriage, despite its ups and downs, provides sanctity to a relationship and a modicum of purpose in life. On the other hand, a live-in relationship is one with no strings attached.[44] Any decision to bring change in Section 125, CrPC with regard to live - in - relationship invites amendments in other laws as well including law of evidence, succession, adoption, bigamy, marriage etc. We must not forget that one enters into living arrangements to effectively deal with a career without any sort of personal obligations of family. Therefore, if even inspite of no relationship in the eyes of law (marriage), one has to be made liable to pay maintenance after a reasonable time period, aren't we disturbing the concept of virtual arrangements (existing without tension about other)? With the weakening of marriage as an institution, there are possibilities that not only would social offences increase but also independence of people would get manifested by indulging in live-in-relationships.[45]

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42 (2011) 11 SCC 1.

43 *Vidhyadhari v. Sukhrana Bai*, (2008) 2 SCC 238.

44 Sumit Paul at *http://www.thehindu.com/opinion/letters/livein-relationships/article5411360.ece* accessed on 29.01.2014.

45 *Supra* note 7.

WOMEN DURING ARMED CONFLICT AND HEALTHCARE

Sangeeta Taak*

1.1 Introductory

In today's wars, humanitarian assistance is increasingly denied as part of a deliberate policy to target civilians, in particular during internal armed conflicts. The often-discussed change in the nature of warfare might be one reason for this development. The other reason might be the change in the nature of humanitarian operations. In the 1990s, there has been an increasing tendency to use them as a substitute for effective political or military action. Besides, the number of relief operations has risen steadily. This has led to a situation where humanitarian assistance is often used as a bargaining chip in political dealings and is therefore regularly impeded. Because the international media is giving more attention to the matter, the withholding of aid has also become more obvious than before.[1]

As per the law Geneva Conventions, 1949 state that persons who do not or can no longer take part in the hostilities are entitled to respect for their life and for their physical and mental integrity. Such persons must in all circumstances be protected and treated with humanity, without any unfavorable distinction whatever. It further states that it is forbidden to kill or wound an adversary who surrenders or who can no longer take part in the fighting. The wounded and sick must be collected and cared for by the party to the conflict which is having them in its power. Medical personnel and medical establishments, transports and equipment must be spared. The Red Cross or Red Crescent on a white background is the sign protecting such persons and objects and must be respected.[2]

Moreover, the denial of humanitarian assistance amounts to a crime under international law. The denial of medical assistance may lead to the war crime,[3] crimes against humanity[4] and genocide under International Criminal Law.

In real situation of war the infrastructure of the conflicting state gets severally damaged during conflicts. The health care units and buildings are made the soft targets to lessen the resistance of people as well as army. The clinics, medical staffs, vehicles, availability of drugs are attacked during conflicts, although it is illegal. The transportation system gets disrupted due to attacks; this situation leads to the lack of drugs, equipments and other supplies. Especially, the border area is badly affected

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1 Christa Rottensteiner, "The Denial of Humanitarian Assistance as a Crime under International Law, *International Review of the Red Cross*, No. 835, 1999.

2 *http://www.redcross.lv/en/conventions.htm#geneva*

3 A war crime is a serious and criminally punishable violation of international humanitarian law committed by any physical person, no matter whether military or civilian.

4 Recent international jurisprudence and the adoption of the ICC Statute have helped clarify the definition of crimes against humanity, which had been a matter of controversy since the Nuremberg Charter. It is now widely accepted that the following conditions have to be fulfilled: acts have to be committed against any civilian population and in a widespread or systematic manner, and must be based on a policy by a State, an organization or a group.

during conflicts, as communication is bad and even the non-governmental international agencies can't reach over there.

In order to reduce or curb the unnecessary sufferings, health professionals around the world have been contributing to the discipline of health and human rights, they have attempted to tackle some of these issues through advocacy and participation in global health challenges. The right to health and other fundamental human rights are interrelated. The different violations of the physical and mental integrity of persons (torture, ill treatment, sexual violence, mutilations, etc.), and attacks on the social integrity of populations (ethnic purges, forced resettlements, breaking up of families, etc.), all have dramatic consequences for health. In more general terms, health professionals feel that it would be unethical to care for people without also taking into account the serious violations of human rights and International Humanitarian Law of which they could also be victims.

2.1 Historical Background

Battle of Solferino[5] is not only an example of worst atrocities faced. Even "New World order" of 1900's has witnessed many such events happening on the doorsteps of Western Europe in former Yugoslavia, especially in Bosnia and Herzegovina. Apart from Europe continent in (1994) Rwanda, approximately 1million people lost their lives on account of genocide taking place, due to the civil war that had taken place. It had majorly taken place due to international communities tangled with political concerns and self interest. Sudan suffered eruption of civil war primarily on religious lines. Moreover, Darfur region also faced heavy account of casualties due to genocide conduct. The era of cold war, had also witnessed many severe atrocities including India's intervention into Bangladesh in 1971, Vietnam's intervention in Cambodia, Tanzania's intervention in Uganda in 1979. Somalia in 1992 is one major example, when after 5, 00,000 being killed in famine.[6]

During 20thCentury, two global wars in Afghanistan and Iraq have led to Humanitarian crises. Beyond negligence, some of the major problems faced in all areas of conflicts were personnel and transport facilities that were unable to reach to those in need. First aid workers were unable to reach people in critical moments of injury. Sometimes even authorities did not give permission to health-care personnel to enter a particular area of wounded and sick, thus delaying timely care. Similarly supplies to health care facilities were sometimes blocked.

Poor securities conditions, shortages and disruptions of supply of material resource and staff at all stages of health-care chain can be blamed for poor health care availability during armed conflicts however, the obligation to collect and care for the wounded and sick is at the heart of International Humanitarian law (IHL). It implies that both States and non-state parties to conflict must take all feasible measures to

5 The decisive clash of the war of Italian unification; the suffering of the wounded left without care was the inspiration for the founding of the Red Cross.

6 Further reference is also available at *http://www.icrc.org/eng/resources/documents/ misc/57jnvr.htm* Costi, Alberto "Foreword" in Book on International Humanitarian Law. Also See, Milton Leitenberg, "*Deaths in War and Conflicts in 20th Century*, available at *http://www.cissm.umd.edu/papers/files/deathswarsconflictsjune52006.pdf.*

guarantee that the wounded and sick receive care as soon as possible, regardless of their status or their allegiance.[7]

Similar efforts have been taken up by the UN. The Charter of the United Nations was signed, in San Francisco, on 26 June 1945 and is the foundation document for all UN works.[8] The UN was established to *"save succeeding generations from the scourge of war"* and one of its main purposes is to maintain international peace and security. Sometimes a question emerges in my mind, why United Nations does not think about the solution without war? UN never interferes pre war situation although; it can use good offices or coercive methods, if UN wishes so.

3.1 The Right to Health Care During Armed Conflict

The rights are always there even in the situation of armed conflict. During the armed conflict accessibility of medicine to injured persons is a duty of the state but the effect of warfare in the injury causing element which leads to the suffering of innocent people is also a fact. The object of war is to weaken the military forces of the enemy, and not to senselessly cause suffering to innocent millions.[9] So, means and methods of warfare play an important role on the health and extent of injury caused during an armed conflict. Therefore, a need for the control of the means and methods i.e. the tactics and strategy applied in military operations to weaken the adversary which has a toll on people.[10]

The idea of regulating means and methods of warfare first came into being in the Lieber Code[11] limiting means of warfare. Since then many declarations came out limiting the collateral injuries suffered by the civilians, even the unnecessary suffering caused. Later came St. Petersburg Declaration of 1868, Hague IV Regulations, 1907 (Art 22 and 23), Additional Protocol I of Geneva Convention 1977 (Art 35). Later United Nations also indulged in limiting the unnecessary suffering by UN Secretary General's Bulletin, 1999.[12] Most recently came up Rome Statute 1998 Art 8(2)(b)(xx) which declares "employing weapons, projectiles and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering" as a crime of ICRC Customary Rules 11, 12, 70 and 71.

3.1.1 "The primary task of the medical profession is to preserve health and save life"

Ethically the duty of medical staff is to take care of wounded and sick. They are not supposed to discriminate on the basis of age, disease or disability, creed, ethnic origin, gender, nationality, political affiliation, race, sexual orientation, or social

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7 Bovier, Paul "Medical ethics and the protection of healthcare in armed conflicts" Geneva Health Forum ICRC, 21 April, 2010.

8 Southall, D and MacDonald, R "Maternal and Child health Advocacy International-MCAI", "Enforcing Health Protection" Armed Conflicts Mothers And Children.

9 St. Petersburg Declaration of 1868.

10 For example: Two physicians, a Russian and an American, launched the idea of an association of medical doctors to prevent a nuclear war. This idea was the origin of the creation of the organization called International Physicians for the Prevention of Nuclear War in Geneva. In 1985, this association received the Nobel Peace Prize for making people aware of the catastrophic consequences a nuclear conflict would entail. For further details please see; Pierre Perrin "The Right to Health in Armed Conflict" *http://www.swisshumanrightsbook.com/SHRB/shrb_03_files/09_453_Perrin.pdf.*

11 Instructions for the Government of Armies of the United States in the Field (1863).

12 *"The right of a UN force to choose methods and means of combat is not unlimited".*

standing or any other similar criterion. The medical duty to treat people with humanity and respect applies to all patients as per the Geneva Conventions. The physician must always give the required care impartially and without discrimination. **Medical ethics in times of armed conflict is identical to medical ethics in times of peace,** as stated in the *International Code of Medical Ethics* of the WMA.[13] There are certain regulations which are unethical and a medical advisor is not supposed to give it.

