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INNOCENCE BOUND TO FIRES OF HELL: VICTIM OF ACID ATTACK

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ABSTRACT

A Pakistani lawyer, Uzma Saeed working with a women's non-government organisation in Lahore, Pakistan has commented that victim of acid attack is like a living corpse. The victim is sentenced to a lifetime of fires of Hell. Acid violence is becoming an epidemic that is not restricted to any specific race, religion, country or even gender. It occurs in many countries around the world from America to Afghanistan and India to Abu Dhabi .Besides Sub-Saharan Africa, the West Indies, South-East Asia or the Middle East, random and informal incidents of attacks can be traced everywhere and anywhere. The new weapon of choice that is fast taking on the form of a phenomenon is 'Acid'; easily, cheaply available to all who want to settle scores and teach their rivals and enemies a lesson worth remembering – a fate worse than death itself. Rarely fatal, the result of the attacks is nevertheless horrifying not only for the victim but others as well. Acid attack violence is a multi-causal problem, it is a complicated interwoven issue related to cultural, societal, situational and personal causative factors that further combine to support and spread acid attack violence in various cultural and societal settings. The whole problem is so tangled and twisted that no end seems in sight without a forceful and rigorous effort at every front and level to curb this menace.

Key Words: Acid, Fatal, Hell, Gender, Acidattack, Violence, Victim.

"My face suddenly felt tight and it was burning all over. The smoke emanating from my face was suffocating me. Fearing the acid would eat up my face, I ran home. My mother opened the door and went into shock to see her daughter's face being swallowed up by acid fumes. I received third degree burns on my face, right hand and chest. My features were completely distorted, and it was difficult for my own friends to recognise me. Since my eyelids had shrunk, I couldn't close my eyes, and this made it very difficult for me to sleep. Every night, I'd sit on my bed waiting for dawn."

- Shirin Fuwaley, acid attack victim

The new weapon of choice that is fast taking on the form of a phenomenon is 'Acid'; easily, cheaply available to all who want to settle scores and teach their rivals and enemies a lessonworth remembering a fate worse than death itself. A Pakistani lawyer, Uzma Saeed working with a women's non-government organisation in Lahore, Pakistan has commented that victim of acid attack is like a living corpse. The victim is sentenced to a lifetime of fires of Hell. Acid violence is becoming an epidemic that is not restricted to any specific race, religion, country or even gender. Acid attacks are not limited to post-conflict, post-colonial, or developing countries only, but occur all over the globe from South-East Asia, Sub-Saharan Africa, the West Indies and the Middle East to the so called developed and more civilized nations of the World, though the evidence is generally anecdotal.

Acid violence is intentionally using corrosive acid to maim, disfigure or even kill a person .The horror of the attacks is unimaginable the skin melts, nostrils seal ,ears, eyes are gone even bones corrode what is left is a human being in extreme pain and discomfort both physically and emotionally. The attack is purposed to serve as threatening message to victim as well as the society in general. With nearly a thousand reported cases of acid attacks every year of which approximately 80 percent of the victims are women, the claims of this crime not being gender specific are falsified . Generally this heinous crime goes unreported as the victims are too petrified and and the black data of the actual incidents is horrifyingly huge and hidden . It is a new form of violence against women and children in societies where already limited or no rights are available to them.

Historically, acid attacks were also widespread in France, the United Kingdomand other parts of Europe from the 18th century onwards .Vitriol appeared in Europe during the 16th century,and a recorded case of an acid attack occurred in 17th century France under the ruleof Louis XIV . Many reports suggest vitriolic attacks were in vogue during the late nineteenth century in the United Kingdom and Europe.

The question that arises time and again crops up is the rationale and reason behind this odius act. Both women and men both are attacked and reasons vary from jealousy , marital issues, crimes of passion to business rivalry family and land disputes and revenge. The rationale sometimes is not known and so are the attackers. SitalKalantry, the Cornell international human rights clinical director has called the phenomenon a form of "gender terrorism." A female who dares to step out of the proverbial "LaxmanRekha" or the gender subordination is a good enough reason to subject her to this horror.

The victims rarely die but are left to live a life worse than death . With serious disfiguration the sufferer is scarred not physically only but mentally ,socially and financially ,lack of medical and legal recourse makes the survival even more difficult. Simple daily routine tasks are rendered almost impossible for some victims. Acid corrodes the body as well as the hopes , dreams and desires of a happy human being into a fossilized shell of the former self. Other factors that act as catalyst are a corrupt legal system, cheap and easily available acid or corrosive materials, and misconceived notions of righteous social norms further enraged by influences from media. There is no sole causative or underpinning factor, rather a complex interplay ofcultural, societal, situational and personal imperatives that combine to underpin andproliferate acid attack violence in various cultural settings. Many human rights agencies have advocated banning the sale of acid to decrease its availability. But for those who are motivated, acid can be found. However, insofar as authentically addressing these aetiologies,

to date, themedicalised, legal and development approaches and interventions have not been successful. In order to rebuild their lives, survivors of acid attack need long-term access to a holistic programme of medical support, rehabilitation, and advocacy that can only be provided by local organisations. It is imperative to curb the menace that women are upped in every possible manner and unless they are able to step into a role of equality of rights and freedoms, the problem will persist. With the end results so extreme, some have called for punishment of death for those who inflict this on others. Yet in most cases, the perpetrator is left to carry on as if nothing happened. Laws have been passed with jail sentences as high as 14-years. But inefficiencies and corruption within the legal systems where these attacks occur mean that fewer than 10 percent of cases make it to court. There is a paucity of literature, theories and understandings of violence from a non-Western context and non-legal context. Additionally, to date there is a dearth ofinformation and understandings on why do people commit violence. Working withscholars and anti-violence activists could prove useful in developing action orientedinterventions. Education and sensitisation of national institutionsGovernment officials, policy-makers, community and religious leaders, judges, policeand court officials, medical doctors, NGO leaders, and others need to be challengedabout their individual prejudices, and educated about the consequences of acidattack violence and about the need to implement laws and punish perpetrators.Training sessions on 'changing attitudes and behaviour' and 'acid attack violenceawareness' could be useful avenues for disseminating information and challengingdiscriminatory attitudes and beliefs.In addition to the current support from NGOs, in order to eliminate acid attackviolence governments needs to spearhead a zero-tolerance policy. This shouldreceive the dedicated support of all national institutions, including governmentofficials, police officers, community and religious leaders, policy-makers, judges andcourt officials, and others.

Although there are countries which have passed laws to control the sale of acid but this has in no concrete manner dramatically affected the occurrence of these attacks.

Acid attacks cause many deaths. Families and partners of victims should beoffered psychological support, therapy, and legal advice, and be included incampaigns and focus groups. Also there is great need of gender sensitivity training with boys and young men, and increased opportunities for education and training for both women and men. The list of suggestions is not exhaustive but the most important of all is inclusion of the acid attack survivor and their families in mainstream by the society. The misplaced concepts of 'honour' and 'shame', 'right' and 'wrong' are meant to be redefined in order to bring some peace to those innocents who are burning in fires of hell .

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INTERACTION BETWEEN BIODIVERSITY AND SUSTAINABLE DEVELOPMENT: AN OVERVIEW

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ABSTRACT

The protection and conservation of biological diversity is a major challenge before the present world. The advancement of biotechnology posed serious threats to the ecological balance and thereby leading to the loss of biodiversity. So, this issue is addressed by the international as well as national legal instruments to fill the gap between science & law. The convention on Bio-logical diversity is the first legal instrument at the international level which aims to secure the sustainable use of Biodiversity along with its protection and conservation. The crucial task is the management of bio-diversity in such a balanced way so that the economic, social and cultural values of the environment could be preserved. The human race is facing a biggest challenge of creating a balance among the development process and the environment protection. Since the last few decades the conservation and protection of environment is a major concern at global level. The answer ,we understand, lies in inclusive growth along with sustainable development because economic development cannot be visualized in isolation from the environmental concerns. Conservation and protection of Bio-diversity is the most significant aspect towards sustainable development because in case of extinction of Biological resources there are no chances for recovery of such loss. Because it is next to impossible to understand the complex interrelationship of a wide range of species. It is a well known fact that the survival of human species is mainly dependent upon the service provided by the ecosystem and other species. So, the protection and conservation of natural resources and their sustainable use is the dire need of the hour. In consonance with the idea of sustainable development the paper is an attempt to analyse the relationship of Biological diversity with the various components of sustainable development.

Key Words: Biodiversity, Sustainable Development, Environment, Conservation.

Biodiversity under pins the relationship between global economy, society and the eco-system. The crucial task is the management of bio-diversity in such a balanced way so that the economic, social and cultural values of the environment could be preserved. The human race is facing a biggest challenge of creating a balance among the development process and the environment protection. Since the last few decades the conservation and protection of environment is a major concern at global level.There is a deep linkage between cultural diversity and biodiversity because human culture shapes the natural environment. It is worth mentioning in Indian context where the worshiping of trees and comparison as well as association of animals, trees, rivers and other form of faunal diversity with religion presents a unique form of conservation of bio logical diversity. Apart from this the various agricultural practices in different cultures such as shifting cultivation, multiple cropping also promotes the in-situ conservation of natural resources. Natural resources are the significant tool for the formation of diversified cultures and institutions of human survival. People from different cultures perceive nature from their own experiences and try to preserve it in their own unique way.The intrinsic and adaptive capacity of bio-diversity is very significant for survival of human beings and the life support system. The existence of the present as well as future human race will depend upon the wide range of biological resources as it caters to the daily necessities as food, medicines, shelter and furthermore provides a platform for inclusive growth by regulating the economic sector through regulation of agriculture, forestry, fisheries, tourism etc. Particularly in Indian context a huge strata of population depend on agriculture activities to earn their livelihood and various components of biodiversity such as plants, animals, land, and water are crucial for such activities. Further it plays a vital role in soil conservation, purified air and regulation of climate change as a whole. The term biodiversity can be diversified into three major segments, genes, species and ecosystem. Genetic diversity is the further bifurcation of various genes within species. It is inclusive of huge varieties of life forms as animals, plants, and microorganism. Bio-diversity refers to variation of life forms such as animals, plants, micro- organism including diversity within species and among different species of the ecosystem . Plant diversity, faunal diversity, crop diversity are the important components of bio logical diversity. Human diversity along with natural diversity is a key to sustainable development. Bio-logical diversity is the key for survival of these species as well as significant for sustainability and prosperity of the ecosystem.

The first global efforts in this regard is the United Nations Conference on Human Environment popularly known as Stockholm Declaration. A deep concern over the accelerating decline in the environment was expressed in the Stockholm conference. It stated:

"In the long evolution of the human race on this planet a stage has been reached when through rapid acceleration of science and technology, man has acquired the power to transform his environment in countless ways and an unprecedented scale. Both aspects of Man environment the natural and manmade are essential to his well being and to the enjoyment of basic human rights even the right to life itself.''

It is recognized unanimously that the environment concern should be considered as part of process of development . The further development in this series is the establishment of the Brundtland Commission by the UN General Assembly in 1983.Sustainable development is a blend of balanced use of physical and natural resources as nature provide a complex system of survival through air water, food and suitable climates. The terms Sustainable development

also depicts the development policies in the context of livelihood. Nature has limited capacity to bear the hazardous environment impacts. The ends users i.e. the human race is interfering with the sustainability of the natural resources to such as extent that the very survival of mankind is threatened. The concept of sustainable development has emerged as an issue of major concern in the decade of late 1980s when it is a much debated and discussed issue at the National, international and individual level.

Sustainable use of Biodiversity is very significant for the production of agricultural goods which ensures the basic food security, Nutrition and livelihood. Agriculture caters to the basic needs of human beings. Biodiversity in the form of plants and animals forms the basis of agriculture. In an indirect way other species contribute to the smooth functioning of agriculture activities through the ecological environment. The accelerating decline in Biodiversity at an alarming rate hampering the ecological systems and agricultural activities too. The preservation and conservation of biodiversity is essential for the smooth functioning of agriculture activities and balancing the eco-system. Agriculture is the basic source of human subsistence and livelihood form time immortal. Poverty, growing population, inadequate food production, lack of nutritional value are the major challenge before the agriculture sector at present. In other terms food security is a major challenge faced by this sector. The food and agriculture organizations defines food security as " a situations in which all people at all time have physical and economic access to sufficient, safe and nutritional food preferences for an active and healthy life."

The conservations of agriculture biodiversity depend upon its sustainable use and proper management.The modern agriculture techniques are the drivers of Bio-diversity loss. There are various challenges for the conservation and protection of biological resources such as rapid growth in population, use of advanced agricultural technology, conversion of land into the agricultural area which is having very harmful impact on the environment. So sustainable agricultural technology is the need of hour. The ecosystem approach as emphasized in the convention on Bio-logical diversity can be an effective solution in this regard. Due to increase in pollution there is enormous pressure on the eco-system and natural resources which leads to habitat destruction and it is the major driver of Biodiversity loss. Population growth with a rapid manner, changing patterns of consumption leads to increased stresses over natural resources. Cumulative effects of different human activities in synergistic ways alter the eco-system along with its regional variations. Land degradation is leading to habitat loss which reduces livelihood options for the rural community though they are totally depended on the forest resources for their daily needs as well as complementary sources of income. The linkages between Bio-diversity and livelihood issues are directly related to the interrelationship of societies with their respective environment. The rapid increase in globalization diminishes the quality of eco-system. Though species extinction is a natural process but human induced factors in the major cause for accelerating decline in Bio logical resources.

Nature and natural resources are the significant tools for the formation of diversified cultures and the institution of human survival. People from different cultures try to perceive nature from their own experiences. Human diversity along with natural diversity is a key to sustainable development. But at present it is endangered and loss of Biological diversity led to the destruction of cultural diversity. Protection of traditional knowledge, recognition and

respect for spiritual and cultural values, community involvement and awareness are some of key components of cultural diversity towards the protection and conservation of Bio-logical diversity. Since cultural diversity forms a moral vision towards the goal of sustainable development, it works as a prominent factor for the protection of Bio-logical diversity. It creates a balance among tangible and intangible aspects of development. It implies a blend of economic potentials, productivity, physical security along with the spirit of participation and empowerment from the community as a whole .Particularly in Indian context the eco-system is preserved through the rich traditional knowledge and Cultural diversity of indigenous communities. This includes the plethora of traditional system, beliefs, and cultural values towards the preservation of Biological diversity . Also,as per the millennium ecosystem assessment climate change will be a major driver of biodiversity loss by the end of this century.Such policy framework which encompasses the collective efforts through community conservation along with the legislation framework is required to sustain the eco friendly agricultural practices .The Biological resources and not infinite. So the constant extinction and over-exploitation of resources will make a major shift toward the state of uncertainty regarding the capacity of biological resources to meet the needs of future generations. Biological resources provide the livelihood security to the lower strata of society. So, the protection and conservation of Biological resources should be given preference in the National and International polices. The crucial task is the management of Bio-diversity in such a balanced way so that the economic socio-cultural and environmental values can be preserved. Such degradation not only affects the livelihood rather it enhances the risk of extreme unnatural events. Sustainable use of biodiversity enhances the socio-cultural values. Biodiversities shares a very complex relationship with mankind. So, a proper understanding is required to fill the gaps between Biodiversity concerns and the complex nature of ecosystem.

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STATUTORY PROTECTION OF CHILD RIGHTS

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ABSTRACT

Children are considered the back bone of every nation and their welfare is one of the necessary factors for a nation's building. The framers of our Constitution ensure the protection of all weaker section of the society including children for egalitarian society. The development of any nation depends upon various factors including preservance of children from exploitation. In this direction the Constitution of India in Article 39 of the Directive Principles of State Policy pledges that the State shall, in particular, direct its policy towards securing that the health and strength of workers, men and women, and the tender age of children are not abused, and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength, that children are given opportunities and facilities to develop in a healthy manner, and in conditions of freedom and dignity, and that childhood and youth are protected against exploitation, and against moral and material abandonment.

Key Words: Statutory, Protection, Child, Rights.

"The hallmark of culture and advance of civilization consists in the fulfilment of our obligation to the young generation by opening up all opportunities for every child to unfold its personality and raise to its full stature, physical, mental, moral and spiritual. It is the birth right of every child that cries for justice from the world as a whole."

Hon'ble Justice Krishna Iyer wisely throws light on the importance of child and the commitment of society towards their overall development. The protection from all exploitation and opportunities to grow physically, mentally, morally and spiritually is their birth right. In furtherance of it the Constitution of India ensures that *the health and strength of workers, men and women, and the tender age of children are not abused, and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength, that children are given opportunities and facilities to develop in a healthy manner, and in conditions of freedom and dignity, and that childhood and youth are protected against exploitation, and against moral and material abandonment.* The same has been guaranteed under part III (Fundamental Rights), but before started discussing the paramount requirement of welfare of child and laws let us define child and the age criterion for the child.

According to international law, a child means every human being below the age of 18 years. This is a universally accepted definition of a child and comes from the United Nations Convention on the Rights of the Child (UNCRC), an international legal instrument accepted and ratified by most countries. India has always recognised the category of persons below the age of 18 years as a child and distinct legal entity. That is precisely why people can vote or get

a driving license or enter into legal contracts only when they attain the age of 18 years. Marriage of a girl below the age of 18 years and a boy below 21 years is restrained under the Child Marriage Restraint Act 1929. What makes a person a child is the person's age.

2.1. Constitutional Provisions for Protection of Child Rights

The Constitution is lex loci and any law framed contrary to it will be held unconstitutional and invalid. Our Constitution framers were aware about the child problems, so they framed many rights for the understanding of child rights.

2.1.1. Fundamental Rights

Fundamental rights are the rights that are protected under pert III of the constitution of India. It facilitates the vested interest of the people and child is not an exception to it. The children are no exception to it as various provisions, right from the Preamble, Fundamental Rights and the Directive Principles of State Policy to the present day judicial activism, our Constitution has been trying its best to protect the interest of the children. According to Art.14, *the state shall not deny to any person equality before the law and the equal protection of the laws within the territory of India.* The complementary Article 15 prohibits the state from discriminating against any citizen on grounds only of religion, race, caste, sex, and place of birth or any of them. Article 15(3) includes the special clause i.e. *nothing in this article shall prevent the state from making any special provision for women and children.* Women and children require special treatment on account of their very nature. Further Art.21 protects the right to life and personal liberty. It states that no person shall be deprived of his life or personal liberty, except according to procedure established by law. Right to survival is not explicitly mentioned in the right to life and personal liberty, but right to life includes so many rights, so right to survival is also included in right to life and personal liberty. The right to survival means to survive with all facilities and to provide an identity. So in right to life the protection to child rights is given in the form of right to survival.

The Constitution (86th Amendment) Act, 2002 has added a new Article 21A after Article 21 and has made education for all children of the age of 6 to 14 a fundamental right. It provides that the State shall provide free and compulsory education to all children of the age of 6 to 14 years in such manner as the State may, by law, determine. It is well known that education is a basic human right and it is considered the tool to curb the crimes against children in the society. The Right of children to Free and Compulsory Education Act has come into force from April 1, 2010. This is a historic day for the people of India as from this day the right to education will be accorded the same legal status as the right to life as provided by Article 21A of the Indian Constitution. Every child in the age group of 6-14 years will be provided 8 years of elementary education in an age appropriate classroom in the vicinity of his/her neighbourhood. In a recent judgment in the Supreme Court ordered to Private schools to enforce the RTE Act and reserve 25 per cent quota for students from EWS (economically weaker section). In this way, education may consider one another factor to provide the capacity of protection to the children.

Constitutional law prohibits trafficking of human beings and forced labour. In furtherance of it Art.23 of constitution guarantees that Traffic in human beings and beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law and nothing in this Article shall prevent the state

from imposing compulsory service for public purposes, 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.

2.1.2. Directive Principles of State Policy

The Constitution of India in its chapter called Directive Principles of State Policy enunciates the need for education of children. Article 45 of the Constitution, which is a part of the Directive Principles, lays down that *the State shall endeavour to provide, within a period of time from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of 14 years.* The Constitution has also kept in mind the special requirements of children coming from the depressed classes. In consonance with such thinking, Article 46 specifically mentions that *the State shall promote with special care the educational and economic necessity of the weaker section of the people, and, in particular, Scheduled Castes and Scheduled Tribes and shall protect them from social injustice and all forms of exploitation.* The Constitution of India directs *the state to protect the child form being abused and forced by economic necessity to enter occupations unsuited to their age or strength. Right to equal opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and guaranteed protection of childhood and youth against exploitation and against moral and material abandonment.*

2.2. Provisions Related to Child against Crimes

In general terms crime is defined as an act punishable by law as forbidden by statue or injurious to the public welfare. Indian Penal Code defines the word offence as a thing made punishable by this code. However it is very difficult to give a correct and precise definition of crime. There is no separate classification of offences as offences against children or child abuse. Generally the offences committed against the children or the crimes in which children were victims are categorized as Crimes against Children. The general penal code of this country and the various protective and preventive special and local laws specially mention the offences wherein children are known to be victim. The cases in which the children are victimized and abused, data on which is presently made available by the State/UTs authorities, can be categorized under two broad sections:

a. Crimes committed against Children which are punishable under Indian Penal Code.

b. Crimes reported against Children which are punishable under Special and Local Laws.

2.2.1. Some of the Crimes Punishable under the Indian Penal Code

Indian Penal Code also defines the offences against the children. This includes crimes punishable under sections 315 and 316 (feticides), 316(Infanticides), 304 (Abetment of Suicide), 317(Exposure and abandonment), 360-369 (kidnapping and abduction) (for exporting, ransom, camel racing, begging, compelling marriage, Slavery, for seduction or illicit intercourse, prostitution, unnatural offences), 366-A (procuration of minor girls). The Indian Penal Code deals with the sexual abuse of children in the form of rape (Section 375), unnatural practices (Section 377), molestation and outraging the modesty. Exploitation is addressed in the form of obscenity, indecent representation and procuring persons for the purpose of prostitution and trafficking (Section 372 and 373). The common forms of sexual abuse of children do not come under the definition of rape.

2.2.2. Some of the Crimes Punishable under Special and Local Laws

1.Child marriage

Child marriage means the marriage between two children. It is said to be a crime punishable under various laws. The age of parties to marriage is mentioned in HMA, 2005. According to Hindu Marriage Act, 1955 the bridegroom has completed the age of twenty-one years and the bride, the age of eighteen years at the time of the marriage. So marriage under that age is child marriage. Further to prohibit the child marriage the govt. has enacted the PCMA, 2006. The phenomenon of child marriage can be attributed to a variety of reasons. The chief amongst these reasons is poverty and culture, tradition and values based on patriarchal norms. 2. Child Labour Child labour occurs when children under the age of fourteen are used to do labour. Children are usually forced to do adult work to help provide for their families. They work long hours every day and are unable to attend school, which is their fundamental right. It is very difficult to define child labour. It has not even been defined by the Child Labour (Prohibition and Regulation) Act, 1986.

Child Trafficking

India has a fairly wide framework of laws enacted by the Parliament as well as some State legislatures, apart from provisions of the Constitution which is the basic law of the country.

Immoral Traffic (Prevention) Act, (ITPA) 1956 Renamed as such by drastic amendments to the Suppression of Immoral Traffic in Women and Girls Act, 1956 (SITA) deals exclusively with trafficking, objective is to inhibit / abolish traffic in women and girls for the purpose of prostitution as an organized means of living, offences specified are procuring, including or taking persons for prostitution, detaining a person in premises where prostitution is carried on.

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RIGHT TO INFORMATION AS A HUMAN RIGHT: A GLOBAL PERSPECTIVE

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ABSTRACT

Almost all the countries have provided basic fundamental rights to its citizens through the law of the land i.e. "Constitution". But 'Right to Information' was not provided along with these rights. Probably the reason was the desire of the government to maintain secrecy regarding its working. But this gives a view of closed government as contrary to that of the open government. In the present era of 'Welfare State', a good government that stands for the welfare of its citizens must aim at providing the rights and remedies against the excesses of the government.

Key Words: Right, Information, Human, Global, Perspective, Government.

If government is acting for the welfare of the citizens then what is the need to keep secrets from them. Long struggle precedes the origin of this right. This struggle was not only by one particular section of society but the intensive efforts of all sections of the society. Therefore, the role of the Government has increased both quantitatively as well as qualitatively[1].

Society is always divided into 'classes' be it rich and poor or on caste basis or labour and entrepreneur etc. So, everybody is not equal in the society. Weaker section of the society is always exploited by the stronger one. Some of the people in the society could not even earn their livelihood and therefore, allow themselves to starvation. Many have their homes in the slums, foot-paths, railway stations or bus stands. In a developing country like India also the duty of the government increases manifold. Government cannot avoid its liability[2].

Author's discuss the below mention headings in this research paper –

1. General Meaning of The Term "Right To Information
2. Need to Recognise "Right To Information"
3. Development of 'Right To Information' as a 'Human Right'
4. Development of The Right To Information In Other Countries
5. Conclusion

1. General Meaning of the term "Right to Information":

Right to Information means "the right of citizens to receive information, regarding the working of the government, and have access to the information, contained in government files, records, and documents or held by public authorities. Justification for this right also lies in the fact that if one provides the government with basic information about himself, such as his name, address and date of birth, that information does not become the property of the government. The total information held by the government is only a collection of facts about the people and the country. Therefore in principle this information belongs to people not to the government.[3] Moreover, information is the lifeblood that maintains political, social and business decisions and government spends huge amounts of money to secure this information. But on one hand if the government has right to secrecy, on the other hand, there exists citizen's right to receive information.

2. Need to Recognize "Right to Information":

In democratic governance, citizens have certain rights to elect their representatives and it is assumed that people in such type of governance influence the policies and programs that their governments make. The basis of democracy is considered to be the right to provide, or withhold 'consent'. In recent years, many democracies are finding that the citizens which are reckoned as the 'building blocks of democracy'; the 'demos' in democracy are feeling separated from the structures and processes of formal democracy. Particularly, that is why voting percentages in democratic elections have been declining (especially among the youth); trust of people in elected political representatives has reached an all-time low; authoritarian and sectarian forces are gaining momentum over democratic, secular forces worldwide. Democratic governance systems attempted to codify certain rights and obligations of the citizens in the Constitutions of countries. Freedom of association, expression and actions has been variously codified in such Constitutions. Yet, many democracies, old and new, also carried the premise of 'eminent domain'- which implies that the governments can act in 'sovereign public interest' to limit such freedoms and rights. This basis of State sovereignty, as opposed to citizen sovereignty, has been the underlying rationale for various laws related to land acquisition, taxation and access to 'official' decision-making. Many colonial governments had introduced legislations to protect 'official secrecy'; most governments continued such restrictions even after independence. The official secrets acts in various countries not only legitimized secrecy in transacting official government business; it also made sharing of official information a criminal offence. Such a protective shield then insulated public representatives and government officials from any critical scrutiny by the public itself. Citizens are not only deprived of information relevant to their own lives and livelihood, but also denied the possibility of acting as citizens; to participate in the making of democratic governance itself. Right to Know, therefore, is the basic right of citizens, without which other rights and citizenship responsibilities cannot be adequately discharged.

3. Development of 'Right to Information' as a 'Human Right':

In the post-World War II period, it had been increasingly realized that with the expansion of the government activities, the government was disturbing the equality clause between the citizens and the government and thereby making the government more strong. In the exercise of its power it was possible that it might restrict the written rights of the citizens also.

Therefore, right to information was given the status of 'human right', so as to provide a word of caution to the government regarding the importance of this right. Right to information, as a right in India, though received recognition very late but it was recognized at international level as a 'fundamental human right' during human rights movement in late 1940's. Human Rights are the rights inherent in human being by his very birth in the human community. These rights are necessary for full development of the personality of a human being. The right to information is one of the most precious fundamental human rights. Lack of information denies people the opportunity to develop their potential to the fullest and realize the full range of their human rights. Individual personality, political and social identity and economic capability are all shaped by the information that is available to each person and society at large. Therefore the world has moved toward the universalisation of right to freedom of expression. The development of 'right to information' as a 'human right' can be analysed under following points:

3.1 United Nations

The right was recognized by United Nations at its very inception in 1946,[4] when the General Assembly resolved "Freedom of information is a fundamental human right and the touchstone for all freedoms to which the United Nations is consecrated".[5]

3.2 Universal Declaration of Human Rights

Similarly, Article 19 of the Universal Declaration of Human Rights, 1948 provides that "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers"[6].

3.3 International Convention on Civil and Political Rights, 1966

Later on, under Article 19(1) of the International Convention on civil and political Rights, 1966 it is declared that "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontier, either orally, in writing or in print, in form of art, or through any other media of his choice"[7].

3.4 European Convention on Human Right

In this context, reference may be made to Article 10 of the European Convention on human right as under this article it has been provided that "Everyone has a right to freedom and expression and this right shall include to hold opinions and to receive information and ideas without any interference by public authorities and regardless of the frontier"[8].

3.5 African Charter on Human and People's Right's, 1981

Article 9 of African Charter on Human and People's Right's, 1981 enshrines right to receive information as one of the rights and lays down: "every individual shall have the right to receive information. Every individual shall have the right to express and disseminate his opinions within the law".

3.6 Rome Convention for the Protection of Human Rights

Article 10 of the Rome Convention for the protection of Human Rights and Fundamental Freedoms, 1950 also declares that "everyone has the right to freedom of speech and

expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without any interference by the public authority and regardless of frontiers. This Article shall not prevent States from.

3.7 Rio Declaration on Environment and Development

Principle 10 of the 1992 Rio Declaration on Environment and Development, first, recognised the fact that the access to information on the environment, including information held by the public authorities is the key to sustainable development and effective public participation in environmental governance.

3.8 The Aarhus Convention

In 1998 a legally binding Convention on Access to Information was signed by the Member States of the United Nations Economic Commission for Europe and the European Union (Aarhus Convention). The Aarhus Convention recognizes the right to information as a part of right to live in a healthy environment, rather as a free standing right. Agenda 21 was the next step for establishing the relation between the right to information and the environment. Agenda 21, the "blueprint for sustainable development" states: "Individuals, groups and organizations should have access to information relevant to environment development held by National Authorities, including information on products and activities that have or are likely to have significant impact on the environment, and the information protection measures".

4. Development of the Right to Information in other Countries:

Right to information is not a new concept. History is the witness of its existence and in fact, it can be said that it has been in existence ever since the 18th century. Perhaps the first country in the world which had enacted a law on 'freedom of information' way back in 1766 was Sweden. In recent years, many Commonwealth countries like Canada, Australia, and New Zealand have passed laws providing for the right of access to administrative information. USA France and Scandinavian countries have also passed similar laws. This has given lot of support to the development of right to information at global level. While commenting on the global perspective of the freedom of information law, it has been observed by Thomas Blanton[9] that "Today as a consequence of globalization, the very concept of freedom of information is expanding from a purely moral stance as an indictment of secrecy, to include a moral value-neutral meaning as another form of more efficient administration of government as a contributor to economic growth and the development of information industries."

Thus, till now, more than 99 countries of the world have adopted right to information law, either as a part of their Constitution or enacted separate legislation providing access to public or government records to their citizens.[10] The laws related to information adopted by different countries of the world can briefly be stated as follows:

4.1 Sweden:

Sweden has been enjoying the right to know since 1766. Swedish Freedom of information Law is considered to be the oldest law the world which was paid in 1766. It was replaced in 1949 by a new Act which enjoyed the sanctity of being a part of the Constitution of the country itself, which was later on again amended in 1976, which reaffirmed people's right to access to "official documents" held by the government and the public authorities. Thus, the fundamental principle of Swedish Law is that every Swedish citizen should have access to

virtually all documents kept by the State or municipal agencies. Recently, a special movement has been launched by the Swedish government to raise the level and quality of public knowledge and awareness so as to ensure public participation in information-sharing with the government and the public authorities. This movement is known as the "Open Sweden Campaign"[11]. It is a government initiative to enhance transparency of Swedish public administration.[12] It has been launched to support open division straightforwardness, build open learning and data mindfulness divulgence arrangements, and energize powerful subject association.[13]

4.2 United Kingdom (UK):

Initially, in England the force of the legislation was not on "information" but on "secrecy". In 1993, the Government in England published a white paper on 'open Government' and proposed a voluntary code of practice of providing information. This code was voluntary and thus could not be equated to a statutory law on access to information. But this situation cannot last long because of mounting popular pressure and citizen's charter. Finally, in the year 2000, The Freedom of Information Act 2000 has been enacted in UK which gave citizens a right to access the information held by public authorities and government.[14] This right has been provided in two ways[15]:

- Public authorities are obliged to publish certain information about their activities; and
- Members of the public are entitled to request information from public authorities.

In 2005, the said act has been replaced by a new Freedom of Information Act, 2005 which came into force on 1st January, 2005. On the same day, five important new Rights to Information Acts came into force[16]:

1. The Freedom of Information Act 2000
2. The Freedom of Information (Scotland) Act 2002
3. The Environmental Information Regulations (EIR) 2004
4. The Environmental Information (Scotland) Regulations 2004
5. Amendments to the Data Protection Act 1998

4.3 Australia:

In Australia, the Freedom of Information Act was enacted in December 1982. It gave citizens more access to the Federal Government's documents. With this, manuals used for making decisions were also made available. But in Australia, the right is curtailed where an *agency* can establish that non-disclosure is necessary for protection of essential public interest and private and business affairs of a person about whom information is sought.

Now, Right to Information Act 2009 (as amended by all amendments that commenced on or before 1 July 2014) is the prevailing law in Australia. Another important legislation in this regard is Information Privacy Act 2009 (Current as at 1 January 2015).

The primary object of Right to Information Act 2009 is to give a right of access to information in the government's possession or under the government's control unless, on balance, it is contrary to the public interest to give the access.[17] Whereas, the object of Information Privacy Act 2009 is to provide for[18]:

- The fair collection and handling in the public sector environment of personal information; and
- A right of access to, and amendment of, personal information in the government's possession or under the government's control unless, on balance, it is contrary to the public interest to give the access or allow the information to be amended.

Therefore, Australian government is committed in giving the community greater access to information.

4.4 United States of America (USA):

In USA, Administrative Procedure Act, 1946 was the first enactment which provided a limited access to executive information. The Act was vague in language and had so many drawbacks. Thus, to cure those drawbacks, the law related to 'freedom of information' was enacted in United States in 1966, which came into force on 4th of July, 1967 and has been amended time to time. Finally, it was known as "Electronic Right of Freedom of Information Act. Freedom of Information Act, 1967 of USA provided openness in administration by enabling the public to demand information about issues as varied as deteriorating civic amenities, assets of senators and utilization of public funds. It has provided every citizen a legally enforceable right of access to government files and documents which the administrators may be tempted to keep confidential. If any person was denied the access he could seek injunctive relief from the court. After reviewing the working of this Act, it was amended in 1974 and replaced by The Privacy Act Amendments of 1974.

Later on, the Freedom of Information Reform Act 1986 has been passed which seeks to amend and extend the provisions of previous legislation on the same subject. Another major achievement was the passing of Sunshine Act, 1977 which mandates open meetings for regular session of federal agencies with at least one week's public notice unless prescribed exceptions are attracted. Then comes, "The Electronic Freedom of Information Act Amendments of 1996", which provided that all agencies are required by statute to make certain types of records, created by the agency available electronically on or after November 1, 1996. Agencies must also provide electronic reading rooms for citizens to use to have access to records. Given the large volume of records and limited resources, the amendment also extended the agencies' required response time to FOIA requests. Formerly, the response time was ten days and the amendment extended it to twenty business days.[19]

But after the terrorist attack on World Trade Centre (WTC), New York, by an Executive Order (2001) access to the records of former presidents are restricted in USA. The right to information now had been curtailed and access to information could be denied on both national and international security grounds and US Federal Government could withhold access to information on justifiable grounds.[20] Later on President Barack Obama[21] revoked this order on January 21, 2009 and issued a "Memorandum on Transparency and Open Government" urging all federal executive departments and agencies that FOIA "should be administered with a clear presumption: In the face of doubt, openness prevails." Moreover he called on agencies to "adopt a presumption in favour of disclosure" and to apply that presumption "to all decisions involving the FOIA."[22] This presumption of disclosure includes taking "affirmative steps to make information public," and applying "modern technology to inform citizens about what is known and done by their Government."[23] In response to this, on March 19, 2009,

Attorney General Eric Holder issued FOIA Guidelines reiterating and stressing the President's commitment to accountability and transparency.[24] These guidelines emphasize that[25]

- The FOIA is to be administered with the presumption of openness. This presumption means that information should not be withheld "simply because an agency may do so legally."
- It has been directed that whenever full disclosure of a record is not possible, agencies must consider whether they can make partial disclosure.
- The agencies are to be strongly encouraged to make discretionary disclosure of information.

Moreover, several RTI activists, voluntary organizations are there who are campaigning for free flow of information on national as well as international level too.

4.5 France:

In France law on Free Access to Administrative Documents was created in 1978 closely following the United States, and is therefore part of the 'first-wave' of FOI regimes. It provides for a right to access by all persons to administrative documents held by public bodies. The accountability of public servants is a constitutional right in France.[26] Moreover, all the citizens have a right to decide, either personally or by their representatives, as to the necessity of the public contribution; to grant this freely; to know to what uses it is put.[27] Actually, this is considered to be a special feature of the French right to information law.

4.5 Pakistan:

Although, every citizen of Pakistan is guaranteed right to freedom of speech and expression under Article 19 of the Constitution of Islamic Republic of Pakistan, 1973, yet the then President Pervez Musharraf promulgated the Freedom of Information Ordinance 2002 in October 2002.[28] The law allows any citizen access to public records held by a public body of the federal government including ministries, departments, boards, councils, courts and tribunals. It does not apply to government owned corporations or provincial governments. The bodies must respond within 21 days. Public records are limited to policies and guidelines; transactions involving acquisition and disposal of property; licenses and contracts; final orders and decisions; and other records as notified by the government.[29]

4.6 India:

Though the Constitution of India has no express provision that guarantees the right to information, but it has been recognized by the courts as a part and parcel of Article 19(1) and Article 21 of the Constitution. Article 19(1) (a) of the Constitution guarantees to all citizens the right to freedom of speech and expression. As early as in 1976, the Supreme Court held in a very famous case[30] that "people cannot speak or express themselves unless they know."

The enactment of Right to Information Act, 2005 has made this right a reality. The then Prime Minister of India, while directing the Bill for its passage by the Indian Parliament, stated, as under, on May 11, 2005:[31]

"I believe that the passage of this Bill will see the dawn of a new era in our processes of governance, an era of performance and efficiency, an era which will ensure that benefits of growth flow to all sections of our people, an era which will eliminate the scourge of

corruption, an era which will bring the common man's concern to the heart of all processes of governance, an era which will truly fulfill the hopes of the founding fathers of our Republic."

As per Section 2(j) of the Right to Information Act, 2005 the term "right to information" means the right to information accessible under this Act which is held by or under the control of any Public Authority and includes the right to:

- Inspection of work, documents, records;
- Taking notes, extracts or certified copies of documents or records;
- Taking certified samples of material;
- Obtaining information in the form of disks, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device.

The term "right to information" under Section 2(j) means a right to information as accessible under the provisions of this Act. If it is not accessible under the provisions of this act, then it is not included in the term right to information. This right to information is available in respect of only that information which is held by or is under the control of any Public Authority i.e. any authority or body or institution of self-government established or constituted by or under the:

1. Constitution;
2. Laws made by the Parliament;
3. Laws made by State Legislature;
4. Notification issued or order made by the appropriate Government, and includes any:

- body owned, controlled or substantially financed;
- Non government organization substantially financed, directly or indirectly by funds provided by the appropriate government.

5. Conclusion

It is the privilege of every human being to use and interpret any experience in his own way and the act of choosing between the alternatives brings a moral vitality into play. For expression of freedom of speech, one must also have the freedom to receive the opinion from others and this is possible only by exchange of ideas. Free speech is indispensable commodity for the free transmission of the ideas. An individual owes a debt to the society and he repays it by making his individual contribution to the reservoir of thoughts and ideas. Freedom of speech and expression, which is important for new ideas in the society, is incomplete without information regarding the subject matter on which views are to be expressed. In the modern era, the government has become a medium of social change. Increase in the activities of the government has led to increase in the powers of the government. Thus, the modern government has got the control of individual's life from cradle to grave. So, it becomes, equally, important that the individual, who is being affected by the working of the Government, must have the information of government's functioning. Information and knowledge are critical for realizing all the human aspirations, such as, improvement in quality of life. In the knowledge society, in which we live today, acquisition of information and

knowledge and its application have intense and pervasive impact on productivity gains. People who have access to information and who understand how to make use of the acquired information in the processes of exercising their political, economic and legal rights become empowered, which, in turn, enable them to build their strengths and assets.

5.1 Suggestions

It is expected that the citizens, armed with information obtained through their exercise of right to know, would be able to protect life and liberty as well as secure equity and justice before the law. Therefore, this law must be more strong and effective. Certain suggestions can be given here to make this law more effective worldwide:

5.2.1 There is a need to bring change in the mindset of bureaucracy and this can be achieved by two ways:

1. Repealing the existing Secretive Acts.
2. Giving the necessary training to the officers concerned.

5.2.2 There is a need to identify the implementer of the Information Law and nominating a lead implementer with sufficient seniority, respect, and power will provide the foundational message to other parts of the administration, public service, and civil society that the Government is serious in its efforts.

5.2.3 Changes to be brought in the appointment process of Information Commissioners.

5.2.4 Increase awareness and develop the capacity of the information seekers especially they must know how the law can positively affect their lives. A parallel effort might be required to develop the capacity of the people to use the Act and to persist till information is actually provided. They might also need the help to comprehend, contextualize and effectively use the information so accessed. Moreover, educational institutions should introduce awareness to the Right to Information Act by inclusion of Right to Information in the curriculum.[32] Another requirement is the quality of persistency among the information seekers. Individuals must be prepared to pursue cases for months, and sometimes for years.[33]

5.2.5 Record keeping system must be improved because smooth and prompt flow of information from the Public Authorities depends basically on a good system of record management.

The above said suggestions if applied whole heartedly would help in achieving the objectives of the Right to Information Act in smoother way. Moreover, media and civil society, both should learn to use so gathered information as a powerful tool in their hands to enforce accountability and their powerful fight against mis-governance.[34]

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GENDER DISCRIMINATION IN INDIA: IT'S TIME TO BREAK SILENCE

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ABSRACT

India is going to become a superpower. But even after 68 years of independence when a boy is born in India, friends and relatives congratulate the parents because a son means insurance to them. It is believed that he will inherit the property of his father and get a job to help and support the family. Whereas if a girl is born; the reaction is totally different. Some women even start crying when they find out their baby is a girl; because a daughter is just another expense to them. Her place is considered in the home, not in the world of men. In some parts of India, it is a tradition to greet a family with a newborn girl by saying, "The servant of your household has been born." This pathetic scenario makes one to think in which world they are living. On one hand, girls like Kalpana Chawla reached to the moon, on the other hand, people in India still believe the girls a "burden or expense". A combination of extreme poverty and deep biases against women creates a pitiless cycle of discrimination that keeps girls in developing countries from living up to their full potential. This gender discrimination leaves them vulnerable to severe physical and emotional abuse. Her identity just becomes forged as soon as her family and society use to limit her opportunities and declare her to be below standard. Obviously, in such circumstances a girl can just feel inferior when everything around her tells her that she is worth less than a boy. In this article, gender discrimination at different stages of life of a woman in India has been analysed. Moreover, now the time has come to break the silence regarding this discrimination, thus certain suggestions are also given by the author to curb it.

Key Words: Gender, Discrimination, Vulnerable, Poverty, Burden, Expense.

Gender equality is more than a goal in itself. It is a precondition for meeting the challenge of reducing poverty, promoting sustainable development and building good governance.

Kofi Annan

India is going to become a superpower. But even after 68 years of independence when a boy is born in India, friends and relatives congratulate the parents because a son means insurance to them. It is believed that he will inherit the property of his father and get a job to help and support the family. Whereas if a girl is born; the reaction is totally different. Some women even start crying when they find out their baby is a girl; because a daughter is just another expense to them. Her place is considered in the home, not in the world of men. In some parts

of India, it is a tradition to greet a family with a newborn girl by saying, "The servant of your household has been born." This pathetic scenario makes one to think in which world they are living. On one hand, girls like Kalpana Chawla reached to the moon, on the other hand, people in India still believe the girls a "burden or expense". A combination of extreme poverty and deep biases against women creates a pitiless cycle of discrimination that keeps girls in developing countries from living up to their full potential. This gender discrimination leaves them vulnerable to severe physical and emotional abuse. Her identity just becomes forged as soon as her family and society use to limit her opportunities and declare her to be below standard. Obviously, in such circumstances a girl can just feel inferior when everything around her tells her that she is worth less than a boy. In this article, gender discrimination at different stages of life of a woman in India has been analysed. Moreover, now the time has come to break the silence regarding this discrimination, thus certain suggestions are also given by the author to curb it.

Meaning of "Gender Discrimination":

The practice of unfair treatment towards a person or a group of persons different from other people or groups of people is called discrimination.[1] In simple words, "the gender discrimination is the practice of treating a group of people differently on the basis of their gender." It simply means the presence of unfair behaviour towards one gender believed to be inferior by another. Thus, gender discrimination includes workplace discrimination, sexual discrimination, pregnancy discrimination, and wage discrimination etc. but it is not limited to these only.

A girl child has always been considered only a burden by the parents and this discrimination starts with them even before her birth in the form of foeticide and infanticide. This shows that the girls are being discriminated in one form or the other throughout their life in the name of dowry, domestic violence, honour-killing, sexual harassment in different forms etc. How can an evil (gender discrimination) be curbed, when it starts from the home itself? Actually, it has deep-rooted not only the basis of Indian society, but it is found all over the world. But patience never means a weakness and now the time has come to break the silence and to fight against gender discrimination.

Gender Discrimination in Present Scenario:

Recent news of gender discrimination in India actually shocked the whole nation. The news made me think that even after 68 years of independence; we are at the same place from where we have started our journey in context of gender discrimination. Although equal rights and privileges for men and women has been guaranteed under the Constitution of India and even the provisions are made to improve the status of women in society, yet majority of women are still unable to enjoy the rights and opportunities guaranteed to them for one reason or the other.

In some parts of India, discrimination is very strict rather almost arbitrary e.g. women are being forbidden from driving, from travelling, and from getting an education and in some cases choices of women for clothing are mandated by local laws which if not complied with severe punishments are inflicted on them. Certain recent news needs a mention here in this regard. These are as follows:

- A news from Maharashtra shocked the whole nation when it nation came to know that women are not allowed to enter places of worship in Maharashtra. Although the Bombay High Court directed Maharashtra government to take pro-active steps to ensure compliance of law and prevent discrimination against women on entry to places of worship, by saying "it is the fundamental right of a woman" and the government should protect it. The court declared this while disposing of a PIL through which the bar on entry of women in the sanctum sanctorum of Shani Shingnapur temple in the Ahmednagar district is being challenged. Although this step of judiciary enable them to enter into the place of worship, but the question of discrimination against women remain intact and made us think that still she has to fight for her rights which are guaranteed to her while the Constitution of India came into existence.
- Another news came from a Panchayat in an Aligarh village which has announced a complete ban on the use of mobile phones by girls younger than 18, blaming the devices for "corrupting" them. Moreover, it has been declared by the Panchayat that the families of violators will be punished and for that they have to sweep village roads. They went to the extent of forming three different types of committees for this, who would ensure that no one breaks the law and the order is followed. Although again judicial intervention can be seen while Additional District Magistrate of the city said that no one has the right to take law in his hands and whichever organisation is prohibiting constitutional rights of an individual, would be severely dealt. He further said that "We have got information about the Panchayat order from media reports only. Panchayats are founded to solve small issues through talks and discussions. But this doesn't mean that they can infringe the rights of an individual which are provided by the Constitution itself."[2]
- One more incident made us think that women are still facing discrimination in India when the Apex court of India while disposing a PIL went to the extent of saying that inspite of guarantee of the Constitution; Muslim women are subjected to discrimination. There is no safeguard against arbitrary divorce and second marriage by her husband during currency of the first marriage, resulting in denial of dignity and security to her.

The above discussion proves itself that the question of discrimination against women still remains as it is in the society in one form or the other. People of India are still not able to understand the bad impact of gender discrimination on the society as well as on the whole nation. They should understand that the status of women is central to the health of a society. If one part suffers, so does the whole. But, they are not even ready to evaluate the reasons for this increasing discrimination; so how the solution to curb it can be sought.

Reasons for the growth of Gender Discrimination in India:

First of all reasons for gender discrimination should be analysed and for this following points should be focused:

- Status of women at home: Customs and beliefs: In some parts of India, a tradition can be seen that when a girl child is born, the relatives and neighbours greet the family of newborn girl by saying, "The servant of your household is born." In such situation, a girl can just feel inferior when everything around her tells her that she is worth less than a boy. This statement shows apathetical condition of women at home. It simply means discrimination starts from home. Thus, women are not free from social customs, beliefs

and practices. The history of Indian culture itself proves that since very early periods, men have dominated women as a group and their status has been low in the family and society. Thus, social discrimination is the main cause of gender disparity in our society.

- Dowry system in Indian Society: Over the years, dowry has grown as a deep-rooted social evil. It has become the main reason of atrocity on woman and many unfortunate deaths of young women. It is a heinous, brutal and barbaric crime. In Soni *Devrajbhai Babubhai v. State of Gujarat*[3] the Supreme Court's observation regarding dowry was: "This all-pervading malady in our society has only a few exceptions in spite of equal treatment and opportunity to boys and girls for education and career. Society continues to perpetuate the difference between them for the purposes of marriage and it is this distinction, which makes the dowry system thrive."
- Educational backwardness: "Educational backwardness of the girls has been the resultant cause of gender discrimination. The disparities become more visible between male and female literacy rate, during 2001 and 2011. The progress towards education by girls is very slow and gender disparities persist at primary, upper primary and secondary stage of education. Moreover, participation of girls in education is still below 50%. Gender differences in enrolment are prevalent in all the state at all levels. They are not able to realize full identity and power in all spheres of life only due to illiteracy."[4]
- Low income or Unemployment: "Rights and obligations within a house hold are not distributed evenly. Male ownership of assets and conventional division of labour reduce incentives for women to undertake new activities. In addition child bearing has clear implications for labour force participation by women. Time spent in bearing and rearing of children often results in de-Skilling, termination of long term labour contacts. Thus women are not being able to be economically self sufficient due to unemployment and their economic dependence on the male counterpart is itself a cause of gender disparity. Thus, women are not able to respond to new opportunities and shift to new occupations because their mobility tends to be low due to intra-house hold allocation of responsibilities."[5]
- Family situation and Attitudes: Parents generally think that teaching a girl child to handle the kitchen is more important than sending her to school. Moreover, it is felt that sending a girl child to school will be an unnecessary financial burden as subsequently she will be married off and shifted to some other family, inspite of the fact that the provisions are made for free and compulsory education for girls under the Constitution of India. This type of orthodox belief and attitude of the parents is responsible for gender disparity.

Although, it has been specifically provided under Article 15 of the Indian constitution that the state shall not discriminate any citizen only on the ground of sex, still most of the women are unaware of their basic rights and capabilities. They are not even aware of the fact that how the socio-economic and political forces affect them. They silently accept all types of discriminatory practices that persist in our family and society largely due to their ignorance and unawareness.

Conclusion

After Independence, there have been important changes in legislation and litigation which have facilitated the increased participation of women in political activities as well as in the

socio-economic development activities and the increase appear to be more likely at the lower level than at the highest centres of decision making.

The irony of Indian culture is that despite pronounced social development and technological advancement, women in our society still continue to be victims of exploitation, superstition, illiteracy and social atrocities which is a form of injustice to women. Like male or even above them female plays important role in the family and development of a nation; but her contribution is nowhere recognized by the male dominant society. Now the time has come to speak as Ban Kin-moon (Secretary -General, UNO) stated: "Break the silence. When you witness violence against women and girls, do not sit back and react." This world still continues to be a man's kingdom, but with most people rising ahead to extinguish this wild fire,[6] the authors have good faith and hope that this fire will die soon.

Suggestions

Various movements, programmes are being carried out by the Government, voluntary organizations and by lot of social activities for the empowerment of women and against the gender discrimination.[7] To solve the gender discrimination problem the E4SD factor would be very useful. These E4SD factors are[8]:

- Education
- Employment
- Economic Independence
- Empowerment
- Self-confidence
- Decision Making Power.

But true change starts from within each person. One can bring change by changing his/her orthodox mindset. Some other steps can be taken to curb the evil of gender-discrimination in India like training of personnel of executive, legislative and judicial wings of the State, with a special focus on policy and programme framers, implementation and development agencies, law enforcement machinery and the judiciary, as well as non-governmental organizations can be undertaken in a more stringent way. Certain other measures which can be focused and implemented without any delay includes:

- Stress on promoting societal awareness to gender issues and women's human rights should be given.
- Review of curriculum and educational materials to include gender education and human rights issues should be done.
- All references which are derogatory to the dignity of women from all public documents and legal instruments should be removed as soon as possible.
- Use of different kind of mass media to communicate social messages relating to women's equality and empowerment should be increased.

The above discussion amply reveals that the concepts of gender-discrimination and women empowerment are taking a new shape; still there exists a need to understand that the concept

of gender-discrimination should not only be a matter of debate but it must be checked in reality and all necessary actions should be taken on time to curb this evil.

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FREE LEGAL AID: A CATALYST FOR SOCIAL CHANGE

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ABSTRACT

'Access to Justice' is a basic human right conferred by the common law and exists unless it is taken away by any valid exercise of statutory or constitutional power, by the legislature. Legal Aid conveys the assistance provided by the society to its weaker members in their effort to protect their rights and liberties, provided to them by laws. Unless there is sure uniformity, the justice cannot be done. The innocent and the unassisted persons obviously would be at a very disadvantageous position to fight a legal battle to a legally aided person. The very object of Free Legal Aid to the poor is to ensure equal and uniform justice. In the country like India where the poor are not just unaware of their rights but also are unable to engage lawyers, their part of the story simply remains untold and justice ends up becoming a rich man's indulgence. Article 39-A enunciates that the state shall secure that the operation of legal system promotes justice, on basis of equal opportunity and shall, in particular provide free legal aid, by suitable legislations or schemes in order to ensure that opportunists for securing justice are not denied to any citizen by reason of economic or any other disabilities. The Legal Services Act, 1987, is the most significant legislation on legal aid, it aims at constituting Legal Services Authorities to provide free and competent legal services to the weaker section of the society to ensure that the opportunities for securing justice are not denied to any citizen by any reason whatsoever and to organize Lok Adalats to secure that the operation of legal system promotes justice on the basis of equal opportunity. In India, 80% of the inmates in the prisons are under trials. The major problems faced by them are not only of being granted bails or inhuman treatment in jails or facing bad conditions or lack of proper medical treatment, etc. but actually, not getting a trial. There are various statutes and various precedents which have been laid down in landmark cases which provide for the rights which these prisoners are entitled to. But, the problem which lies today is not in the availability of these rights but in their proper enforcement. Free and Competent Legal Aid to the needy is very important for effective survival of social system and its denial will

> *entail a failure of the rule of law. The time has come to make this right a reality and to judiciously design, dispense, deliver and promote Free Legal Aid.*

Key Words: Legal, Aid, Under, Trials, Social, Justice, Rights, Prisoners.

Legal Aid which means giving free legal services to the poor and needy who are unable to afford the services of an advocate for the conduct of a case or a legal proceeding in any court, tribunal or before an Judicial authority. The concept of legal aid is provided in the form of Article 39A into our constitutional framework. Hence, legal aid is not a charity or bounty, but is a constitutional obligation of the state and right of the citizens. The problems of human law and justice, guided by the constitutional goals to the solution of disparities, agonies, despairs, and handicaps of the weaker, yet larger brackets of humanity is the prime object of the dogma of "equal justice for all". Thus, legal aid strives to ensure that the constitutional pledge is fulfilled in its letter and spirit and equal justice is made available to the downtrodden and weaker sections of the society. It is the duty of the State to see that the legal system promotes justice on the basis of equal opportunity for all its citizens. It must therefore arrange to provide free legal aid to those who cannot access justice due to economic and other disabilities.

In *Maenka Gandhi* v. *Union of India*[1] the Supreme Court gave a new dynamic dimension to Article 21. Protection of this article is well extended to under-trials, prisoners and even to the convicts. It has been ruled that a prisoner, be he a convict, under-trial or a detenu, does not cease to be a human being. Even when lodged in the jail, he continues to enjoy all his fundamental rights including the Right o Life.[2]

In *M.H. Hoskot* v. *State of Maharashtra*[3] the Supreme Court laid down that right to free legal aid at the cost of state to an accused, who could not afford legal services for reasons of poverty, indigence or incommunicado situation, was part of fair, just and reasonable procedure implicit in Article 21. Free legal aid to be indigent has been declared to a states duty and not government charity."

Justice *Krishna Iyer* regards it as a catalyst which would enable the aggrieved masses to re-assert state responsibility, whereas Justice *P.N. Bhagwati* simply calls it "equal justice in action". But, again the constitution not being a mystic parchment but a Pragmatic package of mandates, we have to decode its articles in the context of Indian life's tearful realities and it is here when the judiciary has to take center stage.

The preamble of the Indian constitution basically aims to secure to the people of India justice socio economic and political. Justice *P.N. Bhagwati* aptly stated that legal aid means providing an arrangement in the society which makes the machinery of administration of Justice easily accessible and in reach of those who have to resort to it for enforcement of rights given to them by law. Article 38(1) avows that the State shall promote the welfare of the people by securing and protecting the social order including justice.

In the case of *Hussainara khatoon* v. *State of Bihar*, it was held that if any accused is not able to afford legal services then he has a right to free legal aid at the cost of the state. It is the duty of the State to see that the legal system promotes justice on the basis of equal opportunity for all its citizens. It must therefore arrange to provide free legal aid to those who cannot access justice due to economic and other disabilities.[4]

If the accused does not have sufficient means to engage a lawyer, the court must provide one for the defense of the accused at the expense of the state.[5] The Constitutional duty to provide legal aid arises from the time the accused is produced before the Magistrate for the first time and continues whenever he is produced for remand.[6] A person entitled to appeal against his/her sentence has the right to ask for a counsel, to prepare and argue the appeal.[7]

History of Legal Aid

The concept of legal aid to the indigent person has its roots in the well settled principle of natural justice "audi alteram partem" (hear the other side). Even in the primitive society the leader of tribes used to hear the parties before passing his judgment. In that society either there were no written laws or the laws administered were simple and no lawyer was required to convey the party's plea to the leader. On the other hand in today's society each year a large number of Acts are framed by the Parliament or state Legislature and equally a large number of Rules and Regulations are framed and statutory orders are issued. Added to this plethora of laws, is the Judge made law in the shape of precedents. It has become impossible for the aggrieved party to be aware of all the laws in his favour or against. Therefore in such a situation, the assistance of lawyers becomes a necessity, to the aggrieved person.

Legal aid is the provision of assistance to people who are unable to afford legal representation and access to the court system. Legal aid is regarded as central in providing access to justice by ensuring equality before the law, the right to counsel and the right to fair trial. A number of delivery models for legal aid have emerged, including duty lawyers, community legal clinics and the payment of lawyers to deal with cases for individuals who are entitled to legal aid.

Legal Aid as a Movement

The earliest Legal Aid movement appears to be of the year 1851 when some enactment was introduced in France for providing legal assistance to the indigent. In Britain, the history of the organized efforts on the part of the State to provide legal services to the poor and needy dates back to 1944, when Lord Chancellor, Viscount Simon appointed Rushcliffe Committee to enquire about the facilities existing in England and Wales for giving legal advice to the poor and to make recommendations as appear to be desirable for ensuring that persons in need of legal advice are provided the same by the State.

Since 1952, the Govt. of India also started addressing to the question of legal aid for the poor in various conferences of Law Ministers and Law Commissions. In 1960, some guidelines were drawn by the Govt. for legal aid schemes. In different states legal aid schemes were floated through Legal Aid Boards, Societies and Law Departments.

The First Law Commission, 1958 in its Fourteenth Report had presented a detailed thought on legal aid with a strong plea to implement the *Bhagwati* and *Harries* Reports. The commission also recommended that the word 'pauper' as used in CPC, Order XXXIII, should be substituted by the word 'poor persons' or 'assisted persons'

During 1960, the then Union government had prepared an outline for Legal Aid Organizations and states for their comments. But various State Governments in the conference help during 1962 had expressed their inability to allocate funds for the purpose of Legal Aid Scheme.

Again in 1970 a National Conference was convened in New Delhi on 'Legal Aid and Legal Advise'. In the Conference it was emphasized that it was Constitutional Obligation of the state

to make provision for Legal Aid tot the weaker sections having no means, to help them get legal assistance.

Gujarat Government had for the first time in 1970 appointed a 'Legal Aid Committee' in the Chairmanship of P.N. Bhagwati to grant of Legal Aid in civil, criminal, revenue, labour and other proceedings to backward classes and to make such recommendations on question of encouragements and financial assistance to institutions engaged in the work of such legal aid. This committee recommended certain tests for determining whether a person was eligible for legal aid or not. These tests were:

Means Test: Before providing legal aid, the means and sources of income of applicant should be considered.

Prima Facie Test: This test does not apply in criminal cases. In civil cases, when means test is concluded the applicant is required to show that he has a prima facie case, either to prosecute or to defend the action.

Reasonableness test: After the means test and prima facie test being satisfied: duty falls on the Legal Aid Committee to finally decide whether it is reasonable to provide legal aid to the applicant or not.

Government of India during 1972 had appointed an "Expert Committee" on Legal Aid under the chairmanship of Hon'ble Justice V.R. Krishna Iyer, the then member of Law Commission of India. The Committee had submitted its report in May, 1973, which is known as 'Processual Justice to the People'. The committee recommended that:

- Awareness to be brought among the poor, socially and educationally backward classes regarding their rights;
- To provide legal aid to labourers, women, children, industrial workers, poor prisoners, minors and Harijans:
- To emphasise the need for "Panchyati Justice" and legal aid to the rural poor.

In criminal proceedings the committee is not in favour of granting legal aid to habitual offenders and in cases, which essentially involve private claims. Regular arrangement for aid and advice to the undertrials was to be provided.

A liberalized bail policy which was not to be dependent on financial consideration Legal services was to be extended to investigation as well as post conviction stage. Legal services should also include rehabilitative services. In criminal legal aid, the committee was in favour of salaried lawyers. The report also encourages payment of compensation to victims in criminal cases.

Family courts should be established for women and children with women judges this is specially required in slum areas and rural villages. Public defence council should be appointed in children's court.

Thereafter in 1980, a national committee was constituted, under the chairmanship of Honorable Justice *P.N Bhagwati* the then a judge of the Supreme Court of India to oversee and supervise legal Aid programs throughout the country. This committee came to be known as CILAS (Committee for Implementing Legal Aid schemes) and started monitoring legal Aid activities throughout the country. The introduction of Lok Adalats added a new chapter to the

Justice Dispensation system of this country and succeeds in providing Supplementary forum to the litigants for conciliatory settlement of their disputes. The year 1987, proved to be very significant in Legal Aid History as the "Legal services Authorities Act" was enacted to give a statutory base to the legal system programs throughout the country and bring about a uniform pattern. This Act was finally enforced on the 9th of November, 1995 after certain amendments were introduced therein by the Amendment Act of 1994.

The Bar Council of India constituted under Section 4 of The Advocates Act, 1961 has also framed rules relating to legal aid viz: " The Bar Council of India Legal Aid Rules, 1983", containing 25 headings divided into five chapters which are exclusively dedicated for indigent persons.

In conclusion, The legal Profession should strive for the purpose of extending the benefits of legal aid to poor and needy, and the lawyers in India must render active and voluntary services in this direction. The practicing lawyers of the various courts in India must organize with the collaborative effort of the Bar Council of India, the Education Department and the University Grants Commission a programme of clinical legal education through legal education by their organized involvement in giving legal aid to the poor.

Framework of Legal Aid in India Constitutional Framework

Article 39 A of Indian constitution says that:-"It is the duty of the State to see that the legal system promotes justice on the basis of equal opportunity for all its citizens. It must therefore arrange to provide free legal aid to those who cannot access justice due to economic and other disabilities." The Supreme Court in *Hussainara Kathoon* v. *Home Secretary, State of Bihar*[8] had called upon the Government to frame appropriate scheme for providing legal aid to the poor. Legal Aid implies giving free legal service to the poor and needy who cannot afford the services of a lawyer for the conduct of a case or a legal proceeding in any Court, tribunal or before an authority.

When free help is provided by lawyers to those who can't afford the services of a lawyer for a case or any legal proceeding in a court or tribunal or any such authority, it is called legal aid. Legal aid is provided by the Legal Services Authority.

"If the accused does not have sufficient means to engage a lawyer, the court must provide one for the defense of the accused at the expense of the state." It has been held that this article may be used as an aid to the interpretation of Article 21, where a prisoner, owing to indigence or an incommunicado situation, he is disabled from engaging a lawyer to exercise his statutory right of appeal, the court shall, if the circumstances of the case and the means of justice so require, assign a competent counsel for the convict's defense, provided the appellant does not subject to that lawyer. It is the duty of the state, in such a case to pay reasonable remuneration for the defense counsel, not as charity, as may be equitably fixed by the court. The state must offer every reasonable facility to such counsel for conducting the appeal, as a condition of 'reasonable, fair and just' procedure, which is postulated by art. 21. This right to free legal aid arises when the accused is for the first time produced before the magistrate and continues throughout the trial. It extends even to security proceedings. But the court cannot issue mandamus to the state to supply a lawyer to the accused; his remedy would lie under the procedure laid down in 304(1) of the Cr.P.C., 1973. The ideal of equal access to justice would go against the imposition of an excessive rate of court fees[9].

The Free Legal Services include:

1. Payment of court fee, process fees and all other charges payable or incurred in connection with any legal proceedings;
2. Providing Advocate in legal proceedings;
3. Obtaining and supply of certified copies of orders and other documents in legal proceedings;
4. Preparation of appeal, paper book including printing and translation of documents in legal proceedings.

The principle contained in Article 39-A are fundamental directs the state to ensure that the operation of the legal system promotes justice, on a basis of equal opportunities and further mandates to provide free legal Aid in any way-by legislation or otherwise so that justice is not denied to any citizen by reason of economic or other disabilities. The controversial words, "to provide free legal aid, by suitable legislation or by schemes" or in any other way are used. These words used in Article 39A are very wide .In order to enable the state to afford free legal aid and guarantee sped trial a vast number of persons trained in law are essential. Legal Aid is required in many forms and at various stages, for obtaining guidance, for resolving disputes in court, tribunals and other authorities. The need for a continuing and well organized legal education is absolutely essential in view of new trends in the world order to meet the overgrowing challenges.

Article 39A ordains the state to secure a legal system which promotes justice on the basis of equal opportunity. The language of article 39A is couched in mandatory terms as is clear by the use of the word "shall" twice therein. In the words of Delhi HC "it is emphasized that the legal system should be able to deliver justice expeditiously on the basis of equal opportunity and provide free legal aid to ensure that the opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities".

Article 39A puts stress upon legal justice. To put it simply the directive requires the state to provide free legal aid to deserving people so that justice is not denied to anyone merely because of economic disability. The Supreme Court has emphasized that legal assistance to a poor or indigent accused that is arrested and put in jeopardy of his life and personal liberty is a constitutional imperative mandatory not only by article 39A but also by article 14 and 21.

In the absence of legal assistance, injustice may result. Every act of injustice corrodes the foundation of democracy. The court also ruled that it would make a mockery of Legal Aid if it were to be left to a poor, ignorant and illiterate accused person to ask for a free legal Aid. Accordingly the presiding judge has been obligated to inform the accused that he can obtain free legal service at the cost of the state if he is unable to engage a lawyer because of his indigence.

Although the mandate in Article 39A is addressed to the legislature and the executives yet, as the court can indulge in some "Judicial law making within the interstices of the constitution or any statute before them for construction". The courts too are bound by this mandatory. For the legal Aid program to succeed it is necessary to involve public participation and, for this purpose, the best way is to operate through voluntary organization and social Action groups. The state should encourage and support such bodies in operating the legal aid program. The

court fees should be correlated to expenditure on administration of justice as HC fees bar effective access to justice. The Supreme Court may have to consider whether such high court fees are just or legal.

Eligible persons for getting free legal services include:

1. Women and children;
2. Members of SC/ST;
3. Industrial workmen;
4. Victims of mass disaster; violence, flood, drought, earthquake, industrial disaster;
5. Disabled persons;
6. Persons in custody;
7. Persons whose annual income does not exceed Rs. 50,000/-
8. Victims of Trafficking in Human beings.

Legal aid as one possible solution to the problem the poor face in negotiating the criminal justice system. He traces the history of legal aid right from the colonial context through the heyday of social justice concerns as manifested in the persons of J. *Krishna Iyer* and J. *Bhagwati*, to finally result in the institution of the Legal Services Authority in 1987. In tracing the history, it is careful to point out ways in which legal services could be delivered more effectively to poor clients. The belief clearly is that the legal aid system could be improved and the attempt is to point out ways in which this can happen.[10]

In a recent judgment by Supreme Court, it was stated that, Prison reforms have been the subject matter of discussion and decisions rendered by this Court from time to time over the last 35 years. Unfortunately, even though Article 21 of the Constitution requires a life of dignity for all persons, little appears to have changed on the ground as far as prisoners are concerned and we are once again required to deal with issues relating to prisons in the country and their reform. While issuing certain directions for reforming prisons is that prisoners, like all human beings, deserve to be treated with dignity. To give effect to this, some positive directions are being issued by the Court:

The Member Secretary of the State Legal Services Authority of every State will ensure, in coordination with the Secretary of the District Legal Services Committee in every district, that an adequate number of competent lawyers are empanelled to assist undertrial prisoners and convicts, particularly the poor and indigent, and that legal aid for the poor does not become poor legal aid. He would also look into the issue of the release of undertrial prisoners in compoundable offences, the effort being to effectively explore the possibility of compounding offences rather than requiring a trial to take place.

The Director General of Police/Inspector General of Police in-charge of prisons should ensure that there is proper and effective utilization of available funds so that the living conditions of the prisoners is commensurate with human dignity. This also includes the issue of their health, hygiene, food, clothing, rehabilitation etc.

The Ministry of Home Affairs will conduct an annual review of the implementation of the Model Prison Manual 2016 for which considerable efforts have been made not only by senior

officers of the Ministry of Home Affairs but also persons from civil society. Also it is advisable and necessary to ensure that a similar manual is prepared in respect of juveniles who are in custody either in Observation Homes or Special Homes or Places of Safety in terms of the Juvenile Justice (Care and Protection of Children) Act, 2015. [11]

Legal Services Authorities Act, 1987 and Functioning of Lok Adalats

The Legal Services Authorities Act, 1987 is made to constitute legal service authorities to provide free and competent legal services to the weaker section of the society to ensure that opportunities for securing Justice are not denied to any citizen by reason of economic or other disabilities, and to organize Lok adalats to secure that operation of the legal system promotes Justice on the basis of equal opportunity. [12] The institution of Lok Adalats is at present functioning as a voluntary and conciliatory agency without any statutory backing for its decisions. It has proved to be very popular in providing for a speedier system of administration of justice. [13]

a) Services provided by the Legal Services Authority:

1. Payment of court and other process fee;
2. Charges for preparing, drafting and filing of any legal proceedings;
3. Charges of a legal practitioner or legal advisor;
4. Costs of obtaining decrees, judgments, orders or any other documents in a legal proceeding;
5. Costs of paper work, including printing, translation etc.

b) Duties of the Police Departments and the Courts:

The police must inform the nearest Legal Aid Committee about the arrest of a person immediately after such arrest. [14] The Magistrates and sessions judges must inform every accused who appears before the and who is not represented by a lawyer on account of his poverty or indigence that he is entitled to free legal services at the cost of the State. Failure to provide legal aid to an indigent accused, unless it was refused, would vitiate the trial. It might even result in setting aside a conviction and sentence. [15]

c) Rejection of the Free Legal Services:

If the applicant

- has adequate means to access justice;
- does not fulfill the eligibility criteria;
- has no merits in his application requiring legal action.

d) Non-availability of Legal Aid:

1. Cases in respect of defamation, malicious prosecution, contempt of court, perjury etc.
2. Proceedings relating to election;
3. Cases where the fine imposed is not more than Rs.50/-;
4. Economic offences and offences against social laws;

5. Cases where the person seeking legal aid is not directly concerned with the proceedings and whose interests will not be affected.

e) Withdrawal of Legal Aid:

The legal services committee can with draw the services if,

1. The aid is obtained through misrepresentation or fraud;
2. Any material change occurs in the circumstances of the aided person;
3. There is misconduct, misbehavior or negligence on the part of the aided person;
4. The aided person does not cooperate with the allotted advocate;
5. The aided persons appoints another legal practitioner;
6. The aided person dies, except in civil cases;
7. The proceedings amount to misusing the process of law or of legal service.

f) Entitlement for free legal aid:

Any person, who is:

1. A member of the scheduled castes or tribes;
2. Any person belonging to the Schedule caste/tribe, persons suffering from natural calamity, industrial worker, children, insane person, handicap, persons in custody and those having annual income less than Rs 1 lakh were entitled to avail free legal aid;
3. A victim of trafficking in human beings or beggar;
4. Disabled, including mentally disablement;
5. A woman or child;
6. A victim of mass disaster, ethnic violence, caste atrocity, flood, drought, earth quake, any industrial disaster and other cases of undeserved want;
7. An industrial workman;
8. In custody, including protective custody;
9. Facing a charge which might result in imprisonment[16;]
10. Unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence, and incommunicado situation;
11. In cases of great public importance;
12. Special cases considered deserving of legal services.

Lok Adalats

Lok Adalat is a new concept in our country and evolution of this system can be traced back even to the vedic times. It is judicial body set up for the purpose of facilitating peaceful resolution of disputes between the litigating parties. It has the powers of an ordinary civil court, like summoning, examining evidence etc. Its orders are like any court orders, yet the parties cannot appeal against such orders. Lok Adalat can resolve all matters, except criminal cases that which are non-compoundable. Either of the parties to litigation can make an

application to the court for transferring the case to a lok adalat. Where no compromise or settlement is made by the lok adalat, such a case is transferred to the court and that court deals with the litigation from the stage the lok adalat had reached.

The statement of objects of *The Legal Services Authorities Act*, 1987, states to organize Lok Adalats to ensure that the operation of the legal system promoted justice on basis of equal opportunity. The system of Lok Adalats, which is an innovative mechanism for alternate dispute resolution, has proved effective for resolving disputes in a spirit of conciliation outside courts.

Time and again it has been reiterated by our courts that legal aid may be treated as a part of right created under Article 21 and also under Article 14 and Article 22(1). [17] The apex court has held access to justice as a human right, [18] thus, imparting life and meaning to law.

Right to Legal Aid: an Analysis of Judicial Pronouncements Related to Prisoners and under trials.

Equality as an ideal exerts strong moral force in modern life. But we are not sure in practice what exactly we mean when we say everyone is equal before the law. At present equal protection of law is mediated by property relations. The unequal conditions of life like property and caste do determine the fate of the citizens and value of law.

To overcome the traditional inequalities of “status societies,” the idea of equality before law was invented in Western societies. While achieving greater equality between citizens of different social backgrounds is a continuous process, the indifferent criminal justice system seems to be reinforcing the traditional inequalities behind bars. This is only imitating the religions that claim all are children of god and equal, but men and women, priest and people, saved and damned are different everybody is equal before law but the citizens without property and social status are not. [19] One of the most neglected aspects of criminal justice system is the delay caused in the disposal of cases and detention of the accused pending trial. These undertrial prisoners are detenus put in prison mainly under non-bailable offences and persons who are unable to produce sufficient sureties in cases of bailable offences. It is the result of an arrest for an alleged offence not followed by grant of bail. Sometimes they are denied justice for long stretch of time. They are separated from their family for the best part of their life even though they may be innocent. In different Indian prisons they are found in a sizeable number. In certain cases they have to live in prison for a longer period than the period of imprisonment which would be awarded to them if they were found guilty. [20]

Hussainara Khatoon (IV) v. *Home Secretary, State of Bihar*[21] In this case in the state of Bihar, a very large number of men and women, children including, were behind prison bars for years awaiting trial in courts of law. The offences with which some of them were charged were trivial, which even if proved, would not warrant punishment for more than a few months, perhaps a year or two, and yet they remained in jail, deprived of their freedom, for periods ranging from three to ten years without even as much as their trial having commenced. Hence, The Court ordered immediate release of these under trials many of whom were kept in jail without trial or even without a charge.

It was held that equality under Article 21 is impaired where procedural law does not provide speedy trial of accused; does not provide for his pre-trial release on bail on his personal bond, when he is impoverished and there is no substantial risk of his absconding; if an under-trial

prisoner is kept in jail for a period longer than the maximum term of imprisonment which could have been awarded on his conviction and if he is not offered free legal aid, where he is too poor to engage a lawyer, provided the lawyer engaged by the State is not objected to by the accused. Where the petitioner succeeds in establishing his case, the Court would grant him any relief which is necessary to afford proper justice, or to prevent manifest injustice regardless of technicalities such as to issue directions to the Government and other appropriate authorities, as may be necessary, to secure to a prisoner his constitutional rights.

The Supreme Court held that the state cannot be permitted to deny the constitutional right of speedy trial to the accused on the ground that the State has no adequate financial resources to incur the necessary expenditure needed for improving the administrative and judicial apparatus with a view to improving speedy trial.

In *M.H. Hoskot* v. *State of Maharashtra*[22] , The Honorable court declared that "If a prisoner sentenced to imprisonment is virtually unable to exercise his constitutional and statutory right of appeal inclusive of special leave to appeal (to the Supreme Court) for want of legal assistance, there is implicit in the Court under Article 142 read with Articles 21 and 39-A of the Constitution, power to assign counsel for such imprisoned individual 'for doing complete justice".

In this case, it was held that an accused is expected to get free legal aid under article 39A. However, it doesn't mean that he can move Supreme Court for a writ of mandamus compelling the state to give financial assistance to engage a counsel of his choice.

In *Khatri & Others* v. *State Of Bihar & others*[23], It was held in this case that "Right to free legal aid, just, fail and reasonable procedures is a fundamental right. It is elementary that the jeopardy to his personal liberty arises as soon as the person is arrested and is produced before a magistrate for it is at this stage that he gets the 1st opportunity to apply for bail and obtain his release as also to resist remain to police or jail custody. This is the stage at which and accused person needs competent legal advice and representation. No procedure can be said to be just, fair and reasonable which denies legal advice representation to the accused at this stage. Thus, state is under a constitutional obligation to provide free to aid to the accused not only at the stage of every individual of the society are entitled as a matter of prerogative."

In this case, the court declared the right to legal aid as a fundamental right of an accused person by a process of judicial construction of Article 21; most of the States in the country have not taken note of this decision and provided free legal services to a person accused of an offence. It is mandatory to the State to provide free legal aid to an accused person who is unable to secure legal services on account of indigence, and whatever is necessary for this purpose has to be done by the State as per the constitution. The State may have its financial constraints and its priorities in expenditure but the law does not permit any Government to deprive its priorities in expenditure but the law does not permit any Government to deprive its citizens of constitutional rights on the plea of poverty."

In *State of Maharashtra* v. *Manubhai Pragaji Vashi*[24] , the court widened the scope of the right to free legal aid. The right to free legal aid is guaranteed fundamental right under Art 21 and 39A provides "equal justice" and "free legal aid".

Conclusion and Suggestion

Prisoners are languishing for years in jail before a legal aid counsel is appointed. When they are appointed, the UTPs do not trust their efficacy. The ceremonial and cursory visits by legal aid counsels and magistrates to prisons are not able to address this gargantuan problem.

The undertrials are routinely allotted legal aid counsels at the time of first production before the magistrate but the information does not reach them. The standing legal aid counsels are supposed to represent them when they are produced before the magistrate. In most cases, the legal aid counsels neither contact the prisoners nor their family member to prepare the arguments. It is important to ask why the legal aid system functions this way. The system is presided by the judiciary itself, though rules and resources are made available by the state. The selection of legal aid panels is neither done with care nor is a careful criteria evolved. Advance consultations between prisoners or their family and counsels to strategies legal intervention are never heard of. The expectations of prisoners and performance of the counsels do not meet each other. Yet there are hardly any instances of removing any counsel on grounds of non-performance. The quality of services provided is not reviewed.[25] The lower judiciary looks aside as the system remains dysfunctional but higher judiciary periodically wakes up.

1. The focus of legal aid is particularly on distributive justice, effective implementation of welfare benefits and elimination of social and structural discrimination against the poor. It works in accordance with the *Legal services Authority Act*, 1987 which acts as the guideline of the rendering of free justice.
2. It is highly interesting to know the problems of the rural poor and urban poor separately and also to find out how they compare with the legal problems of the non-poor living in rural and urban India. An efficient organization of a legal services delivery system may have to take account of all of these differences in legal needs of the poor and design the program accordingly.
3. It is a very great right incorporated in our constitution in the Article 39A to promote Justice on equal basis. In the case of *Khatri* v. *State of Bihar*, the court held that the right to legal aid is a fundamental right under article 21 of the Indian constitution.
4. NALSA has formulated a strategy to provide basic and essential knowledge to the vulnerable groups so that they can understand the law and know the scope of their rights under the law and eventually assert their rights as a means to take action, uplift their social status and being in social change.
5. Lack of awareness is the main impendent in effective ‘legal aid’. Efforts should be made to inform the public of the existence of these services by using electronic media and aggressive campaigns. Government should also target rural areas for making them aware about this concept.
6. Free legal aid must not be read to imply poor or inferior legal services. The lawyers in the panel should be experienced. The legal services which are given to the poor should be qualitative.
7. A master plan for juriditcare cannot succeed without sufficient financial resource. An annual amount of only Rs. 6 crore is being allocated to NALSA for the execution of its

policies which is inadequate. Henceforth proper financial resources should be given in order to make the effective implementation of Legal Aid.

8. Awareness of schemes and programs to be able to guide the poor litigants about the issue of Legal Aid.
9. Each district legal aid service authority should be evaluated and compared with other district legal service authority as well as intra states to encourage legal aid.

It is true that Constitution of India confers rights on individuals, but they would be mere paper rights unless the government departments discharge their duties and secure those rights for individuals. When that duty is not discharged by the government departments or the rights are encroached upon or deprived by them, it becomes the duty of the judges to enforce them without fear or favour. Legal aid needs to be organized by the state through appropriate legislation and allocation of resources human and financial. However in a world where controlling crime by any means takes primacy, it is expected that many thousands would be incarcerated without proving their guilt, legal aid be damned.

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JUDICIAL REVIEW OF ADMINISTRATIVE DISCRETION IN AWARDING GOVERNMENT CONTRACTS: THE INDIAN PERSPECTIVE

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ABSTRACT

Judicial review of administrative discretion has played a vital role in remedying the abuse of administrative discretion. The judiciary's role as the protector of the principles laid down in the constitution and larger natural principles ensures a regulation of the administrative discretion so as to meet various constitutional and normative principles. Administrative discretion is a facet of administrative law necessary for the functioning of the legal system. I.P. Massey defined discretion as choosing from available alternative, which cannot be reconciled on the basis of considerations largely subjective and not entirely susceptible to proof.[1] The rising complexity in state function has led to the allocation of wide discretionary powers to the administration. Over the years the courts have identified various principles as the basis for reviewing such discretion. These principles include the natural justice, fairness, reasonableness and other such principles. The scope of judicial review of administrative discretion in awarding government contracts may be traced by closely examining a catena of cases in this regard- starting from Tata Cellular v Union of India. This paper shall address the scope of such review of discretion by studying a catena of cases highlighting this issue.

Key Words: Judicial, Review, Administrative, Discretion, Awarding, Government.

Administrative discretion is a facet of administrative law necessary for the functioning of the legal system. The rising complexity in state function has led to the allocation of wide discretionary powers to the administration. I.P. Massey defined discretion as choosing from available alternative, which cannot be reconciled on the basis of considerations largely subjective and not entirely susceptible to proof.[2] But unfettered discretion has led to the abuse of the administrative process and the judiciary is to regulate and deter such abuse. Over the years the courts have identified various principles as the basis for reviewing such discretion. These principles include the natural justice, fairness, reasonableness and other such principles.

Scope of Judicial Review of Administrative Discretion

No discretion is unreviewable. Unfettered discretion creates scope for abuse and mala fide practices and judicial review is a task assigned to the judiciary by the Constitution to deter any potential abuse. It is thus the touchstone and essence of the rule of law.[3] It is for the executive to administer the law and the function of the judiciary to ensure that the government carries out its duty in accordance with the provisions of the Constitution.[4]

This judiciary's role as the protector of the principles laid down in the constitution and larger natural principles ensures a regulation of the administrative discretion so as to meet various constitutional and normative principles.

The judiciary in a catena of cases have put forth two main concepts for review of administrative discretion, (i) that the Judiciary must respect the discretion of the administrative authority[5] and(ii) that it must ensure this discretion does not violate any constitutional and natural justice. Therefore, the courts have emphasized on the need for a balance between respecting and regulating such discretion.

The Supreme Court has, over the years strived to ensure such a balance by restricting judicial review to the principles of reasonableness and fairness,[6] arbitrariness, openness,[7] public interest.[8] It restricted the grounds for judicial review to (i) illegality (ii) irrationality and (iii) procedural impropriety.

Tracing Judicial Review in Administrative Discretion in Government Contracts

The scope of judicial review of administrative discretion in awarding government contracts may be traced by closely examining a catena of cases in this regard- starting from *Tata Cellular v Union of India*[9] in 1994 to more recent issues raised in infamous scams pertaining to the allocation of spectrum and coal blocks.

Tata Cellular v Union of India[10] arose as a result of alleged biased and arbitrary allocation of contracts by the Department of Telecommunications for Cellular Mobile Telephonic Services. The allegations were based on the personal relationship between a member of administrative panel and a bidder. It was claimed that considerations other than commercial were used to shortlist the bidders.

The Court addressed the principle of judicial review in the light of the Government's role as a guardian of the State's finances. Judicial review applied to the exercise of contractual powers by government bodies in order to prevent arbitrariness or favoritism. However, there existing inherent limitations in exercise of that power of judicial review. The Court upholds the administrator's right to refuse the lowest or any other tender bid as long as the decision is driven by public interest.

The Court essentially held that the Judiciary must hold a nuanced position of reviewing administrative discretion in cases where are not inherently appealable before the Court while preventing unfairness. The Court also upheld the right to equality enshrined in Article 14 of the Constitution.

Judicial review is manifested in two ways, (i) Scope of judicial review (ii) The Court's ability to quash an administrative decision on its merits.

The Court clarifies that it is not empowered to review the merits of the decision, that it may question the decision making process alone. It further qualifies the review by stating that the Court may raise the following questions alone:

(i) Whether a decision making authority exceeded its powers;

(ii) Whether it committed an error of law;

(iii) Whether it committed a breach of rules of natural justice;

(iv) Whether it reached a decision which is no reasonable tribunal would have reached;

(v) Whether the authority abused its powers.

The review, therefore is procedural and not substantive and it cannot be treated as an appeal from the administrative decision. The court may not replace its own substitute its own decision. These questions restrict the legal grounds for moving against administrative decisions to three broad grounds (i) Illegality (ii) Irrationality and (iii) Procedural impropriety.

By *Illegality* the Court referenced the violations of core constitutional and other legal values enshrined in various statues and the Constitution.

Irrationality refers to the *Wednesbury* principle of unreasonableness which is qualified by an outrageous defiance of logic or of accepted moral standards such that no sensible person who had applied their mind would have come to the same conclusion. This principle has two facets:(i) Review evaluation of facts, where the decision taken as a whole could not have warranted the said conclusion and (ii) A decision is unreasonable if partial and unequal treatment is given to different classes.

Procedural impropriety refers to procedural aberrations as to invitation to tender and the screening process to short list bidders.

In defining the scope of judicial review, the Court emphasized on the right of the Government to have the freedom to contract while clarifying that it did not restrict the scope to the three grounds alone. *Tata cellular* laid the foundation for the scope of judicial review of administrative discretion.

In *Commissioner of Police v Syed Hussain*[11] the Court referred to the doctrine of proportionality to determine the scope of judicial review. It emphasized on the extent of the scope of review in the light of the facts and circumstances of the case. The case arose upon the allegedly biased decision of dismissal of the Respondent from service upon misconduct. The Court, finding in favourof the administrative decision invoked the doctrine stating that a dismissal from service for aiding criminals to obtain and jump bail did not violate the doctrine. Therefore, lack of proportionality in the administrative authority's decision is another ground for invoking its judicial review.

In *Reliance Airport Developers Pvt. Ltd. v Airports Authority of India,* [12] the case arose as a result of the lowering of the standard of criteria for the appointment of a technical advisor. It was done due to insufficient number of bidders. It was alleged that this was in contravention of the procedure to be followed and led to arbitrariness. The Court noted that the exercise of discretion must be a result of judicial thinking, that "vigilant circumspection and care" must be taken to prevent abuse of such discretion.

The Court reiterated the principle laid down in *Tata Cellular* that an authority can be directed to exercise discretion but the manner it undertakes cannot be dictated.

The present trend of judicial review, it noted, is to restrict the immunity from judicial review. The Court addresses the willingness of the judiciary to assert their power of scrutiny of the factual basis of discretionary powers. That there are circumstances like those pertaining to national security where the judiciary is said to have no jurisdiction but has exercised itsto determine whether the government's claim may be admitted. Generally the Court differs from interfering in administrative discretion unless it is tainted by any vulnerability, specifically any illegality, irrationality or procedural impropriety.

The depth of judicial review and the deference due to administrative discretion vary with the subject matter. In cases where two views are possible and one has been taken, judicial review cannot be done in the absence of mala fide intent.

The Court also refers to its approach on error of fact and the error of law in the administrative discretion. It qualifies error of fact as inclusive of a decision based on (i) Lack of jurisdiction, (ii) Lack of evidence to arrive at the decision and (iii) A vital fact being misunderstood or ignored. With regards to the error of law, the Court permits a review of any decisive error with regards to its jurisdiction.

Jagdish Mandal Vs. State of Orissa[13] arose due to alleged procedural irregularity in accepting the lowest bidder's earnest money deposit. In this case, the authority did not accept a passbook declared invalid by the authority that issue it. The Court in addressing the issue put forth certain guidelines which clarify the scope of judicial review of government contracts.