4.1 The International legal Instruments guaranteeing health care facilities during armed conflicts

There are various International Legal Instruments which guarantee Health Care facilities during armed conflict. These regulations are most of the time not followed by the drafters of the conventions. All the rules are for the 'others'. It is like we (the states which are powerful) have made rules for the other states to follow. We know when to follow and when not to..... Few of these instruments are:

The Preamble of the Universal Declaration of Human Rights affirms the 'dignity and worth' of human beings. The Declaration provides that "every person has a right to live a 'standard life' which means and includes proper food, clothing, housing and medical care, necessary social services and various social security measures."[14]

Taking into account the suffering of women and children in the armed conflicts belonging to the civilian population, who are targeted uncalled for in the cruel, suppressing movement of the alien power, the Declaration on the Protection of Women and Children in Emergency and Armed Conflict,[15] 1974 was brought into existence. The observances of the said declaration say that 'the women and children belonging to the civilian population, found in emergency or armed conflict shall not be deprived of the basic necessities including 'medical aid'.

The Geneva Conventions 1949 deal with the amelioration of conditions of the wounded and sick in the armed forces at land as well as on the sea and also deals with the treatment of prisoners of war and protection of the civilian population in times of war. The principle on which the Geneva Conventions were founded is 'the humane treatment of the persons including the civilians as well as the combatants. It was founded on the principles of humanity and public conscience.' The First Geneva Convention which is relating to the 'Wounded and Sick in armed conflict on Land' deals with the humane treatment of member of duly authorized armed forces, organized militias, and the persons aiding them. It says that 'they shall be respected

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13 Hence it is deemed unethical for physicians to:
   a. Give advice or perform prophylactic, diagnostic or therapeutic procedures that are not justifiable for the patient's health care.
   b. Weaken the physical or mental strength of a human being without therapeutic justification.
   c. Employ scientific knowledge to imperil health or destroy life.
   d. Employ personal health information to facilitate interrogation.
   e. Condone, facilitate or participate in the practice of torture or any form of cruel, inhuman or degrading treatment.

14 The Universal Declaration of Human Rights, Article 24.

15 Available at: *http://www1.umn.edu/humanrts/instree/e3dpwcea.htm.*

and protected in all circumstances'.[16] The parties to the conflict must treat humanely the persons falling prey to them. Such persons shall not be left wilfully without medical assistance and care,[17] meaning thereby that the person falling prey to the enemy power shall be provided adequate medical care by the controlling power. It also provides that the medical establishments must not be attacked, even if the personnel of such establishments are armed.[18] The Second Geneva Convention provides that the hospital ships shall not be attacked or captured instead they shall be protected and respected in any circumstances.[19] Third Geneva Convention, 1949 says that the persons including the members of the armed forces who have laid down their arms or who are sick, wounded, detained shall be treated humanely in all circumstances.[20] The fourth Geneva Convention deals with the protection of civilians in the war.[21] Persons are given the benefit of this convention in the times of armed conflicts or war if such persons are under the control of the opposite party or the occupying power of which they are not nationals.[22]

Previously only the army men or the combatants used to get protection under the international humanitarian law, but after the formulation of Fourth Geneva Convention the civilians also became entitled to the protection of international law. Article 16 of the said convention says that the wounded and sick shall be the object of particular protection and respect.

The Protocol II, 1977 provides for certain fundamental guarantees for the protection of children, civilians, treatment of civilians,[23] prisoners and detainees[24] as well as the wounded and the sick.[25] The declaration of the Minimum Humanitarian Standard provides that the deprivation of access to necessary food, drinking water and medicine including the threat or incitement to commit these acts are prohibited. The ICRC has formulated principle for the wounded and sick that they shall be collected and cared for by the party to the conflict which is having them in its power. Protection also covers medical personnel, establishment, and transports. The emblem of Red Cross or Red Crescent or Red Lion or Sun is the sign of such protection and must be respected.[26]

5.1 Role of International Organizations

Several international bodies play an important role in laying down rules, guidelines, etc., to be followed so as to supplement these laws. As far as the response of the UN to attacks against medical missions is concerned, there have been several resolutions which have been based on the premise that attacks and threats against humanitarian workers and associated personnel is a factor which increasingly restricts the provision of assistance and protection to populations in need.[27] Earlier the Security

16 See, the First Geneva Convention on the Wounded and Sick on Land, Article 13.
17 Malcolm N. Shaw, *International Law*, Cambridge University, 5th Ed., p- 1057.
18 *Supra* note 16 of the First Geneva Convention, Article 19.
19 The Second Geneva Convention, Chapter III.
20 The Third Geneva Convention, Article 3.
21 Malcolm N. Shaw, *Supra* note 17 at p. 1061.
22 The Fourth Geneva Convention, Article 4.
23 The Protocol II, 1977, Article 17.
24 *Id.*, Article 5.
25 *Id.*, Article 10.
26 Malcolm N. Shaw, *Supra* note 17 at p. 1079.
27 A/RES/64/77, December 2009.

Council Resolution 1502[28] had reaffirmed the obligation of the parties to an armed conflict to comply with the principles of IHL related to protection of humanitarian personnel and stressed on access to health care, security and freedom of movement. The Security Council Resolution 1674[29] reiterated Resolution 1502. It also urged that States on whose territory such attacks occur to prosecute or extradite those responsible. In a statement by the President, the Security Council expressed its concern about attacks on humanitarian workers, in violation of the rules of IHL.[30] The Convention on Safety of United Nations and Associated Personnel was another significant development which entered into force in January 1999. It was a precursor to General Assembly resolutions entitled *Safety and security of humanitarian personnel and protection of United Nations personnel*[31] and *Scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel.*[32] This was followed by the Optional Protocol to the Convention.[33] **However, independent organisations which are outside the ambit of the UN will be excluded from this protection.** The other steps taken in respect of protection for humanitarian aid workers include the Aide Memoire. It was adopted by the Security Council in March 2002 as a practical guide for its analysis and diagnosis of key protection issues and its contents were to be reviewed and updated periodically.[34] This Darfur report considers to what extent the issues raised in the recently updated Aide Memoire reflect the security needs of aid workers on the ground.[35] As regards conduct of hostilities, the guidelines prohibit attacks against medical personnel, units, transport, hospitals using distinctive emblems of Geneva Convention and places where the sick and wounded are collected, provided they are not military objectives.

The World Health Organisation is significant in so far as it can outline the methods in which protection may be improved. In 2009, WHO launched an initiative to make hospitals safe in emergencies, but the programme did not include tracking of attacks on or interference with medical facilities and workers during conflict, or a strategy to restrict such acts through protective measures?[36] Also, the recommendations of the World Medical Association (WMA) may be used for protecting health care workers in difficult situations. While these are not binding legal instruments in the strict sense of the term, they outline the position of the medical profession on difficult problems which are sometimes encountered in armed conflict directly.[37] However, there has not been anything which specifically dealt with protection for medical personnel.

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28 S/RES/1502, August 2003.
29 S/RES/1674, April 2006.
30 Repertoire 13th Supplement (1996–1999): Chapter VIII.
31 A/RES/57/155, December 2002.
32 A/RES/57/28, February 2003.
33 A/C.6/60/L.11, November 2005.
34 (S/PRST/2002/6).
35 Karoline K. Eckroth, 'Protection of Aid Workers: Principled Protection and Humanitarian Security in Darfur', (2010) NUP Working Paper 770 *<kms1.isn.ethz.ch/.../ISN/.../SIP-02-10-WP-770-Eckroth%5B1%5D.pdf>* accessed 29th May 2014.
36 'WHO Save Lives': Make Hospitals Safe in emergencies' 2009 *<http://www.who.int/hac/events/7april2009/en/index.html>* accessed 9th June 2014.
37 World Medical Association Regulations in Times of Armed Conflict 1956.

5.2 Role of ICRC For The Protection of Health Care During Armed Conflict

The ICRC is an international organisation for which respecting and protecting health care is a major concern. Over the years, ICRC has used media to raise consciousness about the growing safety need for the health care workers after the heightened attention on this issue in the Gaza conflict.[38] The ICRC launched a communication campaign to raise awareness of the problems associated with health care in times of armed conflict, and to remind all concerned parties of the need to respect and protect health care personnel, their transport and facilities and ensure access for the wounded and sick.[39] Recently, Merlin, a UK based international medical charity, has produced a campaigning paper exploring the impact of conflict on health workers and the damage this has had on achieving the Millennium Development Goals.[40] Their campaign, "Hands Up For Health Workers" calls for national governments and international donors to fund and implement comprehensive national health workforce plans, to ensure health workers in crisis countries are trained, paid, supported, equipped and protected.[41]

The HELP[42] course, for example, is a multicultural and multidisciplinary learning experience created to enhance professionalism in humanitarian assistance programmes carried out in emergencies. It was created in 1986 by the International Committee of the Red Cross (ICRC)[43] with a purpose to provide the necessary public health tools and an overview of the main legal instruments, particularly international humanitarian law and human rights law, professional codes and declarations that form the basis for decision-making in humanitarian operations and respect the dignity of the victims they seek to assist.

5.3 Reasons for Violations

Actually the reason of violation is mainly no strict sanctions. When states are violating the laws then who will ensure the respect for laws related to health care system? The true reason for these attacks against and misuse of health-care workers, patients, organisations, and their symbols has not been entirely established.[44] The obvious explanation is that terrorists use ambulances, apparently pregnant women, and others as a convenient ways to deliver explosives in a war in which they feel that any action is justified.[45] The abuse of this neutrality is majorly done with the aim of having some advantage over the other party. The civilians and the medical personnel are considered to be part of the armed conflict. Hence, attacking them would mean

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38 Michelle Rockwell, 'OPT- New TV Spot: Health Workers Save Lives- Keep them Safe', 2009 <*http://reliefweb.int/node/293052*> accessed 29th September 2014.