It stated that while invoking power of judicial review in matters as to tenders or award of contracts, certain special features should be borne in mind. That the principles of equity and natural justice may not be invoked as long as the decision was bona fide and in public interest. In this manner, mere procedural aberrations will not permit judicial review if the decision is in public interest.

The Court clarifies circumstances in which interference is permitted (i) If the decision or process is mala fide, (ii) The decision is arbitrary or irrational to the extent that no reasonable authority would give that award. (iii) It violates public interest.

The intention of judicial review is to prevent aberrations and to check whether the decision is made in compliance with the law and not whether it is sound. That the decision should be measured against these standards keeping in mind the administrative autonomy in granting commercial contracts.

In *Michigan Rubber v State of Karnataka,*[14] the Karnataka State Road Transport Corporation floated a tender for the supply of tyres, tubes and flaps. The appellants approached the Court questioning the pre-qualification criteria in this regard.

Finding in favor of the Government, the Court highlighted an important principle. It reasoned the question of judicial review of administrative discretion from the perspective of the rights of the bidder. That judicial review is restricted when the State's action are fair and that no one has a fundamental right to contract with the government. That this discretion therefore extends to denying persons the contract based on certain conditions laid down in the tender, which too are determined and may be modified by the administrative authority. It therefore limits the Court's scope of interference in fair and reasoned decisions.

The Court put forth two instances in which it may interfere in a commercial matter:

(i) When the process adopted was mala fide and intended to favour someone, or when the decision was arbitrary and irrational such that no responsible authority acting reasonably and in accordance with the law could have reached it.

(ii) When the decision is counter to public interest.

The Court reiterated the need for a balance between administrative independence and exercising discretion and preventing abuse of such discretion.

While these precedents addressed the issue of the abuse of administrative discretion, much public attention was garnered owing to the sheer economic loss to the government in *Centre for Public Interest Litigation v. Union of India*[15] and *Natural Resources allocation, In re Special reference.*[16]

Centre for PIL v UOI, [17] better known as the 2G scam arose out of the misallocation of licenses/ radio spectrum to provide 2G services by the Ministry of Communications and Information Technology in January 2008. The allocation was done based on the 'first-cum-first-service' basis, disregarding the quality of the bid or the price being offered for it. It was sold at the economic value of spectrum in 2001 despite an enormous inflation of resources' value in 2007-08. The Comptroller and Auditor General in his report declared the process of allocation as arbitrary.

The Court struck down the allocation and asked for a reallocation of such spectrum based on a *suggested* auction process. It cited violations of equality and public interest in this regard. In this manner, the Court relied, once again on the violation the Constitution and public interest to invoke its right to review the procedure.

Natural resources allocation, In re,[18] or the coal block scam arose as a result of misallocation of coal blocks. The case results from a Presidential reference in the wake of the 2G spectrum case which brought out the large scale economic loss resulting from corrupt practices of the administration. The mechanism for allocation of coal for private commercial exploitation was raised. In the power generation industry, the Mines and Minerals Act[19] forbids the method of auction to allocate natural resources.

That judicial review of discretion was based on the facts of each case and here, the failure to uphold Article 14 of the Constitution lead the Court to term the executive action as arbitrary, unreasonable, biased, unfair and capricious.

While the Court struck down the allocation, it noted that it was outside its scope to suggest an alternate mode of allocation. In doing so it references several cases[20] which define the scope of judicial review, specific to economic decisions. It states that special deference should be afforded to administrative bodies' economic and public policy decisions. The Court is excluded from deciding on such policies but the authorities are not afforded unfettered discretion, it must uphold constitutional and principles of natural justice and fairness.

Manohar Lal Sharma v Principal Secretary[21] refers to the allocation of coal mines between 1993 and 2011. Here too the Court declared the allocation to be invalid, unfair and arbitrary. It stated that the blocks were allotted without any objective criteria, application of mind and essentially without following the guidelines or desired recommendation of the Government. It questioned the procedure or lack of thereof and not the merits of the decision.

It clarifies that while the method of public auction is preferred as it ensure transparency, the Court did not have a say in the policy decisions which are strictly the Executive's prerogative. In doing so, the Court struck down such allocations as violations of the Constitution as well as common good and public interest.

In *Joshi Technologies v Union of India*[22] the allocation of oil and natural gas through production sharing government contracts was questioned. The Court addresses the restricted scope of judicial review under Article 226[23] which permits extraordinary jurisdiction. It states

that the review in respect of dispute pertaining to contractual obligations may be further limited. Based on the facts the Court upheld the High Court's decision to not interfere with the commercial obligations under the contract. It states that the presence of a public element as it exists in government contracts coupled with a violation of Article 14[24] would attack the principle of arbitrariness.

Judicial Review as Deterrence to Abuse of Administrative Discretion

Judicial review of administrative discretion has played a vital role in remedying the abuse of administrative discretion. The cases discussed all clarify the position of permitting judicial review to prevent arbitrariness, bias and unreasonableness. But it is worth reconsidering whether these instances have led to stricter compliance with compliance in the exercise of the jurisdiction.

The Court's emphasis on the need for a balance between the judiciary's respect for discretion and prevention of its abuse is worth noting. But the next step may now be speculated in the light of the continuing abuse of such discretion despite continuous judicial review.

The 2G scam and the coal block scam are instances of the Government's manifestly unwise economic decisions resulting not only in the misallocation or misuse of scarce resources but an enormous loss of the government's potential income worth lakhs of crores of rupees. These largescale losses perhaps indicate the inadequacy of the system in curbing and deterring administrative abuse.

The Supreme Court's decisions have laid down guidelines for the administrative authority to follow but the continuing practices of arbitrary and biased exercise of discretion indicate the need for a radical change in the system. The review processes must become more stringent in order to deter such abuse, the mechanism for which may either be the Judiciary or otherwise.

Conclusion

The legal regime on the judicial review of administrative discretion is clear. It requires the judiciary to hold a nuanced position of respecting the administrative authority while preventing the abuse of such discretion. This respect is garnered from restrictions on the scope of judicial review on their decisions, especially in commercial matters like the awarding of government contracts. Overtime, the scope has been narrowed down to procedural impropriety, irrationality and illegality of the decisions made. These wide principles provide direction to the administrative authority without encroaching on the substance on which their decision is to be based. The question that now remains to be answered is whether these guidelines are sufficient to deter recurrent abuse of administrative discretion.

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USE OF MODERN SCIENTIFIC DECEPTION DETECTION TECHNIQUES IN CRIMINAL INVESTIGATION IN INDIA: A STUDY FROM CONSTITUTIONAL AND HUMAN RIGHTS PERSPECTIVE

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ABSTRACT

In this present paper researcher want to give a detail account of deception detection techniques used in criminal investigation in India. The hallmark of our criminal justice system is the search for truth and our methods of investigation, rules of criminal procedure and appellate process are designed to ensure that. However, our criminal justice system is not free from flaws and thus the grey areas still remain. To fill up these grey areas, the jurors now-a-days have begun increasingly to rely on various modern scientific techniques in the investigative as well as judicial processes. Science and law, no doubt, are two distinct professions, but the legal system today, has to deal with novel scientific evidence on numerous occasions. The courts may permit relevant experiments, demonstrations, or tests by forensic experts to be performed in court in the presence of the jury, or permit evidence to be given of experiments, demonstrations, or tests performed out of court, for carrying out a fair trial. In the present times, forensic science forms an important branch of jurisprudence. It provides scientific methods for investigation of crime and for the analysis of the evidence associated with crimes. The investigating agencies could seek reliance on these techniques to extract information from a person who is suspected or accused of having committed a crime or on witnesses to aid investigative process. The scientific examination by forensic scientists provides a missing link in a chain of investigation. This has posed profound challenges for law as these scientific methodologies often include risks of uncertainty, unacceptable to a legal system. The use of these modern scientific deception detection techniques has thus raised several issues of legal importance, for e.g. their admissibility in evidence which encompasses the questions of their authenticity/accuracy/reliability; encroachment on life/personal liberty; test being violative of Article 20(3) of the Constitution of India; the violation of the human rights of the subject and the requirement of any changes in the existing law to keep pace with times.

Key Words: Deception, Detection, Techniques, Narcoanalysis, Polygraph, Brain.

Law is dynamic and not static and, therefore, as society evolves, law has to keep in consonance with the changing social order. After all *law is the cement of the society.* And

judiciary has the responsibility of interpreting the law for the greater good.[1] Therefore, it is imperative that the judicial mind must stay in touch and keep in step with the advancement of humanity.[2] Since the early ages the man has desired to make out or know the truth of events happening around. In any criminal investigation, interrogation of the suspects and accused plays a vital role in extracting the truth from them. The agencies investigating the accused are of the view that every crime takes place in a person's mind before it is carried out, so investigating or studying the mind of an accused with or without consent, would render a great help in the investigation process. With the advancement of science and technology, sophisticated methods of detecting truth have been developed which do away with the use of 'third degree torture' by the police. The scientific methods of interrogation namely- The Polygraph test, The Brain Mapping test and The Narco analysis or the Truth Serum test are the modern techniques that have been recently developed for detecting deception, although their use is controversial. These psychoanalytical tests are used to interpret the behavior of the criminal (or the suspect) and corroborate the investigating officers' observations. In this way a new jurisprudence is being created by diluting constitutional protections and by replacing conventional investigating tools and procedures in the name of fighting extraordinary crimes. The modern scientific deception detection techniques are now being extensively applied as an investigating tool, the question of their admissibility as evidence still remains as these deception detection techniques raise a host of ethical, legal, and medical issues. As we are living in a scientific era, each day we are observing new techniques or advancements in earlier technology. Law is dynamic not static. Law has to move with this scientific advancement but there are some limits that need to be watched by judiciary in legal jurisprudence. The present study aims at analyzing the use of the modern scientific deception detection or truth testing techniques in criminal investigation, determining the constitutionality and human rights perspective of these techniques and developing inferences based upon their validity on grounds of violation of fundamental rights and human rights.

Deception Detection Techniques

The ultimate goal of any criminal investigation is to seek truth. The traditional methods applied by the investigating agencies for the purpose have been the subject of severe criticism due to the physical torture element involved in them. Moreover, sometimes, in case of hardened criminals, it becomes nearly impossible for the investigating authorities to elicit truth from them. The investigating agencies these days have therefore taken resort to the modern scientific techniques like lie detection test, brain mapping and narco-analysis tests to determine truth.

The Lie Detector or the Polygraph test involves attachment of probes externally to the body which measure several variables such as the pulse, blood pressure, perspiration rate, etc. The test is based on the presumption that a false statement knowingly made by a person will cause these variables to deviate from their standard levels. The underlying theory of this test is when people lie they also get measurably nervous about lying. The heart beat increases; blood pressure goes up, breathing rhythm changes, perspiration increases, and so on and so forth. In the very beginning, a baseline for this physiological characteristic is established by asking questions whose answers the investigator knows. Deviation from this predetermined base line for truthfulness, measured by the lie detector, is taken as a sign of lie. It is to be noted that this test does not involve any direct invasion of the body. The test basically produces a graph of

multiple physiological parameters and hence the name polygraph. Like any other investigative technique, in principle, the subject may choose not to answer the questions asked. The conclusion of expert which would flow from his reading of the polygraph may be admitted or rejected by a judge on appreciation of the statement and the objections raised thereto by the defense and other experts. [3]

Lombroso, the founding father of criminology in 1895, was the first to experiment with a machine measuring blood pressure and pulse to record the honesty of criminals. He called it a hydrosphygmograph. A similar device was used by Harvard psychologist William Marston during World War I in espionage cases, who brought the technique into American court systems.

In 1921, John Larson added the item of respiration rate, and by 1939, Leonard Keeler, one of the founding fathers of forensic science, added skin conductance and an amplifier, thus signaling the birth of the "polygraph" as we know it today. It was basically designed to record blood pressure and changes in pulse rate. [4]

The second test is the P-300, which is better known as brain-mapping test.[5] In this test of brain mapping, the subject is first interviewed and interrogated to find out whether he is concealing any information. The person to be interrogated is made to wear a headband with sensors that measure electrical brain responses. The encephalograph equipment that is used has multiple electrodes that are connected to the scalp by using a gel and thereafter the map of the brain can be taken as is done by neurosurgeons in order to study the brain map, which records the electro-chemical activity in the brain. It involves interrogating the witness on three kinds of questions, 'neutral words' which are directly related to the case, 'probe words' which attempt to elicit concealed information known by the accused, and 'target words' which include findings relevant to the case of which the suspect is not aware.[6] The test does not expect an oral response from the accused, which is merely expected to listen to the words. The suspect's brain would interpret the words, and if he/she has some connection with the words or stimulus, the brain would emit what are known as P-300 waves, which shall be registered by sensors[7]. The results of the test are interpreted by an expert and enable one to infer the areas on which the suspect possesses information. He may then be subjected to a detailed interrogation on the specific areas regarding which he is expected to possess information. Brain fingerprinting test was invented by Lawrence farewell. Brain fingerprinting has been ruled admissible for court use in the United States of America.[8] It has been used in a number of high-profile criminal cases such as the murder trial of Terry Harrington and the sentencing of serial killer J. B. Grinde.

In India, on Jan 30, 2008, Brain-mapping test on serial killer Chandrakant Sharma concluded in Bangalore who was alleged to have revealed details about a case.[9]

The term Narco-Analysis is derived from the Greek word narkc (meaning "anesthesia" or "torpor") and is used to describe a diagnostic and psychotherapeutic technique that uses psychotropic drugs, particularly barbiturates, to induce a stupor in which mental elements with strong associated effects come to the surface, where they can be exploited by the therapist. In a Narco test the subject is administered a fixed quantity of Sodium Pentothal or Sodium Amytal which puts him/her in a state of Hypnotism. Such a test is generally conducted on a suspect who is not coming out with the truth. Once put to this test he is in half sleep and

answers the questions truthfully. This puts the accused in a hypnotic trance. The accused is then interrogated, the statements made by the accused are recorded on audio and video cassettes, and the report of the expert is helpful in collecting evidence. Early in the twentieth century, physicals began to employ scopolamine along with morphine and chloroform; to induce a state of "twilight sleep" during child birth scopolamine was known to produce sedation and drowsiness, confusion and disorientation, inco-ordination and amnesia for events experienced during intoxication.

In 1922 it occurred to Robert House a Dallas Texas Obstetrician that a similar technique might be employed in the interrogation of suspected criminals, and he arranged to interview under scopolamine to prisoners in the Dallas county jail whose guilt seemed clearly confirmed.[10]

Under the drug, both men denied the charges on which they were held; and both, upon trial, were found not guilty. Thus Robert House concluded that a patient under the in influence of scopolamine "cannot create a lie…. And there is no power to think or reason". His experiment and this conclusion attracted wide attention, and the idea of a truth drug was thus launched on the public consciousness. [11] The phrase "truth serum" is believed to have appeared first, in the news report of Robert House's experiment the Los Angeles Record, sometime in 1922. Robert House thereafter came to be known as the father of truth serum.

In India the first Narco-analysis was done in the Forensic Science Laboratory, Bangalore in 2001 on an individual associated with offences committed by Veerappan[12].

The interrogation may be a conventional one or aided by the administration of another scientific test such as the polygraph or Narco analysis. Thus, the results of the test enable one to conclude whether or not the accused possesses or is concealing any relevant information.

Judicial Attitue

These modern scientific techniques are usually said to lack legal soundness as the confession made by a semi-conscious person is not admissible in court of law. The court may, conversely, grant limited admissibility after taking into consideration the circumstances under which the test was carried out. It has been argued in many leading cases that courts could not direct the prosecution to hold narco- analysis, brain mapping and lie detector tests against the will of the accused as it will violate Article 20 (3) of the Indian Constitution which is the main provision on the subject of crime investigation and trial. It deals with the right against self-incrimination. The privilege against self-incrimination is also a fundamental canon of common law criminal jurisprudence. The characteristics features of this principle are-

- that the accused is presumed to be innocent,
- that it is for the prosecution to establish his guilt, and
- that the accused need not make any statement against his will.

These propositions emanate from an apprehension that if compulsory examination of an accused were to be permitted then force and torture may be used against him to entrap him into fatal contradictions. The privilege against self-incrimination thus enables the maintenance of human privacy and observance of civilized standards in the enforcement of criminal justice. [13]

Subjecting the accused to undergo the test, as has been done by the investigating agencies in India, is considered by many as a blatant violation of Art. 20(3) of the Indian Constitution. The legal point of using these techniques as an investigative aid thus raises the issue of encroachment of an individual's rights, liberties and freedom. The right of a person against self-incrimination thus enables the maintenance of human privacy and observance of civilized principles in the enforcement of criminal justice. These tests also go in opposition to the maxim '*nemo tenetur se ipsum accusare'* i.e., 'No man, not even the accused himself can be forced to answer any question, which may tend to prove him guilty of a crime he has been accused of.' If any form of physical or moral compulsion (under hypnotic state of mind too) is used to derive confession from the accused, it should be rejected by the court. In CrPC, Section 161(2) protects a person's right against self-incrimination; it states that every person "is bound to answer truthfully all questions, put to him by [a police] officer, other than the questions the answers to which would have a tendency to expose that person to a criminal charge, penalty or forfeiture" [14]. Further, it is also argued that these deception detection techniques comprise of mental torture and hence violate the "Right to Life" as mentioned in Article 21 which includes right to privacy and right against inhuman treatment and torture.

The first landmark decision addressing the admissibility of polygraph test was ***Frye v United States***[15] in which it was held that test had not yet gained sufficient standing and sufficient recognition among physiological and psychological authorities to justify its admission. In the United States, in some jurisdictions polygraph evidence had been completely banned in criminal proceedings. For e.g. in California, California Evidence Code 351.2(a) mandates that "….the results of a polygraph examination, the opinion of polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence in any criminal proceeding, including pre-trial and pot conviction motions and hearings, or any trial or hearing of a juvenile for a criminal offence, whether heard in juvenile or adult court, unless all parties stipulate to the admission of such results". [16]

In the United States, following the ***Frye decision,*** courts opinion differed in admitting polygraph evidence. Thus in ***United States v Messina,*** [17] court observed that the rule of law which excludes polygraph is the right one. However, in ***United States v Galbreth***, [18] in the admissibility phase court applied ***Daubert*** standard for admissibility of scientific evidence and granted the defendant's motion to admit expert opinion evidence on polygraph results.in the light of ***Daubert***[19] guidelines, court first evaluated the credentials of polygraph expert and then entered into the technical issues connected with polygraph instrument. Then court evaluated the scientific theory underlying the polygraph technique, control question technique, laboratory studies, field studies, scoring techniques and some challenges to the polygraph technique and directly came to the application of ***Dauber***t to the case at hand. [20]

In the United States, attempts were made for admissibility of brain mapping test but failed due to various reasons. In some cases court consider that these tests do not have authority regarding reliability of these tests or not in conformity with the r 702 of the Federal Rules of Evidence and lacked probative value. [21]

In the United States, the history of the admissibility of Narcoanalysis tests can be traced back to the half of the 29th century. In ***Orange v commonwealth*** of Virginia, [22] Supreme Court of Virginia refused to admit the defendant's evidence which was based on truth serum test. In Townsend v Sain, [23] US Supreme Court has stated that if the confession obtained from a

person is as a result of Narcoanalysis test, which was not voluntarily, that confession would be inadmissible.

In the United States, the majority of decisions in which deception detection techniques were involved as prominent question, court were of the opinion that they were not admissible since there were no scientific certainty that these techniques were reliable.

In the case of ***State of Bombay v. Kathikalu,*** [24] it was shown that the accused was constrained to make statement likely to be incriminative of himself. Compulsion means duress (pressure), which includes threatening, beating of wife, parent or child of a person. Thus where the accused makes a confession without any inducement, threat or promise, Art. 20(3) do not apply.

In ***Nandini Sathpathy v. P. L. Dani***[25]***,*** Iyer. J., advocated an expansive interpretation of the phrase compelled testimony. According to him, it is evidence procured not merely by ‘physical threats or violence’ but also by ‘psychic torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity, over-bearing and intimidatory methods, and the like’. Any mode of pressure, subtle or crude, mental or physical, direct or indirect, but sufficiently substantial, applied by the police to obtain information from an accused strongly suggestive of guilt becomes compulsion. However legal perils following upon refusal to answer or answer truthfully, do not amount to compulsion within article 20(3). But frequent threats of prosecution, if there is failure to answer, may take on the complexion of undue pressure violating Article 20(3).

In the year 1999, National Human Rights Commission issued certain guidelines regarding the conduct of these tests on the accused[26]. Complaints came to the NHRC that the investigating agencies in India, without explaining to the people the full implications of a lie detector test which requires prior injection of a drug, were applying the said test on the accused which violated the fundamental right against self-incrimination. Since these tests are not regulated by any particular law as such, the NHRC has laid down guidelines for the conduct of these tests. While issuing these guidelines, the NHRC followed the principle: *“in the absence of a specific ‘law’, any intrusion into fundamental rights must be struck down as constitutionally invidious [violative]”* [27]. The NHRC’s guidelines are as follows:

- No lie detector tests should be administered except on the basis of consent of the accused. An option should be given to the accused whether he wishes to avail himself of such test.
- If the accused volunteers for a lie detector test, he should be given access to a lawyer, and the physical, emotional and legal implication of such a test should be explained to him by the police and his lawyer.
- The consent should be recorded before a judicial magistrate.
- During the hearing before the magistrate, the person alleged to have agreed should be only represented by a lawyer.
- At the hearing, the person in question should also be told in clear terms that the statement that is made shall not be a “confessional” statement to the magistrate but will have the status of a statement made to the police.
- The magistrate shall consider all factors relating to the detention, including the length of detention and the nature of interrogation.

- The actual recording of the test shall be done by an independent agency and conducted in the presence of a lawyer.
- A full medical and factual narration of the manner of the information recorded must be taken on record.

The Bombay High Court, in ***Ramchandra Reddy* v. *State of Maharashtra*[28],** considered whether the compulsory subjection of accused to of these new methods namely lie detector or polygraph test, P-300 test or brain mapping, and narcoanalysis or truth serum tests violates the constitutional prohibition of testimonial compulsion under Article 20(3). According to the court, none of the tests violated article 20(3) because "The tests of brain mapping and lie detector in which map of the brain is the result , or polygraph, … cannot be said to be a statement made by the witness. At the most it can be called the information received or taken out from the witness." With regard to narcoanalysis while holding that the result of administration of serum is necessarily a statement nevertheless "unless it is shown to be incriminating to a person making it, it does not give rise to the protection under Article 20(3)." Thus, the Court held that there was no reason to prevent administration of this test because there were enough protections available under the Indian Evidence Act, Code of Criminal Procedure and under the Constitution to prevent inclusion of any incriminating statement made in the course of the administration of the test.

In ***Dinesh Dalmia v. State***[29], the madras high court ruled that narco-analysis testimony was not 'testimony by compulsion' because the accused "may be taken to the laboratory for such tests against his will, but the revelation during such tests is quite voluntary".

Moreover, there is a question of reliability of tests like Narco Analysis. Studies done by a number of medical associations in the US stick to the view that truth serums do not persuade truthful statements and accused in such a condition of trance under the truth serum may give misleading or false answers. It was held in the case of *Townsend v. Sain*[30] that the petitioner's confession was constitutionally inadmissible if it was adduced by the police questioning, during a period when the petitioner's will was overborne by a drug having the property of a truth serum.

In the recent judgment, in the case of ***Smt. Selvi & Ors v. State of Karnataka*[31],** it was observed that the right against self-incrimination is now viewed as an essential safeguard in criminal procedure. The compulsory administration of the impugned techniques violates the 'right against self-incrimination'. This is because the underlying rationale of the said right is to ensure the reliability as well as voluntariness of statements that are admitted as evidence. The Court recognised that the protective scope of Article 20(3) extends to the investigative stage in criminal cases and when read with Section 161(2) of the Code of Criminal Procedure, 1973 it protects accused persons, suspects as well as witnesses who are examined during an investigation. The test results cannot be admitted in evidence if they have been obtained through the use of compulsion. Article 20 (3) protects an individual's choice between speaking and remaining silent, irrespective of whether the subsequent testimony proves to be inculpatory or exculpatory. Article 20 (3) aims to prevent the forcible 'conveyance of personal knowledge that is relevant to the facts in issue'. The results obtained from each of the impugned tests bear a 'testimonial' character and they cannot be categorised as material evidence. The Supreme Court also held that forcing an individual to undergo any of the

impugned techniques violates the standard of 'substantive due process' which is required for restraining personal liberty. Such a violation will occur irrespective of whether these techniques are forcibly administered during the course of an investigation or for any other purpose since the test results could also expose a person to adverse consequences of a non-penal nature. The compulsory administration of any of these techniques is an unjustified intrusion into the mental privacy of an individual. It would also amount to 'cruel, inhuman or degrading treatment' with regard to the language of evolving international human rights norms. Furthermore, placing reliance on the results gathered from these techniques comes into conflict with the 'right to fair trial'. Invocations of a compelling public interest cannot justify the dilution of constitutional rights such as the 'right against self-incrimination'. The Court further held that the results of the tests by themselves cannot be admitted as evidence, even if the subject has consented to any of these tests, because there is no conscious control being exercised by the subject over the responses during the course of the test. However, if with the help of voluntarily administered test, any material or information is subsequently discovered, then it can be admitted under Section 27 of the Evidence Act, 1872.

On 6th August, 2014, ***in Badaun (UP)*** gang rape case, the CBI has applied these tests and reported that the lie detection test of the five accused arrested in connection with the case did not find "any deviation" from their earlier claim of innocence. The fathers of both girls have gone through lie detector tests because of alleged inconsistencies in their accounts; the CBI says the results are awaited. [32]

In the January 2016 polygraph test of Punjab SP Salwinder Singh was conducted in the Pathankot airbase attack. [33]

Various fundamental questions pertaining to human rights have also been raised on the application of narco- analysis, brain mapping, and lie detector test. Universal Declaration of Human Rights, 1948 in Article 5 provides, 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment', International Covenant on Civil and Political Rights in Article 7 provides, 'no one shall be subjected to torture or to cruel, inhuman or derogating treatment or punishment, in particular no one shall be subjected without his free consent to medical or scientific experimentation'. The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 also provides for similar protection to the subject of such tests.

Conclusion

Law is a living process, which must change according to the changes in the society, science, ethics and so on. The legal system should imbibe developments and advances that take place in the science as long as they do not violate fundamental legal principles and are for the good of the society. Our constitution also requires us to develop scientific temper, humanism and the spirit of inquiry and reform. The criminal justice system should be based on just and equitable principles. But the present day criminal justice system is observed with individual liberty and freedom and in this context a safe passage for criminals due to weakness in the system leading to the dilution of evidence. It is based on the well-known legal phrase that "let hundred guilty go unpunished rather than an innocent is punished". The need of the hour is to upgrade our criminal justice system so as to leave no stone unturned to save an innocent person and to affirm that a criminal does not get away at the cost of innocent life. Thus

hallmark of our criminal justice system is the search for truth and our methods of investigation, rules of criminal procedure and appellate process are designed to ensure that truth. The new developments in the field of forensic science, if used properly with certain safeguards, would be a sufficient tool in the hands of the people fighting crime so as to arm them against it and make the system work to establish more and more just and safe place for the people. The advances in science are the better option for both investigation and interrogation than classical interrogation method. However, our criminal justice system is not free from flaws and thus the grey areas still remain. To fill up these grey areas, the jurors now-a-days have begun increasingly to rely on various modern scientific techniques in the investigative as well as judicial processes. The courts may permit relevant experiments, demonstrations, or tests by forensic experts to be performed in court in the presence of the jury, or permit evidence to be given of experiments, demonstrations, or tests performed out of court, for carrying out a fair trial. In the present times, forensic science forms an important branch of jurisprudence. It provides scientific methods for investigation of crime and for the analysis of the evidence associated with crimes. The investigating agencies could seek reliance on these techniques to extract information from a person who is suspected or accused of having committed a crime or on witnesses to aid investigative process. The scientific deception detection techniques of interrogation namely, Narcoanalysis, brain mapping and polygraph test has posed profound challenges for law as these scientific methodologies often include risks of uncertainty, unacceptable to a legal system. The use of these techniques is also sometimes referred to as ‘psychological third degree method’. These techniques are criticized on the ground that the results achieved through them are not wholly accurate. It has been found in various cases that certain subjects made totally false statements. For instance it is constantly unsuccessful in bringing out truth as such it should not be used to compare the statement already given to the police before use of drug. In many cases, it has been found that a person has given false information even after the administration of drug. The use of these modern scientific deception detection techniques has thus raised several issues of legal importance, for e.g. their admissibility in evidence which encompasses the questions of their authenticity/accuracy/reliability; encroachment on life/personal liberty; test being violative of Article 20(3) of the Constitution of India; the violation of the human rights of the subject and the requirement of any changes in the existing law to keep pace with times.

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CORPORATE GOVERNANCE AND CORPORATE GOVERNANCE RATING: PERSPECTIVE OF THE U.S., U.K. AND INDIA

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ABSTRACT

Corporate Governance is one of those allied areas of corporate world that has gained momentum in recent years. There is always a tendency of a situation, wide enough, to trigger development in an area of law. This is what corporate governance is all about. The compliances mechanism that work for companies and corporate houses are carried out on the basis of the guidelines prescribed by the market regulator, here, Securities and Exchange Board of India, not to mention the catena of regulations in that respect. The aim of this essay is to explore those areas of corporate governance which lead to another chain of concepts, that is, Corporate Governance Rating. The essay discussed the position of Corporate Governance and its Rating in three countries, i.e. the U.S., U.K. and India, and finally concludes on to say which rating mechanism is better.

Key Words: Corporate, Governance, Position, Corporate, Governance, Corporate.

Corporate Governance, as a concept is highlighted as a compliance with corporate standards, so as to ensure that, there exists transparency among the indoor management of the company. It is perhaps one of the most important differentiators of a business that has impact on the profitability, growth and even sustainability of business.[1] It is a multi-levelled and multi-tiered process that is distilled from an organisation's culture, its policies, values, and ethics, especially of the people running the business and the way it deals with various stakeholders.[2]

Over the past few years, ranging to more than a decade, there have been many changes in the corporate governance practices in India. The needs of India’s expanding economy, including access to foreign direct investment, the increased presence of institutional investors (both domestic and foreign), and the growing desire of Indian companies to access global capital markets by being listed on stock exchanges outside of India, have spurred corporate governance laws.[3]

What contemplates as good corporate governance is voluntary compliance to the doctrine of transparency. These regulations can only define the boundaries of good practices, but these are subject to certain limitations to the extent that these regulations can be relied on, because in their essence, all such regulations are only to ensure the transparency, however, what is important is, the managerial personnel who are responsible for the functioning of the company, who must ensure transparency by internal management.

What constitutes good corporate governance has to be voluntary. Law and regulations can, at best, define the basic framework - boundary conditions that cannot be crossed. CII has always

held the view that while law may need to be strengthened when occasions so demand, there are fundamental limits to using legislative and regulatory instruments to enforce better corporate governance.

Importance of Corporate Governance

Corporate Governance is understood as the process by which organisations are directed, controlled and held to account. It encompasses authority, accountability. [4] If countries are to reap the full benefits of the global capital market, and if they are to attract long-term "patient" capital, corporate governance arrangements must be credible and well understood across borders. Even if companies do not rely primarily on foreign sources of capital, adherence to good corporate governance practices will help improve the confidence of domestic investors, may reduce the cost of capital, and ultimately induce more stable sources of financing.[5]

On the contrary, bad corporate governance, hinders the working of efficient auditing of accounts, thereby, reducing the transparency and reliability. Some key factors relevant here are effectiveness of the Board, Enhancing the auditing function, developing mechanisms to provide assurances of good governance, public accountability.

Further, for the purpose of rating a corporate profile (corporate governance rating) on a certain scale is done on the basis of corporate governance, its conduct in identified areas, such as , ability and consistency of payment dividends, transparency in internal managements, frequency in auditing of accounts, etc. The system and process of this rating will be discussed in subsequent paragraphs.

Corporate Governance in United States

The United States of America,[6] is the modular based space for investors-oriented approach to corporate governance. On a general point, Boards of corporations are small, with dispersed power and authority. Corporate boards are small, have a high proportion of outside or independent members, and utilize committees to improve board processes.[7]. Some critics and scholars used these events to mount a strong challenge to the prevailing wisdom about market-based systems of corporate governance.[8] However, there have been many developments in recent years which tell us that, the idea of Corporate Governance, irrespective of the country, is not static but dynamic. This is mostly evident in context of the US.

Prior to the 1980s, the U.S. was characterized by strong managers and weak owners. Top managers tended to view themselves as loyal to the corporation, rather than as agents of shareholders. The 1980s saw a huge wave of hostile takeovers that threatened the hegemony of U.S. managers.[9] By the 1990s, managers had fought back by lobbying state governments to enact anti-takeover legislation, which made hostile takeovers much more costly.[10] But managers, then tend to expound on the notion of "shareholder value" as a new underlying ideology for corporate governance in America. In particular, the rise of equity-based pay such as stock options gave managers a greater stake in promoting restructuring and orientating their strategies toward the stock market. This shift went hand-in-hand with the catalysed role of independent, outside directors in the boardroom. [11]

The Enron Scam, came as a blow to the corporate US, which sparked the intellectual debate over the functioning of the legislations in the country. The model of Corporate Governance,

for which, the country stood as one of its kind, saw a flash, and which collapsed the "good" from the corporate governance. In terms of the U.S. "model" of corporate governance, Enron exposed the fact that the various elements of this system were not functioning together in a complementary fashion. In fact, the weaknesses or limits in the effectiveness of each element seemed to potentially undermine the other. [12] One of the reasons of this crisis, were detailed in view of the revelation by the Enron, of its total trading and brokerage, as revenue, which increased the market value of the company, and the expectations of the market itself. The agency costs of over-valued equity ensue when managers cannot deliver profits in line with unrealistic and inflated investor expectations. [13]

Corporate Governance in European Union

European Union, [14] Internal Market Commissioner issues a statement at a conference, held under the aegis of World Bank Group, highlighting the importance of Company Law and Corporate Governance in the EU economy, and generally, for a corporation/company, as well. It is worth highlighting it here:

"... Economies only work if companies are run efficiently and transparently. We have seen vividly what happens if they are not: investment and jobs will be lost; and in the worst cases, of which there are too many, shareholders, employees, creditors and the public are ripped off ..." [15]

The Commission has strongly endorsed the inclusion of the Boards of companies by including non-executive directors, so as to create a balance between executive and non-executive directors. Protecting shareholders, employees, and the public against potential conflicts of interest through an independent check on management decisions, constituted an important move to restore confidence in financial markets after a number of high-profile scandals. [16]

The development over the Remuneration of Directors, is another highlight of the development of corporate governance in the EU context. Remuneration is one of the main areas of potential conflicts of interest for executive directors. This and the fact that excessive remuneration has emerged as a prominent feature in many corporate fraud scandals has led the Commission to adopt a Recommendation on directors' remuneration. [17]

With the limited approach of this paper, it is submitted that, the EU's member states implemented many of the Commission's recommendations, and in the year 2007, Accounting and Auditing Rules, in 2005, the Transparency Directive, in 2007, Directive on the Exercise of Shareholders' Rights, etc.

Corporate Governance in United Kingdom

In the context of the United Kingdom, [18] the main source of this section is the report by Grant Thornton FTSE 350 Corporate Governance Review Committee. [19] The overall quality of corporate governance among UK companies remains high, as the regulator vows not to make any major changes to its code for the next three years. [20]

Further, as per the Thornton Report, there has been a steep increase in the corporate compliance of the provisions of the Corporate Governance Code of the UK. These include: increased shareholder scrutiny as the Stewardship Code beds down; the introduction of the 2012 Code and Strategic Review Regulations; and the pending introduction of additional

legislation on executive remuneration following the Kay Review. This wave of new guidance and regulation has perhaps kept governance at the top of companies' agendas, causing them to pause and reflect on their practices. However, the report also highlighted that incorrect board composition remains the highest area of non-compliance, with 12.8% of companies lacking sufficient independent directors. [21]

As per the UK Corporate Governance Code, chairmen are encouraged to report personally in their annual statements how the principles relating to the role and effectiveness of the board. [22]

Evolution of Corporate Governance in India

Beginning in the late 1990s, the Indian government began to undertake a significant overhaul of the country's corporate governance system. [23] After lobbying by large firms and leading industry groups, Securities and Exchange Board of India[24] in 2000 introduced unprecedented corporate governance reforms via Clause 49 of the Listing Agreement of Stock Exchanges. [25] Clause 49, a seminal event in Indian corporate governance, established a number of governance requirements for listed companies with a focus on the role and structure of corporate boards, internal controls and disclosure to shareholders.

The year of 2000, was significant for corporate houses of India, which was marked by the famous Satyam Accounting Scandal, which resulted in measures by the Ministry of Corporate Affairs, and the SEBI, as a result of which, greater measures of corporate governance compliances held a stronghold in the community. Some of these include, Companies Bill, 2009, MCA's Corporate Governance Voluntary Guidelines of 2009. [26]

This was further followed by the recommendations of the Birla Committee, also known as Committee on Corporate Governance, appointed by SEBI, whose recommendations primarily focused on improving the conduct and structure of a company's board and enhancing disclosure to shareholders, thereby advocating transparency. SEBI, thereafter, implemented the recommendations in the Listing Agreement.

Triggered by the Enron Scandal, in the recent years, and consequent adoption of Sarbanes-Oxley Act, SEBI formed the Narayana Murthy Committee in order to evaluate the adequacy of the then-existing Clause 49, to further enhance the transparency and integrity of India's stock markets and to "ensure compliance with corporate governance codes, in substance and not merely in form", [27] which were reflected in the 2004 amendments to the Listing Agreement, by the SEBI.

The Irani Committee appointed in 2004, by the Ministry of Corporate Affairs, [28] was charged with evaluating the Companies Act, with a focus on combining internationally accepted best practices in corporate governance with attention to the particular needs of the growing Indian economy. Many of the committee's recommendations were incorporated into proposed amendments to the Companies Act. For example, the concept of "independent director" is proposed under the bill to be introduced in the Indian Companies Act for the first time. [29]

The Irani Committe was then followed by the releasing of the Voluntary Guidelines, 2009, by MCA, provided for a myriad of corporate governance matters including, independence of the boards of directors; responsibilities of the board, the audit committee, auditors, secretarial audits; and mechanisms to encourage and protect whistle blowing. [30]

Following is the brief comparisons outlined at the 7th Confederation of Indian Industry International Corporate Governance Summit:

India:

- SEBI tightened the grip on entities like mutual funds by mandating half yearly disclosures. Such disclosures must be in the prescribed format containing details on the AMC's finances. They must be either sent to all unit holders or published in one national English newspaper and published on the AMC's website.
- Another important development was SEBI's Takeover Code. The Code is aimed at creating a level playing field for all acquirers by fixing the open offer size at 26 percent instead of the proposed 100 percent, enabling easier access to growth capital by raising the open offer trigger to 25 percent from 15 percent, and removing non compete fees to prevent discrimination against minority shareholders.
- Ministry of Corporate Affairs (MCA) drafted the new Companies Act to enable greater shareholder democracy, and stricter norms for corporate governance and corporate social responsibility initiatives. It emphasizes on self regulation, greater disclosures, stricter measures for investor protection, and stringent penalties for repeated or serious offences.
- MCA further introduced the Voluntary Guidelines on Corporate Governance, a set of best practices in key areas of corporate governance. These guidelines based on governance best practices encourage organizations to adopt a principles based approach that is best suited to its needs and regulations.

United Kingdom

- In July 2010, the UK published Stewardship Code to enhance the quality of engagement between institutional investors and companies. The Code aims at improving long term returns to shareholders and efficient exercise of governance responsibilities.
- A committee under Sir David Walker reviewed corporate governance in UK banking industry and made recommendations in several areas including effectiveness of risk management at Board level, the balance of skills, effectiveness of Board practices, and the role of institutional investors.
- Close on the heels of the Walker Report, the Financial Reporting Council (FRC) also revamped the UK Corporate Governance code applicable to listed companies. The revised code includes several key changes encompassing annual re-election of the Chairman, emphasis on the balance of skill sets and processes adopted for selection of the Board members, requirement that Board evaluation should be undertaken by external agencies at least once in three years and greater transparency, disclosures and communications related to Executive compensation and the basis thereof.

The United States of America

- The US passed Dodd–Frank Wall Street Reform and Consumer Protection Act in 2010 to promote the financial stability of the US, to end "too big to fail", to protect American taxpayers by ending bailouts, and to protect consumers from abusive financial services practices. More importantly, this legislation has set new benchmarks in aspects such as

Board compensation, accountability, risk oversight and linking executive pay to performance.

Corporate Governance Rating

The rating, Corporate Governance Rating, [31] is computing a value of the company on a certain scale based on the data available relating to corporate governance. These ratings are done by CGR Agencies. Corporate governance is about commitment to values and ethical business conduct. Good corporate governance is reflected in fair, transparent and responsible interactions between a company's management, its board of directors, shareholders and other stakeholders. Which is why it is essential to have a corporate governance rating by a ratings agency in India.

The current focus on corporate governance has led many to seek more information on the quality of governance practices at specific companies and this is becoming more common for investors to consider governance issues when making investment decisions that has significantly influenced the conduct several organizations which are now offering corporate governance ratings which evaluate governance practices of public companies.[32]

Current System of Corporate Governance Rating

There are Agencies to rate the company such as Institutional Shareholder Services (ISS), which is a leading provider of proxy voting and corporate governance services to institutional investors.[33] The governance scoring tools include, ISS Corporate Governance Quotient, 2002 Government Risk Indicator (GRID), 2010, ISS QuickScore since 2013. QuickScore is a quantitatively-driven data solution designed to identify governance risk within portfolio companies. ISS Governance QuickScore is designed to help institutional investors, identify and monitor potential governance risk, drill down on companies with governance risk, identify companies with which to engage on governance issues, access detailed data to inform their own investment models and advance compliance on mandates.[34]

In Indian context, CRISIL, a leading global firm, is one of the rating agencies in India, as a pioneering product CRISIL GVC (Governance & Value Creation) assesses corporate governance practices at companies with respect to their impact on all stakeholders who deal with the company such as employees, suppliers, shareholders, lenders and society. CRISIL's analysis of corporate failures reveals that they are largely attributable to shortcomings in corporate governance practices.[35]

Process of Corporate Governance Rating

As far as the process of the CGR is concerned, the ambit of this section, which concerns with the process of the rating, will be limited to the process of ISS, to reflect the process in the context of the U.S. and, CRISIL, to reflect the process of India.

1. *Institutional Shareholder Services (ISS):*

ISS ratings are calculated on the basis of 61 variables across eight core categories, discussed further below. ISS looks at many of the factors in combination "under the premise that corporate governance is enhanced when selected combinations" of practices are adopted. ISS assesses the corporate governance practices of covered companies, focusing on the following eight core topics: Board Structure and Composition, Audit Issues, Charter and Bylaw

Provisions, Laws of the State of Incorporation, Executive and Director Compensation, Qualitative Factors, Director and Officer Stock Ownership and Director Education.[36]

2. CRISIL:

CRISIL's ratings process is designed to ensure that all ratings are based on the highest standards of independence and analytical rigour.

From the initial meeting with the management to the assignment of the rating, the rating process normally takes three to four weeks. However, CRISIL has sometimes arrived at rating decisions in shorter timeframes, to meet urgent requirements. The process of rating starts with a rating request from the issuer, and the signing of a rating agreement. CRISIL employs a multi-layered, decision-making process in assigning a rating.

3. ICRA:

ICRA's Corporate Governance Rating (CGR) seeks to evaluate a company's business conduct and practices and the quality of its disclosure standards in terms of fairness and transparency from the perspective of its financial stakeholders. The corporate governance practices prevalent in an organisation reflect the distribution of rights and responsibilities among its different participants—such as the Board, management, shareholders and other financial stakeholders—and the rules and procedures laid down and followed for making decisions on corporate affairs. The emphasis of ICRA's CGR is on substance over form. ICRA assigns CGRs on a six-point scale of CGR1 through to CGR6. The rating of CGR1 implies that in ICRA's current opinion, the rated company has adopted and follows such practices, conventions and codes as would provide its financial stakeholders the highest assurance on the quality of corporate governance. ICRA's opinion, however, is not a certificate of statutory compliance or a comment on the rated company's future financial performance, credit rating or stock price.[37]

Conclusion

It is submitted that, this paper has, through its limited approach, surmised the evolution of Corporate Governance, in modern context, its relevance and evolution, in all, extending the importance of corporate governance to the CGR. The CGR has consistently been developed, however, there still lies sufficient room for further R&D. It is a remarkable point to note that, the influence and strategies that have developed the issue of corporate governance, has been that of the EU. It is an irrefutable position that, most of the legal developments that have taken place are due to the great influence of the UK development. The Companies Act, 2006, of the United Kingdom has invariably developed the Companies Act of India.

Development of CGR has been a remarkable point to be noted in the evolution of the Corporate Law of India. Inclusion of payment of dividends, timely disclosures, working of the in-house counsel, conduct of the employees' welfare schemes, etc., may be some of the recommendations, that can develop and strengthen the hold of the relevance of the CGR.