39 Josephine Osterbery and Jean-Charles Chamois, 'Request for Proposal- Communication Campaign for the Project "Healthcare in Danger"' ICRC 2010 <*www.mondofragilis.net/ content/.../RFP2010-09-02-CIM-HEALTH-V3.pdf*> accessed 3rd October 2014.

40 <*www.who.int/entity/workforcealliance/news/agravenewworld_report.pdf*> accessed 5th June 2011.

41 *Ibid.*

42 Heath Emergencies in Large Populations. See Further *www.icrc.org/Web/eng/siteeng0.nsf/ html/help_course?*

43 ICRC works to protect and assist vicitims of armed conflict and other situations of violence. See *http://www.icrc.org/eng/index.jsp*

44 *Ibid.*

45 *Ibid.*

attacking the enemy and augmenting the loss caused to them. Such actions are **"part of generalised violence directed towards civilians to achieve a political goal, e.g. ethnic cleansing, government destabilisation, control or forced movements of populations, or demoralisation of a population sympathetic to an enemy".**[46] Some attacks on health facilities, health professionals or patients are aimed at preventing injured combatants from receiving healthcare. In violation of humanitarian law, in particular the Geneva Conventions and their Additional Protocols, warring factions attack wounded or sick individuals, threaten, intimidate and attack nurses and doctors, attack health facilities, especially hospitals, attack ambulances transporting sick or injured patients and illegally use health facilities for exacerbating conflict.[47] In effect, this targeting of health facilities and patients results in the use of patients as human shields.[48] After reviewing three global sources of human rights reports in armed conflicts for 2003–08, three major trends could be identified in such assaults: attacks on medical functions seem to be part of a broad assault on civilians; assaults on medical functions are used to achieve a military advantage; and combatants do not respect the ethical duty of health professionals to provide care to patients irrespective of affiliation.[49] These hostile acts are detrimental to the international legal principles regulating armed conflict.

6.1 Consequences of the Lack of Health Care During The Armed Conflict

Due to lack of health care during armed conflict it had worst consequences like loss of life, natural disasters, epidemics, starving of family due to loss of earning members, women & children were left as victims, sufferers and soft targets of war. All these was bringing degradation in several forms thus demanded an action, a right to do, to work, to improve and with sole objective to solve the cause i.e. the cause of health care during armed conflict and thus there was formation of International & National Red Cross society. There was also the need of development of law in order to protect human life and human dignity during armed conflict and so that the poor children and victim should never result as being the "Sufferers of war" or "Poor victims of hatred". Thus everyone joined hand to solve one cause i.e. "Health care during armed conflict". Whenever there was war there was need of physicians, trainees, nurses to provide medical care to wounded, sick soldiers. These all needed an organization to regulate, control and administer thus came forward International Red Cross, Red Crescent Movement, World Health Organization, governments of the concerned nations, several protocols, regulations, International Humanitarian law, International Human rights law which all worked for one cause i.e. Health care of Armed Conflict by protecting life and dignity of Individuals without violating medical ethics do no harm principle, without any discrimination

Water is the most important commodity that has to be managed at the times of armed conflict. Lack of clean water and amenities can lead to epidemics claiming several lives. Thus, water and habitat restoration activities are of major importance.

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46 Slim, Hugo, *Killing Civilians: Method, Madness and Morality in War* (CUP 2008), ISBN 978-0-231-70037-5.
47 *Supra* note 35.
48 *Ibid.*, 35.
49 *Ibid.*, 35.

6.1.1 Mental Health

The mental health and psychosocial consequences of conflict can be felt broadly in populations and more deeply affect children, people who have pre-existing mental health conditions, and individuals who have been subjected to gender-based violence, forcible recruitment into armed groups, discrimination, or social isolation. The damage which is done is in the form of post-traumatic stress disorder, depression, and other conditions, as well as loss of community cohesion.

The post conflict period includes the period which is the result of the war. Fear of sexual violence, joblessness, ongoing displacement and other factors may exacerbate or bring new sources of distress and are the examples of the post conflict violence. The psychological responses of individuals exposed to the stresses stemming from war and disruption of social networks vary considerably and are not homogenous in all the circumstances. This section deals with some of the most vulnerable groups.

7.1 Conclusion

The armed conflicts are triggered between the states or within a state because of political, ethnicity or socio-economic reasons. According to Jean Jacques Rousseau, "War is between the states it has nothing to do with the individuals".

Even then the army on the field does not believe in Jean Jacques Rousseau. Due to that the armed conflict leads to terrible violence in the territories of such state where the conflicts actually takes place. The areas under the conflicts are severally destroyed during the conflicts. The whole social network, economic structure, infrastructure of the state gets perplexed. This situation leads to unemployment, poverty, scarcity of foods and other basic necessities. In this situation the health sector is worst hit. The combatants or enemy forces strikes the hospitals, medical staffs, blow up the roads and other transportation and communication means; this creates the acute shortage of medical staffs, medication, equipments and emergency medical services. It is done to lessen the resistance among the forces as well as the civilians. The mortality and morbidity remain high even years after the conflict because of the long-lasting effects of war such as poverty, unemployment. Further, in the developing or least developing countries the health sector is itself depraved and the armed conflict totally destroys it. Thus, armed conflict whether internal or international put a very bad impact on health care system.

The various international legal instruments have been passed for the protection of the life and health of the soldiers, combatants, civilians including children and women. The Geneva Conventions (four) are the main conventions regarding the protection of life and health, these conventions provide for the protection and care of the wounded and sick army men, the prisoners of war and the civilians. Children and women have also been provided special protection through various treaties/conventions such as Declaration on the protection of women and children in emergency and armed conflict, 1974. But, inspite of the protection guaranteed in these instruments the human right 'to life and to live in health' are violated by the occupying power or enemy combatants/forces. The women are raped, children maimed and the medical staffs are attacked and shot dead. This causes serious health problems as well as

violation of human rights. This has been the condition in Afghanistan,[50] Iraq[51] and other Gulf regions.

This situation can be handled by compulsory legal enforcement of these international instruments. The conventions are although recognized but they do not have legal back-up. For the compulsory legal enforcement of the provisions of conventions on the conflicting party; international community shall impose economic sanction on the state, or the officials of the occupying power must be prosecuted, if the violation of convention on the protection and health care occur. Thus, in order to protect the right to live in health of people across the globe during conflicts, the conventions and IHL dealing with it must be effectively operated.

Efforts must be made by the government of the conflicting states to lessen the effects of conflicts by providing necessary health care facilities to the conflict affected people. It is not only a **legal duty** on them but the states have a **moral responsibility** to ensure them such services. The governmental and the non-governmental agencies engaged in providing relief to the war struck area must give aid to the government of the conflicting state to cope up with the problem of the devastating effects of war on the health care, as the whole system of the government of the conflict struck state is damaged and it is very difficult for them to provide protection and assurance to the people on its own. Especially, the least developed or developing nations already have a poor economy and infrastructure and due to war it gets worsened.

The enforcement of the IHL principles is very important as the Statute of the International Criminal Court (ICC) has been established as an enforcement mechanism. ICC explicitly mentions the denial of humanitarian assistance as an example of an act that may lead to starvation.[52]

> I hope that the implementation through International Criminal Court may contribute to the prevention of denial of medical aid to the needy people in the armed conflict, it will ensure that the Geneva Conventions will be protected in case of the war and medical aid should reach in time in case the national judicial system genuinely unable or unwilling to act in relation to individuals over whom they would normally have jurisdiction. As the International Criminal Court (ICC) is having a complementary jurisdiction that means that if national laws are incompetent and incapable to deal with the situation then the ICC may have the jurisdiction to deal with situation.

For the right to health be respected, national authorities must ensure the correct functioning of health services and that population has access to them. Humanitarian organizations must come forward in such situations to ensure proper functioning of health services. They should remind authorities of their responsibilities by referring to the rules of international humanitarian law and human rights law, in particular when the authorities appear insufficiently concerned about the population. Another

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50 Social determinants of health in countries in conflict, WHO Regional Office for the Eastern Mediterranean, Cairo, 2008, p. 39.

51 *Ibid.*

52 Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions" is a serious violation of the laws and customs of war.

assistance they can provide is by supporting health services with a view to assisting them in responding to the needs of the civilian population. But still, it is very important that the authorities have fundamental functional capacity and are willing to cooperate with humanitarian organizations. The interface between the authorities and humanitarian organizations depends on the legal frameworks. Thus, in non-international armed conflicts, humanitarian organizations may offer their services to the authorities based on the right of initiative, and on the political willingness of the authorities to give access to the people to humanitarian organizations.

REGULARISATION IN PUBLIC APPOINTMENTS – JUDICIAL TREND

Dr. Shipra Kaushal*

Right to employment is not a fundamental right as provided by the Constitution of India. Nonetheless, if a person has requisite qualification, he has an equal right to be considered fairly for a particular post. The Courts are often confronted with a number of issues pertaining to legality of appointments and their subsequent regularisation. On several occasions the Supreme Court has laid down various guidelines and directives in this regard as a safeguard against subversion of the constitutional scheme that provides for a proper selection in the manner recognised by the relevant legislation in consonance with the relevant provisions of the Constitution.

1.1 Back Door Entry in Public Employment

Ad hoc appointments, a convenient way of entry usually from backdoor, at times even in disregard of rules and regulations, are comparatively a recent innovation to the service jurisprudence. They are individual problems to begin with, become a family problem with the passage of time and end with human problems in the Court of Law.[1] Many a times it leads to persons who get employed, without the following of a regular procedure or even through the backdoor or on daily wages, approaching the courts, seeking directions to make them permanent in their posts and prevent regular recruitment to the posts concerned. The Courts have not always kept the legal aspects in mind and have occasionally even stayed the regular process of employment being set in motion and in some cases, even directed that these illegal, irregular or improper entrants be absorbed into service.