As far as the scope of this essay goes, the rating by ICRA, is the one which is found to be more detailed, as well as reliable. Although, it is not to say that, CGR by ISS or CRISIL is not reliable, however, as said in the last paragraph, the factors to be taken into account provide a distinctive feature for the Rating Agencies. Empirical research shows that corporate

governance is one of the important factors influencing corporate valuations. Besides, superior governance practices may also facilitate access to fresh capital, thus having a favourable impact on the cost of capital. Although ICRA's CGR is not an indicator of statutory compliance, a higher CGR may improve the comfort that statutory authorities/regulators may have with the rated company. Also, a CGR may enable a company benchmark itself against the best practices prevalent, thus providing a possible opportunity for improvement.[38]

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JUDICIAL APPOINTMENTS IN INDIA: THE CHRONICLE OF THE TURF FOR ASCENDENCY AND SUPERIORITY

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ABSTRACT

In a democracy, the role of the judiciary is crucial. Judiciary is a faithful keeper of the constitutional assurances. An independent and impartial judiciary can make the legal system vibrant. Credibility of judicial process ultimately depends on the manner of administration of justice. Judiciary is a balancing wheel of the federation and it keeps equilibrium between fundamental rights and social justice. After attaining Independence, the people of India espoused for themselves a democratic form of Government. Like any other modern democratic polity, the system in our country is also divided into three organs, viz. Legislature, Executive and Judiciary. The role assigned to judiciary is of utmost importance. In this Research Paper the Author would discuss the evolution of System of Judicial Appointments in India and would also give recommendations to maintain the independence of the Judiciary which is a sine qua non for the efficacy of the rule of law.

Key Words: Judicial, Appointments, Independence, Judiciary, Collegium, System.

Where are your impartial judges? They all move in the same circle as the employers, and they are all educated and nursed in the same ideas as the employers. How can a labour man or a trade unionist get impartial justice? It is very difficult sometimes to be sure that you have put yourself into a thoroughly impartial position between two disputants, one of your own class and one not of your class.

Lord Justice Scrutton

After attaining Independence, the people of India espoused for themselves a democratic form of Government. Like any other modern democratic polity, the system in our country is also divided into three organs, viz. Legislature, Executive and Judiciary. The role assigned to judiciary is of utmost importance.[1]

Independence is the bulwark of rule of law[2]. Independence of judiciary is important to secure fair and free society under rule of law[3] and is the part of the basic structure doctrine[4].

In a democracy, the role of the judiciary is crucial. Judiciary is a faithful keeper of the constitutional assurances. An independent and impartial judiciary can make the legal system vibrant. Credibility of judicial process ultimately depends on the manner of administration of justice. Judiciary is a balancing wheel of the federation and it keeps equilibrium between fundamental rights and social justice[5]. An independent Judiciary is considered as the strongest pillar of any democracy[6].

Independence of the judiciary is *sine qua non* for the efficacy of the rule of law. Is Independence in this scheme is essential to establish real parliamentary democracy and maintenance of rule of law. Independence of judiciary thus constitutes the cornerstone and the foundation on which our democratic polity itself is to rest and work on sound principles.[7] Independence is the lifeblood of Judiciary, without independence, impartiality cannot survive.[8] Even Dr. P.K. Sen said, "Subject to this Constitution, the Judiciary in India shall be completely separate from and wholly independent of the Executive or the Legislature."[9]

Judicial independence is a pre requisite for a society that claims it to be free, egalitarian and democratic[10]. Judiciary is above the administrative executive and any attempt to place it on par with the administrative executive has to be discouraged[11], unless the executive and judiciary are separated, the independence of the judiciary at the power level would be a mockery. [12] The separation of powers between executive, judiciary and the legislature is basic structure of the Constitution and this structure cannot be destroyed by any form of amendments. [13] To preserve the doctrine of separation of powers, it is necessary that the provisions falling in the domain of judicial field are discharged by the judiciary and that too, effectively[14].

Historical Background of Judicial Appointments

The history of judicial administration in India starts with the High Court's Act, 1860 whereby High Courts were set up in each province and a further appeal from these courts was to the Privy Council in England. Section 200 of the Government of India Act, 1935 created the Federal Court at New Delhi. The Federal Court had Jurisdiction only in constitutional matters. A further appeal would lie to the Privy Council.After India attained independence, the jurisdiction of the Privy Council was abolished by the Abolition of the Privy Council Jurisdiction Act, 1949. All appeals pending before the Privy Council before 10th October 1949 were transferred to the Federal Court. On Republic day, 26th January 1950, the Supreme Court of India was formed and is now the highest court of appeal in India and today its jurisdiction is wider than any known Federal Court or Supreme Court.[15]

A. Appointment of Judges by the Executive (1947-1993)

Under the Government of India Act, 1919 and the subsequent Government of India Act, 1935, appointments to the High Courts were the prerogative of the Crown with no specific provision for consulting the Chief Justice in the appointment process.

Until 1991, Judges were appointed to the High Court on the basis of a panel of advocates whose names were recommended by the Chief Justice of that High Court. These names were forwarded by the Chief Justice of the High Court to the Chief Minister of the respective State and then to the Union Ministry of Home Affairs at New Delhi. If the executive has an objection on a particular name, then the proposal could be dropped. Over the years, there was an unfortunate tendency of trying to ensure some representation for different religions castes and community

The 14th Law Commission adversely commented on such appointments to the Higher Judiciary. The Law Commission also noted that the best possible talent had not reached the bench. This process worked fairly but due to the rigidness of the executive the best talent was not elevated to the Bench. [16]

As far as the appointment of Supreme Court Judges was concerned, the Supreme Court Judges were usually elevated from amongst the Chief Justices of the High Courts. Over the years, there was a tradition of appointing judges of the Supreme Court largely on the basis of seniority.[17]

B. Parliament VS Judiciary – the pressure era on judiciary:

From 1973 to 1983 was a deplorable decade that is of unseemly tussle between the ruling party and the judiciary.

Three senior-most judges of the Supreme Court were superseded on April 25, 1973, a day after the delivery of the judgment in the Fundamental Rights case or the **Kesavananda Bharati Case**[18], the Indira Gandhi government, departing from earlier conventions, superseded three of the senior-most judges, who had decided against the government and appointed Justice A.N. Ray as Chief Justice of India. Justice Ray had decided three major cases in favour of the Central government — though in the minority — namely the Bank Nationalisation case, the Privy Purse case and the Kesavananda Bharat case. The government stand was to appoint "forward looking" judges who shared its philosophy — a euphemism for compliant judges[19, 20].

During the emergency from 1975 to 1977, 16 High Court judges were transferred[21] and all of them had shown remarkable independence[22] which was not to the liking of the then Prime Minister of India - Mrs.Indira Gandhi and her Government. [23] These were all punitive measures to intimidate independent and fearless judges and undermine their morale.[24]

Later on, Justice H.R. Khanna should have become the Chief Justice in January 1997 but he was superseded[25]. However, he delivered a most courageous and dissenting judgement during the emergency[26]. He paid the price and was superseded by a Justice Beg, a junior pusine judge[27] due to his dissenting judgement in **ADM, Jabalpur v. Shivkant Shukla**[28]. Justifying this move, the then Law Minister, Mohan Kumaramangalam proposed a radical re-interpretation to the appointment process, by which the political philosophy of judges, as determined by the government, would be a relevant criterion for appointment[29].

Post-1980, till the evolution of the collegium mechanism, many quipped: "It's better to know the Law Minister than the law." It was widely believed that the executive was blocking appointments recommended by the CJI unless its nominees were cleared by a trade-off. Further, it was the perception of many that favourable orders could be obtained by the executive from compliant judges for dubious considerations. [30]

C. Appointment of Judges by the Collegium System:

After the fall of the Janata government, Indira Gandhi came back to power in 1980. Law Minister Shiv Shankar issued a circular claiming power to transfer High Court judges and attempted to transfer some existing judges and refused to confirm some additional judges[31]. This circular along with other arbitrary decisions of the Central Government were challenged in the Supreme Court but the judgements of the Supreme Court were not able to evolve a proper criteria and uncertainty prevailed.[32]

a. Judges' Transfer Case

This uncertainty led to the famous case of ***S.P Gupta v. Union of India***[33] (also known as Judges' transfer case), in which the 4:3 Judges of the Supreme Court in a self inflicted blow,

held that the word 'consultation' under the Article 124(2) of the Constitution of India, does not mean 'concurrence'. It further held that it is open to the central government to override the opinion given by the constitutional functionaries who are required to be consulted and the Central Government can arrive at its own decision.

b. The Second Judges' Case

In the landmark judgement of the ***Supreme Court in Supreme Court Advocates-on Record Association v. Union of India***[34], the Nine Judge Constitutional Bench over-ruled the decision in the case of ***S.P Gupta v. Union of India***[35], popularly known as the Judges' Transfer Case. Holding the 9:2 majority views, the Constitutional Bench devised a specific procedure for the appointment of Judges to the Supreme Court and the various High Courts' for 'protecting the integrity and guarding the independence of the Judiciary'. The Chief Justice of India (CJI) would now have primacy in the appointment and transfer of Judges. The word 'consultation' under the Article 124(2) of the Constitution of India was interpreted as 'concurrence'.

The process of appointment of the High Court must be initiated by the Chief Justice of the respective High Court and they must adhere to a time bound schedule so that the posts of judges are not kept vacant for a long period. The proposal of the Chief Justice of the High Court must be sent to all other Constitutional functionaries. The other functionaries, within 6 weeks from the receipt of the proposal, must convey their views to the Chief Justice of India. If the particular constitutional functionary does not express its opinion within the specified period, it would be considered as a deemed agreement with the recommendation made by the Chief Justice.

The Chief Justice of India, after considering the recommendations and the views of the constitutional functionaries, should confirm his final opinion and convey to the President, within four weeks, of the final action taken. The Chief Justice of India should take into account the views of his colleagues in the Supreme Court who are likely to be conversant with the affairs of the concerned High Court. It should be noted that these requirements do not change the procedures laid down. It must be considered by the collegium consisting of the Chief Justice of India and two senior-most Supreme Court judges. It is also open to the Chief Justice of India to recommend the initial appointment of a person to any High Court other than the High Court for which the proposal was initiated, provided the other constitutional requirements are satisfied. If there are any objections for the appointment of a particular person, it should be for good reasons, which must be disclosed to the Chief Justice of India to enable him to reconsider and withdraw his recommendations on these conditions[36] [37].

In the event of conflicting opinions by the constitutional functionaries, the opinion of the judiciary symbolised by the view of the Chief Justice of India and formed in the manner indicated, has primacy. No appointment of any Judge to the Supreme Court or any High Court can be made[38], unless it is in conformity with the opinion of the Chief Justice of India.[39]

c. The Third Judges Case:

In ***Re Special Reference 1 of 1998*** [40], also known as the Third Judges Case, the Nine Judge Constitutional Bench of the Supreme Court rendered a unanimous opinion on a reference made by the President under Article 143 [41]. The Supreme Court held the view that the Collegium should consist of the Chief Justice of India and the four senior-most puisne Judges of the Supreme Court[42].

The opinion of the Chief Justice of India which has a primacy in the matter of recommendations for appointment to the Supreme Court has to be formed in consultation with collegiums of judges. The principal objective of the collegium is to ensure that the best available talent is brought to the Supreme Court bench. The Chief Justice of India and the senior most puisne Judges, by reason of their long tenures on the Supreme Court, are best fitted to achieve this objective. They can assess the comparative worth of possible appointees by reason of the fact that their judgments would have been the subject matter of petitions. Even where the person under consideration is a member of the Bar, he would have frequently appeared before them. In assessing comparative worth as foretasted, the collegium would have the benefit of the inputs provided by those whose views have been sought[43].

Over the course of these three cases, namely, ***S.P Gupta v. Union of India***[44]***; Supreme Court in Supreme Court Advocates-on Record Association v. Union of India***[45] *and In* ***re Special Reference 1 of 1998***[46]*,* the Supreme Court evolved the principle of Judicial Independence to mean that no other organ of the State i.e. the Executive and the Legislature would have any say in the appointment of Judges. Since 1993, the appointment of Judges to the Higher Judiciary is done through the 'Collegium System'.

It worthy to mention, that even though the SC takes the recommendations of the Government on the proposed appointee, the Government in approximately most of the cases, has never raised any kind objections on the recommendations. Even till date no judge has been impeached on any ground. But, all theses logical concepts are hard to be explained to the executive as their sole intention is to take away the independence of the Judiciary. Earlier, the collegiums exercised unchecked powers and now the NJAC exercise unrestricted and arbitrary powers.

Past Proposals for Judicial Appointments

A. 121st Report of Law Commission of India

The Law Commission of India recommended the constitution of a National Judicial Service Commission. The Report[47] recommended that the Judicial Service Commission should be composed of eleven persons, namely, the Chief Justice of India and three senior most Judges of the Supreme Court, the immediate predecessor in office of the Chief Justice of India, three senior most Chief Justices of the High Courts, Minister for Law and Justice, the Attorney General of India and an outstanding law academic.

It was observed that recommendation of such a Commission should be binding upon the President but it shall be open to the President to refer the recommendation back to the Commission in any given case along with information in his possession regarding the suitability of the candidate. If, however, after reconsideration, the Commission reiterates its recommendation, the President shall be bound to make the appointment[48].

B. The Constitution (67th Amendment) Bill, 1990

The Bill[49] provided for the constitution of a National Judicial Commission for appointments to be made to the higher judiciary. The constitution of Commission was to comprise of the Chief Justice of India as its Chairman plus two of his senior-most colleagues. For recommending appointments to the High Court, the Commission was to consist of Chief Justice of India as its

Chairman, the State Chief Minister, one other senior-most Supreme Court Judge, the Chief Justice of the High Court and one other senior-most Judge of the High Court[50].

Establishment of the National Judicial Appointments Commission (NJAC)

The Collegium System of Appointment and Transfer of Judges have come to exist in India for more than 20 years by now. The system has also been subject to heavy criticism in India and abroad. India is said to be the only country in the world where the "judges appoint themselves." [51] The collegium system has also come under attack for want of transparency, nepotism and favouritism, bias and for dubious appointments, both from inside the Judiciary and outside of it.[52]

A. The 99th Constitutional Amendment, 2014 and the NJAC Act, 2014

National Judicial Appointments Commission (NJAC) is a body constituted to be responsible for the appointment and transfer of the Judges the Higher Judiciary in India. The Commission is established by amending the Constitution of India through the ninety-ninth constitution amendment vide the Constitution (Ninety-Ninth Amendment) Act, 2014[53] passed by the Lok Sabha on 13 August 2014 and by the Rajya Sabha on 14 August 2014[54]. The NJAC replaces the collegium system for the appointment of judges as invoked by the Supreme Court. Along with the Constitution Amendment Act, the National Judicial Appointments Commission Act, 2014[55], was also passed by the Parliament of India to regulate the functions of the National Judicial Appointments Commission[56]. The NJAC Bill and the Constitutional Amendment Bill, was ratified by 16 of the state legislatures in India, and subsequently assented by the President on 31 December 2014[57]. The NJAC Act and the Constitutional Amendment Act came into force from 13 April 2015[58].

Chief Justice of India, Justice H L Dattu recused[59] from taking part in the Committee to appoint the eminent persons to the NJAC as the matter was sub-judice before the Supreme Court's 5 Judge Constitutional Bench headed by Hon'ble Mr Justice J.S Khehar[60].

B. Composition

As per the amended provisions of the constitution, the NJAC will consist of the following six members[61]:

1. The Chief Justice of India (CJI) - As the Chairperson of the Commission
2. Two other Senior Judges of the Supreme Court next to the CJI
3. The Union Minister in-charge of Law & Justice
4. Two Eminent persons to be nominated by the Committee Consisting of the Prime Minister(PM), CJI and the Leader of opposition of Lok Sabha or the Leader of the single largest opposition party in the Lok Sabha. At least one of them shall be nominated from the SC, ST, OBC, Minorities or Women.[62]

C. Functions of the NJAC

As per the amended constitution, the Commission shall, recommend persons for appointment as Chief Justice of India, Judges of the Supreme Court, Chief Justices of High Courts and other Judges of High Courts; recommend transfer of Chief Justices and other Judges of High Courts from one High Court to any other High Court; ensure that the persons recommended are of ability, merit and other criteria mentioned in the regulations[63] related to the Act [64].

D. Drawbacks of the NJAC

a. Appointment of two Eminent Persons:

The wisdom of the Parliamentarians is a big question as the bill was passed in both the Houses with thumbing Majority and no votes against it. It is nowhere mentioned in the Act that from which field these two eminent persons would be chosen. First, the question arises, that who is an eminent person? A Yoga Guru, a cook, a retired bureaucrat, a corrupt politician, a movie star or an entrepreneur?

Now if a person, as an eminent person, not belonging to the Judicial-Legal field directly or indirectly, becomes a member of the NJAC, the commission which is going to appoint the Judges who are the future of the Justice delivery system of the country, then it is even hard to believe that some of the appointee's favoured by him would be just and reasonable. Further, the ability of the two members of the commission to exercise veto powers will cause much consternation[65].

b. Appointment of the two eminent persons: CJI is 'sandwiched':

The Arithmetic of selecting the eminent persons runs the risk of political taint, considering that the committee for selection has two political members. As the CJI is sandwiched between the two hardcore politicians, i.e. the PM and the Leader of the Opposition in Lok Sabha, this would put the CJI in a delicate position. The past experience of the functioning of many high-powered selection committees has demonstrated that governments tend to use these opportunities to negotiate their nominees for the appointments that will best reflect their own interests. It is not appropriate for negotiations to be in the form of give and take of the kind that is envisaged in other committee processes, because of the very presence of the CJI.

The institutional integrity of the office of the CJI will be undermined while serving as a member of the selection committee. This will potentially lead to the office of the CJI becoming the weakest institution represented in this committee for not being able to exercise any power while participating in the process of identifying the "eminent members" to serve in the NJAC[66].

c. Appointment of the CJI:

The Act discontinues the seniority principle, which was being followed earlier, by under the Collegium System. The Act states that the senior most Judge of the Supreme Court would be appointed as the CJI if he is considered fit to hold the office. The Executive would favour the appointee who is aligned to the ideology and policies of the Government[67].

Moreover, this would lead to supersession of the senior-most Judges as the Act as well as the Constitutional Amendment gives unfettered discretion to the Commission.

d. Full interference of the Executive and the Legislature:

According to the composition of the NJAC, three of 6 members would keep in mind the political considerations in mind while recommending or approving the names of the Candidates shortlisted for Judgeship for the High Court and the Supreme Court. If any two members 'veto' a particular appointment, then such an appointment cannot be made. [68] [69] Even the Convenor of the Commission shall be the Secretary to the Government of India[70],

which in turn would lead to even more interference of the executive in the functioning of the NJAC.

Moreover, as the appointment to the Constitutional Office of the Chief Justice of India is not been made on seniority basis[71], so if the senior-most Judge of the Supreme Court aspires to succeed the office of the CJI, then he would not be able to oppose the recommendation of the Government and take a stand, which in turn would not only undermine the independence of the Judge as a Member of the Commission, but of the Judiciary as a whole.

NJAC is Unconstitutional, Violates the Basic Structure Doctrine and is 'Ultra- Vires' the Legislative Competence of the Parliament: SC

"The perfect Judge fears nothing- he [she] could go front to front before God; Before the perfect Judge all shall stand back- life and death shall stand back-heaven and hell shall stand back"

Walt Whitman

On the procedure in place for the selection and appointment of Judge it was maintained, that primacy in the matter of appointment of Judges to the higher judiciary, was with the Chief Justice of India, and that, the same was based on the collective wisdom of a collegium of Judges. [72]

Article 124A constitutes the edifice of the Constitution (99th Amendment) Act, 2014. The striking down of Article 124A would automatically lead to the undoing of the amendments made to the other Articles. The latter Articles are sustainable only if Article 124A is upheld. If the inclusion of anyone of the Members of the NJAC is held to be unconstitutional, Article 124A will be rendered nugatory, in its entirety[73].

Clauses (a) and (b) of Article 124A(1) do not provide an adequate representation, to the judicial component in the NJAC and are insufficient to preserve the primacy of the judiciary, in the matter of selection, appointment and transfer of Judges, to the higher judiciary. The same are accordingly, violative of the principle of "independence of the judiciary". Clause (c) of Article 124A(1) is *ultra vires* the provisions of the Constitution, because of the inclusion of the Union Minister in charge of Law and Justice as an *ex officio* Member of the NJAC, impinges upon the principles of "independence of the judiciary", as well as, "separation of powers". Clause (d) of Article 124A(1) which provides for the inclusion of two "eminent persons" as Members of the NJAC is *ultra vires* the provisions of the Constitution. The same has also been held as violative of the "basic structure" of the Constitution. The same are accordingly struck down.[74]

In view of the striking down of Article 124A(1), the entire Constitution (99th Amendment) Act, 2014 is liable to be set aside. The same is accordingly hereby struck down in its entirety, as being *ultra vires* the provisions of the Constitution.[75]

The National Judicial Appointments Commission Act, 2014 *inter alia* emanates from Article 124C. It has no independent existence in the absence of the NJAC, constituted under Article 124A(1). Since Articles 124A and 124C have been set aside, as a natural corollary, the National Judicial Appointments Commission Act, 2014 is also set aside; the same is accordingly hereby struck down. With the setting aside of the impugned Constitution (99th

Amendment) Act, 2014, the provisions of the Constitution sought to be amended thereby, would automatically revive, and the *status quo ante* would stand restored.[76]

If the power of appointment of Judges was left to the executive; the same would breach the principles of "independence of the judiciary" and "separation of powers". In the matter of appointment and transfer of Judges to the higher judiciary the primacy in the decision making process, inevitably rests with the Chief Justice of India, and that, the same was expected to be expressed, on the basis of the collective wisdom, of a collegium of Judges.[77]

Conclusion

"Justice can become 'fearless and free' only if Constitutional Immunity and Autonomy are granted"

Hon'ble Mr Justice P.N. Bhagwati[78]

The Government advocated NJAC as a 'more transparent and efficient' replacement of the Collegium System. Recently a retired SC Judge, Justice Markandey Katju alleged that during the previous UPA regime, the executive has stressed on the elevation of a judge despite the charges of corruption against him as he had a solid support of a senior Tamil Nadu politician, whom he had granted bail when he was a District & Sessions Judge[79]. With the establishment of the Commission, executive would have had a direct say in the appointment process, undermining the independence of the Judiciary. Even, it is essential to note that the retired Judges, who have raised voices against the collegiums system, were the beneficiaries of the Government as they held important positions as that of Chairperson or Member of important Central or State Commissions.

Former CJI, Justice P N Bhagwati in an interview said that he feels sorry and admits his mistake in the case and regrets his pro-government stand in the famous ***Habeas Corpus Case***[80] which New York Times considered as Supreme Courts 'utter surrender' to an 'absolute government' as he said that he was influenced by the government policies.[81] It is essential that the judiciary remains absolutely free and isolated from the control and influence of the executive in order to save the country from a similar apology in the future.

The future of the nations vests in the Judiciary, with the Government having totalitarian tendencies. The Government which has a nearly absolute majority has a tendency to concentrate power and the presence of free and independent judiciary is very essential during such a time. The Government rather than ensuring independence of the Judiciary, the iron pillar of democracy, is trying to dilute the same. It is now the responsibility of the Supreme Court to ensure that the Government doesn't do any act which is inconsistent with the basic structure of the Constitution.

The primacy in the matter of appointment of Judges to the higher judiciary is with the Chief Justice of India, and the same was based on the collective wisdom of a collegium of Judges. The SC reaffirmed this principle in the recent Judgement.

The Collegium System of appointment of Judges has worked very well and has ensured that the best talent is brought to the Bench. Independence of Judiciary, by virtue of Judges having a primacy in the appointment and transfer process would ensure impartiality; integrity, competence and diligence for proper discharge of the Judicial office; propriety and equality of treatment to all. This system would not only safeguard the Independence of Judiciary by

preventing the interference from the other organs of the state but would also ensure that the best talent is brought to the bench.

President Pranab Mukharjee on the day of 50th Aniversary the Delhi High Court said, "Each organ of our democracy must function within its own sphere and must not take over what is assigned to the others. An autonomous judiciary is a vital feature of democracy".[82]

The Supreme Court after delivering the final verdict said that it was open to reform in the Collegium system and it would accept recommendations for the same.[83]

Recommendations:

Howsoever, some reforms are essential in the collegiums system. "Judicial Appointments Secretariat" should be established to keep a track and float agenda for the collegiums to take up. These secretariats should be established in the Supreme Court as well as all the High Courts in India.

Composition of the Supreme Court Secretariat:

- Chairman: Chief Justice of India (ex-officio)
- Members: 4 Senior-most Pusine Judges of the Supreme Court

The Secretary General of the Supreme Court should be the 'Secretary' of the 'Judicial Appointments Secretariat. The Registrar General of the Supreme Court Should be the 'Additional Secretary' of the Secretariat.

Composition of the High Court Secretariat:

- Chairman: Chief Justice of the High Court/ the Acting Chief Justice
- Members: 7 Senior-most pusine judges of the High Court

The Registrar General of the High Court should be the full time 'Secretary' of the Committee. The Principal Secretary to the Chief Justice of the High Court should be the Under-Secretary of such Committee.

In case the Registrar General is not available due to varied reasons, then the Registrar (Vigilance), of the High Court would be the Acting Secretary of the Committee.

The Procedure of Recommendations for Appointment and transfer of judges should be followed as per the procedure laid down in ***SCAORA v. Union of India***[84][85]**.**

"When a Judge puts on his judicial robes, he puts off his relationships and friendships, and becomes a person without relative, without a friend, without an acquaintance. In short, he becomes impartial"

Thomas Fuller

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IRRETRIEVABLE BREAKDOWN OF MARRIAGE AS AN ADDITIONAL GROUND OF DIVORCE: A LONG AWAITED MOVE

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ABSTRACT

The institution of marriage in Indian society is largely still a sacrament and not a contract and it being a pious obligation was treated as a holy union which was indissoluble.[1] Now the position has changed marriage is no longer treated as an indissoluble union. With the changing requirements, attitude and aptitude, the society has drastically changed and it is very difficult for the married couples to cope with the change. While adjusting in a new atmosphere in the matrimonial home, spouses may commit, knowingly or unknowingly, with or without intention, some kind of mistakes which create unhealthy atmosphere in the matrimonial home. It is difficult to say which party is at fault but the matrimonial relationship loses its sanctity. Thus, divorce earlier which was considered as an evil, has become a necessity in the society. The Marriage Laws (Amendment) Bill, 2010, which remained in a state of suspended animation for sometime, has been activated again. The Union Cabinet has approved the Bill with certain significant modifications to amend the Hindu Marriage Act, 1955, and the Special Marriage Act, 1954. This initiative has been hailed as 'historic'. In the present paper an attempt has been made to see how far the recent amendment to introduce the irretrievable breakdown as a ground of divorce is in consonance with the changing social needs of the society.

Key Words: Marriage, Divorce, Concept, Divorce, Judicial, Response, Marriage Laws.

Marriage is the basic institution in all progressive societies which has been ordained for the protection of the society from immoral acts on the one hand and continuance of the chain of the society itself on the other. It is believed that in a civilised society the institution of marriage is established to give stability and resilience to a strong social bond besides providing fulfilment to man's instinctive desires. Hindu Dharamsastras define marriage as a permanent union which is created so that the parties entering into this bond could lead happy marital and familial life. But now with the changing perspectives of modern societies, which are becoming complex day by day, this idealised picture of the institution of marriage has undergone a lot of change. Now marriage is no longer considered as an eternal union (parties could remarry at any time after the divorce or death of other party), not a permanent or indissoluble (because now it can be dissolved at any time).

Earlier divorce was considered as an evil and was given only under convincing circumstances, but now with the legislative and judicial interference it is becoming much more recognised.

Thus, divorce has become a necessity in the society as sick marital relations pose a problem not merely for the related spouse but have much wider implications. It is not an antithesis of the marriage. It has never been intended to produce an alternative to the monogamy family, but merely to mitigate the hardships where for special reasons the continuance of the marriage seems to be intolerable.[2] So when the marriage between spouses is dead emotionally and parties at any time feel that they cannot live happily and harmoniously and permanent separation by way of divorce will be a blessing for both the parties as well as for the society, then it is better they should have freedom of dissolving their marriage by their desire. Although The Hindu Marriage Act, 1955 strictly enforces monogamy but a marriage performed under this Act can be dissolved only on the grounds available under Section 13 of the Act. In the present paper an attempt is made to see how far the recent amendment to introduce the irretrievable breakdown ground of divorce is in consonance with the changing social needs of the society.

A. Concept of Divorce:

'Divorce' is the dissolution of a valid marriage in law. Once a divorce is granted, the parties are free from any kind of obligation, legal or otherwise, towards the other party. In India, the judicial divorce is entirely a new experiment. The Hindu shastric law did not permit divorce because Hindus conceived of marriage as a sacramental and holy union between a man and a woman for performance of religious and sacramental rites. But the divorce under custom was allowed, which was practiced mainly among the lower castes. With the passing of the Hindu Marriage Act, 1955 the marriage became dissoluble, in which the divorce as a matrimonial remedy was recognised on some specified grounds for all Hindus alike. The concept of divorce has undergone a tremendous change since the enforcement of the Hindu Marriage Act, 1955. The Act recognises mainly two theories of Divorce: the fault theory and divorce by mutual consent. Under the fault theory, marriage can be dissolved only when either party to the marriage had committed a matrimonial offence.[3] Under this theory it is necessary to have a guilty and an innocent party and only the innocent party can seek the remedy of divorce. However, the major drawback is that if both the parties are at fault, there is no remedy available.

B. Breakdown Theory of Divorce:

The origin of the breakdown theory of divorce may be found in the legislative and judicial developments during a much earlier period. The (New Zealand) Divorce and Matrimonial Causes Amendment Act, 1920, included for the first time the provision that a separation agreement for three years or more was a ground for making a petition to the court for divorce and the court was given a discretion whether to grant the divorce or not and the same was exercised in the case of *Lodder v. Lodder*[4]. Salmond J., in a passage which has now become classic, enunciated the breakdown principle in these words:[5]

The Legislature must, I think, be taken to have intended that separation for three years is to be accepted by this Court, as prima facie a good ground for divorce. When the matrimonial relation has for that period ceased to exist de facto, it should, unless there are special reasons to the contrary, cease to exist de jury also. In general, it is not in the interests of the parties or in the interest of the public that a man and woman should remain bound together as husband and wife in law when for a lengthy period they have ceased to be such in fact. In the case of

such a separation the essential purposes of marriage have been frustrated, and itsfurther continuance is in general not merely unless but mischievous.

The breakdown of marriage theory is incorporated in the Matrimonial Causes Act, 1973. Australia accepted it in 1966 where five years separation is considered to be evidence of breakdown of marriage. Russia and the Scandinavian countries have also recognised it. The breakdown of marriage evidenced by a prescribed period of separation is thus recognised in many countries. The Court of Appeal[6] observed that, "today we are perhaps faced with a new situation as regards the weight to be attached to one particular factor that is the breakdown of marriage." Friedman very pertinently observed[7];

After several years of continuous separation, it may fairly be surmised that the matrimonial community is beyond repair. The alternative to the legal dissolution of marriage after a separation for a number of years is not restoration of the marriage bond, but maintenance of the fiction of marriage by a legal tie, which will drive one or the other or both spouses to sexual and other relations with outsiders, clandestinely or under a social stigma, rather than openly. The law in such a case does not serve the sanctity of the marriage, but it preserves sanctimonious righteous which will, in fact increase adultery, fortification and personal bitterness.

The breakdown theory of divorce was introduced for the first time in the Hindu Marriage Act, 1955 by introducing Section 13(1A) as it give the right to apply for the divorce to either party to a marriage on the ground that there had been no resumption of cohabitation between the parties for two years or more after a decree for judicial separation or there had been no restitution of conjugal rights. As observed by V.S. Deshpandey J., " Prior to amendment, the right to apply for divorce was given only to the innocent party. This is the new way of looking at the phenomenon of the judicial separation between the parties and the non-restitution of conjugal rights between them. This phenomenon by itself is regarded as a breakdown of the marriage necessitating the grant of divorce irrespective of the question by whose fault the breakdown of marriage has resulted".[8]

However, the principle of the breakdown of marriage was introduced in 1964 only "to a limited extent". The breakdown theory of divorce won further recognition when the provision of mutual consent was incorporated by the Marriage Laws (Amendment) Act, in 1976.[9] The breakdown theory of divorce which is inherently attached with no fault theory of divorce represents the modern view of divorce. Under this theory, the law realises a situation and says to the unhappy couple: if you can satisfy the Court that your marriage has broken down, and that you desire to terminate a situation that has become intolerable, then your marriage shall be dissolved, whatever may be the cause. The marriage can be said to be broken when the objects of the marriage cannot be fulfilled. When there is not an iota of hope that parties can be reconciled, it can be considered as irretrievable breakdown of marriage.[10]

In 1978 while reviewing the matrimonial laws the Law Commission in its 71st Report strongly recommended introducing breakdown of marriage as a ground on the basis of at least three years separate and apart living for divorce in addition to fault grounds in the divorce law.[11] Incorporating the recommendations a Bill was introduced in the Parliament in 1981 but was lapsed on account of opposition by certain women organisations as some scholars apprehended that unscrupulous husband would desert their wives and take advantage of this

provision.[12] It is also mentioned in the report that in case the marriage has ceased to exist in substance and in reality, there is no reason for denying divorce, and then the parties alone can decide whether their mutual relationship provides the fulfilment which they seek. Divorce should be seen as a solution and an escape route out of a difficult situation. Such divorce is not concerned with the wrongs of the past, but is concerned with bringing the parties and children to terms with the new situation and developments by working out the most satisfactory basis upon which they may regulate their relationship in the changed circumstances.[13]

Irretrievable breakdown of marriage is now considered in the laws of a number of countries, a good ground of dissolving the marriage by granting a decree of divorce. Irretrievable breakdown of marriage as a separate ground of divorce has not yet found a place in the marriage statutes in India. If a marriage has broken down beyond all possibilities of repair, then it should be brought to an end, without looking into the causes of breakdown and without fixing any responsibility on either party and even in that case, it would be unrealistic for the law not to take notice of that fact, as it would be harmful to the society and injurious to the interest of the parties.[14] Where there has been a long period of continuous separation, it may fairly be surmised that the matrimonial bond is beyond repair. The law in such cases does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. Public interest demands not only that the married status should, as long as possible and whenever possible, be maintained, but where a marriage has been wrecked beyond the hope of salvage, public interest lies in the recognition of that fact. Human life has a short span and situations causing misery cannot be allowed to continue indefinitely. A halt has to be called at some stage. Law cannot turn a blind eye to such situations, nor can it decline to give adequate response to the necessities arising there from. The Supreme Court recommended to the Union of India to seriously consider bringing an amendment in the Hindu marriage Act, 1955 to incorporate irretrievable breakdown of marriage as a separate ground of divorce.[15] The Delhi High Court[16] also observed, "it would not be practical and realistic, indeed it would be unrealistic and inhuman, to compel the parties to keep up the facade of marriage even though the essence of marriage between them has completely disappeared and there are no prospects of their living together as husband and wife".

The breakdown of relationship is presumed *de facto.* The fact, that parties to marriage are living separately for reasonably longer period of time, shows unwillingness of the parties to live together and all their attempts to reunite failed, it will be presumed by law that relationship is dead now. In the Mortimer Committee's report the breakdown of marriage is defined as : "such failure in the matrimonial relationship or such circumstances adverse to that relation that no reasonable probability remains for the spouses again living together as husband and wife".[17] The Bombay High Court[18] held that the enactment of Section 13 (1A) in 1964 is a legislative recognition of the principle that in the interest of the society, if there has been a breakdown, there is no purpose in keeping the parties tied down to each other. Thus, the breakdown theory was introduced into the Indian Law by allowing divorce both to the so called innocent and the guilty parties. However, the provisions of bars to matrimonial relief were overlooked which requires that petitioner must prove that he is not taking advantage of his or her own wrong or disability.[19] Of late, however the courts have been adopting a more realistic view to deal with such cases.

Irretrievable Breakdown of Marriage and Judicial Response

Most of the developed countries of the world have recognised irretrievable breakdown of marriage as an independent ground of divorce but it has not yet found a place in the marriage statutes in India. Today the nature of the family is changing and the family is becoming more democratic, and more egalitarian. Both husband and wife share not only the family house, in some cases they also share earnings of each other. Because of the rising rate of female activity, the family unit is more of a coalition. It is, therefore, necessary that if the coalition cannot be worked, the legal sanction for it must be withdrawn.

Our Courts have liberally interpreted the provision of divorce by mutual consent by interpreting the laws within given framework to meet the ends of justice because law cannot be static in the face of dynamics of life. Various Courts have expressed the opinion that if a marriage in fact has broken down and parties are willing for divorce, then prolongation of the legal status would merely accentuate unhappiness by fermenting agony and distress.[20] Though, there is no explicit provision of 'irretrievable breakdown of marriage' as an independent ground of divorce in Section 13 of the Hindu Marriage Act, 1955 or Section 23 of the Special Marriage Act, 1954, yet the Supreme Court used its power vested in it by Article 142 of the Constitution of India towards administration of absolute justice for the parties in the matrimonial proceedings. In the case of *Ashok Gobind Ram Hurra v. Rupa Ashok Hurra*,[21] the Hon'ble Supreme Court put emphasis on the principle of breakdown of marriage while exercising its jurisdiction under Article 142 of the Constitution granted decree of divorce by mutual consent under Section 13-B of the Hindu Marriage Act, 1955 to meet the ends of justice. The Court observed that, "a period of nearly thirteen years had already passed and there was no useful purpose of prolonging the agony and the curtain should be rung at some stage. This is the stage of 'irretrievable breakdown of marriage' where the rupture in marital life has become unbridgeable and that to continue such matrimony would in substance amount to imposing permanent stage of miseries on the two spouses".[22] Similarly in the case of *Rishikesh Sharma v. Saroj Sharma*[23] the Supreme Court observed that the respondent wife was living separately from the year 1981 and the marriage has broken down irretrievably with no possibility of the parties living together again. While granting decree of divorce the Court observed that the marriage between spouses is dead emotionally, mentally, rationally or practically in every respect, continuance of marital relation is, in substance prolonging agony of spouses and affliction of cruelty by continuance of marriage which simply remains marriage for the sake of marriage.

The Supreme Court also observed earlier[24]: "It appears to be necessary to introduce irretrievable breakdown of marriage and mutual consent as grounds of divorce in all cases… We suggest that the time has come for the intervention of the legislature in those matters to provide for a uniform code of marriage and divorce and to provide by law for a way out of the unhappy situation in which couples like the present have found themselves". In *Naveen Kohli v. Neelu Kohli*[25], the Supreme Court recommended to the Union of India to seriously consider bringing an amendment in the Hindu Marriage Act, 1955 to incorporate irretrievable breakdown of marriage as a ground for divorce in the following words: *"Before we part with this case, on the consideration of the totality of facts, tis Court would like to recommend the Union of India to seriously consider bringing an amendment in the Hindu Marriage Act, 1955 to incorporate irretrievable breakdown of marriage as a ground for the grant of divorce. A*

copy of this judgement be sent to the Secretary, Ministry of Law & Justice, Department of Legal Affairs, Government of India for taking appropriate steps". The Supreme Court also referred to the 71st Report of the Law Commission of India on "Irretrievable Breakdown of Marriage"with approval as follows: "We have examined and referred to the cases from the various countries. We find strong basic similarity in adjudication of cases relating to mental cruelty in matrimonial matters. Now, we deem it appropriate to deal with the 71st Report of the Law Commission of India on irretrievable breakdown of marriage".[26]

In *Manish Goel v. Rohini Goel*[27] the Hon'ble Supreme Court has reiterated the principle that the dissolution of the marriage can be granted where the marriage is totally unworkable, emotionally dead beyond salvage and broken down irretrievably, even if facts of case do not provide ground in law on which divorce could be granted. However, the deficiency in divorce laws has often led to the conflicting rulings from the Supreme Court on the concept of irretrievable breakdown of marriage. In *Vishnu Dutt Sharma v. Manju Dutt Sharma*[28] a two-judge Bench of the court refused to grant divorce on the ground of irretrievable breakdown of marriage. The Court observed that it could not add such a ground to Section 13 of Hindu Marriage Act, 1955 as it would amount to amending the Act which is a function of the Legislature. Thus, we find a variant view on this controversial subject in the last two decades as from the judgement of the Supreme Court in *V. Bhagat v. D. Bhagat*[29] allowing divorce on the ground of irretrievable breakdown of marriage to the pronouncement of the Supreme Court in *Anil Kumar jain v. Maya Jain*[30] not allowing divorce on the ground of irretrievable breakdown of marriage.

It is evident that the judiciary has taken a serious note of irretrievable breakdown of marriage as an independent ground of divorce and has been serving the needy but only in the limited number of cases as it is not possible for all litigants' spouses to afford to reach up to the Supreme Court. Unfortunately the trial Court, which is a competent Court of jurisdiction in matrimonial proceedings, cannot serve the people unless the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954 is amended and 'irretrievable breakdown of marriage' as an independent ground of divorce is incorporated in the Statute book. However, the present scenario of inconsistent judicial verdicts based on the inclinations and opinions of individual judges is not a desirable state of affairs either. The fate of individual lives cannot be left to the opinions of the court bench hearing the matter. The law with respect to irretrievable breakdown as grounds for a divorce needs to be settled once and for all, in the best interests of the society.

Marriage Law (Amendment) Bill, 2010

It has been a long journey of the Bill since 1981, the Bill seeking to introduce the "irretrievable breakdown" of relations as a new ground for seeking divorce under the Hindu Marriage Act, 1955, and the Special Marriage Act, 1954. The long awaited move comes after the Law Commission of India s*uo moto* took up the study of the subject and in its 217th report in March, 2009 had strongly made the above recommendation. The Commission examined the existing legislations as well as a number of judgements of the Supreme court and High Courts on the subject and was of the view that "Irretrievable Breakdown of Marriage" should be incorporated as another ground for granting divorce under the provisions of Hindu Marriage Act, 1955 and the Special Marriage Act, 1954. The Commission also recommended that the court before granting a decree of divorce on the ground that marriage has irretrievably broken

down, should also examine whether adequate financial arrangements have been made for the parties and children.

The intention of the legislators to bring forth the concept of introduction of the new ground for divorce is aptly evident from the statement of objects and reasons of the Amendment Bill, which reads as under: "*The rights to apply for divorce on the ground that cohabitation has not been resumed for a space of 2 years or more, from the date of decree of restitution of conjugal rights, should be available to both, the husband and wife, as in such cases, it is clear, that the marriage had proved a complete failure. There is therefore, no justification for tying the parties down to the bond of marriage"*.[31] The proposed Section 13C (2) says the court hearing a petition shall not hold the marriage to have broken down irretrievably unless it is satisfied that the parties to the marriage have lived apart for a continuous period of not less than three years immediately preceding the presentation of the petition. Now breakdown means living separate for a minimum of three years, which include intermittent small reunions not exceeding three months in all. Besides, there is a duty cast upon the court to see whether maintenance of wife and children is adequately provided for before the divorce is granted for this reason.

The Bill is being welcomed as a progressive measure that would allow people to extricate themselves easily from bad marriages. However, the social impact of the irretrievable breakdown clause should be rigorously studied. The "irretrievable breakdown" ground should not be viewed as merely adding yet another clause to Section 13 of the Hindu Marriage Act. Rather, it should be viewed as a disruptive change to the structural edifice of the Family Law in India. Irretrievable breakdown changes the terms of divorce from a "fault" basis to a "no-fault" basis. Adoption of the principle of "irretrievable breakdown of marriage" for granting the decree of divorce under the principal Acts will indeed be a historic step. However, such an adoption is not without a caveat: the breakdown principle needs to be adopted and enacted in the mode and manner in which it has been conceptually conceived, developed, tested and tried in the Common Law tradition. This ground is essentially premised on the principle that determinants of dissolution of marriage should not be located in findings- the guilty and the innocent. This is so because in marriage relationship neither of the spouses could be termed as 'totally guilty' or 'totally innocent'.

The prime purpose of the new principle is to save the marriage as far as possible. Its objective is not to make divorce either easy or difficult. To use the classical language of the Law Commission on Reform of the Grounds of Divorce, its objective is two- fold: "One, to buttress rather than undermine the stability of marriage; and two, when regrettably a marriage has irretrievably broken down, to enable the empty shell to be destroyed with maximum fairness and minimum bitterness, distress and humiliation". [32] Acting on this new-humane-no-fault principle, the British Parliament abandoned the fault-based grounds and made "irretrievable breakdown of marriage" as "the sole ground for divorce" under their Divorce Law Reforms Act, 1973. In functional terms, the core concern of the court in every case under this new ground is to determine, not just whether the marriage has simply broken down but, whether the marital breakdown is 'irretrievable'.We may usefully follow more than 40-year-analogous- experience of the British Parliament, who, after a meaningful debate and deliberation, abandoned the fault-based approach to their matrimony law. This should promote us to ponder and look at the fault- based grounds with a new perspective. The existing

grounds, like adultery, cruelty, desertion, etc., would tell us the story that these are, more often than not, "the outcome rather than the cause of the deteriorating marriage". [33]

Conclusion

Law cannot be static in the face of the dynamics of life. The enactment of law and its applicability must have a direct nexus with the needs and aspirations of the society. Therefore, laws must be amended with a view to meet the changing needs of the society. The addition of irretrievable breakdown of marriage as a ground for divorce by The Marriage Laws (Amendment) Bill, 2010 is the best possible solution for the future of broken marriages where continuance of marital relations is for namesake only. The Supreme Court in number of cases has strongly argued in favour of the inclusion of irretrievable breakdown of marriage as a separate ground of divorce and it is high time that the Government should recognise the need of the hour and save many couples from disgrace and humiliation by introducing irretrievable breakdown of marriage as a separate ground of divorce in the matrimonial laws. We all believe that marriage is a social institution and is the first step towards the formation of a family. It gives the people, the much needed support to face the adversaries of life and is a source of happiness for any individual. However, when there is clash of expectations between individuals and the mutual trust between partners is broken, the marriage ceases to exist in spirit and remains only on papers. The concept of deriving marital satisfaction and happiness, is gaining acceptance in the society as opposed to the customary practice of the husband and wife being obliged to stay together forever. To conclude, irretrievable breakdown as a sole ground of divorce is a valid and sound ground in view of the fast changing socio-legal needs of the society.