A class of employment which can only be called "litigious employment" has risen like a phoenix seriously impairing the constitutional scheme. Such orders are passed apparently in exercise of the wide powers under Article 226 of the Constitution. It seems to be an issue of grave concern that needs deliberation that whether the wide powers under Article 226 of the Constitution are intended to be used for a purpose certain to defeat the concept of social justice and equal opportunity for all, subject to affirmative action in the matter of public employment as recognised by our Constitution.[2]

The public employment is a facet of right to equality envisaged under Article 16 of the Constitution of India and that the recruitment rules are framed with a view to give equal opportunity to all the citizens of India entitled for being considered for recruitment in the vacant posts.[3] Several provisions in the Constitution of India empower the Parliament and the State Legislature to make law in respect of recruitment, with Article 309 covering all kinds of public appointments.

Even before the rules are made, appointments to public post can be made by the exercise of executive power of the government in relation to all matters with respect

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1 *Karnataka State Private College Stop-Gap Lecturers Assn. v. State of Karnataka,* (1992) 2 SCC 29.

2 *Secy. of State of Karnataka v. Umadevi, (2006) 4 SCC 1* at pp. 17-18.

3 *Mehar Chand Polytechnic v. Anu Lamba,* (2006) 7 SCC 161 at p. 166.

to which the legislature has the power to make laws. Even where the rules exist, they can be supplemented by administrative instructions, which can only fill up the gaps in the statutory rules but cannot amend the statutory rules.[4] In any case the rules cannot be dispensed with or relaxed to the extent to make them nugatory. Whenever there is relaxation of operation of any rule, regard must be given to the causation of undue hardship. Moreover, the authority concerned has to record satisfaction while dispensing with or relaxing any rule to such an extent and subject to such conditions as it may consider necessary for dealing with the case in a just and equitable manner. It cannot be exercised in an arbitrary manner so as to dispense with the procedure of selection in entirety in respect of a particular class, for it has to be strictly construed and there has to be a positive foundation for exercise of such power, otherwise it cannot withstand the scrutiny of Article 14 of the Constitution of India.[5] Administrative instructions are invalid to the extent of inconsistency with the statutory rules and would be void *ab-initio* or would have to be read down to make them in consonance with the statutory provisions. Hence, recruitment can be made only in accordance with the various modes prescribed in the statutory rules or the administrative instructions, as the case may be.

The creation and abolition of posts, formation and structuring/restructuring of cadres, prescribing the source and mode of recruitment and qualifications and criteria of selection, *etc.* are matters that fall within the exclusive domain of the employer. Every sovereign Government has within its own jurisdiction right and power to create whatever public offices it may regard as necessary to its proper functioning and its own internal administration. Undoubtedly, the assessment of the need to employ a certain number of people to discharge a particular responsibility of the State under the Constitution is always with the executive Government of the day subject to the overall control of the Legislature. Nonetheless, it is open to examination by the Constitutional Court regarding the accuracy of the assessment of the need.[6] Although the decisions of the employer to create or abolish posts or cadres or to prescribe the source or mode of recruitment and laying down the qualification, *etc.* is not immune from judicial review, the Court is always extremely cautious and circumspect in tinkering with the exercise of discretion by the employer. The Court cannot sit in appeal over the judgment of the employer and ordain that a particular post or number of posts be created or filled by a particular mode of recruitment. The power of judicial review can be exercised in such matters only if it is shown that the action of the employer is contrary to any constitutional or statutory provisions or is patently arbitrary or vitiated by *malafides*. As a model employer the Government must conduct itself with high probity and candour with its employees.[7]

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4 *State of Haryana v. Shamsher Jang Bahadur,* (1972) 2 SCC 188; *Guman Singh v. State of Rajasthan,* (1971) 2 SCC 452.

5 *Bhupendra Nath Hazarika v. State of Assam,* (2013) 2 SCC 516 at p. 539.

6 See *S.S. Dhanoa v. Union of India,* (1991) 3 SCC 567. In this case the Supreme Court did examine the correctness of the assessment made by the executive government. It was a case where Union of India appointed two election Commissioners in addition to the Chief Election Commissioner just before the general elections to the *Lok Sabha*. Subsequent to the elections, the new government abolished those posts. It was concluded by the Court on the basis of record that there was no need for the said appointments.

7 *Balram Gupta v. Union of India,* 1987 Supp SCC 228 at p. 236.

Various appointments at various levels have been tested on the touchstone of Articles 14 and 16 of the Constitution of India in the various High Courts and the Supreme Court of India.

2.1 Regularisation in Public Appointment: Recent Judicial Trend

In A. *Umarani v. Registrar, Coop. Societies*,[8] the Supreme Court depreciated the act of the State to make appointment in violation of the statutory provisions, even by resorting to Article 162 of the Constitution of India and thus clarified that no regularisation is permissible in exercise of the statutory power conferred under Article 162 of the Constitution if the appointments have been made in contravention of the statutory rules.[9]

Initially in *Dhirendra Chamoli*,[10] *Bhagwati Prasad*[11] to *Piara Singh*,[12] the Apex Court endeavoured to expand the meaning of the equality clause enshrined in the Constitution and ordained that employees appointed on temporary/*adhoc*/daily-wage basis should be treated at par with regular employees in the matter of payment of salaries and allowances and that their services be regularised. In some cases, the Courts have also directed the State and its instrumentalities/agencies to frame schemes for regularisation of the services of such employees.[13]

On several occasions, the schemes framed by the Government and public employer for regularisation of temporary/*ad-hoc*/daily-wage/casual employees irrespective of the source and mode of their appointment/engagement have also been approved.[14]

In *State of Haryana* v. *Piara Singh*,[15] the Supreme Court while reiterating that appointment to the public posts should ordinarily be made by regular recruitment through the prescribed agency and that even where *ad hoc* or temporary employment is necessitated on account of the exigencies of administration, the candidate should be drawn from the employment exchange and that if no candidate is available or sponsored with the employment exchange, some method consistent with the requirements of Article 14 of the Constitution should be followed by publishing notice in appropriate manner, calling for applications and all those who apply in response thereto should be considered fairly, proceeded to observe that if an *ad hoc* or temporary employee is continued for a fairly long spell, the authorities are duty-bound to consider his case for regularisation subject to his fulfilling the conditions of eligibility and the requirement of satisfactory service. The propositions laid down in *Piara Singh's* case were followed by almost all the High Courts for directing the State Governments and public authorities concerned to regularise the services of *ad-hoc*/temporary/ daily-wage employees only on the ground that they have continued for a particular length of time. In some cases, the schemes framed for regularisation of the services of the backdoor entrants were also approved. The Supreme Court in *Piara Singh* has favoured that the authorities must consider a case for regularization

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8 *A. Umarani v. Registrar, Coop. Societies,* (2004) 7 SCC 112.
9 *Id.*, at p. 126.
10 *Dhirender Chamoli v. State of U.P.,* (1986) 1 SCC 637.
11 *Bhagwati Prasad v. Delhi State Mineral Development Corporation,* (1990) 1 SCC 361.
12 *State of Haryana v. Piara Singh,* (1992) 4 SCC 118.
13 *Ibid.*
14 See *Gujarat Agricultural University v. Rathod Labhu Bechar,* (2001) 3 SCC 574.
15 (1992) 4 SCC 118.

in case an *ad hoc* or temporary employee is continued for a fairly long spell provided he is eligible and qualified according to the rules and his service record is satisfactory and his appointment does not run counter to the reservation policy of the State.

While pointing to the work-charged employees and casual labour, the Court suggested to make an effort to regularise them as far as possible and as early as possible subject to their fulfilling the qualifications, if any, prescribed for the post and subject also to availability of work. The Court further elicited the presumption of the need for the services of the said casual labour if he continued for a fairly long spell — say two or three years. The Court further noted that in such a situation, it becomes obligatory for the authority concerned to examine the feasibility of his regularization. Taking a humanitarian view, the Court maintained that authorities ought to adopt a positive approach coupled with an empathy for the person.[16]

Unfortunately, this was misused by the Executive to make appointments on 240 days basis and regularise the services of such people. The Executive exploited Articles 14 and 16 as also the provisions contained in the Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 with impunity. Thousands of persons were employed/engaged throughout the length and breadth of the country by backdoor methods. Those who could pull strings in the power corridors at the higher levels managed to get the benefit of public employment by trampling over the rights of other eligible and more meritorious persons registered with the employment exchanges. A huge illegal employment market developed in different parts of the country and rampant corruption afflicted the whole system.[17]

Such illegal and backdoor appointments lead to a rethink with the result that Courts refusing to entertain claims of *adhoc*/temporary employees for regularisation. In *Madhyamik Shiksha Parishad, U.P. v. Anil Kumar Misra*,[18] the Hon'ble Supreme Court dealt with a situation where there were no sanctioned posts in existence to which they could be said to have been appointed and the assignment was only an *adhoc* one which anticipatedly spent itself out. While rejecting the status of workmen on the analogy of the provisions of the Industrial Disputes Act, 1947, importing the incidents of completion of 240 days' work the Court clarified that the legal consequences that flow from work for that duration under the Industrial Disputes Act, 1947, are entirely different from what, by way of implication, is attributed to the present situation. The completion of 240 days' work does not, under that law import the right to regularisation. It merely imposes certain obligations on the employer at the time of termination of the service. It is not appropriate to import and apply that analogy, in an extended or enlarged form here.[19]

A Constitution Bench of the Supreme Court in a landmark judgment *Secy., State of Karnataka* v. *Umadevi*[20] adverted to the theme of constitutionalism in a system established on the rule of law, expanded the meaning given to the doctrine of equality in general and equality in the matter of employment in particular, dealt with multifaceted problems including the one relating to unwarranted fiscal burden on the

16 *Ibid.*
17 *Official Liquidator v. Dayanand,* (2008) 10 SCC 1.
18 (2005) 5 SCC 122.
19 *Id.*, at p. 123.
20 (2006) 4 SCC 1.

public exchequer created on account of the directions given by the Courts for regularisation of the services of persons appointed on purely temporary or *adhoc* basis or engaged on daily wages or as casual labourers. The Constitution Bench considered the question whether the State can frame a scheme for regularisation of the services of *adhoc*/temporary/daily wager appointed in violation of the doctrine of equality or the one appointed with a clear stipulation that such appointment will not confer any right on the appointee to seek regularisation or absorption in the regular cadre and whether the Court can issue mandamus for regularisation or absorption of such appointee and answered the same in negative.

While analyzing whether right to life includes within its ambit right to employment, the Bench declined to accept the argument based on Article 21 of Constitution of India. The Court clarified that if right to employment is a part of right to life, then it would stand denuded by the preferring of those who have got in casually or those who have come through the backdoor. The Court reminded that the obligation cast on the State under Article 39(*a*) of the Constitution is to ensure that all citizens equally have the right to adequate means of livelihood and stressed that it will be more consistent with that policy if the courts recognise that an appointment to a post in government service or in the service of its instrumentalities, can only be by way of a proper selection in the manner recognised by the relevant legislation in the context of the relevant provisions of the Constitution. The Court further noted that in the name of individualising justice, it is also not possible to overlook the constitutional scheme and the right of the numerous as against the few who are before the court. The Directive Principles of State policy have also to be reconciled with the rights available to the citizens under Part III of the Constitution and the obligation of the State to one and all and not to a particular group of citizens.[21]

The Court after making reference to numerous Constitutional Bench judgments and elucidating the concept of the "rule of law" as the core of the Constitution, proceeded to hold that equality in public employment is a basic feature of the Constitution of India and cannot be destroyed at any cost. Therefore, consistent with the scheme for public employment the Court succinctly observed that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. The Court clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the Court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of *ad hoc* employees who by the very nature of their appointment, do not acquire any right.[22] The Bench further cautioned the Courts to ensure that they

21 *Id.*, at p. 36.
22 *Ibid.*

do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates.[23]

Dealing with the argument of legitimate expectation the Court clarified that the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees when the engagement is not based on a proper selection as recognised by the relevant rules or procedure as he is aware of the consequences of the appointment being temporary, casual or contractual in nature. In such circumstances it cannot also be held that the State has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post.[24]

Declining to treat unequals as equals, the Constitution Bench in clear terms held that the appointments have to be consistent with Articles 14 and 16 of the Constitution of India and the relevant rules. Those who are working on daily wages formed a class by themselves. They cannot claim that they are discriminated as against those who have been regularly recruited on the basis of the relevant rules. No right can be founded on an employment on daily wages to claim that such employee should be treated on a par with a regularly recruited candidate, and be made permanent in employment. There is no fundamental right in those who have been employed on daily wages or temporarily or on contractual basis, to claim that they have a right to be absorbed in service and they cannot be said to be holders of a post, since, a regular appointment could be made only by making appointments consistent with the requirements of Articles 14 and 16 of the Constitution. The right to be treated equally with the other employees employed on daily wages, cannot be extended to a claim for equal treatment with those who were regularly employed. That would be treating unequals as equals.[25]

The Court has to ascertain whether the person seeking relief by way of a writ before it to be regularised had any legal right to be enforced. In the light of the very clear constitutional scheme, if the employees have never been appointed in terms of the relevant rules or in adherence of Articles 14 and 16 of the Constitution it cannot be said that they have a legal right to be made permanent. The State cannot be permitted to perpetuate an illegality in the matter of public employment in negation of the constitutional scheme.[26]

Recognising the distinction between 'irregular appointments'[27] and 'illegal appointments' the Court, as a one-time measure, proceeded to direct the Union and the State Governments to regularise the services of irregularly appointed persons who had worked for ten years or more but without the intervention of orders of the courts or of tribunals in duly sanctioned posts. The Court observed that the process must be

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23 *Id.*, at p. 37.
24 *Id.*, at p. 39.
25 *Id.*, at p. 40.
26 *Ibid.*
27 See *State of Mysore v. S.V. Narayanappa*, AIR 1967 SC 1071; *R.N. Nanjundappa v. T. Thimmiah* (1972) 1 SCC 409; *B.N. Nagarajan v. State of Karnataka (1979) 4 SCC 507.*

set in motion within six months from the date of judgment. The Court further clarified that this judgment will not reopen any regularisation already made, provided it is not *sub judice*; with a clear indication that there should be no further bypassing of the constitutional requirement and regularising or making permanent, those not duly appointed as per the constitutional scheme.[28]

The Constitution Bench impliedly overruled various important judgments running counter to the principles settled by it and such judgments would no longer be precedents.[29]

In *Punjab Water Supply & Sewerage Board* v. *Ranjodh Singh*,[30] the Supreme Court categorically held that any appointment made without following the procedure laid down in the statutory rules and made in a manner contrary to the constitutional provisions is void. The Court while holding that the respondents had a legal right in relation to their claim for regularisation, noted that the High Court failed to issue a writ of mandamus which it was obligated to do. It proceeded to issue the directions only on the basis of the purported policy decision adopted by the State. The Court further noted that a policy decision cannot be adopted by means of a circular letter, even a policy decision adopted in terms of Article 162 of the Constitution of India in that behalf would be void. The Court observed as follows:

> Any departmental letter or executive instruction cannot prevail over statutory rule and constitutional provisions. Any appointment, thus, made without following the procedure would be ultra vires.[31]

The Supreme Court in *State of Karnataka v. M.L. Kesari*[32] noted that *Umadevi's* case casts a duty upon the Government or instrumentality concerned, to take steps to regularize the services of those irregularly appointed employees who had served for more than 10 years without the benefit or protection of any interim orders of courts or tribunals, as a one-time measure. The object behind it is to ensure that the departments/instrumentalities do not perpetuate the practice of employing persons on daily wage/*ad hoc*/casual basis for long periods and then periodically regularize them.[33]

In *Nihal Singh v. State of Punjab*,[34] the *ratio decidendi* of *Umadevi's* case was examined by highlighting that the Apex Court in the said case considered the legality of the action of the State in resorting to irregular appointments without reference to the duty to comply with the proper appointment procedure contemplated by the Constitution. The Union, the States, their departments and instrumentalities resorted to irregular appointments, especially in the lower rungs of the service, without reference to the duty to ensure a proper appointment procedure through the Public Service Commissions or otherwise as per the rules adopted and to permit these irregular appointees or those appointed on contract or on daily wages, to continue year after year, thus, keeping out those who are qualified to apply for the post

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28 *Supra* note 20 at p. 42.
29 For example, *Grih Kalyan Kendra Workers' Union v. Union of India*, (1991) 1 SCC 619; *State of Haryana v. Piara Singh*, (1992) 4 SCC 118; *Arun Kumar Rout v. State of Bihar*, (1998) 9 SCC 71.
30 *Punjab Water Supply & Sewerage Board v. Ranjodh Singh*, (2007) 2 SCC 491.
31 *Ibid.*
32 (2010) 9 SCC 247.
33 *Id.* at p. 251.
34 2013 (11) JT 289.

concerned and depriving them of an opportunity to compete for the post. The Court while recognising the authority of the State to make temporary appointments engaging workers on daily wages declared that the regularisation of the employment of such persons which was made without following the procedure conforming to the requirement of the Scheme of the Constitution in the matter of public appointments cannot become an alternate mode of recruitment to public appointment.

In *Nihal Singh* it was noted that even by applying the principles laid down in *Umadevi's* case the appellants would be entitled to be absorbed into the services of the State on permanent basis as the initial appointment of the appellants was made in accordance with the statutory procedure contemplated under the Police Act, 1861. It was in pursuance of a policy made by the Government to enrol the ex-servicemen to guard the life and property of the Government employees. All the petitioners being ex-servicemen enrolled themselves in the employment exchange, who were called upon by the police department to give their option to be enrolled in as Special Police Officer under the said Act. The Court referred to the judgement *Union of India v. N. Hargopal*,[35] wherein such a procedure making recruitments through the employment exchanges was held to be consistent with the requirement of Articles 14 and 16 of the Constitution of India. The Court refuted the submission that employment exchanges do not reach everywhere by drawing analogy with advertising vacancies in the daily press that it was also equally ineffective as it did not reach everyone desiring employment.

The Court further opined that the process of selection adopted in identifying the appellants was not unreasonable or arbitrary in the sense that it was not devised to eliminate the other eligible candidates. The Court in *Umadevi's* case was dealing with appointments made without following any rational procedure in the lower rungs of various services of the Union and the States.