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(ia) has, after the solemnisation of the marriage, treated the petitioner with cruelty; or

(ib) has deserted the petitioner for a continuous period of not less than two years immediately presiding the presentation of the petition; or

(ii) has ceased to be Hindu by conversion to another religion; or

(iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent

Explanation- In this clause-

(a) the expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and include schizophrenia;

(b) expression "psychopathic disorder" means a persistent disorder or disability of mind which rests in abnormally aggressive or seriously irresponsible conduct on the part of the other party and whether or not it requires or is susceptible to medical treatment; or

(iv) has been suffering from a virulent and incurable form of leprosy; or

(v) has been suffering from veneral disease in a communicable form; or

(vi) has renounced the world by entering any religious order; or

(vii) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive;

4. *Lodder v. Lodder* (1921). New Zealand Law Reports 786.
5. Law Commission of India, The Hindu Marriage Act. (1955). *Irretrievable Breakdown of Marriage as a Ground of Divorce*, Report No. 71 (April 1978), 9.
6. *Masarati v. Masarati*, (1969). WLR, 1, 392.
7. Friedman, *The Law in the Changing Society,* (2nd Eds.), 233.
8. J., V.S. Desnpandey. (1971). *Divorce under the Hindu Marriage Act- A conflict of principle. AIR., Journal Section*, 113.
9. Section 13-B (1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the District Court by both the parties to a marriage together, whether such marriage was solemnised before or after the

commencement of the Marriage Laws (Amendment) Act, 1976, on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved. (2) On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the mean time, the Court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnised and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.

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22. Ibid.
23. *Rishikesh Sharma v. Saroj Sharma.* (2006). SCALE, 12, 282.
24. *Ms. Jorden Diengdeh v. S.S. Chopra*. (1985). AIR., SC, 1266.
25. *Naveen Kohli v. Neelu Kohli.* (2006). AIR., SC, 1675.
26. *Samar Ghosh v. Jaya Ghosh.* (2007). SCC, 4, 511.
27. *Manish Goel v. Rohini Goel.* (2010). SCC, 4, 393.
28. *Vishnu Dutt Sharma v. Manju Dutt Sharma.* (2009). SCC, 6, 379.

29. *V. Bhagat v. D. Bhagat.* (1994). SCC, 1, 337.
30. *Anil Kumar jain v. Maya Jain.* (2009). SCC, 10, 415.
31. Marriage Law (Amendment) Bill (2010). Vide Gazette of India, Para 2, 86.
32. Law Commission of India, The Hindu Marriage Act. (1955). *Irretrievable Breakdown of Marriage as a Ground of Divorce*, Report No. 71 (April 1978), 7.
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ENFORCEMENT OF FOREIGN COMMERCIAL AWARD IN INDIA

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ABSTRACT

With international trade and commerce growing rapidly across continents and borders, international commercial arbitration flows naturally. This is the need of the hour as lengthy litigation would inevitably prove as a barrier in maintaining business efficiency. Given the need for an efficient dispute resolution mechanism, international arbitration has emerged as the preferred option for resolving cross-border commercial disputes and preserving business relationships. With an influx of overseas commercial transactions and open ended economic policies acting as a catalyst, international commercial disputes involving India are steadily rising. This has led to tremendous focus from the international community in India's international arbitration regime. India's Arbitration and Conciliation Act[1] 1996 provides a statutory framework for the enforcement of foreign arbitral awards given in countries which are signatories to either the 1927 Convention on the Execution of Foreign Arbitral Awards (Geneva Convention) or the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). This Paper Shall Discuss Enforcement of Foreign Commercial Award on India

Key Words: Foreign, Commercial, Award, Enforcement, Arbitral, Award, Judicial.

Increasing international trade and investment is accompanied by growth in cross-border commercial disputes. Given the need for an efficient dispute resolution mechanism, international arbitration has emerged as the preferred option for resolving cross-border commercial disputes and preserving business relationships. With an influx of overseas commercial transactions and open ended economic policies acting as a catalyst, international commercial disputes involving India are steadily rising. This has led to tremendous focus from the international community in India's international arbitration regime.

In law, the enforcement of foreign judgments is the recognition and enforcement rendered in another ("foreign") jurisdiction. Foreign judgments may be recognized based on bilateral or multilateral treaties or understandings, or unilaterally without an express international agreement. The "recognition" of a foreign judgment occurs when the court of one country or jurisdiction accepts a judicial decision made by the courts of another "foreign" country or jurisdiction, and issues a judgment in substantially identical terms without rehearing the

substance of the original lawsuit.Recognition will be generally denied if the judgment is substantively incompatible with basic legal principles in the recognizing country.

India's *Arbitration and Conciliation Act*[2] *1996* provides a statutory framework for the enforcement of foreign arbitral awards given in countries which are signatories to either the 1927 Convention on the Execution of Foreign Arbitral Awards (Geneva Convention) or the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

Objectives:

1. To understand the enforcement of foreign arbitral award in India
2. To identify the development of enforcement of foreign arbitral award in India
3. To analyse the enforcement of foreign arbitral award in India

Conditions for Enforcement of Foreign Arbitral Award

In order to be considered as a foreign award for the purposes of the Act, the same must fulfill two requirements. First it must deal with differences arising out of a legal relationship (whether contractual or not) considered as commercial under the laws in force in India. The expression 'commercial relationship' has been very widely interpreted by Indian courts. The Supreme Court in the case of *RM Investments Trading Co Pvt Ltd v Boeing Co &Anr*[3], while construing the expression 'commercial relationship', held:

The term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. The second requirement is more significant and that is that the country where the award has been issued must be a country notified by the Indian government to be a country to which the New York Convention applies. Only a few countries have been notified so far and only awards rendered therein are recognised as foreign awards and enforceable as such in India.

The conditions for enforcement of a foreign award are as per the New York Convention. The only addition being an 'Explanation' to the ground of public policy which states that an award shall be deemed to be in conflict with the public policy of India if it was induced or affected by fraud or corruption.

A. Procedural Requirements

A party applying for enforcement of a foreign award is required to produce before the court:

(a) The original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;

(b) The original agreement for arbitration or a duly certified copy thereof; and

(c) Such evidence as may be necessary to prove that the award is a foreign award.

The Supreme Court has held that once the court determines that a foreign award is enforceable it can straightaway be executed as a decree. In other words, no other application is required to convert the judgment into a decree.[4] This was so held in the case of *Fuerst Day Lawson Ltd v Jindal Exports Ltd*,[5]

B. Section 44 A of the Civil Procedure Code, 1908 : Execution of decrees passed by Courts in reciprocating territory.

"(1) Where a certified copy of decree of any of the superior Courts of any reciprocating territory has been filed in a District Court, the decree may be executed in India as if it had been passed by the District Court.

(2) Together with the certified copy of the decree shall be filed a certificate from such superior Court stating the extent, if any, to which the decree has been satisfied or adjusted and such certificate shall, for the purposes of proceedings under this section, be conclusive proof of the extent of such satisfaction or adjustment.

(3) The provisions of section 47 shall as from the filing of the certified copy of the decree apply to the proceedings of a District Court executing a decree under this section, and the District Court shall refuse execution of any such decree, if it is shown to the satisfaction of the Court that the decree falls within any of the exceptions specified in clauses (a) to (f) of section 13."

Reciprocating territories

- United Kingdom
- Aden
- Fiji
- Republic of Singapore
- Federation of Malaya
- Trinidad and Tobago
- New Zealand, the Cook Islands (including Niue) and the Trust Territories of Western Samoa
- Hong Kong
- Papua and New Guinea
- Bangladesh
- United Arab Emirates

Requirements under section 44A of CPC

- It should be a decree of a superior court of a reciprocating territory.
- There should be a certified copy of the
- ➢ Decree does not include sum payable in respect of taxes, fine and penalty.
- ➢ Decree also does not include arbitration awards;

Marina World Shipping Corporation Ltd. v. Jindal Exports & Imports Private Ltd[6] -Delhi High Court took the view that an award can only be enforced under the provisions of Arbitration and Conciliation Act, 1996. A foreign arbitration award converted into a foreign decree will not be executed under section 44 A of CPC.

C. Exceptions to the execution of a decree: Sec 13 of CPC

There should be a Certificate from the superior court stating the extent to which the decree has been satisfied/adjusted. The decree should not fall within the exception to execution of the decree under Section 13 (a) to (f) of the Civil Procedure Code, 1908.

Exceptions to the execution of a decree Sec 13 of CPC

Section 13: When foreign judgment not conclusive : **-**

(a) Where it has not been pronounced by a Court of competent jurisdiction;

(b) Where it has not been given on the merits of the case;

(c) Where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of India in cases in which such law is applicable;

(d) Where the proceedings in which the judgment was obtained are opposed to natural justice;

(e) Where it has been obtained by fraud;

(f) Where it sustains a claim founded on a breach of any law in force in India.

Judicial Timeline of Enforceability of Foreign Arbitral Award

Bhatia International V. *Bulk Trading S.A.(‘Bhatia International’*[7]*):*

The Supreme Court, in *Bhatia International*, held that Part-I of the Act would apply to international commercial arbitration held outside India (‘outside arbitration’) but parties could exclude the applicability of Part-I expressly or impliedly. The Court reasoned that were Part-I to be held inapplicable to such arbitrations, the following anomalies would arise:

1. There would be no law governing arbitrations held in non-convention countries.
2. Part-I would apply to Jammu & Kashmir in all international commercial arbitrations (including outside arbitrations) but for the rest of India, Part-I would not apply to outside arbitrations.
3. Sec 2(4) and (5) would be in conflict with Sec 2(2) of the Act.
4. A party to an outside arbitration would have no remedy to obtain interim relief even if the assets which are the subject matter of such application for interim relief are in India.

The above reasoning in *Bhatia International* has been criticized as grossly erroneous.

One of the justifications in *Bhatia International* was that Part-I did not provide for interim measures in arbitrations held outside India. This was the chief issue that confronted the Court.

The Court’s error in *Bhatia International* was in interpreting Sec 2(2), which provides that Part-I would apply to arbitration in India, to mean that Part-I would also apply to outside arbitration. The Court’s logic was that by not employing the term “only” in Sec 2(2), the Legislature’s intent was to make Part-I applicable even to outside arbitrations. This construction is completely out-of-sync with the literal reading of the provision. This has resulted in ambiguity on the applicability of Part-I of the Act to outside arbitrations leading to inconsistent decisions, especially on the issue of implied exclusion of Part-I of the Act to outside arbitrations.

In ***Hardy Oil and Gas Ltd.* v. *Hindustan Oil Exploration Co. Ltd.*,**[8] the substantive law of the contract was Indian law, the substantive law of the arbitration agreement was English law, the

arbitration was to be conducted as per Rules of the London Court of International Arbitration and the venue was London. The Gujarat High Court held that Part-I was impliedly excluded because the parties had expressly chosen English law to be the law governing arbitration. In *Videocon Industries Ltd.* v. *Union of India*,[9] the agreement provided for Indian law as the substantive law of contract, Kuala Lumpur, Malaysia as the venue of arbitration and English law as the law of arbitration. The Court held that by virtue of English law being the law of arbitration, Part-I was excluded. In *Yograj Infrastructure Ltd.* v. *Ssangyong Engineering & Construction Ltd.-I*,[10] the agreement provided for the arbitration Rules of the Singapore International Arbitration Centre ('SIAC') as the rules of arbitration and the seat was Singapore. The Court held that Part-I was excluded although the substantive law of contract as per the agreement was Indian law. *Per contra*, in *Aurohill Global Commodities Ltd.* v. *M.S.T.C. Ltd*[11] and *Paragon Steels Pvt. Ltd.* v. *European Metal Recycling Ltd*,[12] the substantive law of contract was Indian law, the venue in both cases was London and procedural rules were of non-Indian arbitral institutions. Nevertheless, it was held that Part-I was not excluded.

*Narayan Prasad Lohia*V. *Nikunj Kumar Lohia*[13] *('Lohia'):*

Sec 10(1) provides that the parties shall not appoint an even number of arbitrators. Notwithstanding the said provision, the Supreme Court held in *Lohia* that the appointment of a two member tribunal was valid. This came as a shock to the followers of Indian arbitration because the decision was in complete contradiction to the statute.

The Court's reason was that since there was no ground by which an award could be set aside for the reason that it was passed by a two member tribunal, the provision was not mandatory in nature. The Court stated that it would make no difference if two arbitrators were appointed and in case of a disagreement between them the matter could be referred to a third arbitrator. Consequently, the Court interpreted "shall" in the provision to mean "may".

Oil & Natural Gas Corporation Ltd. V. *Saw Pipes Ltd.*[14] *('Saw Pipes'):*

The Supreme Court in *SAW Pipes* broadly read the ground of public policy for setting aside arbitral awards to the consternation of many stakeholders Indian arbitration. The reason for their anguish was that the Court held that an award could be set aside even if it was patently illegal. This meant that substantive review of arbitral awards could take place in the annulment proceedings, which, according to critics, reflected unjustified judicial mistrust and hostility towards arbitration. The principal issue in the setting aside proceedings was the correctness of the tribunal's decision on the proof of loss suffered when there was a provision on liquidated damages in the contract.

SAW Pipes has been criticised for subverting the arbitral process and for being in contradiction to the policies contained in the Act, especially the policies of finality of awards and minimum judicial intervention into the arbitral process. The judgment, it has been argued, has struck at the very heart of arbitration in India by potentially exposing all awards to be questioned in courts and has made commercial dispute resolution a time-consuming and expensive process, and has hindered foreign investment in India.

Centrotrade Minerals And Metal Inc. V. *Hindustan Copper Ltd.*[15] *('Centrotrade'):*

In *Centrotrade*, a Division Bench of the Supreme Court comprising Sinha and TarunChatterjee, JJ. disagreed on the validity of an arbitration clause providing for two-tiered

arbitration vis-à-vis the Act. Although Sinha, J. noted that there were several decisions under the Arbitration Act, 1940 where two-tier arbitration clauses were held to be valid,the two-tier arbitration as contemplated in the arbitration clause was, nevertheless, held to be invalid.The arbitration clause provided for domestic arbitration under the Rules of the Indian Council for Arbitration ('ICA') and for arbitration appeal in London under the International Chamber of Commerce Rules. The judge stated that had the clause provided for arbitral appeal to the ICA, it would have "probably" been valid. Since the arbitration clause provided for domestic arbitration in the first instance, this would, according to him, mean that the moment the arbitral tribunal gave the award, it was enforceable as a decree when the award was not challenged within the period specified in Sec34. Sinha, J. reasoned that an appeal from a domestic award leading to a foreign award was not contemplated in the Act and therefore, the arbitration clause was invalid. He distinguished the two-tier arbitration contemplated in the arbitration clause with two-tier arbitrations conducted under the aegis of arbitral institutions.

SBP& Co. V. *M/S. Patel Engineering Ltd.*[16] *('Patel Engineering'):*

The extent of the *Kompetenz-Kompetenz* doctrine was one of the earliest controversies under the Act.53 According to a three judge bench of the Supreme Court in *Konkan Railway Corporation* v. *Mehul Constructions*,the role of the Chief Justice under Sec11 was merely to act as an appointing authority in case of failure of the appointment procedure agreed upon by the parties. The Court held that the Act advocated extreme *Kompetenz-Kompetenz*. Hence, according to the Court, the decision of the Chief Justice was an administrative decision and all jurisdictional questions, including questions pertaining to the validity of the arbitration agreement, were to be taken before the arbitral tribunal. This decision was confirmed by a five judge Bench in *Konkan Railway Corporation* v. *Rani Constructions*.

In *Patel Engineering*, a seven judge Bench of the Supreme Court had to decide on the nature of function of the Chief Justice (or his designate) under Sec11 of the Act. The issue was whether the Chief Justice should decide any contentious jurisdictional issue before referring the parties to arbitration. The Court held that when any tribunal exercises jurisdiction, it has to be satisfied with the existence of conditions, known as jurisdictional facts, which permit it to do so. According to the Court, when a statute confers power to the tribunal "to adjudicate" and makes its decision final, such decision is judicial in character. The tribunal, according to the Court, has to be satisfied of the existence of the jurisdictional facts. Consequently, the Court held that the Chief Justice has to necessarily be satisfied of the existence of jurisdictional facts such as the existence of an arbitration agreement, existence of such agreement between the parties to the application, etc.

Venture Global Engineering V. *Satyam Computer Services Pvt. Ltd.*[17] *('Venture Global'):*

The Supreme Court had to decide in *Venture Global* if an Indian court could have a supervisory role over an arbitration whose seat was outside India. A dispute arose between the parties under a shareholders' agreement and was referred to arbitration in London. The arbitrator passed an award that was taken up by Satyam Computer Services Pvt. Ltd ('Satyam') for enforcement in the Michigan District Court, USA. Venture Global Engineering ('Venture') approached the Indian courts for setting the award aside. Ultimately, the matter went to the Supreme Court of India, where the question was whether the foreign award could be set aside under Sec 34 of the Act. Both the parties relied on *Bhatia International* to support

their respective contentions and therefore, the Court had to interpret *Bhatia International*. The Court construed *Bhatia International* to mean that Part-I, including Sec 34, applied to all arbitrations, domestic or foreign, and the Court could set aside a patently illegal foreign award for violating the public policy of India. The Bench comprising Tarun Chatterjee and Sathasivam, JJ, held that *Bhatia International* never exempted foreign awards from the applicability of Part-I of the Act; rather, the courts had wrongly interpreted *Bhatia International*. After quoting *Bhatia International* extensively, the Court concluded that the legislative intent in not expressly providing that Part-I will apply only to domestic arbitration was to make Part-I apply even to outside arbitrations; but by not expressly stating that Part-I would apply to outside arbitrations, the intention was to allow parties to provide by agreement that Part-I or any provision therein (including the non-derogable provisions) will not apply.

On the applicability of Part-I of the Act to the case, the Court held that Part-I was not expressly or impliedly excluded due to the presence of the non-obstante clause in Clause 11.05(c)of the shareholders' agreement, despite the fact that the governing law of the contract was the law of Michigan.

The judgment has completely disregarded the seat theory, which is the prevailing norm in international commercial arbitration. Even the Model Law is based on the territoriality principle with the seat of arbitration having supervisory power and control over arbitral proceedings taking place within its territory.[18]

Shri Lal Mahal V. Progetto Grano Spa[19]

Shri Lal Mahal Ltd. instituted action in Delhi High Court for enforcement of foreign awards inter alia on the grounds that the awards which were sought to be enforced were contrary to the public policy of India in as much as they were contrary to the express provisions of the contract entered into between the parties. Progetto Grano Spa submitted that Shri Lal Mahal Ltd. could not be permitted to reopen questions of fact that had already been decided by the Board of Appeal which were affirmed by the High Court of Justice at London.

The Delhi High Court overruled the objections raised by Shri Lal Mahal Ltd. to the enforcement of foreign awards and held that they were enforceable under Part II of the Arbitration & Conciliation Act, 1996, ("Act"), hence Shri Lal Mahal Ltd. appealed to the Supreme Court. The Supreme Court held that that enforcement of foreign award would be refused under Section 48(2) (b) of the Act, only if such enforcement would be contrary to (i) fundamental policy of Indian law; or (2) the interests of India or (3) justice or morality.

The Supreme Court further held that Section 48 of Act does not give an opportunity to have a 'second look' at the foreign award in the award - enforcement stage. The scope of inquiry under

Section 48 does not permit review of the foreign award on merits. Procedural defects (like taking into consideration inadmissible evidence or ignoring/rejecting the evidence which may be of binding nature) in the course of foreign arbitration does not necessarily lead to excuse of the award from enforcement on the grounds of public policy.

The Supreme Court held that while considering the enforceability of foreign awards, the court does not exercise appellate jurisdiction over the foreign award nor does it enquire as to whether, while rendering foreign award, some error has been committed. Under Section

48(2)(b) of the Act, the enforcement of a foreign award can be refused only if such enforcement is found to be contrary to (1) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality. As the objections raised by the appellant did not fall in any of the abovementioned categories, therefore, the foreign awards cannot be held to be contrary to public policy of India as contemplated under Section 48(2)(b) of the Act.

Enforcement of Foreign Awards under Arbitration and Conciliation Act, 1996

A. Geneva Convention

Sec 53-Interpretation.- In this Chapter "foreign award" means an arbitral award on differences relating to matters considered as commercial under the law in force in India made after the 28th day of July, 1924,

(a) In pursuance of an agreement for arbitration to which the Protocol set forth in the Second Schedule applies, and

(b) Between persons of whom one is subject to the jurisdiction of some one of such Powers as the Central Government, being satisfied that reciprocal provisions have been made, may, by notification in the Official Gazette, declare to be parties to the Convention set forth in the Third Schedule, and of whom the other is subject to the jurisdiction of some other of the Powers aforesaid, and

(c) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made, may, by like notification, declare to be territories to which the said Convention applies, and for the purposes of this Chapter an award shall not be deemed to be final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made.
Sec 56: The burden to produce evidence for enforcement of the foreign award is on the party enforcing the foreign award in India. The party is required to fulfill the requirements stated u/s 56 of The Arbitration and Conciliation Act, 1996 (Act) . Further, the party also has to satisfy the Court that the conditions laid down u/s 57 of the Act have been satisfied.

Evidence.:

(1) The party applying for the enforcement of a foreign award shall, at the time of application procedure before the Court

   (a) The original award or a copy thereof duly authenticated in the manner required by the law of the country in which it was made;

   (b) Evidence proving that the award has become final; and

   (c) Such evidence as may be necessary to prove that the conditions mentioned in clauses (a) and (c) of sub-section (1) of section 57 are satisfied.

(2) Where any document requiring to be produced under sub-section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.

Explanation-In this section and all the following sections of this Chapter, "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in

exercise of its ordinary original civil jurisdiction, having jurisdiction over the subject-matter of the award if the same had been the subject matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes.

Sec 57: The burden is on the party enforcing the foreign award to show that all the conditions listed u/s 57 of the have been satisfied.

Conditions for enforcement of foreign awards.-

(1) In order that a foreign award may be enforceable under this Chapter, it shall be necessary that

(a) The award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto;

(b) The subject-matter of the award is capable of settlement by arbitration under the law of India;

(c) The award has been made by the arbitral tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure;

(d) the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition or appeal or if it is proved that any proceedings for the purpose of contesting the validity of the award the pending;

(e) The enforcement of the award is not contrary to the public policy or the law of India.

Explanation-Without prejudice to the generality of clause (e), it is hereby declared, for the avoidance, of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption.

(2) Even if the conditions laid down in sub-section (1) are fulfilled, enforcement of the award shall be refused if the Court is satisfied that

(a) The award has been annulled in the country in which it was made;

(b) The party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he was not properly represented;

(c) the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope for the submission or arbitration;

Provided that if the award has not covered all the differences submitted to the arbitral tribunal, the Court may, if it thinks fit, postpone such enforcement or grant it subject to such guarantee as the Court may decide.

(3) If the party against whom the award has been made proves that under the law governing the arbitration procedure there is a ground, other than the grounds referred to in clauses (a) and (c) of sub-section (1) and clauses (b) and (c) of sub-section (2) entitling him to contest the validity of the award, the Court may, if it thinks fit, either refuse enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent tribunal.

B. New York Convention

Sec 47: The burden to produce evidence for enforcement of the foreign award is on the party enforcing the foreign award in India. The party is required to fulfill the requirements stated u/s 47 of Act.

(1) The party applying for the enforcement of a foreign award shall, at the time of the application, produce before the court- (a) the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;(b) the original agreement for arbitration or a duly certified thereof; and

  (c) Such evidence as may be necessary to prove that the award is a foreign award.

(2) If the award or agreement to be produced under sub- section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.

Sec 48: The burden is on the party resisting enforcement of the foreign award to show that the conditions listed u/s 48 of the Act have not been satisfied.

Conditions for enforcement of foreign awards.-

(1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that

  (a) the parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or (b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

  (c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.

  Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or

  (d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place ; or

  (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

(2) Enforcement of an arbitral award may also be refused if the court finds that-

  (a) The subject -matter of the difference is not capable of settlement by arbitration under the law of India; or

  (b) The enforcement of the award would be contrary to the public policy of India.

Explanation: Without prejudice to the generality of clause (b), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption.

(3) If an application for the setting aside or suspension of the award has been made to a competent authority referred to in clause

(e) Of sub-section (1) the Court may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Conclusion

With international trade and commerce growing rapidly across continents and borders, international commercial arbitration flows naturally. This is the need of the hour as lengthy litigation would inevitably prove as a barrier in maintaining business efficiency.

Increasingly, arbitration is recognised as the most effective method of solving commercial disputes, especially those of an international dimension. It can achieve equitable solutions more quickly than litigation, and at less cost; it allows parties to adopt whatever procedure they choose for the resolution of differences; it enables parties to decide where disputes shall be heard.

Within and around Asia, India offers both the resources and a venue for Arbitrations and dispute resolution procedures and is dedicated in its mission to advancing and supporting arbitration as a means of resolving commercial disputes

The Indians have long been aware of the advantages of arbitration, acknowledging its value as a method of resolving disputes, and more recently has extended tradition by the statutory adoption of the UNCITRAL Model Law for international commercial arbitration and the UNCITRAL Rules of Arbitration, with relevant modifications to fit into its institutional framework.

There have been many cases in the recent past where foreign clients have found it difficult to enforce awards which they have judicially won outside India. This makes it essential for foreign clients and investors to understand the intricacies involved in this process. An understanding of recent developments and interpretation given to the Arbitration and Conciliation Act proves that judicial decisions play a far greater role than the actual text of the Act.

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JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN ACT) 2015: A CRITIQUE

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ABSTRACT

This Article critically analyzed the provisions of newly amended Juvenile Justice (Care and Protection of Children Act) 2015. The main objective of this Article is to check whether the Juvenile Justice (Care and Protection of Children Act) 2015 is sufficient and enough to curb and eliminate the possibilities of crime committed by juveniles. Juvenile Justice Act, 2015 is based on principle of reformation and rehabilitation of children who committed crimes but presumed to be innocent not to commit a crime and the children who committed crimes under the influence of their social surroundings. In this Article we tried to differentiate juveniles involved in heinous crimes under the influence of their social surroundings and juveniles involved in crimes other than heinous crime which can help to punish the perpetuators in the former while thinking of remedial measures in the latter. The present Article described the evolution of Juvenile Justice Legislation, from pre-independence era to post-independence India. An attempt is also made to critically evaluate the various provisions of Juvenile Justice Act, 2015. In this Article we tried to find out the causes and types of Juvenile Crimes in our society. In the concluding part, some suggestions have been made for preventive measures of Juvenile Crimes under Juvenile Justice (Care and Protection of Children Act) 2015.

Key Words: Juvenile, Justice, Crime, Juvenile, Crimes, Juvenile, Justice, System.

Children are regarded as gift of God and future of the country and it is the responsibility of everyone to ensure them a safe environment to live in. But the crime rate of juveniles has been increasing day by day from the last decade in a developing country like India. At present, Juvenile crime is like an incurable disease in our society. The need of the hour is to cure such a disease and take necessary steps to save, protect and prevent future generation from committing crimes. Our government has taken various steps to reform and rehabilitate juvenile offenders. The Juvenile Justice Act, 2000 has been amended by the Government from time to time for the welfare of juvenile offenders and prevents them from committing a crime

again.[1] But inspite of such welfare law for juvenile offenders, there is a rise in the number of juvenile offenders across the country. Among the juveniles the delinquent behavior has assumed serious forms and which is a sign of sick society. Juvenile delinquency has become a cause of concern in India with release of crime report of India, 2014, which shows children between the age group of 16-18 years were responsible for 66% of crimes committed by all children in 2013.[2] On December 16, 2012 the brutal gang rape of a paramedical student by six men on a moving bus in the national capital shook the nation for the sheer brutality and torture inflicted on the helpless girl. One of the perpetrators of the crime was a juvenile who was sent to a juvenile home for just 3 years. So the question peeped in our mind is that whether Juvenile offenders who committed heinous crimes should be treated as adults or not. If such juveniles are treated as adults then what will be the measures to prevent them from committing crimes and where will they kept because if such juveniles kept with hardened adults criminals then their future will be ruined and they will become hardened criminals. So at first we will discuss the meaning of juvenile and delinquent behavior of juveniles.

A. Meaning of Juvenile

The word juvenile is derived from Latin, meaning thereby young. So juvenile means a person who is very young, teenager, adolescent or under age. In other words, juvenile means children who have not yet reached the age of adults in the sense that they are still childish or immature. Sometimes the term "child" is also interchangeably used for the term "juvenile". Legally speaking, a juvenile can be defined as a child who has not attained a certain age at which he can be held liable for his criminal acts like an adult person under the law of the country. Juvenile is a child who committed certain acts or omissions which are in violation of any law and are declared to be an offence. According to Juvenile Justice Act, 1986 a juvenile or child is a person who in case has not completed age of 16 years and in case of a girl 18 years of age. The Juvenile Justice Act, 1986 was repealed by the Act of 2000 and the Government of India by this Act omitted the distinction with regard to age between male and female juveniles in performance of its obligation to the international obligations. Then the age of juvenile in conflict with law for male and female was fixed at 18 years. A juvenile in conflict with law under the Juvenile Justice (Care & Protection of Children) Act, 2000 is a juvenile who is alleged to have committed an offence and has not completed 18 years of age as on the date of commission of such offence. So prior to the Act of 2015 a person who has not attained the age of eighteen years was a juvenile. But after the Enactment of Act of 2015[3] juveniles involved in heinous crimes can be treated as adult even if they are less than eighteen years during the commission of act. Now we will discuss the meaning of juvenile delinquency.

B. Meaning of Juvenile Delinquency

Delinquency is an act or conduct of a juvenile which is socially undesirable and which is against the provisions of law. Juvenile delinquency generally means the failure of children to meet certain obligations expected from them by the society. Juvenile delinquency is expression of an unsatisfied urge in the juvenile delinquent. Whether a particular act or conduct of the child would be deviant or not will depend on various factors and vary in different States, Cities and also time to time. The juvenile delinquent has even been defined as "a child trying to act like a grown up". A particular act of the child may be viewed as ordinary childish prank but in another particular context it may cause concern and anxiety. The distinction between a delinquent and normal child, at times is very blurred and deciding point

between a playful act and the juvenile delinquency is his relation to concerned person. In fact there is a haze of vagueness and confusion surrounding the definition of juvenile delinquency and there is no single definition that may be acceptable to all. The first legislation on juvenile delinquency, passed by the State of Illinois in l899[4] provides exact meaning of delinquency. According to which a delinquent child means any male who while under the age of 17 years, or any female who while under the age of 18 years violates any law... or is incorrigible, or knowingly associates with thieves, vicious or immoral persons; or without just cause and without the consent of its parents, guardian or custodian absents itself from its home or place of abode, or is growing up in idleness or crime, or knowingly frequents a house of ill repute; or knowingly frequents any policy shop or place where gambling device is operated; or frequents any saloon or dram- shop where intoxicating liquors are sold; or patronizes or visits any public pool room or bucket shop, or wanders about the streets in the night time without being on any lawful business or lawful occupation; or habitually wanders about any railroad yards or tracks or jumps or attempts to jump on to any moving train, or enters any car or engine without lawful authority, or uses vile, obscene, vulgar, or indecent language in any public place or about any school house, or is guilty of indecent or lascivious conduct. Thus juvenile delinquency is a crime committed by children and adolescents under statutory age. So juvenile delinquency is a criminal behavior of the minor with major problems. The age limit and the meaning of delinquency are interchangeable in most of the countries. Generally, any person between the ages 7 to 18, who violates the law, is considered as delinquent and persons above this age are considered as criminals. The incidence of delinquency is rising amongst the girls also. Juvenile delinquency is one of the most serious problems of our times. It is basically known as anti-social behavior. There are different forms of delinquent behavior such as loitering, loafing, pick-pocketing, stealing, gambling, sexual offences like eve teasing, etc. The rate of delinquency is rising very fast all over the world and one of the main suspected reasons could be the negligence of parents.

Reasons for Juvenile Crimes

There are various factors that lead to criminal behavior of the youth. Juvenile delinquency takes place in various forms and varies in degree, frequency, duration and seriousness and involves different forms of specialization like drug addiction, sex offences, predatory acts etc. Delinquency like other social behavior has complex roots. It is most often a transitory phenomenon. The future criminals can certainly be reduced by preventing the children of going astray. The child because of his being future of the nation should be given atmosphere conducive to his being a responsible and sensible citizen. Juvenile delinquency is a social disease and it cannot be treated without knowing its causes. The subject of crime unlocks such powerful emotions that it is most difficult to obtain objective or scientific data on the incidence of crime and on the circumstances under which the crime rate rises and falls. In order to explain juvenile misconduct it is necessary to analyze the condition of the individual involved in crime, the influence of the society around him and the sequence of occurrence preceding the deviant behavior of the juvenile. Delinquency is an important problem requiring urgent attention. The problem of causation is not easy but rather highly complex. There is no single cause of Juvenile delinquency but there are many and varied causes. Basically, causes of Juvenile delinquency are of three types.

- Biological

- Socio-Environmental
- Psychological, Physiological and personal

A. Biological Factors

(i) Ocular Ailments: It leads to irritability. It causes emotional disturbance and discomfort. Moreover, this may prevent the acquisition of sufficient knowledge so useful for making one able to make a living.

(ii) Nose and throat problem: This may cause weakness and discomfort and may result in school truancy or dislike for work. Breathing may be obstructed, and may result in mouth breathing and may, thus, give an appearance of inefficiency in work.[5]

(iii) Hearing Problem: Such as deafness or difficulty in hearing makes the person concerned inefficient Efficiency is generally weak and adversely affects his ability to work and he depends on others which may lead to antisocial behavior.

(iv) Speech Problem: It is also found to lead to delinquency acts especially in children. A person with speech problem is pitted or laughed at in the society. Due to this, feeling of inferiority may be developed which may lead to a desire to make up in criminal acts.

(v) Enuresis: It involves a disorder of functions of the bladder. Sometimes it discomfort and even some time may lead to delinquency.

(vi) Irritation: Irritation caused by ailments such, as ringworm eczema, irritation of sexual organs is also a significant factor resulting in delinquency.

(vii) Headache :It may cause irritation of temperamental though rarely may result in some sort of outburst. [6]

(viii) Excessive strength: A person who is possessed excessive physical strength and his mental trait being uncultured and not properly channelized, probability of his committing an act of offence becomes higher. [7]

B. Socio-Environmental Factors

(i) Mobility

Through rapid growth of industrialization and urbanization the means of communication, travel facilities and propagations of views through press and platform has expanded and increased. Migration of persons to new places where they are strangers offers them opportunity for crime as chances of detection are minimized considerably. Thus this factor also leads to crime causation and juvenile delinquency in the society.

(ii) Family background

This factor is also the main cause of juvenile delinquency in the society. According to Sutherland[8] the family background has greatest influence on the criminal behaviour of offender or Juvenile. The Children are apt to imbibe criminal tendencies, if they find their parents or members of the family to which they belong behaving in the similar manner. A child who is brought up in a broken family is likely to face an easy prey to criminality. Children easily indulged in criminal activities if there is lack of parental control over children due to death, divorce, or desertion of parent or their ignorance or illness. And such situation creates a soothing ground for children to resort to criminal acts. The constant quarrels

amongst parents, undue domination of one over the other, step-motherly treatment with children, frequent births in the family, immorality of parents, misery, poverty of unwholesome family atmosphere unemployment, low income or parent's continued long absence from home may led to the child to do commit the offence in the society.

(iii) Social Media

Social media is also considered as cause of crime or delinquency because children are of easy impressionable mind. What they see on the television, cinema, video games, mobile, I-pads, computers they try to do as it is in real life. Present day movies, cartoons, games, other videos on social media are full of criminal activities scenes like violence, robbery, theft, loot and rape etc. The parents must be careful and serious in not taking their children to undesirable pictures especially with the crime scenes on the social media. The connection between movie and delinquency is considered to be quite close. It is true that social media has an adverse effect on the moral sense of the children because of its emphasis on violence, crime and sex. Too crazy people for movies neglect their studies, turn truant from school and house. Quite often when they don't have money for the cinema ticket, they resort to stealing. The undesirable influence of television lies in introducing an element of impersonal relationships in the family. According to Marie Seton,[9] interest in films in the country (India) is unparallel; therefore, carefully planned programmes with appeal to different groups could be built up through suitable films.

(iv) Poverty

Poverty is yet another potential cause of juvenile delinquency. Failure of parents to provide necessities of life such as food and clothing etc. draws their children to delinquency in a quest for earning money by whatever means. At times, even the parents connive at this for the sake of petty monetary gains.

C. Psychological, Physiological and Personal

For determination of delinquency offender's mental traits, peculiarities to abilities play a very important role. In real sense it is the mind that controls our body, the mind is designed, defective or feeble, we must turn, for acute, to removal of defect or to the fortification of the faculty. There are some substantial factors in causation of anti-social behavior and crime. Physiological and Neuro-physiological conditions and ailments, ocular ailment, nose and throat obstructions, eating trouble, speech defects, enthuses, phinosis physical irritations excessive physical strength mental disorder etc; as in the case of normal behaviour, the delinquent behaviour is also affected by intellectual factors. It is commonly observed that intelligent persons in teenagers perform delinquent acts in rather refined manner. The personality traits, such as neuroticism, psychotics, frustration and maladjustment appear to be important causative factors of juvenile delinquency. Russell (1977) found that neuroticism, depression, sensitivity, impulsivity, social extroversion and social non-conformity were dominant personality characteristics in juvenile delinquents.

Besides the aforesaid causes, there are also some of the contributing factors aggravating juvenile delinquency which are as under the following:

1. Bad Company
2. Adolescent instability and impulses

3. Early sex experiences
4. Mental conflicts
5. Excessive social suggestibility
6. Love of adventure
7. Illiteracy
8. Child labour
9. Squalor
10. Motion pictures
11. School dissatisfaction
12. Poor recreation
13. Street life
14. Vocational dissatisfaction
15. Sudden impulse
16. Physical condition.[10]

It is stated that the nature of delinquency among male juveniles differs radically from those of girls. Boys are more prone to offences such as, theft, pick-pocketing, gambling, eve-teasing, obscenity, cruelty, mischief, etc., while the offences commonly committed by girls include sex-involvements, running away home, truancy and shop lifting. It is further noteworthy that delinquency rate among boys in much higher than those of girls, the reason being that boys by nature are more adventurous and enduring than those of girls.[11]

Juvenile Crimes in India and Law

Available statistics on juvenile delinquency reveal that the crime by juveniles is a harsh reality in India. In recent times juveniles were found to be involved in most of the heinous crimes such as murder and gang rape. It becomes a disturbing trend of our society and whole of our society anguished by such criminal acts of children. The impact of western civilization and temptation for luxuries has greatly disturbed the modern Indian youth. Consequently, there has been a considerable growth in crimes committed by juveniles. Like any other country, India also seeks to tackle the problem of juvenile delinquency on the basis of three fundamental assumptions:-[12]

(i) young offenders should not be tried, they should rather be corrected;

(ii) they should not be punished but be reformed; and

(iii) exclusion of delinquents i.e. children in conflict with law from the ambit of court and stress on their non-penal treatment through community based social control agencies such a Juvenile Justice Board, Observation Homes, Special Homes etc.

A. Historical Perspective of the Law Relating to Juvenile Justice in India

Historical development of juvenile justice in India can be divided into various phases through reference of treatment of children, legislative developments, judicial Intervention and other government policies.[13]

a. Status of Juveniles Justice System prior to 1773

Both Hindu law (Manusmriti) and Islamic law (Sharia) provided for maintenance and proper upbringing of the children and it was the sole responsibility of parents to provide care and protection to the children and if the families were unable then someone from the community took care of the children. According to the principles of Islamic law if anyone finds the abandoned or deserted child and feels that child would be harmed then he must take care of the child. Manusmriti prescribes various forms of punishments for the children committed certain offences[14] for example, if a child is found throwing filth on the public road he has to clean the place while an adult has to pay the fine.[15] Under Muslim law, there is a specific Injunction which forbids execution of children.[16] Provisions contained in the traditional texts of Hindu as well as Islamic laws shows that the children were treated separately from that of adults, wanting special care for their survival and they were not fully responsible for their actions. So the Indian culture historically treated child as a child in need of care and protection and he could not be treated as adult even if he has committed any wrong.

b. Status of Juveniles Justice from1773-1849

In this period India was prominently dominated by East India Company. After the failure of company the government of Britain took over the control under the supervision of Governor General. Colonial exploitation ruined the agrarian economy forcing deprived class to live in slums in the city outskirts. This increased destitution and delinquency among children.[17] Welfare mechanism for the children took different forms. Krishna Chandra Ghoshal and Jai Narayan Ghoshal approached to the Governor General for establishing the home for destitute juveniles in major trading city of Calcutta. The first Ragged School for vagrant and orphan children was established in 1843 in Bombay now it's known as David Sasson Industrial School. The objective was to reform the child delinquents who were arrested by the police. The main objective behind the establishment of this school to encouraged the deprived children to work through apprenticeship and Industrial Training which pave the way for enactment of Apprentices Act 1850.

c. Status of Juveniles Justice System from 1850 to 1950

In 1850 the first law was introduced which provided a special status for juveniles.[18] According to this Act the children who were committed petty offences under the age group of 10-18 years were made to undergo their sentence as apprentices. The objective of the law was to channelize the energy of the children and prevent them from criminal influence and make them to work so that after reaching majority they could earn a living.[19] In 1860 the Indian Penal Code fixed the age limitations for criminal liability which provided protection to children from criminal prosecution until they have developed cognitive faculties to understand the nature of their actions.[20] The code of criminal procedure 1861 as well as 1898[21] prescribed for separate trial for the persons below the age of 15 years and required that they should be confined in reformatory homes instead of adult prisons. These provisions changed the philosophy of penology from punishment to reformation. Constant arisen of crimes by juveniles led to passing of Whipping Act of 1864 aiming that whipping for certain class of offences by young delinquents will have a deterrent effect, and government will not have to Invest on establishing the reformatories for the juveniles as juvenile delinquency got politicized such that some were in favor of corporal punishment and some were on

rehabilitation and lastly corporal was chosen as it was viable in terms of economic conditions.[22] Madras children's Act was the first delinquency law in India, it did not used the term delinquent but it defined 'child' as a person under the age of fourteen years, a 'young' person from fourteen to eighteen years and an 'youthful offender' under the age of eighteen years who has been convicted of offence mentioned in Indian Penal code or any other special or local laws for which an offender can be incarcerated.[23] The important legislation pertaining to the street or vagabond children was the Vagrancy Act of 1943 which provided for care and training to children below fourteen years living on begging or lacked proper guardianship had parents who were involved in criminal habits and drinking, visiting prostitutes or were destitute.[24]

d. Status of Juveniles Justice System from 1950-2000

By 1960 many states in India had established separate systems and laws for juveniles which varied in terms of definitions, and other procedural requirements and their implementation also varied. In 1960 Union government enacted the Children Act 1960, which was applicable to union territories and was directly administered by the Union government. It was intended to serve as a model for the state legislations. On the basis of Children Act 1960 the National law was passed as Juvenile Justice Act 1986 which become a uniform law throughout the country. Apex court Judgment in Sheela Barse played a crucial role in passing the uniform law on juvenile justice where it acknowledged that the children in the jails are entitled to special treatment and recommended that parliament should make a uniform law applicable throughout the country.[25] Parliament invoked its power under Article 253 of constitution of India in making the juvenile justice system in India to conform the United Nations standard Minimum Rules for the Administration of Juvenile Justice[26] to abide the International Obligation which India agreed by ratifying in 1985.