The Supreme Court in *Alka Ojha v. Rajasthan Public Service Commission*[36] was confronted with a different issue wherein it was submitted before the Court for the invocation of Article 142 of the Constitution to direct the competent authority to allow the petitioners to continue in service because they had already completed more than five years' service. Nonetheless, the Court found no merit in the submission and firmly noted that the power under Article 142 could not be exercised for conferring legitimacy to the appointment of the petitioners who were not eligible to be considered for selection. By declining to regularize them the Court observed that if the submission was accepted in this manner, every illegal appointment would get regularized by judicial fiat and those who were eligible and more meritorious would be deprived of their constitutional right to be fairly considered for selection and appointment.[37]

In *Official Liquidator v. Dayanand*,[38] the Supreme Court noticed various judgments of its different benches taking a view contrary to *Umadevi*, followed the ratio of law laid therein and held that those cases were illustrative of non-adherence to the rule of judicial discipline which is *sine qua non* for sustaining the system. The Court

35 (1987) 3 SCC 308.
36 (2011) 9 SCC 438.
37 *Id.* at pp. 449-50.
38 (2008) 10 SCC 1.

expressed its concern over the substantial increase in the number of cases involving violation of the basics of judicial discipline, despite several pronouncements on the subject. The Court noted with distress that the High Courts refuse to follow and accept the verdict and law laid down by coordinate and even larger Benches by citing minor difference in the facts as the ground for doing so. In this background, the Hon'ble Court observed as follows:

> [I]t has become necessary to reiterate that disrespect to the constitutional ethos and breach of discipline have grave impact on the credibility of judicial institution and encourages chance litigation. It must be remembered that predictability and certainty is an important hallmark of judicial jurisprudence developed in this country in the last six decades and increase in the frequency of conflicting judgments of the superior judiciary will do incalculable harm to the system inasmuch as the courts at the grass roots will not be able to decide as to which of the judgments lay down the correct law and which one should be followed.[39]

It is amply clear that the requirement of being employed through proper channel cannot be relaxed in an arbitrary and cavalier manner for the benefit of a few persons.[40] In view of this in a recent case *Chief Executive Officer, Pondicherry Khadi and Village Industries Board v. K. Aroquia Radza*,[41] the Supreme Court observed that the respondents who had taken co-terminous appointment with full understanding of the same cannot be permitted to challenge their disengagement when the tenure of the Chairman was over.

A perusal of the above noted trend makes it amply clear that the Courts have held that illegality has no basis and is fundamental to the Constitution of India and also the governance of the State. Every citizen is bound to abide by the Constitution of India. No person has any right, legal or fundamental, to be regularised. Such legitimate expectation is not justifiable. Recruitment to a public post can only be in terms of the Statutory Rules or Administrative Instructions in absence of such rules. In any case, the same has to be in accordance with the constitutional framework. No policy can run counter to it. "Rule of Law" has to prevail. One can have sympathy with persons who are not regularised even after many years of service. However, sympathy and emotions cannot circumvent the constitutional framework and confer no right in any such person. Accordingly, it is hoped that the latest judicial trend will stop back door entries and help in cleansing the system of filling of posts through regularisation.

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39 *Id.*, at p. 57.

40 *Union of India v. Dharam Pal,* (2009) 4 SCC 170; see also *Chief Executive Officer, Pondicherry Khadi and Village Industries Board v. K. Aroquia Radza*, (2013) 3 SCC 780.

41 (2013) 3 SCC 780. In this case the respondents were appointed as personal staff members of the Chairman of the Board on his persuasion solely on coterminous basis and were not sponsored by the employment exchange nor did they compete against other eligible candidates for appointment.

PRE-NUPTIAL AGREEMENTS IN INDIA

Dr. Kamaljit Kaur*

1.1 Introduction

> Marriage is an adjustment between the biological purposes of nature and sociological purposes of mam.... It is an institution; it is a device for the expression and development of love.
>
> **Dr. S. Radha Krishnan**

Marriage and sonship constitute some of the unique chapter in the literalegis of ancient Hindu law. As early as the time of Rig Veda marriage had assumed the sacred character of a sacrament and sanction of religion had heightened the character and importance of the institution of marriage.[1] From the ancient time marriage is considered necessary sacrament to discharge one's religious & secular obligations in Hindu law. The concept of marriage has under gone many changes since its inception. In modern India where the institution of marriage is not just governed by customs but also by set of codified laws,[2] the concept of prenuptial agreement has made an attempt to give a new dimension to this sacred institution. Prenuptial agreements do not find any recognition under existing matrimonial legislation or under other civil codified laws. Hence, premarital settlements between Hindus are alien to the present legal system.[3] Such agreements are not common in India and are contrary to India customs and views about marriage. Nevertheless, the global publicity about celebrity prenuptial agreements is encouraging more affluent people to consider the idea in India.[4] Apart from being against the sacramental value of marriage, Pre-nuptial agreements have many advantages for couples. Pre-nuptial agreements give the opportunity to couples to settle the terms in advance in accordance with law & public policy. It is a means of safeguarding individual interests which helps the couple to avoid embittered divorce. Prenuptial agreements not only includes the terms and conditions that a couple is supposed to abide by incase of they decided to get separated rather such agreements can also incorporate the clause regarding their rights and duties towards each other in their marriage. It is need of the hour to incorporate the law on pre-nuptial agreements under current matrimonial legislation. For this purpose a Draft Amendment Bill has been proposed in this project.

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1 The Rig Veda pronounces some impressive texts: after completing the seventh step (Saptapadi) the bridegroom said: 'with seven steps we have become friends (Sakha). May I attain to friendship with thee: may I not be separated from thy friendship.' Shatapathabrahmana speaks of the wife as the half o one's self – 'ardho ha vaeshaatmano' as quoted by" Mulla's Principles of Hindu Law", Vol. II, Twentieth Edition, ed. By Sunderlal T. Desai, (LexisNexis Butterworths, New Delhi) at p. 3.

2 The set of codified laws is referred to the various matrimonial legislations like, *Hindu Marriage Act*, 1955, *Special Marriage Act*, 1954, etc.

3 Anil Malhotra, *"Opening prenuptial window for divorce"* in *http://familylawmavin.blogspot.in/2013/08/opening prenuptial-window-for-divorce.html* (last accessed: 13 august 2014).

4 Jeremy D.Morley, "Prenuptial Agreements Around the World" in http://www.international preuptials.com /prenups-worldwide.html (last accessed: 12 august 2014).

2.1 Concept of Pre-Nuptial Agreements

Premarital agreements are agreements parties enter into when they are about to marry. In the standard, if somewhat archaic, formulation, the agreements are "in contemplation of marriage." They concern the rights of the parties during the marriage and/or upon the dissolution of the marriage by death or divorce.[5] Most significantly, spouses-to-be have relied on the premarital agreement for financial planning for the contingency of divorce. For this purpose, the parties agree pre-nuptially on property distribution, alimony, and other matters to take effect in the event of divorce.[6] Persons about to marry have also used the premarital agreement as a marriage contract in which the parties define their mutual expectations about their ongoing marriage.[7] A pre-nuptial agreement also includes rights to maintenance and child support during and after the dissolution of a marriage.[8] Apart from Documenting and agreeing upon division of property alone, pre-nuptial agreement can also include the clause regarding child custody, cheating and philandering or negotiating other rights as means of safeguarding individual interests which spare the couple an embittered separation.[9] The general view of premarital agreements derives in large part from their perceived purpose. One commentator has stated that "the purpose and effect of most premarital agreements is to protect the wealth and earnings of an economically superior spouse from being shared with an economically inferior spouse."[10] Other possible purpose[11] of such agreements include:

1. Ensuring that children from a prior marriage retain certain family wealth, despite possible claims by the new spouse:
2. Assuring the economically weaker spouse-to-be that he or she will have adequate economic protection after divorce;
3. Attempting to make any eventual divorce simpler and less contentious; and
4. Assuring that certain family heirlooms or family wealth stay with in a family upon divorce.

3.1 Status of Pre-Nuptial Agreements Under International Law

Under the international law, pre-agreements are valid & enforceable.[12] The Hague Convention gives to the spouse the opportunity to sign more than one contract and to

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5 Brain Bix, Bargaining *In The Shadow Of Love: The Enforcement Of Premarital Agreements And How We Think About Marriage*, 40 Wm. & Mary L. Rev. 145 (1998), http://scholarship.law.wm.edu/wmlr/vol40/iss1/4 (PDF).

6 Suzanne Reynolds, Premarital Agreements, 13 Campbell L.Rev. 343 (1991) (PDF).

7 *Ibid.*

8 SakinaBabwani, *"Pre-nuptial pact can make splitsville life stressfree" in http://articles.economictimes.indiatimes.com/2011-06-16/news/29665652_1_nup-divorce-lawyer-indian - law* (last accessed: 13 august 2014).

9 IpshitaMitra "Happily married, but conditions apply!" inhttp://timesofindia.indiatimes.com/life-style/relationships/man-woman/Happily-married-but-conditions-apply/articleshow/12230194.cms (last accessed: 11 august 2014).

10 *Supra* note 5.

11 *Ibid.*

12 Hague Convention on the Law, Article 12. Applicable to Matrimonial Property Regimes 1978, states "the marriage contract is valid as to form if it complies either with the internal law applicable to the matrimonial property regime, or with the internal law of the place where it was made. In any event, the marriage shall be in writing, dated and signed by both spouses."

designate more than one applicable law.[13] In most of the countries around the world prenuptial agreements are enforceable and are binding upon the parties. Following are the countries[14] where prenuptial agreements are valid under their respective family law: Australia, Austria, Brizil, Canada, China, Russia, France, New Zealand, Philippines, Norway, Estonia, Finland, Germany, Greece, Hong Kong, Israel, Italy, Jamaica, Korea, Luxemburg, Netherlands, Portugal, Scotland, Singapore, South Africa, Spain, Sweden, Switzerland, Taiwan, Thailand, Turkey, Turkmenistan, Untied States Virgin Islands and Denmark.