In India for the first time the law enacted for care, protection, treatment, development and rehabilitation of neglected and delinquent juveniles and for adjudication and disposition of juvenile delinquency matters throughout country.[27] The act formulated separated procedures for the juvenile delinquents and neglected juveniles, by establishing separate juvenile courts and juvenile welfare boards. Juvenile courts were established to handle the cases deal with offences committed by girls and boys under the age of eighteen years and sixteen years respectively.[28]

The JJ Act of 1986 provided a definition of juvenile delinquents according to which juveniles delinquents are those persons who are below the specified ages who committed certain acts that would be treated as crimes if committed by adults. The Act constituted certain special offences in relation to juveniles and provided punishment for them. The delinquents who are convicted could be fined or placed under supervision for a maximum of three years but they cannot be executed or imprisoned or jailed. It laid down a uniform framework for juvenile justice in the country so as to ensure that no child under any circumstances is lodged in jail or police lock-up.

e. Status of Juveniles Justice System from 2000-2015

The Juvenile Justice (care and protection of children) Act 1986 was replaced by Juvenile Justice (care and protection of children) Act 2000 which was passed in December 2000 and came in force on April 1, 2001 and was amended in 2006 aiming to protect, care, rehabilitate

and educate the juvenile and to provide them with vocational training opportunities. As the Preamble clearly states that the "object of the law relating to juveniles in conflict with law is providing proper care, protection and treatment by catering to their development needs and by adopting a child friendly approach in the adjudication and disposition of matters in the best interest of children and for their ultimate rehabilitation through institutions established under this law".[29]

The law sets a welfare approach by inclusion of non-criminal justice language by which arrest is replaced by apprehension and the said Act does not speak about Jail, court, police, trial. On the basis of recommendations of United Nation Convention held at Beijing in 1985 the age of juvenile in conflict with law made same for both boys and girls as eighteen years. The Act of 2000 is more emphasis on rehabilitation, re-socialization and reintegration of juvenile in conflict with law rather than punishment, placing minimal intervention of the correctional authorities and police. This Act also replaced the juvenile courts by Juvenile Justice Boards so as to make more child friendly in adjudication. The new law also emphasized on the involvement of voluntary organizations and urged for their participation in the process of juvenile justice through running the Observation homes, special homes, compiling social investigation reports.[30] There is no provision of death sentence in the law and juvenile cannot be sent to prison if unable to pay the fine and establishing separate homes for different age groups in order to separate younger offenders from mature juveniles so that the system could meet the requirements of the Beijing Rules on Administration of Justice.

B. Need for New Law

The Juvenile Justice (Care and Protection of Children) Act, 2000 has been amended twice in 2006 and in 2011 respectively. After the Delhi gang rape case of December 16, 2012 there was a public outcry demanding more stringent punishment for the prime accused, a juvenile. In this case a juvenile was involved with other adult offenders in raping and torturing due to which the victim died; the issue raised a debate on reduction of age of Juvenile in conflict with law as debated that juvenile offenders are increasing. Later on a committee headed by Justice Verma was established for amending the provisions of criminal law to protect the rights of women but the committee refused to reduce the age of juvenile and said that the time is not ripe for reduction and one case cannot be the reason for changing the law. After that on 31 July, 2013 a BJP Politician Subramanian Swamy filed a petition for reducing the age of criminality. But the Apex court quashed it with specific reasons. But the rage and anger in the public sphere led to coming of the Bill on The Juvenile Justice (Care and Protection of Children) bill 2014. Although the bill is well equipped with protection mechanisms for the child in conflict with law (earlier juvenile in conflict with law) but the law has distinguished the offences for which the a child can be sentenced like Adult offenders.

Enactment of Juvenile Justice (Care and Protection of Children) Act, 2015

On July 2014, Minister of Women and Child Development, Maneka Gandhi said that they were preparing a new law which will allow 16-year-olds to be tried as adult. She said that 50% of juvenile crimes were committed by teens who know that they get away with it. Further she stated that changing of the law will allow such teens to be tried for murder and rape as adults and such a law will scare them. The bill was introduced in the Parliament by Maneka Gandhi on 12 August 2014. On 22 April 2015, the Cabinet cleared the final version after some

changes. The Bill passed in Rajya Sabha on Tuesday 22 December 2015, after the Nirbhaya case accused was released.

A. *Features of Juvenile Justice (Care and Protection of Children) Act, 2015*

The preamble of the Act stated that, it is expedient to re-enact the Juvenile Justice (Care and Protection of Children) Act, 2000 to make comprehensive provisions for children alleged and found to be in conflict with law and children in need of care and protection, taking into consideration the standards prescribed in the Convention on the Rights of the Child, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (the Beijing Rules), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990), the Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption (1993), and other related international instruments which was absent in the original JJ act, 2000. In the beginning it is stated that the Act may be called the Juvenile Justice (Care and Protection of Children) Act, 2015.[31] It extends to the whole of India except the State of Jammu and Kashmir.[32] The provisions of this Act shall apply to all matters concerning children in need of care and protection and children in conflict with law, including-

(*i*) apprehension, detention, prosecution, penalty or imprisonment, rehabilitation and social re-integration of children in conflict with law;

(*ii*) procedures and decisions or orders relating to rehabilitation, adoption, re-integration, and restoration of children in need of care and protection.[33]

The JJ Act, 2015 has replaced the word 'juvenile' with the word 'child' and the expression 'juvenile in conflict with the law' has been changed to 'child in conflict with law.' In the Act of 2000, juveniles in conflict with law were defined as the 'accused' , but the Act of 2015 identifies a 'child in conflict with law' to be one who has been found by the Juvenile Justice Board to have actually committed an offence. It also defines an 'abandoned child'[34] as well as 'aftercare'.[35] Chapter two of JJ Act, 2015 provided fundamental principles for care, protection, rehabilitation and justice for children. It incorporates internationally accepted principles of presumption of innocence, dignity and worth, family responsibility, participation, best interest, non-stigmatizing semantics, privacy and confidentially, repatriation and restoration, equality and non discrimination, and diversion and natural justice, among others. [36] The principle of institutionalization is suggested as a measure of last resort according to which juveniles are to be institutionalized only if no other family-based care option is possible or available.[37]

B. Procedure

Juvenile Justice Act, 2015 prescribed a new procedure for handling children in conflict with law.[38]A revamped child Welfare Committee has been constituted, [39] empowered[40] and given various statutory fuctions[41] such as:

(*i*) taking cognizance of and receiving the children produced before it;

(*ii*) conducting inquiry on all issues relating to and affecting the safety and wellbeing of the children under this Act;

(*iii*) directing the Child Welfare Officers or probation officers or District Child Protection Unit or non-governmental organisations to conduct social investigation and submit a

report before the Committee , (*iv*) conducting inquiry for declaring fit persons for care of children in need of care and protection;

(*v*) directing placement of a child in foster care;

(*vi*) ensuring care, protection, appropriate rehabilitation or restoration of children in need of care and protection, based on the child's individual care plan and passing necessary directions to parents or guardians or fit persons or children's homes or fit facility in this regard;

(*vii*) selecting registered institution for placement of each child requiring institutional support, based on the child's age, gender, disability and needs and keeping in mind the available capacity of the institution;

(*viii*) conducting at least two inspection visits per month of residential facilities for children in need of care and protection and recommending action for improvement in quality of services to the District Child Protection Unit and the State Government;

(*ix*) certifying the execution of the surrender deed by the parents and ensuring that they are given time to reconsider their decision as well as making all efforts to keep the family together;

(*x*) ensuring that all efforts are made for restoration of abandoned or lost children to their families following due process, as may be prescribed;

(*xi*) declaration of orphan, abandoned and surrendered child as legally free for adoption after due inquiry;

(*xii*) taking *suo motu* cognizance of cases and reaching out to children in need of care and protection, who are not produced before the Committee, provided that such decision is taken by at least three members;

(*xiii*) taking action for rehabilitation of sexually abused children who are reported as children in need of care and protection to the Committee by Special Juvenile Police Unit or local police, as the case may be, under the Protection of Children from Sexual Offences Act, 2012;

(*xiv*) dealing with cases referred by the Board under sub-section (*2*) of section 17;

(*xv*) co-ordinate with the police, labour department and other agencies involved in the care and protection of children with support of the District Child Protection Unit or the State Government;

(*xvi*) in case of a complaint of abuse of a child in any child care institution, the Committee shall conduct an inquiry and give directions to the police or the District Child Protection Unit or labour department or childline services, as the case may be;

(*xvii*) accessing appropriate legal services for children;

(*xviii*) such other functions and responsibilities, as may be prescribed.

The JJ Act, 2015 provided that there should be mandatory registration of childcare institutions.[42] The State Government shall established observation, shelter and special homes for children in need of residential support, on short term basis, with the objective of protecting them from abuse or weaning them, or keeping them, away from a life on the streets.[43] Central

Adoption Resource Agency has been established as a statutory body vested with functions of in-country and inter-country adoptions.[44] It is provided that all applications for adoptions for adoption shall be filed before a Principle Magistrate of the concerned jurisdiction where the registered adoption agency is located. The Act also constituted a juvenile justice board, which would include psychologists and sociologists, to decide whether a juvenile criminal in the age group of 16-18 should tried as an adult or not. The Act also introduced foster care in India. Families will sign up for foster care and abandoned, orphaned children, or those in conflict with the law will be sent to them. Such families will be monitored and shall receive financial aid from the state. In adoption, priority will be given to disabled children and children of physically and financially incapable. Parents giving up their children for adoption will get three months to reconsider, compared to the earlier provision of one month.[45] In the new Act[46] it is also provided that a person giving alcohol or drugs to a child shall be punished with seven years imprisonment or Rs. 1, 00,000 fine and both. A person selling a child will be fine with RS. 1,00, 000 and imprisoned for 5 years.[47] It is also provided that 16 years or older juveniles to be tried as adults for heinous offences like rape and murder. Heinous offences are those which are punishable with imprisonment of seven years or more. It is also provided that any child who committed any crime will now be sending for a preliminary assessment for a period of three months, which was earlier one month.[48] In the new Act there will now be proper training of special juvenile unit in the police force. NCPCR (National Commission for Protection of Child Rights) and SCPCR (State Commission for Protection of Child Rights)[49] will be the nodal authorities to be responsible for monitoring implementation, the Child Rights publicity of the amended act, and to look into the cases that arise out of the Act. Thus these are the various features of Juvenile Justice (Care and Protection of Children) Act, 2015.

C. Criticism

It is true that the juvenile law enacted in 2000 was not being implemented properly and there was a need to change and revise its provisions. The Juvenile Justice (Care and Protection of Children) act, 2015, passed by the Lok Sabha is a forward-looking and comprehensive enactment having adequate provisions for dealing with children in conflict with the law and children who need care and protection. But its good and valuable features have been overshadowed by few provisions that states that children in the 16-18 age group will henceforth be tried as adults if they are accused of committing ‘heinous offences’. During the debate in the Lok Sabha in May 2015, Shashi Tharoor, an Indian National Congress Member the Parliament (MP), argued that the law relating to juvenles was in contradiction with international standards and the most of children who break the law come from poor and illiterate families. He was of the view that they should be educated instead of being punished. Various Child Rights Activists and Women Rights Activists have called the bill a regressive step and have criticized the Act of 2015. Many experts and activists viewed post December 2012 Delhi Gang Rape responses as creation of media sensationalisation of the issue, and cautioned against any regressive move to disturb the momentum of Juvenile Justice Legislation in the Country. However some sections in the society felt that in view of terrorism and other serious offences, Juvenile Justice Act of 2000 needed to be amended to include punitive approaches in the existing Juvenile Justice Law, which so far is purely rehabilitative and reformative. Some argued that there is no need of tampering with Juvenile Justice Act for putting up effective deterrent against terrorism. Retired Judge of Delhi High Court, Justice RS

Sodhi on 8 August 2015 told Hindustan Times, "We are a civilised nation and if we become barbaric by twisting our own laws, then the enemy will succeed in destroying our social structure. We should not allow that but we must condemn this move of sending children to fight their war".[50] It is right to say that the Act of 2015 completely destroys the rehabilitative foundation of the existing juvenile justice system in India by adopting a retributive approach for heinous crimes committed by children in this age group.

The constitutionality of the JJ Act 2000, in so far as it allows all children in conflict with the law to be dealt with under the beneficial juvenile justice system irrespective of the gravity of the offence has been upheld by the Hon'ble Supreme Court in Salil Bali v. Union of India [51] and Dr. Subramanian Swamy v. Raju[52]. In these cases Supreme Court emphasized that, "the essence of the Juvenile Justice (Care and Protection of Children) Act, 2000, and the Rules framed thereunder in 2007, is restorative and not retributive, providing for rehabilitation and re- integration of children in conflict with law into mainstream society."

'Preliminary assessment' by Juvenile Justice Board [53] violates the test of procedural fairness under the Constitution. This assessment is in essence a sentencing decision that is arrived at even before the guilt is established. [54] The arbitrary and irrational procedure provided under the JJ Act, 2015 contravenes the fundamental guarantees under Article 14 and 21 of the Constitution. The Supreme Court of India in Maneka Gandhi v. Union of India[55] in has categorically held that procedural fairness is an integral part of due process. Deprivation of the protection against disqualification) violates the right to life under Article 21 and the right to equality under Article

14. The combined effect of these provisos is that children between 16 and 18 years found to be in conflict with the law under Clause 20(1) (i) will incur disqualifications thus rendering their rehabilitation and re-integration impossible. The JJ Act, 2015 is silent on the orders that can be passed if the Juvenile Justice Board decides not to transfer the child to the adult court. The transfer system provided under JJ Act, 2015 violates India's obligations under the UN Convention on the Rights of the Child. The transfer system ignores the domestic jurisprudence on juvenile justice. The Report of the Indian Jails Committee, 1919-1920 which predates international standards on this issue, observed that "it is undesirable' to familiarize the young with the sights of prison life or to blunt the fear of prison which is one of the most powerful deterrents from crime. For all these reasons, we consider that the imprisonment of children and young person's is clearly contrary to public policy…"[56] In Munna v. State of Uttar Pradesh, [57] while deciding three writ petitions highlighting the horrific plight of more than 100 juveniles who were lodged in the Kanpur Central Jail instead of being sent to the Children's Home, the Supreme Court observed: "The law is very much concerned to see that juveniles do not come into contact with hardened criminals and their chances of reformation are not blighted by contact with criminal offenders." Some incidents of juvenile crime, though a cause of serious concern should not be the basis for introducing drastic changes in the existing juvenile justice system.

Conclusion and Suggestions

From the above it is concluded that juveniles who have committed 'heinous' and 'grave' crime should not be sent to jail because it is not in the interest of children, women, families or the wider community as a whole. The first responsibility is on the State to know and review

the causes of juvenile crimes and implement adequate means to prevent juveniles from committing a crime. In India there is absence of functional assessment, probation and counseling services for juveniles, and the lack of anything special or scientific about the services provided to children in the 'Special Homes' mandated to provide special correctional services in order to achieve the rehabilitative goals of the law, and prevent recidivism. The damaging effects of placing adolescents who are at a difficult transitional phase in their lives along with adult criminals will only serve to place these young people at risk of being physically, sexually and emotionally abused and these adolescents further criminalized by seasoned adult criminals in adult jails. This obviously regressive outcome is in stark contradiction to the aims outlined in the Preamble of the Act as well as the aspirations of the wider public for a safer healthier society. It is fact beyond any doubt that a law for prevention of juvenile delinquency is urgently needed, but equally important will be its implementation and enforcement. Steps should be taken to prevent juvenile delinquency and to reform child in conflict with law and various legal provisions regarding prevention of juvenile delinquency and mechanism to deal with children in conflict with law as well as children who are in need of care and protection must be enforced by the authorities earnestly and sincerely. At the end it is suggested that undoubtedly, every delinquent youth is a victim of circumstance. No human is ever bad or wrong. So it is the duty of every citizen of India, as parents, teachers, relatives, friends, to guide the future generation of India into the right path. It is important to remove evil from the individual and not the individual.

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39. Section 27 of JJ Act. (2015). Provides that the State Government shall by notification in the Official Gazette constitute for every district, one or more Child Welfare Committees for exercising the powers and to discharge the duties conferred on such Committees in relation to children in need of care and protection under this Act and ensure that induction training and sensitisation of all members of the committee is provided within two months from the date of notification.

    (*2*) The Committee shall consist of a Chairperson, and four other members as the State Government may think fit to appoint, of whom atleast one shall be a woman and another, an expert on the matters concerning children.

(*3*) The District Child Protection Unit shall provide a Secretary and other staff that may be required for secretarial support to the Committee for its effective functioning.

40. Section 29 provides that the Committee shall have the authority to dispose of cases for the care, protection, treatment, development and rehabilitation of children in need of care and protection, as well as to provide for their basic needs and protection.

    (*2*) Where a Committee has been constituted for any area, such Committee shall, notwithstanding anything contained in any other law for the time being in force, but save as otherwise expressly provided in this Act, have the power to deal exclusively with all proceedings under this Act relating to children in need of care and protection.

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44. Section 68 of JJ Act. (2015). Provides that the Central Adoption Resource Agency existing before the commencement of this Act, shall be deemed to have been constituted as the Central Adoption Resource Authority under this Act to perform the following functions, namely:—

(a) to promote in-country adoptions and to facilitate inter-State adoptions in co-ordination with State Agency.

(b) to regulate inter-country adoptions.

(c) to frame regulations on adoption and related matters from time to time as may be necessary.

(d) to carry out the functions of the Central Authority under the Hague Convention on Protection of Children and Cooperation in respect of Inter-country Adoption.

(e) any other function as may be prescribed.

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APOLOGY IN CONTEMPT PROCEEDINGS

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ABSTRACT

Contempt of court is broadly classified under civil and criminal heads. While criminal contempt proceeding is to ensure the faith of the people in the due administration of justice mechanism, civil contempt proceeding is basically intended for the enforcement of orders, decrees or directions of the court. In this regard civil contempt provides the remedy to the party to enforce orders, decrees or directions of the court which is basically issued for the benefit of the party who has initiated the contempt proceeding. In addition to this private remedy, by ensuring that orders, decrees and directions of the court is duly complied with, civil contempt also satisfies the public interest that by enforcing orders, decrees and directions of the court administration of justice is duly complied with and this will ultimately lead to retaining of confidence of public in the administration of justice mechanism. Out of these dual objectives it is not clear which is given vital importance in civil contempt proceedings. However, ensuring confidence of public in the due administration of justice is a public concern rather than a private interest. Relieving a person from contempt on the basis of apology is recognized in both civil and criminal contempts. However, it is not clear whether apology is a defence or punishment for contempt of court. A person approaching the court for civil contempt is trying to enforce the decree, order or direction of the court or punishing somebody who is responsible for the willful disobedience of orders, decrees or directions of the court. Apology is not made to the party whose right is violated because of willful disobedience of orders, decrees or directions of the court. Relieving the contemnor on the basis of apology has nothing to do with the violated private right of the parties who has initiated the civil contempt proceeding. Further there is no well recognized principle regarding to whom apology is to be made and the manner in which it is to be tendered. All this make apology in civil contempt proceeding complex and irrational. To avoid this, the only practical solution is to amend the Contempt of Courts Act and the scope of apology shall be confined to criminal contempt cases only.

Key Words: Contempt, Court, Proceeding, Justice, Mechanism, Cases, Classification.

Though the way in which contempt of court developed and found its place in the realm of law is different in different countries, there are some general features in the origin and development of contempt laws. In the earlier period King was treated as the unquestionable representative of God, and administration of justice was treated solely the responsibility of the King[1]. As the society got expanded and social life became more prolix, it turned to be impossible for the king to administer justice personally. To overcome the situation, he laid

down norms for administration of justice which were called to be laws, and established agencies expert in law for administration of justice which were known to be courts. Subsequently by the fall of divine origin theory, social contract theory formed the basis of contempt power[2] and the theory of due administration of justice was suggested as rationale behind contempt power[3].

Classification of Contempt

The principle of interference with authority of King or authority of court led to the emergence of treating contempt as an offence punishable by imposition of imprisonment or fine in appropriate cases. But it is treated as an offence of special character. Thus in contempt proceedings, normally the contemnor is not treated as an accused and he cannot claim constitutional protections guaranteed to an accused. Though originally there was no classification for contempt under different heads, at some point of time it was felt that the rules of civil procedure which was developed by the common law courts or courts of equity is unsuitable to deal with and punish persons for criminal contempt of court. This led to the development of different set of procedures for dealing with criminal contempt, which ultimately led to the classification of contempts under civil and criminal heads[4]. Whatever may be the theoretical basis for the classification, now a day, generally, contempt is dealt under two heads – civil and criminal. The philosophy and underlying rationale behind these two categories of contempt are different. It has been pointed out that civil contempt and criminal contempt differ as crime differs from tort.[5] The distinction is reflected in the areas of rules of appeal, privilege from arrest, power to pardon, punishment, rules of evidence, procedure to be followed and discharge or release upon compliance. [6] The prominent distinction between civil and criminal contempt is based on the fact that civil contempt proceedings are generally initiated by individuals and intended to enforce a court order or to ensure obedience to an undertaking given to court whereas criminal contempt is intended to uphold dignity of courts and proper administration of justice.[7] In this regard civil contempt involves an element of private injury[8]. Traditionally it does not involve a sentence for a definite period of time and is not treated as a method to punish a person who had disobeyed a court order or an undertaking given to a court.[9] On the other hand, criminal contempt is treated as something done against administration of justice and its ultimate purpose is to punish the wrong doer.[10]

Position of Apology in Contempt Proceedings

Apology in contempt proceeding is recognized under the common law. It seems that *Martin's case*[11] was the first English case were apology has got considerable significance in contempt proceeding. In this case a bank note was sent by a possible litigant as a present to Lord Chancellor. The conduct was treated as contempt of court and proceeding was initialed. However, the proceeding was dropped and the contemnor was discharged on submission of sincere apology[12]. Though in some later cases, on the basis of apology contempt proceedings were dropped, the scope and relevance of apology in common law was thoroughly debated and discussed only in *Morris v Crown Office*[13]. In this case the Court opined that a proper apology moved at the proper time must be taken into consideration before imposing severe punishments. After taking into account the gravity of interference with administration of justice and the apology moved by the contemnors, lesser punishments were imposed on the contemnors who have moved sincere apology on time and heavier penalties were imposed on

those who refused to move apology[14]. Thus on a close scrutiny it could be identified that apology is a mitigating factor rather than a punishment.

US Approach to Apology in Contempt Proceedings

Following the English law, apology was recognized under U S law also. Under the U S law also apology is recognized as a mitigating factor in imposing punishment in criminal contempt cases that too in direct contempts.[15] The logic followed in U S law is that civil contempt is basically for the benefit of a party and apology has no significance in such contexts. Thus on a careful analysis of contempt cases in common law will indicate that apology is not a punishment, but it is a defence in contempt cases to relieve the contemnor from serious punishments.

Indian Position

Compared to English and U S position, the Indian position is quite different. In India, apology is treated as a form of punishment and since the 1926 Contempt of Courts Act, the plea of apology was specifically incorporated in the Acts as a punishment and got a statutory basis.[16] Often the contemnor may be discharged on a genuine apology being made to the satisfaction of the court. Under the present Act, the question whether the contemnor had moved an apology becomes relevant only if the party is found guilty[17]. But to discharge the contemnor on the basis of the apology, it must be genuine and sincere. An apology merely to protect against the rigor of law is not an apology[18]. Further if it is an empty formality it may not be accepted[19]. It should not be farce and a trick to avoid serious punishment for contempt of court. Even in situations where apology is found valid, it is not a panacea for all consequences[20]. Whether or not an apology may be accepted and whether the contemnor may be discharged on the basis of the apology, are all at the discretion of the court. This discretion is exercised taking into account facts and circumstances of each case[21]. Further in spite of an apology, where the conduct of the contemnor was so reprehensible as to warrant condemnation by the imposition of sentence, apology may be rejected[22]. Thus there are no recognized hard and fast rules to identify in what circumstance an apology can be accepted and when it can be rejected. However the Courts have laid down a number of criteria in this regard. Primarily, if the apology is not sincere[23], but only a tactic to avoid serious punishments, it is only to be rejected[24]. Similarly if the contemnor is playing with the word apology, such an apology could not be treated as an apology at all[25]. A belated apology,[26] apology on an afterthought, or one made at the verge of imposing severe punishment are not treated as apologies[27]. On the same rationale, an apology made only at appeal stage will not be considered[28]. The proper method of tendering an apology is to offer it in the first hand in the open court and thereafter make his submission in defense of his conduct[29]. The general approach of the court regarding apology was laid down *Chunnilal Ken v Shyamlal Sukhram and others.*[30] In this case explaining the importance and ingredients of a genuine apology, the Madhya Pradesh High Court observed as follows[31]:

"An apology usually mitigates the offence and if it is unreserved, the Court may accept it. But it does not follow that because an apology is offered, the court must accept it. I have my own doubt whether the apologies tendered in this case can be deemed to be an apology at all. Instead of tendering apology in the open court, the three non petitioners have resorted to a procedure which detracts from the merits of it. They quietly go to the Deputy Registrar's

office, and hand over the petitions, purporting to be their apologies. This sort of behavior is an afterthought of contemnors conceived in the hope of avoiding consequences. There is no evidence of real contriteness and the manner in which the contemnors have acted leaves much to be desired".

Further there cannot be both justification and apology for the reason that the two are incongruous[32]. Thus in *In Re Vinay Chandra Misra*, Supreme Court observed : [33]

"We have not accepted his apology, firstly because we find that the apology is not a free and frank admission of the misdemeanor he indulged in the incident in question. Nor is there a sincere regret for the disrespect he showed to the learned judge and the Court, and for the harm he has done to the judiciary. On the other hand, the apology is couched in a sophisticated and garbed language exhibiting more an attempt to justify his conduct by reference to the circumstances in which he had indulged in it and to exonerate himself from the offence by pleading that the condition in which the situation had developed was not an ideal one and were it ideal, the situation should not have arisen".

The decision clearly indicates the difficulty regarding the nature of apology as a punishment. If apology is a punishment it must be imposed only after the alleged contemnor is found liable. If it is a punishment and if it is to be moved at the earliest opportunity viz. before finding a person guilty or contempt, it will lead to a situation that a person is punished without finding him guilty. Further, if civil contempt is for the benefit of the party who is initiating the contempt proceeding, it is meaningless to relieve the contemnor on the basis of apology.

It is well accepted that the civil contempt proceeding has an incidental purpose of ensuring due administration of justice other than vindicating the private injury caused by non compliance with orders, decrees, or directions of the courts. By ensuring that decrees, orders or directions of the courts are complied with, people's faith in the administration of justice is kept intact. Thus it is to be accepted that civil contempt proceeding is not just like ordinary tort proceedings. Out of these twin objectives of civil contempt proceedings, which one must be given priority is a much confusing question. It seems that both are given equal importance in English law[34]. However, under U S law importance is given for assisting a party in enforcing court orders or undertakings given to court. Taking into account the assistance to be given to a party, under U S law civil contempt is again classified into coercive civil contempt and compensatory civil contempt[35]. In coercive civil contempt, the principal aim is to compel respondents compliance with the court order whereas compensatory civil contempt action is basically to get compensation.

In India Whether the civil contempt proceeding is basically to assist a party by enforcing court order or to protect the dignity and authority of court was raised in a number of cases. In *State v Desrath Jha,*[36] it was held that the principal objective of civil contempt is to secure the enforcement of the court orders.[37] The same view was adopted in *Abdul Razack Sahib v Mrs. Azizunissa Begum and others*[38]. Subsequently the matter was considered by the Madras High Court in *Ramalingan v Mahalinga Nadar,*[39] and it was observed: [40]

> *Essentially contempt of court is a matter which concerns the administration of justice and the dignity and authority of judicial tribunals; a party can bring to the notice of the court, facts constituting what may appear to amount to contempt of court, for such action as the court deems it expedient*

> *to adopt. But essentially, jurisdiction in contempt is not a right of a party, to be invoked for the redressal of his grievances; nor is it a mode by which the rights of a party adjudicated upon by a tribunal, can be enforced against another party.*

Though in some cases it was observed that remedy under some law is not a bar for initiating civil contempt proceedings[41], general view in this regard was laid down by Madhya Pradesh High Court in *Horilal v Bhajanlal*[42]. In this case the Court observed as follows: [43]

> *When decree and judgment passed can be executed in accordance to the law, contempt petition is not maintainable. When the Code of Civil Procedure provides for instituting a procedure for execution of the judgment and decree, then contempt application under Art.215 read with Section 12 of Contempt of Courts Act is not maintainable as the statute provides for mechanism for execution of the decree passed.*

Thus under the Indian approach, basically contempt proceeding is an alternative to execution proceeding, when there is no other mechanism for enforcement of decree, order or direction of a court. If the contemnor is relieved on the basis of an apology, the individual interest is affected and the very purpose of civil contempt proceeding turns to be illusory. A better option in this regard is to limit the scope of apology to criminal contempt case alone by appropriate amendment to the statute.

Procedure for Making Apology

Though the apology is to be made to the satisfaction of the court, the Contempt of Courts Act is silent as to whom the apology is to be made. But the court is to be satisfied regarding the apology. A normal conclusion which could be drawn in this regard is that the apology must be made to the court to its satisfaction. However, *In re: Harijai Singh and another*[44], when contempt was committed against a judicial officer by publication of a report through a newspaper, the court instructed the party to publish the apology with adequate importance in the newspaper which published the matter which led to contempt proceeding. Similarly in *Court on its own motion v K.K. Jha*[45] direction was issued to the contemnor to make apology to the District Judge against whom the allegations were made. In *Virender Kumar and others v Manik Chandra Gupta and another,* [46] the appellant was punished for scandalizing a magistrate by publication of an article. On appeal to Supreme Court, reducing the period of imprisonment, directed the Editor to make apology to the magistrate who was scandalized and also to publish the apology through the newspaper which published the scandalizing remarks[47].

Whatever may be the nature of contempt, as in English law, in Indian law also, if a proper apology is made at the relevant time, even if the court reaches the conclusion that taking into account the gravity of contempt the contemnor cannot be discharged on the basis of apology, it may be taken into consideration while imposing punishment. Thus in *R.K. Garg v State of H.P*[48], though the conduct of the contemnor was treated as having the effect of serious interference with administration of justice, taking into account the apology made by the contemnor, on appeal to Supreme Court the punishment of six months imprisonment imposed by the High Court was reduced to one month imprisonment.[49]. Similarly in *Dhananjay Sharma v state of Haryana and others*[50], though the conduct of all the contemnors were

serious in nature including filing of false affidavits, less punishments were given to the contemnors who had moved apology on time and serious punishments were given to those whose apologies were rejected[51]. The importance of making a proper apology, and its reflection on punishment was considered by the Supreme Court in *Suresh Chandra Poddar v Dhani Ram,*[52] where it was observed that Section 12 of Contempt of Courts Act, 1971, had indicated a caution that while dealing with the powers of contempt, the court should be generous in discharging the contemnor if he tenders an apology to the satisfaction of the court[53]. However, recently the courts are more vigilant in dealing with apology as persons guilty of contempt of courts are misusing apology to escape from serious punishments. Thus in *T.M.A. Pai Foundation and others v State of Karnataka and others*[54], the Supreme Court observed that it is necessary to erase an impression which appears to be gaining the ground that the 'mantra' of unconditional apology is a complete answer to violations of court orders[55].

Conclusion

It seems that the law relating to apology is dealt quite casually under the Indian law. The very fact that apology must be moved along with the submission of affidavit by the alleged contemnor, destroys the very nature of apology as a form of punishment. It leads to a situation of punishing somebody without finding him guilty.

Secondly, there is no meaning in accepting apology in civil contempt proceedings. It is well settled principle of law that civil contempt proceeding is basically meant for a private individual who want to execute the court order. The situation is further complicated by the fact that the prominent view in this regard is that civil contempt proceeding and a proceeding for execution of court order will not lie simultaneously. If the civil contemnor escape from liability on the basis of an apology, the individual interest achieved through civil contempt proceedings turns to be mirage.

A drastic change in law regarding apology is highly necessary in India. Primarily apology as a punishment could be invoked only if the contemnor is found guilty for interference with administration of justice. As the apology is for interference with administration of justice it could be moved only to the court which is having the responsibility of administration of justice. In the strict sense the punishment for contempt of court is to protect the interest of the society. Thus apology cannot be made to a judge who has been insulted by a statement. A through revisal of the law in this regard is required and the punishment of apology must be cleared from doubts.

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5. It has been pointed out that civil and criminal contempt differs as widely as torts differ from crimes. Civil contempt has many resemblances with tort and criminal contempt is in many respects similar to a crime. Seamus Henchy, Contempt of Court and Freedom of Expression. (1976). 33 *NILQ* 326, 327, See also Taylor, E. Leland. (1915). *Procedure in Contempt Cases*, 2 *Va L Rev* 265, 266.
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9. Ackerman, Thomas C. (1951). Standards of Punishment in Contempt Cases, 39 *Cal L R* 552, 553. See also Harvard Law Review Association. (1912). *Nature of Criminal Contempt,* 25 *Harv L Rev* 375, 376.
10. The common law distinction between civil and criminal contempt is followed in U S also. U S law treats criminal contempt a crime and civil contempt as a civil proceeding in its ordinary sense. The distinction is recognized in different respects including substantive and procedural rules to be applied. In American law, contempt is treated as criminal when punishment by way of fine or imprisonment is deemed imperative to vindicate the authority of the court. In contrast, a proceeding for civil contempt is remedial rather than punitive, serves only the purpose of the party litigant, and is intended to coerce compliance with an order of the court or to compensate for losses or damages caused by noncompliance and such proceedings are usually between the original parties and are instituted and tried as parts of the main cause or as a supplemental proceeding there to. But a criminal contempt proceeding is considered as a separate and independent one at law from the main cause, with the public on one side and the defendant on the other. See *Bloom v. Illinois*, 391 US 194, (1968). In this case petitioner was convicted in a criminal contempt and sentenced to twenty four months imprisonment for wilfullly petitioning to probate a will falsely prepared and executed after the putative testator's death. The court observed that criminal contempt is a crime in every essential respect; serious criminal contempts are so nearly like other serious crimes. Id at 201. It was further held that the Constitutional guarantee of the right to jury trial in state court prosecutions can be claimed in criminal contempt proceeding just as in other crimes. *Ibid*. The fact that the act with which the defendant was charged in the contempt proceeding is also an indictable crime is yet another point to distinguish civil from criminal contempt. *Id*. at 796. Yet

another point is the presence of some "special elements of contumacy" which can't be found in civil contempt. *Ibid*.

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16. The proviso to S. 3 of Contempt of Courts Act. (1926) Reads: - Provided that the accused may be discharged or the punishment may be remitted on apology being made to the satisfaction of the Court: Similarly proviso to S. 4 of the Contempt of Courts Act. (1952). Reads:- Provided that the accused may be discharged or the punishment awarded may be remitted on apology being made to the satisfaction of the Court: Proviso to S. 12 of contempt of Courts Act. (1971). Reads:- provided the accused may be discharged or the punishment awarded may be remitted on apology being made to the satisfaction of the court.
17. *Maharaj Singh v State of U. P and others*. (1977). SCC, 1, 155.
18. *Chandra Shashi v Anil Kumar Verma.* (1995). SCC, 1, 421, See also *M.B. Sanghi v High Court of Punjab and Haryana*. AIR. 1991SC 1834. In this case it was observed that an apology in contempt proceeding is not a weapon of defense to purge the guilty of the offense; nor it is intended to operate a universal panacea, but intended to be evidence of universal real contriteness. *Id*. at 1839.
19. *Prem Surana v Additional Munsiff and Judicial Magistrate.* (2002). SCC, 6, 722.
20. *M.B. Sanghi v High Court of Punjab and Haryana.* (1991). SCC, 3, 600.
21. *In Re Bola Nath.* (1961). AIR., Pat.1.
22. *In Re: Vinay Chandra Misra.* (1995). SCC, 2, 584, 619.
23. It seems that the test to distinguish whether an apology is sincere or not is subjective. The courts in this regard generally distinguish between heartfelt apology and paper apology. The heartfelt apology come out of sincere regret and from heart but paper apology come from pen and is just a trick to escape from severe punishments. See *L.D. Jaikwal v State of U.P.* (1984). SCC, 3, 405, 406. See also *Dinabandhu Sahu v The State of Orissa.* (1972). SCC, 4, 761.
24. *The State v Krishna Madho and others*. (1952). AIR., All. 86, 87. The Allahabad High Court Lucknow Bench in this case held that the question whether the court should or should not accept the apology would depend upon the circumstances of each particular case. Even if the court accepts the apology, it may still inflict punishment upon an accused person. *Ibid.*

25. *Prem Surana v Additional Munsif & Judicial Magistrate and another*. (2002). SCC, 6, 722, 726. This was a case were an advocate slapped a Magistrate in the open court upon using most abusive and unseemly language. Finding the lawyer guilty of gross criminal contempt of the court, the High Court sentenced the contemnor to undergo simple imprisonment for six months and to pay a fine of rupees two thousand.
26. Unless apology is offered at the earliest occasion it is liable to be rejected, See *C.Elumalai&Co v A.G.L. Irudayaraj & Anr.* (2009). AIR., SC, 2214.
27. *T.N. Godavarrman Thirumulpad v Ashok Khot.* (2006). SCC, 5, 1. In this case Supreme Court observed that apology is an act of contrition. Apology is not a weapon of defence to purge the guilty of their offence, nor it is intended to operate as a universal panacea, but it is intended to be evidence of real contriteness. Unless apology is offered at the earliest opportunity and in good grace it is liable to be rejected. *Id.* at 17.
28. See *Ex – Capt. Harish Uppal v Union of India and Another.* (2003). SCC, 2, 45.
29. *Giani Ram v Ramnath Dutt*. (1955). AIR., Raj. 123.
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31. *Id*. at 52. See also *M/S. Ma Santhoshi Transport v Sasim Kr. Barui*. (2007). AIR., Cal. 130. In this case it was observed that, it is now a settled law that mere tendering of unconditional apology can't be a weapon of defence to purge the guilty of their offence; nor it is a universal panacea but it depends upon the real contriteness of the alleged contemnor. *Id.* 134.
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33. (1995). SCC, 584, 619, See also *Haridas v Usha Rani Banik.* (2007). AIR., SC, 2688, 2694.
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37. Id at 444, See also *In Re S. Govind Swaminathan.* (1955). AIR., Mad. 121. In this case it was observed that contempts have been broadly classified into two categories civil and criminal contempts - the former comprising those cases where the power of the court is invoked and exercised to invoke obedience to orders of courts and the latter where the act of the contemnor is calculated to interfere with the course of justice including libels or insults to judges and publications prejudicing the fair conduct of proceedings in court. *Id*. at 129. See also *Dulal Chandra Bhar v Sukumar Banerjee*. (1958). AIR., Cal. 474. It seems that the Calcutta High Court gave importance to enforcing court orders as the main purpose behind civil contempt proceeding. *Id*. at 481.
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43. Id. See also *M/S. Info Edge (India) Pvt. Ltd. v Sumanta Bhattacharya & Co*. (2012). AIR., Cal.1. In this case it was argued that in case of grave breach of an order of a temporary injunction, punitive measures are to be resorted to under the Contempt of Courts Act, 1971 and not under Order 39, Rule 2A of Civil Procedure Code. *Id*. at 3. Court rejected the argument and reached the conclusion that the main provisions for punishing the parties who have violated the court order are contained in Civil Procedure Code. Id at 5. The Court also pointed out that a proceeding under Order 39, Rule 2A of Civil Procedure Code is also to uphold dignity and authority of the judiciary. *Id.*
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45. Jharkhand. (2007). AIR., 67, See also *High Court of Karnataka v Chirman Das.* (1997). (3) Crimes 210. Direction was given to news paper (Economic Times) to publish unconditional apology to judge. Similarly when some allegation is made against a District Judge through writ petition,
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NEMO MORITURUS PRAESUMNTUR MENTIRE: ADMISSIBILITY OF DYING DECLARATION UNDER THE INDIAN EVIDENCE ACT

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ABSTRACT

The concept of Dying declaration is based on the principle of Nemo Moriturus Praesumntur Mentire, which means the person who is going to die, or he is expecting that he is going to die will not be lie at his deathbed. it is the settled principle that the person would not lie at the time of his death, and therefore the statement made by him at that point of time will be admissible although the same is the part of the hearsay evidence. The Dying declaration is the hearsay exception that everyone loves to hate.[1] It is the settled principle of the law of evidence that, the hearsay evidence cannot be consider as an evidence as the witness giving the statement is not of his own words but of the third person and the same cannot be cross examined, and the true fact cannot be come to the picture.[2] The Dying declaration is an exception to such rule of the hearsay evidence mainly due to the two reasons, one is that the victim being the sole eye witness of the crime, not admitting his evidence may lead to the defeat in the ends of justice and secondly the said statement was made while expecting the death in near future which presume to be true statement.[3] Witness of the crime, not admitting his evidence may lead to the defeat in the ends of justice.

Key Words: Dying, Declaration, Concept, Dying, Declaration, Legal, Position, Condititions.

The Dying declaration is the hearsay exception that everyone loves to hate.[4] It is the settled principle of the law of evidence that, the hearsay evidence cannot be consider as an evidence as the witness giving the statement is not of his own words but of the third person and the same cannot be cross examined, and the true fact cannot be come to the picture.[5] The Dying declaration is an exception to such rule of the hearsay evidence mainly due to the two reasons, one is that the victim being the sole eye and secondly the said statement was made while expecting the death in near future which presume to be true statement.[6]

Section 32 of the Act specified that the statement of the relevant fact given by the person who

is dead or cannot be found is relevant. Although there is no such specific word "Dying Declaration" has been used anywhere in the statute, but section 32(1) specifically deals with the statements made by the person at the time of the death as to the cause of his death can be consider as the relevant evidence. In the case of the dying declaration it is the duty of the Court to examine the said statement with proper care and caution as the dead person cannot be produce before the Court and cross examined.[7] The said clause of section 32, works as an exception to the general rule of hearsay evidence. [8]

The concept of Dying declaration is based on the principle of *Nemo Moriturus Praesumntur Mentire,* which means the person who is going to die, or he is expecting that he is going to die will not be lie at his deathbed.[9] The principle of *Nemo Moriturus praesumitur mentire* is based on the public policy as the said principle has been accepted by the people throughout the world. The presumption is that when the person is conscious of his impending death, when he is confident of his fast dissolution or when he has resigned from the hope of survival, then in such a case he would not lie because he has to face his Maker, the Almighty of the other world.[10] The said presumption is based on the religious belief and the fear of divine punishment in the minds of people.

In the case of ***R. Vs. Woodcack***[11], Justice Eyere held, "Dying declarations are the statements made in the extremity when the person is at the point of death; when every motive for falsehood is silenced and when every hope of this world is gone and when his mind is induced by the most powerful spiritual consideration to speak the truth." [12]

In the case of ***Mutthu kutty & Another Vs. State by inspector of police T.N.*** [13] the Apex Court held that, the rule regarding hearsay evidence is an exception to the general rule of hearsay evidence under section 60 of the Evidence Act, which is based on the Maxim, *Nemo Moriturus praesumitur mentire,* which means men will not meet his maker with the lie in his mouth. Excluding dying declaration from the admissible evidence may lead to the miscarriage of justice and therefore the same has to be conider as evidence under the law.

Thus, it is the settled principle that the person would not lie at the time of his death, and therefore the statement made by him at that point of time will be admissible although the same is the part of the hearsay evidence. Under section 60 of the Indian Evidence Act, it is clearly specified that the dying declaration is the exception to the principle of the hearsay evidence, and the same is required for the safeguard of ends of justice.

History and Concept of Dying Declaration

The concept of dying declaration is based on the religious and spiritual aspect that the person would not like to meet his Maker the Almighty with the lie on his lip. [14] Therefore it is the clear fact that the said principle is prevailing from the ancient period itself. The exception to the hearsay evidence that is dying declaration is there in the common law system and not anywhere else. The principle of dying declaration was there in the statute books, but said concept was for the first time held in the case of ***R. Vs. Woodcack***[15], Justice Eyere held, "Dying declarations are the statements made in the extremity when the person is at the point of death; when every motive for falsehood is silenced and when every hope of this world is gone and when his mind is induced by the most powerful spiritual consideration to speak the truth." [16]

After that the American Court, in the case of State Vs. Moody[17] that the "Dying declaration

may received of one so near his end that no hope of his life remains, for then the solemnity of the occasion is a good security for his speaking the truth, as much so as if he were under the obligation of oath." [18] but in the same case the Hon'ble Court had held that in case if there is reasonable chance that the person would not die in that case the said statement cannot be consider as dying declaration because the Court at that point of time believe that the statement given in such a situation may be due to personal revenge as well. [19] But he said principle was overruled by various judgements in the upcoming cases.

In the case of Mattox Vs United State[20] held that, dying declaration is not only admissible on the bases of religious belief of the people. But when the declaration has done before the immediate death of the person there would not be any chance of falsehood and therefore the said statement can be consider as the truthful one as given under the oath. But at the same time while considering the statement as an evidence it is the duty of the Court to take the necessary care and caution. [21] The principle of immediate death as lay down by the Court of United States although not followed in the India, as in the various judgments the Supreme Court has held that the time of the death does not lead to lose the value of such statements.

In the case of ***Najjam Faraghi Vs. State of West Bengal***[22] the Hon'ble Supreme Court held that, "When the person is expecting his death to take place he would not be indulging in falsehood, but that does not mean that such statement loses its value if person died long after making of dying declaration." [23]

Thus from the ancient period, may it be the religious or spiritual belief the concept of dying declaration is prevailing in all the society of the world. And later on the said principle has been accepted by the law-makers, and the same has been put in the statute books. And in the present time the concept of dying declaration is consider as one of the strong evidence in Court of law. And if the dying declaration is found trustworthy and acceptable that can be the sole bases of the conviction[24] in the present time.

Legal Provisions of Dying Declaration

A. Admissibility of Dying Declaration

Under Section 32 (1) [25] of the Indian Evidence Act, Dying declaration, will be admissible as an evidence if the following basic conditions has satisfied:

a. Basic Conditions

1. The Declarant must have died :

It is the one of the basic condition for the admissibility of the dying declaration that the person who is making the statement must be died, than only such statement will be admissible as dying declaration under section 32(1) of the Indian Evidence act. If the person while expecting his death made the statement such statement at the time of recording may consider as the dying declaration, but if the person survive after making such statement than the statement merely become the statement recorded during the investigation and not considered as dying declaration. [26] If in case the maker of the statement survive afterwards such statement will not fall under section 32(1) but will be used as corroborative evidence under section 157 of the Evidence Act. [27]

2. Injuries Must have cause the death :

The second condition, as laid down in section 32 of the Indian Evidence Act, is that the

injuries must have caused the death. If a person died not due to the injuries inflicted on him and for which he has given the dying declaration, but died due to some other injuries or reason, in that case such dying declaration would not be admissible under section 32 of the Act. [28]

In case, where there is no proof to show what exactly cause the death of the person, in such a case the dying declaration given by the person would not be admissible. [29] The dying declaration would not be admissible unless the injury so caused is shown to have proximate connection with the death. [30] Which means, if it is proved by the prosecution that the injuries caused has the connection with the death of the person, or such injuries are the reason for the death of the person in that case only the dying declaration would be admissible under section 32(1) of the Indian Evidence Act.

In the case of ***Sudhakar vs. Sate of Maharashtra***[31], a lady school teacher was raped by some staff of the same school, where as after 5 and half month she had committed suicide, and there was no such relevant evidence which shows that the suicide was done due to the humiliation and the said rape. Therefore the Supreme Court held that, the death of the deceased is not due to the rape committed by the accused person, and hence, the accused person cannot be convicted for the same.

Thus, for the admission of the statement as a dying declaration, the person who has given the statement must be died after the same and the death of the person must be due to the injuries caused to him, and not due to any other reason. If both the conditions have been satisfied and proved beyond reasonable doubt then only the Court will consider the dying declaration as evidence.

b. Other Conditions:

1. Declaration must be as to cause of death, or as to any of the circumstances which resulted in death. [32]

According to section 32(1) of The Indian Evidence Act, the declaration which pertained to the cause of death or the circumstances which may result to the death is consider as the dying declaration. [33] When the statement made by the person, which is directly relating to the cause of death, in that case such a statement would be admissible under section 32(1) of the Act, but the question arose in the second part of the said section, which says, "as to any of the circumstances of the transaction which resulted in the death.", here the question is what can be consider as the circumstances and is it the same like the circumstantial evidence? The Hon'ble Supreme Court in the case of ***Kans Raj vs. State of Punjab***[34] held that, the declaration relating to the circumstances is not as wide as the circumstantial evidence, which includes all the relevant facts. Evidence cannot be give on the circumstances unless it is proximately related that is so connected with the actual occurrence of the event. The statement given by the person must be sufficiently or closely connect with the actual transaction. [35] if the facts are not closely connected with the actual act in that case, such declaration will have to be admissible as whole.[36]

Thus, when the statement made by the deceased relating to the cause of death, or the circumstances which are closely connected to the act which result in the death, can be admissible as a dying declaration under section 32 of the Act.

2. The cause of death of declaring must be question. [37]

In order that the declaration may be admissible the cause of death of the deceased must be in issue, but not of the other person. [38] The person who is making such statement, his death must be in issue before the Court of law, in that case only the declaration can be admissible as dying declaration. [39] If the declaration is made as to the cause of other person's death but not as to the cause of the death of the deceased which is in issue, the same can not be admissible under section 32 of the Act. [40]

3. The dying declaration must be complete. [41]

As laid down under section 32(1) of the Indian Evidence Act, the dying declaration must be complete than only such declaration would be admissible, if the person dies in between the giving or making the statement in that case the statement can not be admissible as dying declaration, as the full facts were not come out. But if the incomplete dying declaration unmistakably points out the guilt of the accused in that case such incomplete declaration can also be admissible under section 32(1) of the Act. [42]

4. The declarant must be in a fit condition. [43]

Whether a dying declaration is of impeccable character depends upone the several factors; physical and mental condition of the deceased at the time of making the dying declaration is one of them. [44] The deceased who is making the declaration must be fit at the time of making such declaration, than only such declaration would be admissible. According to section 32(1) of the Act, it must be shown that the declarant was in a fit state of mind to make the dying declaration, that the declarant was conscious of surrounding and the person who attacked him. [45] It is the duty of the magistrate or any other person who is recording the declaration to check that the deceased at the time of making the declarations was fit and conscious or not. If the declarant was not in the fit state of mind at the time of giving the statement such declaration cannot be admissible in the Court of law. Even it is the duty of the doctor to check and certify that the deceased at the time of making statement was fit and conscious, and aware about the situation. [46] Such declarations cannot be rejected only on the ground that at the time of the recording the statement the doctor has not certified that the deceased was fit and conscious to give the statement. [47]

Thus, the deceased must be fit and conscious at the time of making the declaration, than only said declaration would be admissible.

5. The declarant must be competent. [48]

The declarant must be competent to make the statement, although under Indian law there is no such bar on the incompetency. But if in any case the person cannot be consider as a competent under any other law, the competency of such person has to be determining under section 118[49] of the Indian Evidence Act. [50]

B. Evidentiary Value of Dying Declaration

The concept of dying declaration which is based on the maxim, *Nemo Moriturus Praesumntur Mentire,* which means the person who is going to die, or he is expecting that he is going to die will not be lie at his deathbed. [51] Thus the dying declaration itself is having the strong evidentiary value. There is no such rule which prohibits the Court regarding taking in to consideration and not taking in to consideration the declaration made by the deceased person[52],

it is upto Court and according to the facts and circumstances of the each case depends the evidentiary value of the dying declaration. Dying declaration itself an exception to the general rule of the hearsay evidence, which if found the true and reliable in that case, can be only ground for the conviction of the person. [53] Although nowhere in the statute it is provided that, which kind of declaration having the wrong evidentiary value but there are some consideration which would land strength to the credibility of the dying declaration, which are as follows:

1. The Dying declaration must have recorded by the competent Magistrate. [54]

Dying declaration can be made to anyone, to police, doctor, magistrate or any other person. There is no such strict rule regarding the same, but at the same time the dying declaration made to the competent magistrate is having more credibility in comparison to others. Normally magistrate have been called for the recording of the dying declaration, and the declaration recorded by him is having the high evidentiary value, as it is having the similar value of statement recording on the oath in the Court.

Although, the dying declaration recorded by the magistrate having no authority or jurisdiction for the same, but it cannot be invalidate on the same ground only. [55] But the statement cannot be inadmissible only on the ground that the same is not recorded by the magistrate. [56]

Thus the statement recorded by the competent magistrate having the strong evidentiary value in comparison of others.

2. The Dying declaration must have been recorded in the exact words in which it is made. [57]

It is recommended that the dying declaration has to be made in the exact same manner and word as stated by the deceased. It has to be recorded in the same words as stated by the person. [58] Although, the same can be recorded in the similar meaning, words or way if it is not possible to record word by word. As per the section 32 it is stated “statement oral or written” that means, if the deceased is not able to speak or write, in that case if he answered by sign or gesture the same can be recorded by the person as per the common interpretation. The dying declaration has to be recorded in the language which the deceased being proficient. In case where the dying declaration recorded in two different languages and the deceased being proficient in both the language than the same can be valid. [59]

Thus the declaration has to be recorded in the same words or with the same meaning as stated by the deceased.

3. The dying declaration must have made soon after the alleged incident. [60]

In case, the dying declaration made by the person as soon as the incident took place, in that case, the same would have the strong evidentiary value, because there were least chances of falsehood or influence of others in that case. If there was long time taken for the recording the statement then it may provide opportunity to the deceased to give the false statement.

Thus the statement recorded soon after the incident the same is having the strong evidentiary value.

4. Where the successive declarations are made all must be identical. [61]

The declaration must be consistent as to identify of the circumstances as well as to the identity of the assailant. [62] If the deceased make the declaration more than once, in that case all the declaration should be similar or identical or in connection of each other, than only such

declaration would be admissible. In case there is some kind of contradiction in any of the successive declaration, in that case any of the declaration would not have evidentiary value and al the previous declaration also losses its value due to such contradiction, because contradiction may rise the doubt regarding the truthfulness of the said statements.

Therefore in case, where the dying declaration fulfils all the above provisions the same would have the strong evidentiary value. Before some time, dying declaration was using as the corroborative evidence, where only the dying declaration cannot be the sole bases for the conviction, it should be supported by other evidences as well. But in the present time, dying declaration can be the sole bases of the conviction if the same is found true and trustworthy.

Judicial Trend: Journey from Past to Present

It is evidently fact that the concept of dying declaration is having so much importance at the time of admissibility and consideration of evidence. The Hon'ble Supreme Court of India and various High Courts have interpreted the said principle in the different manner at the different point of time. The said differences were due to the change in circumstances, change in time, amendment of the statutes or due to the different views of the different judges. Although having some differences, the said principle of dying declaration has not lost its importance any time. Even after passing time, the said principle started having strong evidentiary value in comparisons to other evidences. The Hon'ble Courts has discussed the concept of dying declaration, or some point relating to same in the various cases. Starting from the case of ***Queen Empress vs. Abdullah***[63], the Hon'ble chief justice has interpreted the wordings of section 32 for the better clearance and understanding.

The question arose before the Court was; can the declaration made in sign and gesture, admissible as evidence? The Court held that, the starting part of section 32 of the Act, stated, "Statement oral or written", there id no question regarding the written statement, but the question arose in the oral one. The Court discussed, by putting the word oral instead of Verbal, the makers of the act indirectly includes the declaration made by signs and gestures. If they had used the word verbal than the declaration has to be made through words and held that, the declaration made in form of signs and gesture also being part of the dying declaration.[64] After the said decision, in various cases the question arose regarding the time of death of the deceased, that what is the evidentiary value of the declaration if the declarant died after some time of the declaration. The Court has answer the same in so many cases that no matter deceased died after so many days of the making of the dying declaration, until and unless there was nexus between the death and the declaration, the same is admissible as an evidence.

In the case of ***Amar Jan Vs. State***[65]***,*** the Court held that, the mere fact that the victim died after laps of 25 days of making statement does not affect the evidentiary value of the same, since there is nexus between circumstances stated and death of the victim. In the another case of ***Surendar Vs State of Haryana***[66]***,*** the Court held that, merely due to the laps of time between death and the statement made, the statement cannot be consider as invalid.[67] Thus, if there was time gap, between statement made and the death of the person, the same would not affect the value of the declaration.

Before some years, there was rule of corroboration, which means the dying declaration cannot be sufficient evidence, on the sole bases of which the conviction could be there. But after passing of time through various decisions, it is now the clear fact that the dying declaration

can be sole bases of the conviction.

In the case of ***Mutthu Kutty vs. State***[68]***,*** it was held that, where the Court is satisfied that the dying declaration was true and voluntary, it can rely on it to sustain the conviction without any further corroboration since the rule requiring corroboration is merely a rule of prudence.[69] In the case of ***Shakuntala Vs. State of Haryana***[70]***,*** The Hon'ble Apex Court held that, if the dying declaration is trustworthy and if it can be shown that the person making it is not influenced by any other person, and made the statement which was duly recorded in that case they said dying declaration can be made the sole bases of the conviction.[71] In the case of ***Motilal S. Rathod vs. State of Maharashtra***[72]***,*** The Court held that if the dying declaration found trustworthy and acceptable, can be sole basis of conviction.[73]

In the case of ***State of Maharashtra Vs. Anil***[74]***,*** the Court has widen the scope of the concept of dying declaration by stating that the suicide note written by the deceased person before the death can also be consider as dying declaration, although the forensic examination of the same can be there to check the trustworthiness and validity of the said note.[75]

Therefore in the various cases the Court has taken the different views and interpreted section 32 of the Act accordingly. After so many decisions of the various high Courts and Supreme Court, presently it is the settled principle that the dying declaration is one of the strongest evidence against the accused if the same is proved trustworthy. Because now a days the dying declaration, if found trustworthy can be the sole basis of the conviction of the person, there is no need of any other evidence to support the same.

The only reason being giving such a importance to the concept of dying declaration is the presumption that the person would not speak lie at the time of the death as he has to meet his Maker, God after the same.

Conclusion

The general exception to the rule of the hearsay evidence, the dying declaration has given the so much of importance by the law makers. Hearsay evidence will not be admissible in the Court of law, as the said statement would give by the third person, who cannot be cross examined to verify the facts. Dying declaration is an exception to this rule because if this evidence is not considered very purpose of the justice will be forfeited in certain situations when there may not be any other witness to the crime except the person who has since died.[76] Although for the securing the ends of the justice, there is need to accept such a statement given by the deceased person before his death.

The rule of the dying declaration is only to meet his Maker after that. There is the fear of divine punishment and therefore the person would not lie. The said concept of dying declaration is fully based on the spiritual and religious belief prevailing in the minds of people all over the world. The said principle of dying declaration is prevailing from the ancient period even before the commencement of the Evidence Act.

There is neither the rule of law nor of prudence, the dying declaration cannot be acted upon without corroboration and Court only if satisfied can based conviction on the basis of dying declaration. Normally the Court in order to satisfy whether the deceased was in the fit mental condition to make dying declaration looks up to the medical opinion, but where the eye witnesses has said that the deceased was in the fit state of mind.[77]

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At the present times, after the decision of Hon'ble Supreme Court it is clear fact that the dying declaration can be the sole basis of the conviction if it is proved trustworthy that can be the sole basis of the conviction. But actually for archiving the better justice there is need to use the dying declaration with the corroboration with the other evidence, as there is possibility of the falsehood in the statement.

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PLEA-BARGAINING: AN INCREASINGLY PREFERRED ADR MECHANISM

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ABSTRACT

The statistics associated with the criminal justice system in India are startling in 2014, the number of inmates housed in Indian jails was almost 62,000 more than their capacity. A total of 12,052 under-trial prisoners were lodged beyond 3 years and up to 5 years at the end of 2014.[1] The Criminal Law (Amendment) Act of 2005, incorporated the concept of Plea-bargaining, which is a pre-trial procedure, where there is an agreement between the prosecutor and the defendant whereby the defendant agrees to plead guilty to a particular charge in return for some concession from the prosecutor.[2] To elucidate on this increasingly preferred mechanism of plea-bargaining, which secures its importance in the legal strata. Notwithstanding the controlled process however, there may be coercion or undue influence, which would taint the impression of innocent defendants, who would have to live with such ignominy.[3]

Key Words: Criminal Law, Plea-Bargaining, Agreement, Trial, Objectives.

Criminal jurisprudence is aimed at the protection and preservation of the rights of the individual and the State against the international invasion by others. It strives to shelter the weak from the strong, the lawful against the lawless and the hospitable against the hostile. The life, liberty and property of the citizens are inter alia, the solemn obligation of the State to protect.[4] However, cases like that of ***Best Bakery, Jessica Lal, Nitish Katara*** *and* ***Priyadarshini Matto,*** are reminiscent of the foremost loopholes which linger in the criminal justice delivering mechanism, and testify against the wholesomeness of the justice system. The administration and deliverance of criminal justice acknowledges the incidence and implications of plea-bargaining. Most criminal cases are promptly and absolutely disposed of such is the beauty of plea-bargaining.[5]

The under trials who are charged under a singular or different sections of the Indian Penal Code, according to numerous reports, face the twin dilemma of firstly, the denial of the most necessary human rights and secondly, are involuntarily made to fritter away the productive years of their lives, while imprisoned, sans any hope of respite anytime in the immediate future. One would but realize that such incarceration of under trials in some cases, the period transcending the prescribed penalty defies all principles of punishment, and screams for

redemption.[6] It was observed, with reference to the persons under trial, in ***Hussainara Khatoon (1) v. Home Secy., State of Bihar***[7],*"No procedure which does not ensure a reasonably quick trial can be regarded as 'reasonable fair or just' and it would fall foul of Article 21."*

The Supreme Court lambasted the prevalent system in ***Kadra Pahadiya v. State of Bihar***[8], where it held,

*"It is a crying shame upon our adjudicatory system which keeps men in jail for years on end with no trial."*Furthermore, the court observed with empathy that:

"No one shall be allowed to be confined in jail for more than a reasonable period of time, which we think cannot and should not exceed on year for a session trial... we fail to understand why our justice system has become so dehumanizing that lawyers and judges do not feel a sense of revolt at caging people in jail for years without trial."

The practice of 'plea-bargaining' has been subject to considerable scrutiny during the last few decades of conclusion of the previous century, and whatever time has elapsed in the present. Canada has been very forthcoming with its interest in such a swift practice, for it has undertaken discussions revolving around the actual nature of the practice and the most amicable term to christen such practice. The ***Law Reform Commission of Canada***, in 1975, decided that '*plea-bargaining*' was '*any agreement by the accused to plead guilty in return for the promise of some benefit*'. Significant objections arose against offering an asylum to a practice that many felt led to the purchase of justice at the bargaining table. As a consequence, there was a stark departure from the employment of the term *'plea-bargaining'*, and towards the usage of more unbiased terminologies such as *'plea negotiations'*, *'plea agreements', 'plea discussions'* and *'resolution discussions'*. The usage of such expressions, testified for the maturity of and revolution in the practice itself, while indistinctly accrediting that the concept of 'plea-bargaining' had surpassed the primitive belief of being a simple bargaining procedure and now entailed the contemplation of other issues, rather than there being an agreement for a reduced penalty contingent to the accused pleading guilty.

The ***Doctrine of Nolo Contendere***, is recognized to have inspired the Indian concept of plea-bargaining. Owing to the inability of the Indian criminal justice mechanism to effectively afford and ensure speedy and economical justice to its citizens, this doctrine has been under consideration, for quite some time now, to be introduced and employed in the justice system. Since the Courts are flooded with astronomical arrears, the life span of a trial is excruciatingly long, tedious and expensive. Moreover, there is a huge influx of cases which are arising under the criminal jurisdiction, with the rate of conviction being negligible.

The Government of India, acting on the recommendations of the Law Commission, has freshly accepted the Doctrine of *Nolo Contendere*. The concept of plea-bargaining has been considered keeping in mind the economic as well as social conditions dominant in the State. Accordingly, the Criminal Procedure Code, 1973, has been appropriately amended. It is believed that this infant concept of plea-bargaining, shall be expedient and sufficient to mount a challenge to the problems of mounting criminal cases and pending trials.

Plea-Bargaining

A. Definition

Plea-bargaining commands no perfect, simple or singular definition. The word *"Plea"* is defined as *"appeal, prayer, request or formal statement by or on behalf of defendant"*, by the Oxford Dictionary, while the word *"Bargain"* is accredited the definition as *"negotiation, settlement, deal, covenant, barter or pact."*[9] Plea-bargaining—in keeping with the couple of above definitions—may therefore be illuminated as to being an appeal or formal statement by the defendant, negotiating for a relief for the offence charged against him, with the prosecution.[10]

The Black's Law Dictionary defines plea-bargaining as;

"The process whereby the accused and the prosecutor in a criminal case work out a mutual satisfactory disposition of the case subject to court approval. It usually involves the defendant's pleading guilty to a lesser offence or to only one or some of the courts of a multi-count indication in return for a higher sentence than that possible for the graver charge."

Interestingly therefore, any arrangement in a criminal case between the prosecution and the defence, due to the providence of which, the accused amends his plea of being not guilty to being guilty, in reciprocation of any offer made by the prosecution, or if the Judge has casually made it clear that the sentence would be minimized provided the accused pleaded guilty, could also be a definition of plea-bargaining.[11]

B. Concept of Plea-Bargaining

The Indian criminal jurisprudence is not exactly unacquainted with the ideals of plea-bargaining. Yet it is undeniably a marked shift in this nation's criminal jurisprudence, as evident from various decisions of the Conclusive Court, where it has expressly observed that Indian criminal jurisprudence does not recognize the concept of plea-bargaining. *Hiddavatullah J.*, speaking on behalf of the Supreme Court, opined in one of the foremost cases—***Madan Lal Ram Chandra Daga v. State of Maharashtra***[12], that:

"If the court thinks that leniency can be shown on the facts of the case it may impose a lighter sentence. But the court should never he a party to a bargain by which money is recovered for the complainant through their agency."

The observations of *Krishna Iyer J.*, as made in ***Murlidhar Meghraj Loya etc. v. State of Maharashtra etc.***[13], a case pertaining to offences of food adulteration and governed by the Prevention of Food Adulteration Act, 1954, are extremely interesting to note, for other than reflecting the position of Indian law while distinguishing the same from American law in 1976, its viewpoint stands correct and applicable for the present amendments, since socio-economic offences are not covered under the present provisions that deal with plea-bargaining. The pertinent observations of the Court have been stated as follows:

> "*...Many economic offenders resort to practices the Americans call 'plea-bargaining' 'plea negotiation' 'trading out' and 'compromise in criminal case' and the trial magistrate drowned by a docket burden nods assent to the sub rosa ante-room settlement. The businessman culprit, confronted by a sure prospect of the agony and ignominy of tenancy of a prison cell, 'trades out' of the situation, the bargain being a plea of guilt, coupled with a promise of 'no jail'. These advance arrangements please everyone except the distant victim, the silent society. The prosecutor is relieved of the long process of proof, legal technicalities and long*

arguments, punctuated by revisional excursions to higher courts, the court sighs relief that its ordeal, surrounded by a crowd of papers and persons, is avoided by one case less and the accused is happy that even if legalistic battles might have held out some astrological hope of abstract acquittal in the expensive hierarchy of the justice-system he is free early in the day to pursue his old profession. It is idle to speculate on the virtue of negotiated settlements of criminal cases, as obtains in the United States but in our jurisdiction, especially in the area of dangerous economic crimes and food offences, this practice intrudes on society's interest by opposing society's decision expressed through predetermined legislative fixation of minimum sentences and by subtly subverting the mandate of the law."

The ***142th Law Commission Report***[14] was of immense significance, for it impregnated the legislature with the idea of incorporating the concept of plea-bargaining, which was to be a remedial legislative measure that would check the interruptions plaguing the disposal of criminal appeals and trials, while also alleviating, rather than accentuating, the sufferings of under trial prisoners awaiting trial.

It was vehemently recommended by the ***154th report of the Law Commission*** that the Indian criminal jurisprudence accord for a separate chapter on plea-bargaining.[15]

Later reports of the Law Commission[16], also sought to incorporate the idea of plea-bargaining. The Committee on Reforms of the Criminal Justice system, 2003, reported that evidence regarding the effective implementation of plea-bargaining, as a means for the disposal of accrued cases and accelerating the distribution of criminal justice could be gathered from the experience of the United States. A committee was formed, under the power of the NDA government. This committee was to be helmed by *Justice V.S. Malimath*, the erstwhile Chief Justice of the Karnataka and Kerala High Courts, who ideated upon some masterful suggestions to parry the escalating number of criminal cases. The ***Malimath Committee*** recommended in its report, that the '*Indian criminal administration of judicial system'*, incorporate the system of plea-bargaining, so as to facilitate the swift disposal of cases bordering on the criminal issues, and to dissolve the affliction of the courts. As a result, the draft ***Criminal Law (Amendment) Bill, 2003,*** was presented in the legislature. The statement of objects and reasons, inter alia, mentioned that, considerable time and energy was exhausted in the disposal of criminal trials, while in some cases, it took as long as 3 to 5 years, for the trial to be inaugurated, subsequent to the accused being remitted to judicial custody. Plea-bargaining was therefore considered to be recognized as an effective mechanism to deal with the arrears of criminal cases in the courts. The bill attracted a torrent of emotions, with some saying that such recognition would violate the public policy as residing in our criminal justice system. It has been reiterated by the Supreme Court however, that negotiation in criminal cases is not permissible. [17]

The Criminal Law (Amendment) Act, 2005, which amended the Code of Criminal Procedure and introduced a new chapter XXI (A) in the code containing sections 265A to 265L, was the principal element that breathed life into the genesis of plea-bargaining in the country. The Indian government was inspired by its American counterpart, to try and experiment with a concept, which was still in its infancy. The delay in dispersion of justice has contributed to the dysphoria among the public. In the wake of the escalation in crime rate overtaking the rate of punishment meted out to offenders, it is absolutely imperative, that a wholesome and capable

mechanism be constructed, one that would bring about an equilibrium, and bridge the gap between commitment of crime, and delivery of effective and fair justice.

The burden of the courts can be greatly reduced through the process of plea-bargaining. The state of Karnataka, was the frontrunner to introduce the concept of plea-bargaining in India. ***HK Patil**, the **Law minister of Karnataka***, ideated that the backlog from the courts, would be weeded out by the concept of plea-bargaining. Arvind Narain, a lawyer allied with the Alternative Law Forum, opined that, plea-bargaining was one of the methods of erasing the accumulation. The perennial problems of delays has mired the justice system of this country. Matters—both civil and criminal—flutter along with time, with there being no clear time period within which good and equitable justice could be expected. The pursuit of justice is more often than not an agonizing journey, which is seldom unsuccessful in resulting in the disastrous sensation that it is but a waste of time. Judges and jurists alike, have proposed for a mechanism to facilitate the criminal adjudicating system, while expressing grave apprehensions about the sluggish, slothful and sleeping state of the justice distribution system. *Justice Krishna lyer* had famously remarked in ***Babu Singh v. State of Uttar Pradesh***[18], while dealing with a bail petition:

> *"Our justice system even in grave cases, suffers from slow motion syndrome which is lethal to fair trial whatever the ultimate decision. Speedy justice is a component of social justice since the community, as a whole, is concerned in the criminal being condignly and finally punished within a reasonable time and the innocent being absolved from the inordinate ordeal of criminal proceedings."*

Theoretically professing, the plea-bargaining mechanism aims at reducing the administration of criminal justice to a system of exchange or barter, where the negotiating concerns various degrees of legal punishment and also of gains to the wrongdoer. Sadly though, an innocent accused would also bow to the pressures of incorrect compromises and false convictions in order to be liberated from the ordeal of a lengthy and lavish trial. Furthermore, cases which might finally allow the accused to secure acquittal could be mutated into cases of unwarranted conviction. In such a situation, all hope in the justice dispensing system could escape the accused forever. In such a situation, one might condemn plea-bargaining as being rebellious towards the principles as enshrined under ***Article 21 of the Constitution***. [19]

Objectives and Applicability of Plea-Bargaining

A. Objectives of Plea-Bargaining

- To diminish the arrears of criminal cases that are pending in the criminal courts of India;
- To decrease the aggregate of under-trial prisoners who languish, almost perpetually, in jail, for terms longer than that as prescribed by law for the offences. Due to this, there is heavy expenditure borne by the state exchequer;
- To provide for compensation to the victim/s of the crime committed by the accused, who have suffered loss and borne expenses, due to the offence/s committed against the person or property by the accused;
- To do away with the delays persisting in the criminal cases' disposal.

B. Applicability of Plea-Bargaining

Plea-bargaining, finds its calling in cases where the punishment prescribed for the proscribed act are not punishment by death or imprisonment for a term in excess of seven years. Only at the stage of appreciation of the offence by the court, may a request for plea-bargaining be filed. [20]

Positively elucidating, any and all offences for which, the prescribed punishment, is less than up to seven years, are governed by the concept of plea-bargaining. [21]

C. Exceptions: Where Plea-bargaining is not allowed

1. Where the offence has been committed against a woman, or a child below the age of fourteen years. [22]
2. Where the accused has previously been convicted by a court in a case charged with the same offence. [23]
3. It does not apply where such offence affects the socio-economic conditions of the country (the offences affecting the socio-economic conditions, are to be notified by the Central Govt.). [24]
4. Where the accused is a "juvenile" as defined under clause (K) of section 2 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (56 of 2000). [25]

D. When Plea Bargains are Made?

a. On Police Report:

When the officer in charge of the police station, files a police report under section 173 of the Code of Criminal Procedure, subsequent to the investigation of the case, in the court Judicial Magistrate concerning an offence (other than an offence harbouring a punishment of death or of life imprisonment or of imprisonment for a time period in excess of seven years, has been laid down) and once its discretionary powers have been applied, the Judicial Magistrate takes cognizance of the offence and proceeds to frame a charge against the accused, the application for plea-bargaining may be permitted by the trial court. [26]

b. On Private Complaint:

The accused may, in case of a private complaint, file for plea-bargaining at the stage where cognizance of an offence, (other than an offence harbouring a punishment of death or of life imprisonment or of imprisonment for a time period in excess of seven years, has been laid down), is taken by a Judicial Magistrate after proper examination of the complainant and the witnesses, and elects to issue processes as enshrined under sections 200 and 204 of the Code of Criminal Procedure, against the accused. [27]

Plea-bargaining: is it violative of the constitution?

A. Article 14 of the Constitution of India

Two similarly situated individuals may be subject to an arbitrary and unreasonable classification due to the system of plea-bargaining. The sole reason for such disparity could be accredited to the ability of one to compensate the victim, (generally by paying money) and the incapacity of another to do something similar. Such an occurrence when studied on the touchstone of Article 14 of the Constitution, is found to be wanting of reasonableness, and is arbitrary. [28]

A poor offender is aware that he would be kept aloof of any incentive like his-rich counterpart, even if he is to plead guilty. Owing to this distinction, a poor offender would tend to opt for a trial rather than plead guilty, and such an act would lead to the burden of court proceedings. This is one of the reasons for plea-bargaining not finding favour with many. [29]

B. Article 20 of the Constitution of India

Plea-bargaining as a concept revolts against the provisions of Article 20(3) of the Constitution. Article 20(3) endeavours to protect an accused from self-incrimination and guarantees that: *"No person accused of any offence shall be compelled to be a witness against himself."* The compulsion referred to under Article 20(3) refers to duress and is inclusive of not just physical threats or violence, but also overbearing and intimidating methods like psychic torture, environmental coercion, atmospheric pressure and tiring interrogative proximity. [30]

Even though it might appear that the accused voluntarily makes an under Section 265-B, while under the procedure of plea-bargaining, but in fact he is generally 'compelled' to make such application and to plead guilty. There is no mechanism which can vouch for voluntariness. Therefore, the concept of plea-bargaining is not only hostile towards the provisions enshrined under Article 20(3) and may cause grave injustice, but it also proceeds towards legalising extortion. The Supreme Court has been quite clear when it has opined that the concept of plea-bargaining violates Article 21[31] of the Constitution, which aims at guaranteeing the right to life and personal liberty.

Conclusion

The genesis of plea-bargaining was to facilitate as an alternative remedy to parry the existing problems of congested jails, overtaxed courts and unnecessary delays. The practice of plea-bargaining has been widely celebrated for it has achieved the desired effect, and has provided a fillip to the system by leading to the speedy disposal of criminal cases and appeals, which has further helped in alleviating the under trial prisoners of their paranoia of perpetually awaiting the inauguration and cease of trials.

The accused may be awarded a lighter sentence by the Court, honouring the settlement reached as a result of such bargaining. The Apex Court has nevertheless been observant and employed foresight in its landmark judgments, where it has declared the practice of plea-bargaining to be illegal, unconstitutional and one which is inclined to nurture corruption, collusion and stain the pure fountain of justice. The minimum limit of sentence as prescribed by law, is therefore necessary to be honoured by every adjudicating authority.

Notwithstanding the issues which smear the practice of plea-bargaining with incensed remarks and observations, such a practice has matured to be an effective mechanism to remove the backlog in courts. An offender must befriend the tiniest shred of humanity resting within himself and be willing to confess and agree to the terms of the victim. Every procedure may be wrought into use or misuse. At the end of the day the humanity of the alleged 'in-humans' would be tested. The texture of plea-bargaining, imaginatively interweaves the concept of compensation it seems.

We would also like to reiterate that mere alterations, approvals and transformation in the procedural and substantive laws are scant in order to achieve the goal of fair trial. Plea-bargaining aims to spread the noble idea of fair trial, albeit quicker and more effectively. It is

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therefore upon the people, who form the justice mechanism, to ensure that quick, fair and unambiguous justice is delivered to all.

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RIGHT AGAINST SELF-INCRIMINATION: A CONSTITUTIONAL PRIVILEGE

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ABSTRACT

Right to Self-Incrimination also known as Privilege of Self Incrimination or the Right to Silence is a very ancient concept and the origin of it cannot be ascertained precisely. There have been several justifications developed by various thinkers of the Anglo American history in favor of this right. One of the fundamental rationales for this right was the need to safeguard the accused from torture and unjust means of interrogation adopted by the investigation agencies. The right against self-incrimination can be traced as back as the medieval law of the Roman church somewhere around 16th century. Interrogation and questioning of an accused under any criminal investigation is an extremely important process which leads to discovery of evidences, materials and findings. The investigative agencies rely on the process of interrogation to identify the motive behind the crime, to gather as much possible evidence to charge an accused with penal provisions and ultimately build a case against him. There have been several instances of custodial tortures, some resulting to grave bodily injuries and some to the extent of death at the hands of investigative agencies.[1] This inhumane phenomenon has led to the evolution of a concept known as "Right against Self Incrimination".

This Paper Shall discuss Right against Self-Incrimination a Constitutional Privilege.

Key Words: Right, Against, Self-Incrimination, Constitutional, Privilege, Privilege.

The interrogation and questioning of an accused under any criminal investigation is an extremely important process which leads to discovery of evidences, materials and findings. The investigative agencies rely on the process of interrogation to identify the motive behind the crime, to gather as much possible evidence to charge an accused with penal provisions and ultimately build a case against him. This process has since time immemorial been riddled with allegations of abuse of power. There have been several instances of custodial tortures, some resulting to grave bodily injuries and some to the extent of death at the hands of investigative agencies.[2] This inhumane phenomenon has led to the evolution of a concept known as "Right against Self Incrimination".

Right to Self-Incrimination also known as Privilege of Self Incrimination or the Right to Silence is a very ancient concept and the origin of it cannot be ascertained precisely. The right against self-incrimination can be traced as back as the medieval law of the Roman church somewhere around 16th century. The then existing English Courts of State chamber and High Commission followed a practice of forcing an accused to affirm an oath known as the as "ex-officio oath". The accused undertaking this oath had to answer any charges levelled against him or questions addressed to him even in the absence of a formal charge put on him by either the judge or prosecution. If the accused refused to take the oath there were several stern and torturous methods used against him. Soon the State Chamber and High Commission started forcing the accused to provide evidence, witness, and incriminatory statement towards himself. Parliament eventually abolished the Court of High Commission and the Star Chamber due to severe outrage against the unfair and inhumane methods of interrogation of accused persons and, passed a law stating that "*no man shall administer to any person whatsoever the oath usually called ex officio or any other oath whereby such persons may be charged or compelled to confess to any criminal matter*." [3]

There have been several justifications developed by various thinkers of the Anglo American history in favor of this right. One of the fundamental rationales for this right was the need to safeguard the accused from torture and unjust means of interrogation adopted by the investigation agencies. The underlying rationale behind this right primarily is that if statements made out of compulsion or against a person's will were readily accepted in court of law then it would act as an incentive to the interrogator who would then resort to unjust methods to extract such evidences out of an accused. Such methods including torture, coercion, deception and threats would eventually vitiate the whole idea of justice.[4]

This right thus acts as a check on the abuse of police power and prevents the scope of torture and other 'third-degree methods' that could be adopted to extract evidences out of an accused. The basic idea behind this right was that law should not encourage or grant the scope of use of such interrogation techniques which violate the dignity and bodily integrity of the accused.[5] There are also other rationales behind the grant of this right such as the protection of those accused who might under the anxiety and stress of an interrogation end up creating doubts over their innocence.

In India the right against self-incrimination was carefully discussed by the framers of the constitution and then was made a part of the basic fundamental rights to be granted to the citizens of the nation by virtue of Article 20 (3) of the Indian Constitution. This article expressly confers to the citizens of the nation a right against self-incrimination. The fundamental rule of criminal jurisprudence evolved in the common law has been given a constitutional status and been made a part of fundamental right. This right extends to any person accused of an offence and prohibits all kinds of compulsions to make him a witness against himself.[6]

Right Against Self Incrimination: Indian Scenario

A. Legal Framework

There were several contrary views among the makers of the Constitution, but it was widely accepted by those who devoted serious thought to it, that the easy path of procuring evidence, oral or documentary, by compulsion from an accused would do more harm than good to the

administration of justice; it was felt that existence of this path would tend to discourage investigators or prosecution to indulge in a diligent search for reliable independent evidence and also dissuade them to exercise care while sifting through available evidence for the ascertainment of truth.[7]

In India after the independence, the framers of the Indian Constitution carefully included the provision under article 20, 21, 22 of the constitution to provide protection to the accused from the ill treatment at the hands of the police authorities. The right against self-incrimination is a right which is conferred by the constitution of India to an accused and is a sacrosanct principle of our criminal jurisprudence.

B. Privilege against Self-Incrimination: Article 20(3) of the Constitution

Article 20(3) manifests in it the fundamental principles developed in the common law system as well as that of the American jurisprudence. The cardinal principle of criminal law jurisprudence is that an accused must be presumed to be innocent till the contrary is proved. It is the duty of the prosecution to prove the offence. The accused need not make any admission or statement against his free will. The privilege against self-incrimination is a fundamental rule of the criminal law jurisprudence.

There are some of the important characteristics of the privilege against self-incrimination.

- That the accused is presumed to be innocent.
- The burden of proof is on the prosecution.
- The accused is free not to make any statement against his will.[8]

Article 20 (3) of the constitution provides "*no person accused of any offence shall be compelled to be a witness against himself*". [9]

Therefore this article guarantees the following three components:-

- It is a right pertaining to a person "accused of an offence".
- It is a protection against "compulsion" to be a witness.
- It is a protection against such "compulsion" resulting in his giving evidence "against himself."[10]

All the above three ingredients must necessarily co-exist before the protection of Art 20(3) can be claimed. If any of these ingredients is missing Art 20(3) cannot be invoked. [11]

To understand the protection extended under this article one must first understand the various terminologies associated with this right.

1. Who is accused: The first and foremost thing to be understood for the application of this right is to understand who is an accused. An accused can be understood as any person against whom a formal allegation or charge relating to the commission of an offence has been levelled which in the normal course may result in the criminal proceeding. If the person is charged with the first information report and investigation ordered by the magistrate against him than he can claim protection under this article. [12]

The privilege is not only available to an individual, but even to an incorporated body, if "accused of an offence". [13]

2. Compulsion to be a witness: To be a witness simply means making any oral as well as written statements inside or outside the court by a person accused of an offence. Any incriminatory statement which point out the granted right of the accused comes under it. [14] In the case of *State of Bombay v. kathikaluOghad*[15] it was observed that an accused person cannot be said to have been compelled to be a witness against himself just because he made a statement during police custody. To bring the statement in violation of article 20(3) that statement shall be incriminatory in character.
3. 'Compulsion' giving evidence 'against himself': An accused is also protected under this article from compulsion to give evidence against himself. In *Kalawati v. State of Himachal Pradesh*, [16] it was held that confession is made by an accused against himself without any inducement, threat or promise does not comes under article 20 (3). Only the evidence where the accused is compelled to furnish comes within the inhibition of art 20(3).

Article 20(3) is available only in criminal proceedings or proceedings of criminal nature before a court of law or other tribunal before which a person may be accused of an offence as defined in S. (38) of General Clauses Act i.e. is an act punishable under the Penal code or a special or local law. [17]

Provision under Other Code Affecting Article 20(3)

The code of Criminal Procedural and Indian Evidence Act provides the certain sections which empower the police for proper investigation and responsibilities made on the citizens to co-operate with the police authority. For the proper protection of the right to self -incrimination the certain section under the both these codes should be read along with Art 20(3) of the constitution.

A. The Indian Evidence Act 1872:

a. Section 24: This section deals with Confessions and reads:

"Confession caused by inducement , threat or promise when irrelevant in criminal proceedings- a confession made by the accused person is irrelevant in a criminal proceedings, if the making of the confession appears to the court to have been caused by the inducement, threat or promise ,having reference to the charge against the accused person ,proceedings from a person in authority and sufficient in the opinion of the court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him." [18]

b. Section 25: "*Confession to the police officer not to be proved- No confession made to a police officer shall be proved as an against a person accused of any offence*." [19]
c. Section 26: "*Confession by the accused while in custody of the police not to be proved against him- No confession made by any person whilst he is in the custody of the police officer, unless it be made in the immediate presence of the magistrate shall be proved as against this person."* [20]
d. Section 27: "*How much of the information received from the accused may be proved- Provided that when any fact is disposed to as discovered in consequence of information received from a person accused of an offence, in the custody of a police officer, so much*

> *such, information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved*."[21]

As per section 24 any confession made by an accused is irrelevant in a criminal proceeding if it is caused by Inducement, Threat or promise. This is a protection granted to the accused person that he is not bound by law to confess his guilty by any way of inducement, threat or promise done by the police authorities. Section 25 makes the confession inadmissible in evidence to avoid the danger of admitting a false confession. Thus these sections again protect the accused against becoming the victim of his own mistake or the streamlining of others to self- incriminate in crime. Under section 26 the provision is made that the confession is accepted only when it is made in the immediate presence before the magistrate. The purpose of this section is very clear that it made the confession free and voluntary and it is not under any fear of the police.

Section 27 is closely connected to the article 20(3) of the constitution. Whether the information disclosed under this section by an accused person which leads to the discovery of article is admissible in evidence or not and does is offend the article 20(3) of the constitution. It is made clear by the supreme court with various case laws that the statement made under section 27 of Indian Evidence Act is admissible as an evidence and it is not in any way offend article 20(3) of the constitution. For the protection of article 20(3) the person accused of an offence compelled to be witness but by merely giving a statement while in the police custody which helps the police authorities for the discovery of the articles is not to be said any sort of compulsion to be a witness against himself and thus can never offend right of self-incrimination.[22]

B. The Criminal Procedure Code 1973

Besides, the provisions of the constitution of India and in Indian Evidence Act 1872, there are certain provisions in the Criminal Procedure Code also to protect the right of the accused. Under these provisions of the criminal procedure code the police officers have the power to investigate a matter but simultaneously a safeguard is created so that it doesn't directly or indirectly hit the provision provided by different laws for the protection of the accused in the criminal offence.

Section 162 (2) makes it mandatory for every person to answer truthfully all questions, put to him by the officer. However these 'questions' do not include the questions the answers to which would have a tendency to expose that person to a criminal charge, penalty and forfeiture.[23] Section 163of the code provides that no inducement to be offered. **Section 164:** Regarding of the confessions and the statements. **Section 313:** Power to examine the accused.

Section 315: Accused person to be the competent witness

Judicial Pronouncements

Although there is an express constitutional right provided in the Indian constitution against self-incrimination still there have been instances of abridgement of this right and also the judicial stand regarding the several facets of this rights for example evidences, procedures etc. has been complex. There have been some very important judicial pronouncements in this arena a few of which are as follows:

In ***M.P. Sharma v. Satish Chandra***[24], explaining the scope of Article 20(3) the Supreme Court observed that this right embodies the following essentials:

(a) It is a right pertaining to a person who is "accused of an offence."

(b) It is a protection against "compulsion to be a witness".

(c) It is a protection against such compulsion relating to his giving evidence "against himself."

The Supreme Court also took a broader view of Art 20(3) in this case and held it to cover not only oral testimony or statements in writing of the accused but also production of a thing or of evidence by other modes.[25]

State of Bombay v. Kathi Kalu Oghad,[26] was a landmark judgment of eleven judges and made a very significant contribution in evolving the case law on Article 20(3). It redefined what constituted 'being a witness against himself' taking M.P. Sharma v Satish Chandra as precedent. The judgment sought to establish a distinction between testimonial and physical evidence, and held that the act of providing testimonial evidence alone constitutes 'to be a witness'. Self-incrimination was declared as the conveying of information that was based upon the personal knowledge of a person giving that information. It was ruled that 'personal testimony' was to depend upon volition.

Also handwriting samples, fingerprints, thumb-prints, palm- prints, footprints or signatures, were declared as material evidence, not incriminating the accused and falling outside the scope of Article 20(3), thereby subjecting them to compulsion in the due process of law.[27]

In ***NandiniSatpathy v. P.L. Dani***[28], the Supreme Court has considerably widened the scope of clause (3) of Article 20. The Court held that the prohibitive scope of Article 20(3) goes back to the stage of police interrogation not commencing in court only. It extends to, and protects the accused in regard to other offences-pending or imminent, which may deter him from voluntary disclosure. The phrase compelled testimony' 'must be read as evidence procured not merely by physical threats or violence but by psychic (mental) torture, atmospheric pressure, environmental coercion, tiring interrogatives, proximity, overbearing and intimidatory methods and the like.

Smt. Selvi v. State of *Karnataka*[29] this case dealt with the use of advanced scientific methods for collection of evidence for criminal investigations. In Selvi, the constitutionality of narco-analysis, lie- detector test and analysis of brain waves (Brain Electrical Activated Profiling (BEAP) test) was questioned.

In this case the Hon'ble Chief Justice, Justice K.G Balakrishnan spoke of behalf of the Apex Court, and drew the following conclusions:

1. The right against self-incrimination and personal liberty are non-derogable rights, their enforcement therefore is not suspended even during emergency.
2. The right of police to investigate an offence and examine any person do not and cannot override constitutional protection in Article 20(3);
3. The protection is available not only at the stage of trial but also at the stage of investigation;

4. That the right protects persons who have been formally accused, suspects and even witnesses who apprehend to make any statements which could expose them to criminal charges or further investigation;
5. The law confers on 'any person' who is examined during an investigation, an effective choice between speaking and remaining silent. This implies that it is for the person being examined to decide whether the answer to a particular question would be inculpatory or exculpatory;
6. Article 20(3) cannot be invoked by witnesses during proceedings that cannot be characterised as criminal proceedings;
7. Compulsory narco-analysis test amounts to 'testimonial compulsion' and attracts protection under Article 20(3);
8. Conducting DNA profiling is not a testimonial act, and hence protection cannot be granted under Article 20(3);
9. That acts such as compulsory obtaining signatures and handwriting samples are testimonial in nature, they are not incriminating by themselves if they are used for the purpose of identification or corroboration;
10. That subjecting a person to polygraph test or narco-analysis test without his consent amounts to forcible interference with a person's mental processes and hence violates the right to privacy for which protection can be sought under Article 20(3)

Conclusion

"The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power." [30]

The Right against self-incrimination is a right that evolved out of the presumption that the investigative agencies may resort to various forms of unjust methods to extract information out of an accused if there are no safeguards provided against it. The underlying rationale behind this privilege was to protect the bodily and mentally integrity and wellbeing of an accused from the chances of abuse of power by investigative agencies.