4.1 Legal Status of Pre-Nuptial Agreements Under Indian Law

India is a unique democracy where law *& customs go hand in hand. Till date India has not received her nutrition supplement of Universal Civil Code to strengthen Indian republic by fostering her level of national unity and integrity but has been continuously kept on steroids of separate personal laws for different religions. On one hand in Mohammedan law marriage is considered as a contract whereas, on the other hand Hindu law views marriage both as a sacrament as well as contract. A reading of section of section 5 and 7 makes it clear that a Hindu marriage has both religious as well as secular aspects. Therefore, it is to be treated both as a sacrament and as a contract.[15] Even under the original Hindu law marriage was a sacrament as well as a contract which takes a form of a gift in the Brahma, a sale in the Asura and an agreement in the Gandharva.[16] The concept of prenuptial agreements does not find any recognition under existing matrimonial legislation or under other civil codified laws. Hence, premarital settlements between Hindus are alien to the present legal system.[17] It is well established fact that current matrimonial legislations are silent on this newly developed vaccination against the complicated embittered divorce, but, these prenuptial agreements stand valid under India contract act 1872 like any other contract which satisfies the essentials of section 10[18] of the same. If there be any prenuptial settlement, it would be tested like any other contract for its validity'. Essentially, it should not be opposed to public policy, must not violate principle of natural justice, shall not be fraudulent, and must recognize rights of both the parties as also should be executed freely, voluntarily, without coercion and upon full disclosure of all relevant facts.[19] Further a valid prenuptial agreement should not be opposed to public policy or in restraint of marriage or in restrain of legal proceedings. For instance any pre-nuptial agreement with an object of forbidding any spouse to remarry after divorce will not be considered as valid contract. Any pre-nuptial agreement that states that wife will not be maintained in case of a divorce or

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13 Alexandre Boiche "Marriage Contracts and Prenuptial Agreements in French law" in *http://www.iaml.org/cms_media/files/iamlmaterialabfrance.pdf?static=1* (last accessed: 14 august 2014).

14 *Supra* note 4.

15 *Mayne's Hindu Law and Usage,* Sixteenth Edition, ed by Justice Ranganath Mishra & Vijender Kumar, Bharat Law House. New Delhi at 181.

16 *Id.* at p. 126.

17 *Supra* note 3.

18 Section 10 of India Contract Act, 1872 provides, "what agreements are contracts – All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void."

19 Jaita Chatterjee, "Pre-nuptial agreements" in *http://www.legalserviceindia.com/article/1284-Pre-nuptial-agreements.html* (last accessed: 11 august 2014).

children shall not be maintained, etc, will not be valid. So a wife cannot be deprived of any right by a pre-nuptial agreement.[20]

Despite the limited value of a pre-nuptial agreement in India, it remains a good safeguard for both men and women. A pre-nuptial agreement helps alleviate frustrations that may come along with a divorce[21] Couple who are financially very strong and practical enter into pre-nuptial agreements to avoid washing dirty linen in public.[22] As of now, at best, prenuptial agreements can be used for the purpose of evidence, reference or for self-regulation but they do not stand valid in the court of law under the matrimonial legislations.[23]

5.1 Change in Society is Inevitable But in Law it is Necessary

'The law regulates relationships between people. It prescribed patterns of behavior. It reflects the vales of society. It is based on a given factual and social reality that is constantly changing.[24] Indeed, when social reality changes, the law must change too. Just as change in social reality is the law of life, responsiveness to change in social reality is the life of the law. It can be said that the history of law is the history of adapting the law to society's changing needs.'[25] The concept of marriage which was once considered to be purely sacramental in nature under Hindu law has evolved in its nature as semblance to both of a sacrament as well as a contract. With the rise in the level of rationality & objectivity, man's view about social institution such as marriage has changed. The changed notions which prompted social change have always been corroborated by change in laws to keep the society in the state of equilibrium. But the legal change is not only based on rationality but also on the notions of public welfare & in support of public policy. 'An unusual fact situation posing issues for resolution is an opportunity for innovation. The law does not remain static. It does not operate in a vacuum. As social norms and values change, law too has to be reinterpreted, and recast. Law is really a dynamic instrument fashioned by society for the purposes of achieving harmonious adjustment of human relations by elimination of social tensions and conflicts.'[26] In a modern progressive society with fast – changing social values and concepts, new heads of public policy need be evolved whenever necessary. Law cannot afford to remain static.'[27] If we agree on this fact that the society is changing its views about marriage and concept pre-nuptial agreements is the new change that has dawned upon our society. Then, the question that needs our attention is, "should the prenuptial agreements be enforced by bringing the change in current matrimonial legislations?" "Would Indian Sacramental perspective of marriage validate prenuptial agreements?" In order to reach answers for these questions, "It is worth considering what may be at stake. Among the issues the inquiry most obviously raised are the general move from status to contract in legal regulation of marriage, our attitudes toward marriage itself,

20 *Supra* note 8.
21 *Ibid.*
22 *Ibid.*
23 Jeremy D. Morley, *"Prenuptial Agreements in India" http://www.internationalfamilylawfirm.com/2012/04/prenuptial-agreements-in-india.html* (last accessed: 13 august 2014).
24 *Badshah v. Urmila Badshah Godses* (2014) I SCC 188.
25 *Ibid.*
26 *B.P. Achala Anand v. S. Appi Reddy* (2005) 3 SCC 313 : AIR 2005 SC 986 : (2005) 117 DLT 354.
27 *Ratan Chand Hira Chand v. Askar Nawaz Jung* AIR 1976 AP 112 : (1975) 1 APLJ (HC) 344 : ILR 1975 AP 843.

problems of rationality in long-term agreements, and the complex intersection of family law and gender equality."[28] The comment for which the legal historian Sir Henry Maine is most famous is: "We may say that the movement of the progressive societies has hitherto been a movement *from Status to Contract."* The idea is that while our rights and obligations once largely derived from our "status" as members of a class, caste, or ethnic group, or from a gender defined role within an extended family, in modern times more and more of our legal rights and obligations are the result of private, voluntary agreements.[29] The element of the progressive aspect of contract is very much evident in prenuptial agreements as well. Specifically, the partners might recognize that there are potential gains from contracting but decide not to initiate negotiations because doing so would signal either distrust or a recognition that the marriage might end in divorce.[30] It will be as ill logical as to say that life insurance or health insurance promote death or ill-health. Prenuptial agreements are like the inexpensive insurance policies which have nothing to do with one's happy married life, but, in case of separation it acts as an insurance cover which has many benefits to offer. 'Prenuptial agreements can decrease the financial cost of divorce by allocating the assets in advance and by providing for medication in the case of disputes, thereby avoiding court altogether. Even if parts of the agreement or its enforceability are not entirely clear, a premarital contract will reduce the number of decisions to be made by a court.'[31] 'Prenuptial agreements can also reduce the emotional trauma of divorce by allowing the couple to plan for divorce at a time when both spouses are accommodating and cooperative.'[32] 'Prenuptial agreements can affect behavior during marriage, improving the marriage and reducing the like hood of divorce.'[33] Marriage might mean quite different things to quite different people may indicate that our laws should be similarly flexible; that is, couples should be able to choose from a "menu" of options.[34] In the context of current marriage and no fault divorce law, contracts can be a useful means for a couple who want to make a greater commitment to each other, and who want to create greater incentives for altruistic behavior.[35]

6.1 Suggestions and Recommendations

In order to achieve the objective for protecting the interest of the parties to draw the Pre/Post-nuptial agreement the following suggestions/Recommendations are made:

6.1.1 Amendments to the Hindu Marriage Act 1955

The following Draft Matrimonial Law (Amendment) Bill, 2014 is proposed to enforce and give legal status to prenuptial or post-nuptial agreements under Hindu-Marriage Act 1955.

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28 *Supra* note 5.
29 *Ibid.*
30 Heather Mahar, *Why There So Few Prenuptial Agreements?* The Harvard John M. Olin Discussion Paper Series:http://www.law.harvard.edu/programs/olin_center/ (PDF).
31 *Ibid.*
32 *Ibid.*
33 *Ibid.*
34 *Supra note 5.*
35 *Ibid.*

MATRIMONIAL LAWS (AMENDMENT) DRAFT BILL, 2014

A

BILL

BE it enacted by Parliament in the Sixty-Fifth Year of the Republic of India as follows:-

CHAPTER 1
PRELIMINARY

1. **Short Title and Commencement** – (1) This Act may be called the Matrimonial Laws (Amendment) Act, 2014.
2. It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

CHAPTER II
AMENDMENTS TO THE HINDU MARRIAGE ACT, 1955

2. In the Hindu Marriage Act, 1955 (hereinafter in this Chapter referred to as the Hindu Marriage Act), the following section shall be inserted, namely:-

(6) "Marital Contract" – (1) the written agreement made by parties to marriage or in contemplation of marriage, in accordance with the provision of this Act, with respect to any of the matters mentioned in Section 6(2) is a "marital contract".

Explanation – the validity of an agreement under this section shall be governed by provisions of Indian Contract Act 1872.

(2) The matters referred to in sub – section (1) of this section are:
   a) division/disposal of all or any of the property or financial resources of either or both husband and wife, in the event of breakdown of marriage by divorce or death;
   b) The maintenance of either of the spouse, during the marriage or after the dissolution of marriage or both during and after dissolution of marriage;
   c) Any other matter which the court may not regards it as immoral, or opposed to public policy.

(3) Validity & Enforceability: The question whether a marital contract is valid, enforceable or effective is to be determined by the court in accordance with the principles of law and equity, in case such an agreement has been disputed by either of the party.

(4) Essentials: any marital contract shall become valid only if:
   a) The agreement is signed by both parties;
   b) The agreement contains an affidavit by each party to the agreement, certifying, before the agreement was signed by him or her, has been provided with independent legal advice from a legal practitioner regarding the matter of agreement with advice from a legal practitioner regarding the matter of agreement with regards to their rights and duties under the agreement;
   c) The agreement contains affidavit stating the value of assets and liabilities of each party;
   d) The agreement is tended and registered with registrar at the time of registration of marriage in the presence of two independent witnesses.

(5) Termination of marital contract: marital contract can be made by the following:
   a) Parties to the marital contract by consensus can terminate the agreement by making a written agreement to that effect.
   b) Court may terminate marital contract or any part of it, if, the court is satisfied that:
      i. The consent to an agreement is caused by coercion, fraud (including non-disclosure of a material matter), undue influence or misrepresentation: or
      ii. The agreement is void, violable or unenforceable; or
      iii. There is material change in the circumstances since the agreement was made, which has made it impossible to enforce the agreement in whole or any part of the agreement.
      iv. It is necessary to set aside the agreement or any part of the agreement on the principles of equity, justice & good conscience.

3. Section 8, the sub-section (I) shall be amended as:-

(1) For the purpose of facilitating the proof of Hindu marriages, the State Government may make rules for providing that the parties to any such marriage may have the particulars relating to their marriage entered in such manner and subject to such condition as may be prescribed in a Hindu Marriage Register kept for the purpose and also for tendering of the marital contract entered into by parties to the marriage under section 6.

4. Section 23 the sub-section (5) shall be inserted, namely:-

(5) While passing the decree of divorce and for relief, the court must take into consideration the marital contract if entered into by parties under section 6 of this Act.

5. Hindu Marriage Act, 1955 the Section 24 shall be amended as:-

24. Maintenance pendent elite and expenses of proceedings. –Where in any proceeding under this Act it appears to the Court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay the petitioner the expenses of the proceeding such sum as, having regard to the marital contract between the parties and the petitioner's own income and the income of the respondent, it may seem to the Court to be reasonable.

6. Section 25 the sub-section (1) shall be amended as:-

(1) Any court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purposes by either the wife or the husband, as the case may be, order that the respondent shall pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the marital contract between the parties, the respondent's own income and other property of the applicant, the conduct of the parties and other circumstances of the case, it may seen to the Court to be just, and any such payment may secured, if necessary, by a charge on the immoveable property of the respondent.

7. Hindu Marriage Act 1955 the Section 27 shall be amended as:-

27. Disposal of property – In any proceeding under this Act, the Court may make such provisions in the decree having to the marital contract between the parties or in the absence of such contract as it deems just and proper with respect to any property presented at or about the time of marriage, which may belong jointly to both the husband and the wife.

As the personal laws are not secular in Nature and are religion based, it is further Recommended that such similar changes be made in the Special marriage Act 1954,and similarly for Christians Muslims, Parses' and Jews.

Conclusion:

In a decision rendered on July 15, the Supreme Court, accepting a tripartite settlement deed executed between a woman, her husband and his mother through mediation, permitted parties to part ways upon a one-time payment of Rs 45 lakh to the wife with the condition that both would not seek divorce on any ground. The couple married for 30 years agreed to withdraw all their pending litigation and the wife agreed not to cause any disturbance or invade the privacy of her husband and his 83-year-old mother living in their household property.

The sum of Rs 45 lakh paid in full and final settlement to the wife was towards all her financial claims. Both parties, living separately since 2009, agreed that they shall have[36] nothing to do with each other's lives and will not undergo any divorce proceedings. The wife would also not claim restitution of conjugal rights or rights of residence in the household.

However, in the event of remarriage of the husband, the agreement shall stand terminated and the wife would be entitled to revive her claim for maintenance or alimony for the present and future, since the sum of Rs 45 lakh shall not be considered as an amount towards dissolution of marriage and payment of permanent alimony. The court accepting the deed and the undertakings of the parties, disposed of the matter and permitted the parties to file the same before all courts where litigation was pending with liberty to invoke the provisions of the Contempt of Courts Act, 1971, upon breach if any.

Under the Hindu family laws, where marriage is considered a sacrament and not a contract, prenuptial agreements do not find any recognition under existing matrimonial legislation or under other civil codified laws. Hence, premarital settlements between Hindus are alien to the present legal system. Regardless, if there be any prenuptial settlement, it would be tested like any other contract for its validity. Essentially, it should not be opposed to public policy, must not violate principles of natural justice, shall not be fraudulent, and must recognize rights of both the parties as also should be executed freely, voluntarily, without coercion and upon full disclosure of all relevant facts. As, traditionally, breakups are not discussed before marriage, there seems to be no reported decision testing the validity of a prenuptial termination agreement.

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[36] Anil Malhotra,Advocate, The Tribune, Chandigarh, Wednesday, 21 August 2013 *(www.tribuneindia.com)*.

In a fast evolving society of urban set-ups and escalating cross-border matrimonial unions, divorces settled through mutual consent petitions to avoid ugly, protracted and harmful litigations are being increasingly resorted to through the process of alternative dispute resolution and mediation centers now available in all courts in India.

Invoking of punitive criminal proceedings against immediate family members and parents of spouses upon the death of a matrimonial relationship often results in the entire family being implicated on trumped up charges as retribution to settle scores. Easy outlets to do so under the Indian Penal Code and the Domestic Violence Act often result in harassment to the parties, even though they may have no apparent role attributed to them.

Likewise, adequate protection and financial support to an abandoned spouse needs to be secured in advance to avoid flights of fancy, leaving a hapless partner with nothing to survive on, if a marriage goes sour. Securing protection for children from inter-parental child removal is another dimension of breaking marriages when abduction of children is resorted to by parents to settle egos.

Such facets of life of new generations makes the mind ponder to evolve solutions which as of now do not exist in the statute book but are now necessitated with the advent of time.

As of now, mutual consent is the most resorted to method for divorce if parties are principally in agreement on the terms and conditions of termination of marriage, which in itself reflects acceptable breakdown of marriage. However, Parliament is looking at defining and bringing in irretrievable breakdown of marriage as an additional ground for divorce, through the process of legislation may be time consuming.

Though irretrievable breakdown of marriage is not recognized as a ground of divorce under existing matrimonial laws, the apex court, in exercise of its vast powers under Article 142 of the Constitution, may pass such decree or make such order as it is necessary for doing complete justice in any cause or matter pending before it.

The judgment of July 15 opens a new window. It is in this breath that the need for prenuptial agreements needs a fresh thought with a new outlook. It comes at a time when surrogacy agreements are entered upon freely and have become acceptable in society. Thus, if the concept of a premarital settlement finds judicial acceptance and ultimate legislative sanction, matrimonial terms can be settled in advance optionally and alternatively to those who wish to do so. By no means would this be mandatory to offend those who do not wish to think of marital breakups before marriage by considering it as inauspicious or uneventful.

Without disturbing sentiments of traditional mindsets, the thought process can possibly relax drawing up of pre-marriage agreements where double-income independent spouses are comfortable in such mutual understandings.[37]

Protection of spouses and avoidance of inter-parental child removal are immediate benefits of it. Beneficiaries would include a large segment of the non-resident Indian

[37] *Supra* note 36.

(NRI) population who either marry foreign spouses or relocate to overseas jurisdictions and need written understandings for mutual protection and easy implementation by courts in alien jurisdictions. The clash of parallel matrimonial disputes in Indian and foreign courts can be avoided to a large extent by following this system.

The law does not forbid spouses to agree as to how they should live and conduct themselves as husband and wife, when they would consummate their marriage and how they would conduct themselves to each other. It is equally important that due respect should be given for adult autonomy, subject to proper safeguards and which could be tested by judicial discretion, when the need arises.

The fact of the matter remains that any matrimonial agreement between a husband and a wife should not be illegal, immoral or opposed to any public policy. The overhanging safeguard of the premarital settlement being adopted as a fair, free and just settlement will always be omnipotent. By no means or standard, it should be used as an instrument of oppression to take away rights of spouses which are guaranteed under existing laws meant to secure relief.

The need for evolving the jurisprudence to develop a positive thought process for creating such friendly methods would require an educative process to familiarize the advantages of such a concept while also clearly identifying its negative traits, if any.

The chaff should be separated from the grain to enjoy the dough which has to be kneaded and blended nicely over a long period of time to be consumed to become acceptable as a welcome change.

The traditional and sacramental notion of marriage must be gently flavored with a commercially sounding phrase of prenuptial agreements, which is not to be viewed as an announcement of a breakup of a marriage, even before it is solemnized.

The path has to be tread carefully and slowly while administering the change. Changing times require that amicable matrimonial settlements be arrived at by dispute resolution which can be aided and assisted if the parameters are penned down in advance to benefit the parties concerned. It can be concluded that:

- Matrimonial terms can be settled in advance.[38]
- Without disturbing traditional mindsets, the thought process can relax drawing up of pre-marriage agreements where spouses are comfortable in such mutual understandings.
- Protection of spouses and avoidance of inter-parental child removal are immediate benefits.
- Beneficiaries would include NRIs who marry foreign spouses or relocate to overseas jurisdictions and need written understandings for mutual protection and easy implementation by courts in alien jurisdictions.

In a prolonged messy litigation, the court may bury the hatchet in the facts and circumstances of a case under its inherent jurisdiction. The court in BS Joshi vs. State

[38] *Supra* note 36.

of Haryana[39] and GV Rao vs. LHV Prasad,[40] has very eloquently emphasized the need to encourage court settlements in matrimonial disputes.

It concluded "...that the parties may ponder over their defaults and terminate their disputes amicably by mutual agreement instead of fighting it out in a court of law where it takes years and years to conclude and in that process the parties lose their 'young' days in chasing their 'cases' in different courts." Therefore, there is far greater emphasis in the Indian context to settle post-marriage matrimonial disputes in the event of divorce oriented litigation, rather than focusing on prenuptial agreements. Law looks at the cure and not the remedy to prevent the problems.

39 (2003) 4 Supreme Court Cases 675.
40 (2000) 3 Supreme Court Cases 693.

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