The right against self-incrimination in India is asserted by virtue of the fundamental right provided under Article 20(3).This right was created by the constitution framers as a result of the influence of the existing American and common law principle granting the privilege against self-incrimination. Over the course of time the scope of this right has been expanded by way of judicial pronouncements and several facets of this right have been introduced under the umbrella of art 20(3).

Therefore this is a very essential constitutional privilege. This privilege has become even more significant because of the rapid change in the society and the advent of technology. There are so many tools for falsely implicating and torturing an accused and therefore it is even more necessary that rights like these are given more and more assertion. However there is also a need to delve into a lot of issues arising out of this right such as narco tests, polygraph test etc.

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SURROGACY: THE UGLY SIDE OF BEING A WOMAN

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ABSTRACT

The availability of medical infrastructure and impending surrogates, coupled with international demand, has driven the growth of the industry. A vast majority of infertile couples, mostly from overseas, hire the wombs of Indian women to carry their embryos till the birth of the child. India, with cheap technology, skilled doctors and a stable supply of indigenous surrogates, is one of the few countries where women can be remunerated to carry the child of another person. The process usually comprises in-vitro fertilisation and embryo transfer, resulting in an increase of fertility centres offering such services, but, surrogacy also carries a social stigma as it is often equated to prostitution and by virtue of this, it is argued by many people that it should not be allowed on moral grounds. Surrogacy, in India is relatively a low cost process which is complimentary to the legal environment persisting in the State. In 2008, the Supreme Court of India in the case of Manji, legalised commercial surrogacy and also gave a direction to the Legislature to pass a suitable law to govern the same. Giving due respect to the directions of the apex court, the Legislature enacted Assisted Reproductive Technology (Regulation) Bill & Rules, 2013 which is still awaiting a response from the Parliament and is expected to come in force from the next year. The Law Commission of India succumbed the 228th report on Assisted Reproductive Technology procedures deliberating the need and importance of surrogacy, and also the steps taken to regulate surrogacy arrangements. However, it also stated that cases of abortions shall be administered only by the Medical Termination of Pregnancy Act 1971 and no other legislature shall override the provisions of the Act.

Key Words: Surrogacy, Medical, Termination, Pregnancy, Right, Health.

"I have rented my womb, I have not sold my body"

The nature has bequeathed the stunning capacity to procreate a life within women. Every woman relishes the experience of being a mother. Unfortunately, some women, owing to certain biological conditions are not in a position to give birth to their own progenies. The aspiration for motherhood leads them to quest for an alternative solution, and surrogacy benevolences itself as the most feasible alternative. Surrogacy is defined as "the practice of carrying and delivering a child for another person."[1] It is a technique of assisted reproduction which may either be natural or gestational.[2]Surrogacy serves as a boon to barren couples.[3] The people who favour surrogacy believe that it is an exercise of reproductive choice and freedom to contract by a women and can be traced back to the ancient history.

Surrogacy, in its contemporary avatar has its foundation patenting from ancient Egypt, where infertile women were permitted to assume the practice of countenancing another women to endure the biological child of her husband to avoid divorce.[4] The development and change in the mentality of the society over a considerable period of time has given a positive outlook to surrogacy but few people still disdain it, as they believe that it exploits the parties intricate in the agreement.[5]

Philanthropic Surrogacy V. Commercial Surrogacy

In traditional surrogacy, the surrogate is gravid with her own biological child, but this child is conceived with the intent of renouncing the child to be upraised by others. Thus, the child is inherently related to the surrogate mother.[6] Traditional surrogacy can be broadly categorised into philanthropic surrogacy and commercial surrogacy. In philanthropic surrogacy, the surrogate obtains no financial incentive for renunciation of the child whereas commercial surrogacy is a system of arrangement where a gestational carrier is remunerated to carry a child in her womb.[7] Commercial surrogacy is also recognised as 'wombs for rent', subcontracted pregnancies' or 'baby ranches'.[8] It is often equated with prostitution and is thus, regarded as an abhorrent and a deplorable practice[9] which stigmatizes surrogate women.[10]

The legal aspects surrounding surrogacy are still nascent, complex, diverse and mostly unsettled. In the year 2008, the Supreme Court of India, gave a direction to the legislature to pass an appropriate law, to give legal effect to the practice of commercial surrogacy. [11] Giving due respect to the directions of the apex court, the Legislature enacted Assisted Reproductive Technology (Regulation) Bill & Rules, 2013 which is still awaiting a response from the Parliament and is expected to come in force from the next year. Ever since then, India has emerged as an International surrogacy destination. However, the codified law is yet to be adopted and implemented.[12]

The Birth of Surrogacy in the Indian Scenario

Every realm in the world has a different perspective on surrogacy but, the primary condition, throughout the globe, before the parents opt for surrogacy, is that the child must be biologically related to, either the mother or the father. In India, the conception of surrogacy is not a new scientific spectacle.[13] It can be traced back to 1978, where the concept of surrogacy was familiarised to the Indian culture with the birth of India's first "In Vitro Fertilization" child "Kanupriya*alias* Durga" on October 3, 1978 in Kolkata.[14]

The Rise of Surrogacy in the Indian Scenario

In order to comprehend surrogacy, one must appreciate the fact that "The Transplantation of Human Organs Act, 1994" prohibits the trade of human organs but organ loaning, an equally demanding and perilous venture is endorsed by the medical industry through paid surrogacy. The medical industry greets lucrative international ventures such as "procreant tourism "with open arms, even though infertility constitutes only a trivial segment of domestic primacies as the rate of infertility in India, is predicted to be around 8 to 10%, of the total population.[15]

The Risks Involved in Surrogacy

A. Ectopic Pregnancy

The child conceived by IVF may be ectopic with consequent threat of haemorrhage and death. An alternative laparotomy may be necessary, with its associated perils. However, most

"patients" are meticulously monitored using the ultra-sound technology which helps to identify ectopic pregnancies, before it causes a detrimental effect on the health of the surrogate mother.

B. Foetal Reduction

Multiple incubation pregnancies is an impediment of infertility drugs and treatments. The sustained use of fertility drugs and the act of grafting more than one embryo to upsurge the success rates can pretence a risk to the mother and foetus. Foetal reduction is a practice used to terminate foetuses in multiple incubation pregnancies where a saline solution is inoculated into the uterus to abort some foetuses. It results in uterine haemorrhage, premature labour and at times, harm to all foetuses.[16]

The Assisted Reproductive Technology (Regulation) Bill 2013[17]

The Assisted Reproductive Technology Regulation Bill and Rules (2013) proposes to regulate a "diligence" in India which has been escalating by leaps and bounds, principally on account of a mounting demand by foreign couples in search of comparativelyeconomical surrogacy arrangements.[18] The Bill recognizes surrogacy agreements and their legal enforceability which would ensure that surrogacy agreements are treated on an equal pedestrian with other contracts and the principles of law enumerated in the Indian Contract Act, 1872.[19] The chief highlights of the Bill are mentioned below:

- The Bill prescribes that a single person is also competent to opt for a surrogacy arrangement.
- The Bill prescribes that a foreign couple, not a resident of India or a non-resident Indian couple, seeking surrogacy in India, shall assign a local guardian who would be legally accountable for taking care of the surrogate during and after pregnancy, till the custody of the child is handed over to the couple or the local guardian.[20] It is further prescribed that the contracting parents or parent shall be lawfully destined to accept the custody of the child regardless of any deformityin the child and the refusal to do so shall constitute an offence under the Bill.[21]
- The Bill prescribes that a surrogate mother shall renounce all maternal rights over the child.
- The birth certificate in reverence of the baby born through surrogacy shall bear the names of genetic parents of the baby.
- The Bill prescribes that a child born to a married couple or a single person through Artificial Reproductive Technology shall be recognised to be the legitimate child of the couple or the single person. If the contracting couple separates or gets divorced, after opting for surrogacy but prior to the birth of the child, even then, the child shall be considered to be the legitimate child of the couple. [22]
- As per the guidelines enumerated in the Bill, a couple cannot have more than one surrogate at a time.

The Assisted Reproductive Technology (Regulation) Bill, 2013 recommends the establishment of a National Registry of Assisted Reproductive Technology (ART) in India for accreditation and administration of ART clinics to protect the social and legal rights of the

surrogate mother with maximum benefit to all the stakeholders within an accepted framework of virtuous medical practices. [23]

Human Rights of the Surrogate Mother and Child

The European Council has not yet ratified a treaty to address explicitly the issue of surrogacy, nevertheless, the principles of law from other analogous treaties provide a structure from which a reliable position on surrogacy can be comprehended by the people. [24] Human dignity functions as the core of human rights. Throughout the globe, there exists a universal policy in favor of protecting and promoting human dignity, barring human trafficking, especially among women and children, safeguarding the best interest of the child and not intruding with the natural process of conception and birth.[25] This is demonstrated by an interdict on choosing the sex of a baby born through in vitro fertilization and the ban on cloning human beings, as such actions are contrary to human dignity. Keeping in line with these recognized policies, the European Council must adopt a policy of forbidding surrogacy because the contractual procedure is fashioned with potential exploitation which diminishes the surrogate mother and the baby to commodities of a contract in defilement of their human dignity. [26]

Conclusion

The availability of medical infrastructure and impending surrogates, coupled with international demand, has driven the growth of the industry. A vast majority of infertile couples, mostly from overseas, hire the wombs of Indian women to carry their embryos till the birth of the child. [27] India, with cheap technology, skilled doctors and a stable supply of indigenous surrogates, is one of the few countries where women can be remunerated to carry the child of another person. [28] However, we must ensure that the medical fraternity, along with the surrogates and intended parents must be treated with utmost care to circumvent any problem to the family specifically to the children born out of surrogacy. [29] The laws must be endorsed in such a manner, that the eventual beneficiaries of the procedure must be the child, surrogate mother and the envisioned parents and not the middlemen. Foreign individuals desirous of having surrogate children in India should be permitted only after suitable verification of credentials through specific agencies and embassies. Lastly a favourable and stringent law must be enacted, after deliberation in the Parliament to govern all parties involved in the surrogacy arrangement. [30]

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SURROGACY LAWS IN INDIA: A COMPARATIVE STUDY WITH OTHER COUNTRIES

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ABSTRACT

Surrogacy is the process by which a woman agrees, usually by a written contract to gestate a child on behalf of his intended parent /parents and to relinquish the child and all the rights and responsibilities as a mother upon the birth of the child. Surrogacy as an Assisted Reproductive Technique (ART) is a medical boon to parents suffering from natural deficiency to reproduce. It is a scientific extension of the natural ability to reproduce. Surrogacy is of two types that includes Gestation Surrogacy and Partial Surrogacy. Gestation Surrogacy is when egg from intended mother and sperm from intended father is fertilized and the embryo is transferred to the surrogate mother to carry the embryo to term. Partial Surrogacy is when the surrogate mother is artificially inseminated with the sperm of the intended father. Surrogacy has seen boon in the past decade as it is a more viable option for childless couple because the child is either way related to the couple, genetically. In case of Gestation Surrogacy the child is related to both the parents and in case of Partial Surrogacy the child is genetically related to the father. Surrogacy is not only seen as a better alternative for childless couples but has also become a source of exploitation in a form of low cost rent a womb services.The research paper is a comparative study of different form of Surrogacy laws in some countries and the degree of services permitted under the laws of that country. The paper includes comparative study with others countries.

Key Words: Surrogacy, Assisted, Reproductive, Technique, Partial.

Surrogacy is the process by which a woman agrees, usually by a written contract to gestate a child on behalf of his intended parent /parents and to relinquish the child and all the rights and responsibilities as a mother upon the birth of the child. Surrogacy as an Assisted Reproductive Technique (ART) is a medical boon to parents suffering from natural deficiency to reproduce. It is a scientific extension of the natural ability to reproduce. Intended parents who are medically incapable of reproducing a child use the service of a surrogate. Surrogate is a woman who bears the child on behalf of the intended parents till the child is born. It is more often referred to as rent-a-womb-service. There are two types of Surrogacy:

A. Gestational Surrogacy

This is form of surrogacy where the surrogate mother is genetically not related to the child. The intended mother provides the egg which is fused with the sperm of the intended father. The fertilized embryo is implanted into the uterus of the surrogate through In Vitro Fertilization, commonly known as IVF. In Vitro Fertilization is a process where the egg and the sperms are manually fused outside the body and then transferred to the uterus of the surrogate for her to carry the child to the term.

This is more favored type of surrogacy as the intended parents are genetically related to the child, since egg of the surrogate is not used therefore surrogate mother remains unrelated to the child, genetically.

B. Traditional Surrogacy

Traditional Surrogacy is also known as partial surrogacy because the donor of the egg is the surrogate mother herself. In partial form of surrogacy the sperm is of the intended father but the donor egg comes from the surrogate mother. Surrogate mother is impregnated by the process of Intrauterine Insemination (IUI). Through this process sperms are placed inside the uterus of the surrogate to facilitate fertilization. In this form of surrogacy intended mother is not related to the child because the donor egg comes from the surrogate mother thereby genetically linking the child to the surrogate mother and not to the intended mother. The lack of genetic link between the mother and the child renders this process as unethical form of service. The service of providing a child to a couple is not seen as a socially acceptable way of fulfilling the need to parenting a child.

Surrogacy Laws from Around the World

There is no internationally binding convention on surrogacy. However, The Convention on Protection of Children and Co-operation in respect of Inter country Adoption 1993 states that:-

1) Consideration must be given to the possibility of placing the child in the state of origin[1] ; this is a condition that will not be fulfilled by cross border surrogacy
2) The consent for adoption of a child should not be induced by payment[2]
3) The consent for adoption of a child should be given by the mother only after the birth of the child[3]
4) There shall be no contact between the prospective adoptive parents and the child's parents or any other person who has care of the child[4]; this is practically not possible in case of surrogacy as surrogacy agreements take place when intended parents and the surrogate are in contact of each other

A. India

Law Commission of India in its 228th report recommended prohibition of commercial surrogacy after looking into the complexities of commercial surrogacy that was first recognized in Baby Manjhi Yamada v. Union of India. Dr. Yuki Yamada and Dr. Ikufumi Yamada came to India looking for a surrogate. Baby Manjhi was born to a surrogate mother through In Vitro Fertilization. Due to matrimonial discord the couple separated and the mother left for Japan. Biological father of the child had to leave due to expiration of his visa he wanted the baby to be taken to Japan but due to lack of proper laws there was no provision for

recognizing children born to a surrogate as the legal heir of the intended parents. Later it was held by the apex court that the baby would leave for Japan with his grandmother.

This was the first time when need for proper laws on surrogacy came up in India. The Surrogacy (Regulation) Bill 2016 proposes to de clutter the problems revolving around surrogacy in India as India is becoming a desired destination for foreign couples for rent-a-womb-service. In India assisted reproduction treatment industry is Rs. 25,000 crore industry[5]. In a country where the population is huge and with increasing number couples who are keen to have a biological child look up to surrogacy to fulfill their need. In the draft of Surrogacy (Regulation) Bill 2016 which is approved by the union cabinet and is yet to be tabled in the winter session of the parliament has approved Altruistic form of surrogacy- Wherein a women can carry someone's child when there is no payment in terms of money is involved, other than the medical expenses incurred during the term.

Key aspects of the Bill[6]

a. Eligibility:

1. Indian infertile couples between the ages of 23-50 years (woman) and 26-55 (man) who have been married for five years and who do not have a surviving child will be eligible for surrogacy.
2. Only legally-wedded Indian couples can have children through surrogacy, provided at least one of them have been proven to have fertility-related issues.
3. The surrogate mother should be a close relative of the intending couple and between the ages of 25-35 years and shall act as a surrogate mother only once in her lifetime.
4. Foreigners, even Overseas Indians, are barred from commissioning surrogacy
5. Unmarried couples, single parents, live-in partners and homosexuals cannot opt for surrogacy as per the new bill

b. Kind of Surrogacy

1. The new Bill proposes complete ban on commercial surrogacy.
2. A woman will be allowed to become a surrogate mother only for altruistic purpose and under no circumstances money shall be paid to her, except for medical expenses.

c. Other Aspects

1. The child born through surrogacy will have all the rights of a biological child.
2. Under the new bill, the clinics will have to maintain records of surrogacy for 25 years
3. Any establishment found undertaking commercial surrogacy, abandoning the child, exploiting the surrogate mother, selling or importing a human embryo shall be punishable with imprisonment for a term not be less than 10 years and with a fine up to Rs.10 lakh.
4. Surrogacy regulation board will be set-up at Central and State-level.

B. Canada

In Canada surrogacy is legal as per the Assisted Human Reproduction Act,2004 (AHRA) that guards the scope and laws related to surrogacy in the country. In Canada altruistic kind of surrogacy is allowed wherein consideration to the surrogate for her services is illegal. As per

Section 6 of the AHRA, payment to a surrogate for her services is a prohibited activity and as per section 60 of the act any prohibited act is punishable. Section **60** of AHRA, 2004 states:-

A person who contravenes any of sections 5 to 7 and 9 is guilty of an offence and

- ***(a)** is liable, on conviction on indictment, to a fine not exceeding $500,000 or to imprisonment for a term not exceeding ten years, or to both; or*
- ***(b)** is liable, on summary conviction, to a fine not exceeding $250,000 or to imprisonment for a term not exceeding four years, or to both.*

The punishment levied is against those people who use surrogacy as a way of making money by acting as a intermediate between the intended parents and the surrogate for facilitating the services of surrogacy to the couples in need. Section 5(3) of the AHRA, 2004 prohibits payment or offer to payment to any person for doing a prohibited act. Therefore act of arranging the services of surrogates is illegal and the act of payment for the same is also illegal. The surrogate mother is not brought under the scanner as per the above mentioned provisions of the act and prohibits financial gain to the surrogate. The expenses incurred during the pregnancy are paid by the intended parents.

Besides Canada; Belgium, Denmark, Greece, Australia, Netherlands, Israel are few other countries which recognize Altruistic Surrogacy.

C. Russia

Russia recognizes Gestational as well as Commercial surrogacy. The Registration of the surrogate children is regulated and enumerated under Article 51-52, Family Code of Russia and Article 16 of Law on Acts on Civil Status.

- The consent of the surrogate is mandatory, other than that no adoption or consent from the court is required.
- The Surrogate mother's name is not mentioned on the birth certificate.
- Also, it is not mandatory for the child to be genetically related to at least one of the commissioning parents.

In case of heterosexual couples, Art. 5 of the Family Code regulates registration of the children born to heterosexual couples who are single intended parents or not officially married through gestational surrogacy. However, in this case the consent or decision of the court may be needed.

Liberalizing surrogacy laws has made Russia a tourist destination for couples wanting to have a child through surrogacy. Foreigners have the same rights as that of Russian citizens. Three days after the birth of the child, the commissioning parents are handed over the birth certificate with their names on it. Genetic compatibility is not an essential factor.

Ukraine, Mexico, California, Illinois, Texas are few other places which have legalized Commercial Surrogacy.

D. France

Since 1994, any kind of surrogacy arrangement in France, whether commercial or altruistic, was strictly prohibited. France does not recognize Surrogacy. The French Court of Cassation,

in 1991, held that any Surrogacy agreement was illegal in the eyes of law and violative of the following articles of the Code Civil.

Article 6: Statutes relating to public policy and morals may not be derogated from by private agreements,

Article 353: An adoption order maybe made at the request of the adopter by the tribunal de grande instance which shall verify "within six months after reference to the court, whether the statutory requirements are fulfilled and adoption is consonant for the welfare of the child

Article 1128: Only things which may be the subjects of legal transactions between private individuals may be the object of agreements[7].

It was only in the landmark case of ***Mennesson v. France***, wherein the Complainants, Mr and Mrs Mennesson who were French citizens, entered into a surrogacy agreement with a woman from California. Surrogacy laws are recognized in California. The surrogate mother underwent In Vitro Fertilization with embryos conceived using donor egg cell and sperm from Mr Mennesson and became pregnant with twins. The children who were the remaining two complainants in the case, were born in the United States in 2000 and issued a birth certificate recognizing the Mennessons as their legal parents. The French authorities refused to issue a French birth certificate for the children, on their return to France, and refused to recognize Mr and Mrs Mennesson as the legal parents, meaning that the children could not acquire French nationality. The refusal was made on the grounds that French law doesn't recognize Surrogacy.

The Mennessons further approached the European Court of Human Rights challenging the decisions of the French Authorities. The Court held that the refusal to issue a birth certificate to the children, put the children in a position of legal uncertainty, violated their right to respect for their private life. Considering the fact that they are related biologically to one of their parents, it cannot be claimed that it is in the interest of the children to be deprived of their legal relationship. Therefore, given the serious restriction on the children's ability to establish their identity in law, the right to respect for private and family life protected by the Convention has been violated.[8]

Surrogacy even till date is banned in France. However, the highest Court of France after the judgment passed by the European Court of Human Rights in the Mennessons Case, allowed the surrogate children to enjoy the same rights as that of the parents and other French Children.

E. Germany

Practice of Surrogacy within the country is strictly prohibited as the German courts have held that the process of surrogacy is a breach and violation of Article 1 of the Constitution, which says that human dignity is inviolable. Moreover, considering a human being as the subject of a contract is not permissible under German law, this also includes using a third party's body for the purposes of reproduction. The definition of motherhood enumerated in the German Civil Code also makes surrogacy arrangements strictly illegal and impermissible.

As per German laws, Altruistic as well as Commercial Surrogacy are prohibited under § 14b Adoption Placement Act and § 1(1) No. 7 German Embryo Protection Act, which penalize the regulation of surrogacy.

The Federal Court in a case of a German gay couple, who had their child born via surrogacy in California in 2010 wherein German authorities had refused to recognize them as the legal parents of the child even though both the fathers have been living with their child in Berlin for the past three-and-a-half years. Under German law, the surrogate is the presumed legal mother of the child. Gay marriage is not legal in Germany, and legal recognition of same-sex relationships is limited. Adoption by gay or lesbian individuals is also not allowed, although in a few cases, a gay person has been allowed to adopt his partner's child from an earlier relationship[9].

The European Court for Human Rights stated that not denying citizenship to the child is violative of Art. 8(1) ECHR which secures the children's right to respect for their private life.

The Court ruled that the government is under a duty to recognize the children born via surrogacy arrangements in other countries as the legal offspring of German intended parents and citizens of Germany. In its ruling the court stated that German authorities must respect the decisions held by the foreign authorities with reference to the parental rights of German intended parents, even though surrogacy is not permitted in Germany.[10]

Besides Germany, Spain and France also recognize Foreign Surrogacy.

Conclusion

Surrogacy is a form of technology that is proven to help many infertile couples who are in a desperate need of a biological child. The battle on the basis of ethics is not the prime issue because the intended parents have the right to enjoy parenthood and infertility or any other cause for opting for surrogacy cannot bar them and on the other hand, surrogates are well versed with the terms and conditions of the services taken from them and willfully do it in order to obtain good returns of the services incurred from them. The main issue is about exploitation of women who are forced to become surrogates in order to make money and the children born out of surrogacy and the bar on people as to who can avail the services of surrogacy which is also a form of violation of the right to enjoy parenthood. With no proper international conventions, children born out of surrogacy are left in middle of nowhere when they are taken to the countries where they are not recognized as the legal heir of the commission parents.

Ban on commercial surrogacy reduces the child from the status of a commodity which is purchased at the cost of money and is seen ethically more acceptable. Altruistic form of surrogacy does not abate exploitation as no one would like to render services for free of cost and with a ban on commercial surrogacy, rent a womb service will more likely to be done out of willful consent by those women who genuinely feel to render their services and not for the sake of money or the benefits that intended parents offer.

With more and more people opting for surrogacy it is important that surrogacy is regulated by proper laws both on national and international level. Whereabouts of the children born out of surrogacy should be maintained by a proper committee that should be constituted to govern the surrogacy taking place in that particular area, in order to avoid exploitation. Heavy fines and imprisonment should be imposed on the people for trafficking of the new born children born out of surrogacy. The process of surrogacy needs to be more transparent so to clear out the loopholes in the system and in order to be more transparent it needs to be more acceptable by the society.

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MAINTENANCE OF DIVORCEE MUSLIM WOMEN

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ABSTRACT

The Indian constitution provides some sacrosanct fundamental rights to the individuals under Part III. These are prima facie negative duties imposed on the state. The laws enacted need to confirm to the rights under Part III. For the the purposes of Part III term 'law' is defined under Art 13(3). This definition does not include personal law. So when there is an infringement of the rights of an individual via personal laws they are kept outside the purview of the Courts adjudication. But with the development of fundamental rights jurisprudence in India, the courts have started liberal interpretation of statutes in existence to enforce the fundamental rights. Today we are witnessing the issue of Triple Talaq (a personal law question) under adjudication before the Supreme Court in the case of Shayara Bano. This makes one ponder over that whether the courts can do something to uphold the muslim women right as is the case with women of other religion. This is not the first time that the courts would interfere with the muslim personal law. A great deal of efforts was made by the courts regarding "Maintenance of Divorcee Muslim Women" starting with Shah Bano and ultimately the courts have brought the muslim women at par with women of other women in matters regarding maintenance. So in this article a study of various court decisions and statues will be made to see how how the courts have enforced muslim women right of maintenance. This may help one to understand the course which the court can take in triple talaq case and how the fundamental rights issue has got over the personal law.

Key Words: Indian, Constitution, Maintenance, Divorcee, Muslim, Women.

The whole concept of maintenance was introduced in order to see that if there is a spouse who is not independent financially then the other spouse should help him/her in order to make the living of the other person possible and independent. Maintenance is the amount which a husband is under an obligation to make to a wife either during the subsistence of the marriage or upon separation or divorce, under certain circumstances. Maintenance not only includes basic necessities like food, clothing and residence but it also includes the things necessary for comfort and status in which the person entitled is reasonably expected to live. Section 125 of Cr.P.C. deals with the provisions of the maintenance. It is a secular provision and deals with right of the wife to claim for the maintenance from his husband. The word 'wife' also includes the divorced wife who has not been remarried. This sec 125 is harmoniously applied for the Hindus both in case of a subsisting marriage and in case of divorce. But under Muslim Law the application of sec 125 is limited only till the case the marriage is in subsistence. Muslim law prefers the application of Muslim Personal Law when it comes to provide maintenance to the divorced wife.

The courts have tried to give beneficial nature of the secular provision of sec 125 Cr. P.C. but the political considerations have always tried to let it down. The Shah Bano case lead to new relief to the muslim divorced women but the hue and cry by the male section of the muslim community lead to a new legislation of Muslim Women (Protection of Rights on Divorce) Act,1986. It gave the supremacy to the muslim personal law again and annulled the decision of the Shah Bano case.

In the present study there is an attempt that whether the enactment reinforcing the muslim personal law has been duly accepted and applied by the courts and if yes then whether court has used it to establish the superiority of men over women or tried at a pro-women approach to help the divorced muslim women.

Maintenance under Personal Law and Supreme Court

A. *Maintenance under Personal Law*

Under the muslim personal law the husband is bound to maintain his wife so long as she is faithful to him and obeys his reasonable orders. But he is not bound to maintain a wife who refuses herself to him or is otherwise disobedient, unless the refusal or disobedience is justified by the non payment of prompt dower or she leaves the husband's house on account of his cruelty.[1]

If the husband neglects or refuses to maintain his wife without any lawful cause, the wife may sue him for the maintenance. The right of the wife to maintenance depends on the following conditions:

1. The wife must be capable on entering into matrimonial relationship- If the wife is minor i.e. she has not attained maturity then she will not be entitled to maintenance.
2. The wife must be accessible for conjugal intercourse – if the husband is unable to have sexual intercourse with his wife because of any act or conduct of the wife, then the husband is not liable to maintain her.
3. She must obey the reasonable commands of the Husband - the wife should obey all the commands of her husband which can be considered as just and reasonable. If the wife leaves the husband’s place without his permission she will lose her right of maintenance.

After Divorce:

After divorce, the wife is entitled to maintenance during the period of iddat. If the divorce is not communicated to her until after the expiry of that period, she is entitled to maintenance until she is informed of the divorce. So once the wife and the husband is divorced then the liability of the husband to maintain the divorced wife exists only upto the period of iddat. Once the iddat period ends, the liability of the husband to maintain her wife ends.

B. Court's Approach:

The Hindu women were better placed as compared to the muslim women, on the grounds of the maintenance after divorce. The liability of the Hindu husband continued till the time of the remarriage of the wife as contemplated by sec 125 Cr.P.C. but the muslim women had limited scope of maintenance based on the personal laws.

The muslim women were also given the extended benefit of the secular nature and rights under sec 125 Cr.P.C. by the court in ***Mohd. Ahmed Khan vs Shah Bano Begum***[2]**.** This was

an appeal, arising out of an application filed by a divorced Muslim woman for maintenance under section 125 of the Code of Criminal Procedure. The appellant, who was an advocate by profession, was married to the respondent in 1932. Three sons and two daughters were born of that marriage. In 1975, the appellant drove the respondent out of the matrimonial home. In April 1978, the respondent filed a petition against the appellant under Section 125 of the Code in the court of the learned Judicial Magistrate (First Class), Indore, asking for maintenance at the rate of Rs. 500/- per month. On November 6, 1979 the appellant divorced the respondent by an irrevocable talaq. His defence to the respondent's petition for maintenance was that she had ceased to be wife by reason of the divorce granted by him, that he was therefore under no obligation to provide maintenance for her, that he had already paid maintenance to her at the rate of Rs. 200/- per month for about two years and that, he had deposited a sum of Rs. 3000/- in the court by way of dower during the, period of iddat. In August, 1979 the learned Magistrate directed the appellant to pay a princely sum of Rs. 25/- per month to the respondent by way of maintenance. In July, 1980, in a revision application filed by the respondent, the High Court of Madhya Pradesh enhanced the amount of maintenance to Rs. 179.20 per month.

The husband appealed against the High Court judgment. Five judge bench of Supreme Court held that the *term "Wife" under section 125 Cr.P.C. includes divorced Muslim woman so long as she has not remarried - S. 125 overrides personal law.* It was also held that Clause (b) of the Explanation to S. 125(1), which defines 'wife' as including a divorced wife, contains no words of limitation to justify the exclusion of Muslim women from its scope. Therefore, a divorced Muslim woman, so long as she has not remarried, is a 'wife' for the purpose of section 125. The statutory right available to her under that section is unaffected by the provisions of the personal law applicable to her. So, a Muslim husband is liable to maintain his divorced wife even after the period of iddat till she gets remarried.

The relying on the religious text of muslim law held that the personal law does not take into account those situation in which the wife is unable to maintain herself after the period of iddat. Whereas section 125 applies where the wife is unable to maintain herself. So Muslim Personal Law and Section 125 are not conflicting. *The true position is that, if the divorced wife is able to maintain herself, the husband's liability to provide maintenance for her ceases with the expiration of the period of iddat. If she is unable to maintain herself, she is entitled to take recourse to section 125 of the Code. The outcome of this discussion is that there is no conflict between the provisions of section 125 and those of the Muslim Personal Law on the question of the Muslim husband's obligation to provide maintenance for a divorced wife who is unable to maintain herself.*

The Muslim Women (Protection of Rights on Divorce) Act, 1986

The Act was enacted in 1986 in the wake of the Supreme Court's judgment in the Shah Bano case, whereby the apex court ruled that even a Muslim woman was entitled to receive alimony under the general provisions of the Criminal Procedure Code (CrPC), like anybody else. While the judgment was not the first granting a divorced Muslim woman maintenance under the CrPC, it was the first in which the Supreme Court referred to Muslim personal laws in detail. Many Muslim clerics saw the judgment as an encroachment on the right of Muslims to be governed by their personal laws. Following severe protests from various Muslim community leaders, the Rajiv Gandhi government got the Muslim Women (Protection of Rights on

Divorce) Act passed in Parliament, with absolute majority.

According to the Statement of Objects and Reasons of the bill introduced, it stated that the Supreme Court, in Mohd. Ahmed Khan vs. Shah Bano Begum,has led to some controversy as to the obligation of the Muslim husband to pay maintenance to the divorced wife. Opportunity has, therefore, been taken to specify the rights which a Muslim divorced woman is entitled to at the time of divorce and to protect her interests.

So the Act provided that when a Muslim divorced woman is unable to support herself after the iddat period that she must observe after the death of her spouse or after a divorce, during which she may not marry another man, the magistrate is empowered to make an order for the payment of maintenance by her relatives who would be entitled to inherit her property on her death according to Muslim Law. But when a divorced woman has no such relatives, and does not have enough means to pay the maintenance, the magistrate would order the State Waqf Board to pay the maintenance. The 'liability' of husband to pay the maintenance was thus restricted to the period of the iddat only.

Thus the salient features of the act were:

1. The wife is entitled to a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband.
2. The wife is entitled to an amount equal to the sum of mahr or dower agreed to be paid to her at her time of her marriage or at any time thereafter according to Muslim law.
3. On an application where the Magistrate is satisfied that a divorced woman has not re-married and is not able to maintain herself after the *iddat* period, he may make an order directing such of her relatives as would be entitled to inherit her property on her death according to Muslim law to pay such reasonable and fair maintenance to her as he may determine fit and proper.
4. In case where there is no such relative, then it is the responsibility of the State Waqf Board functioning in the area where the woman resided, to pay her the maintenance.

The act though aimed at providing subsidiary means to women to support themselves, but annulled the Shah Bano's verdict by absolving the husband's liability and limiting it only upto the period of iddat. The act though for the benefit of women is not actually supporting them as the State Waqf themselves are in poor conditions and themselves require financial support.

Constitutional Validity of the Act

In the landmark case of ***Danial Latifi v. Union of India***[3]**,** The Muslim Women (Protection of Rights on Divorce) Act,1986, was challenged on the basis that Section 125 CrPC is a provision made in respect of women belonging to all religions and exclusion of Muslim women from the same results in discrimination between women and women. Apart from the gender injustice caused in the country, this discrimination further leads to a monstrous proposition of nullifying a law declared by this Court in Shah Banos case. *Thus there is a violation of not only equality before law under Art. 14 but also equal protection of laws and inherent infringement of Art. 21 as well as basic human values.* If the object of Section 125 Cr.P.C is to avoid vagrancy, the remedy thereunder cannot be denied to Muslim women.

The court held that on careful reading of the provisions of the Act, it would indicate that a

divorced woman is entitled to a reasonable and fair provision for maintenance. The preamble of the act shows that the Parliament seems to intend that the divorced woman gets sufficient means of livelihood, after the divorce and, therefore, the word "fair provision" indicates that something is provided in advance for meeting some needs. In other words, at the time of divorce the Muslim husband is required to contemplate the future needs and make preparatory arrangements in advance for meeting those needs. Reasonable and fair provision may include provision for her residence, her food, her cloths, and other articles.

The expression "within" should be read as during or for and this cannot be done because words cannot be construed contrary to their meaning as the word within would mean on or before, not beyond and, therefore, it was held that the Act would mean that on or before the expiration of the iddat period, the husband is bound to make and pay a maintenance to the wife and if he fails to do so then the wife is entitled to recover it by filing an application before the Magistrate as provided in Section 3(3) but no where the Parliament has provided that reasonable and fair provision and maintenance is limited only for the iddat period and not beyond it. It would extend to the whole life of the divorced wife unless she gets married for a second time.

The important section in the Act is Section 3 which provides that divorced woman is entitled to obtain from her former husband maintenance, provision and mahr, and to recover from his possession her wedding presents and dowry and authorizes the magistrate to order payment or restoration of these sums or properties. The crux of the matter is that the divorced woman shall be entitled to a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband. The wordings of Section 3 of the Act appear to indicate that the husband has two separate and distinct obligations : (1) to make a reasonable and fair provision for his divorced wife; and (2) to provide maintenance for her. *The emphasis of section 3 is not on the nature or duration of any such provision or maintenance, but on the time by which an arrangement for payment of provision and maintenance should be concluded, namely, within the iddat period.* If the provisions are so read, the Act would exclude from liability for post-iddat period maintenance to a man who has already discharged his obligations of both reasonable and fair provision and maintenance by paying these amounts in a lump sum to his wife, in addition to having paid his wifes mahr and restored her dowry as per Section 3(1)(c) and 3(1)(d) of the Act.

The court further observed that the point that arose for consideration in Shah Bano's case was that the husband has not made a reasonable and fair provision for his divorced wife even if he had paid the amount agreed as mahr half a century earlier and provided iddat maintenance and he was, therefore, ordered to pay a specified sum monthly to her under Section 125 Cr.P.C. This position was available to Parliament on the date it enacted the law but even so, the provisions enacted under the Act are a reasonable and fair provision and maintenance to be made and paid as provided under Section 3(1)(a) of the Act and these expressions cover different things, firstly, by the use of two different verbs to be made and paid to her within the iddat period, it is clear that a fair and reasonable provision is to be made while maintenance is to be paid.

The court further observed that on comparison of these provisions with Section 125 Cr.P.C will make it clear that requirements provided in Section 125 and the purpose, object and scope thereof being to prevent vagrancy by compelling those who can do so to support those who are

unable to support themselves and who have a normal and legitimate claim to support is satisfied. If that is so, the under the Act also beneficial provisions are available on the interpretation placed by us from the one provided under the Code of Criminal Procedure deprive them of their right loses its significance. The object and scope of Section 125 CrPC is to prevent vagrancy by compelling those who are under an obligation to support those who are unable to support themselves and that object being fulfilled by the Muslim Women (Protection of Rights on Divorce) Act,1986. The court held that the said act is constitutionally valid.

Finally upholding the validity of the act, the court concluded that:

1) Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3(1)(a) of the Act.

2) Liability of Muslim husband to his divorced wife arising under Section 3(1)(a) of the Act to pay maintenance is not confined to iddat period.

3) A divorced Muslim woman who has not remarried and who is not able to maintain herself after iddat period can proceed as provided under Section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death according to Muslim law from such divorced woman including her children and parents. If any of the relatives being unable to pay maintenance, the Magistrate may direct the State Wakf Board established under the Act to pay such maintenance.

4) The provisions of the Act do not offend Articles 14, 15 and 21 of the Constitution of India.

Thus, while upholding the validity of the act the court gave an important interpretation and resulted in a beneficial piece of legislation. Under the act the husband has to even contemplate the future needs of the wife and pay her accordingly. There is no upper limit on what could be this amount. The amount that can be paid is not limited by any statutory provision. Whereas in the case of sec 125 Cr.P.C. there is a upper limit prescribed beyond which the maintenance can not be allowed to a woman. Also the act provides for the maintenance of woman from her relatives and the Waqf board. So though the act was to strengthen back the position of husbands by limiting their liability but the interpretation rendered by the court has actually resulted in the benefit of the divorced woman by extending the liability of the husband beyond any upper limit of the maintenance amount.

Some Other Developments

After the liberal interpretation of the act by the court in the Danial Latifi case, the divorced muslim women began to get the maintenance for the period beyond iddat. But there were some difficulties regarding the procedural aspects and some other issues. To resolve them and to secure the rights of the divorced muslim women the court gave liberal interpretations to the provisions of the act and eventually diluted the same.

1.) *The courts can change the suit filed under sec 125 Cr.P.C. to a petition as filed under Muslim Women(Protection of Rights on Divorce) Act,1986.*

The enactment of the Muslim Women(Protection of Rights on Divorce) Act,1986 was not much known. The legal fraternity generally uses the Cr.P.C. provision while moving maintenance petitions, considering it handy. So when the objection was raised by the other

party that he would be governed by Muslim Women(Protection of Rights on Divorce) Act,1986, the petition used to be rejected. But the scenario changed after the decision of the apex court in ***Iqbal Bano v. State of U.P.***[4].

In this case the appellant had married in the year 1959. The husband was living separately from the appellant and stopped coming to the house of the appellant where she was staying and also did not pay anything for her subsistence. Therefore, an application under Section 125 Cr.P.C. was filed on 21.2.1992. Before that she had sent notice demanding payment of maintenance. Respondent replied to the notice and denied his liability to pay maintenance. On 28.5.1992 written statement was filed wherein it was stated that long back he had divorced his wife by utterance the word "Talaq" "Talaq" "Talaq". It was further stated that there was severance of marital ties between them for years as the divorce was over by the utterance of the word "Talaq" thrice and he had also paid Mehr and the Iddat period was over the claim was not acceptable. He also stated he had contacted the second marriage.

The learned Magistrate held that there was no material to substantiate the plea of divorce and accordingly maintenance was granted. First Revisional Court held that on coming of Muslim Women (Protection of Right on Divorce) Act, 1986, there is bar on Muslim woman filing petition in terms of Section 125 Cr.P.C. This was held by High Court also.

On appeal the Supreme court held that the Act only applies to divorced woman and not the Muslim married women who are not divorced. Further, mere statement in the written statement about some divorce long back does not meet the requirement of law. The finding of the First Revisional Court about payment of Mehr has no relevance.

The court further held that the proceedings under Section 125 Cr.P.C. are civil in nature. Even if the Court notices that there was a divorced woman in the case in question, it was open to him to treat it as a petition under the Act considering the beneficial nature of the legislation.

2.) *When a suit is filed before the Family Court, the divorced Muslim Women can be granted relief under section 125 Cr.P.C. unless she gets remarried.*

In ***Shabana Bano v. Imran Khan***[5] the appellant Shabana Bano was married to the respondent Imran Khan according to Muslim rites at Gwalior on 26.11.2001. The respondent threatened the appellant that in case his demand of dowry is not met by the appellant's parents, then she would not be taken back to her matrimonial home even after delivery. Appellant delivered a child in her parental home. Since even after delivery, respondent did not think it proper to discharge his responsibility by taking her back, she was constrained to file a petition under Section 125 of the Code of Criminal Procedure against the respondent in the Court of Family Judge, Gwalior. She claimed a sum of Rs.3000/- per month from the respondent towards maintenance. The husband claimed that he had divorced her earlier and is not liable to pay beyond iddat period.

The claim of the appellant by the Family Court was allowed to the extent of Rs. 2,000/- per month towards maintenance from the date of institution of the petition till the date of divorce, i.e., 20.8.2004 and further from the said date till the expiry of iddat period but amount of maintenance thereafter was denied.

The High Court dismissed the revision, so the appellant approach the Supreme Court.

The basic and foremost question that arose for consideration before the Supreme Court was

whether a Muslim divorced wife would be entitled to receive the amount of maintenance from her divorced husband under Section 125 of the Cr.P.C. and, if yes, then through which forum.

The court relied on the provisions of the Family Courts Act, 1984. The purpose of enactment was essentially to set up family courts for the settlement of family disputes, emphasizing on conciliation and achieving socially desirable results and adherence to rigid rules of procedure and evidence should be eliminated. In other words, the purpose was for early settlement of family disputes.

The Act, seeks to exclusively provide within jurisdiction of the family courts the matters relating to maintenance, including proceedings under Chapter IX of the Cr.P.C. Section 7 appearing in Chapter III of the Family Act deals with Jurisdiction. It gives the Family court the power to deal with a suit or proceeding for maintenance. *Section 20 of the Family Act appearing in Chapter VI deals with overriding effect of the provisions of the Act.* It reads that the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

So the court held that the bare perusal of Section 20 of the Family Act makes it crystal clear that the provisions of this Act shall have overriding effect on all other enactments in force dealing with this issue. Also it is quite discernible that a Family Court established under the Family Act shall exclusively have jurisdiction to adjudicate upon the applications filed under Section 125 of Cr.P.C.

Finally on cumulative reading of the relevant portions of judgments of the Court in Danial Latifi and Iqbal Bano, the court held that it is crystal clear that even a divorced Muslim woman would be entitled to claim maintenance from her divorced husband, as long as she does not remarry. This being a beneficial piece of legislation, the benefit thereof must accrue to the divorced Muslim women. *It was held that even if a Muslim woman has been divorced, she would be entitled to claim maintenance from her husband under Section 125 of the Cr.P.C. after the expiry of period of iddat also, as long as she does not remarry.*

Present Scenario

In view of the above discussion made, the legal proposition of law as propounded by the Apex Court in its various pronouncements and the present status of the rights of a divorced Muslim Woman are as follows:

1.) That divorced muslim wife would be entitled to maintenance from her husband under section 125 of Criminal Procedure Code subject to provisions of Muslim Women(Protection of Rights on Divorce) Act,1986. Section 125 of Cr.P.C. would apply only when both the parties have consented to be tried under the provisions of Cr.P.C. as required by section 5 of the said act.

2.) In Dainial Latifi's case the validity of Muslim Women (Protection of Rights on Divorce) Act, 1986 has been upheld. The court has interpreted that the emphasis of section 3 is not on the nature or duration of any such provision or maintenance, but on the time by which an arrangement for payment of provision and maintenance should be concluded, namely, within the iddat period and the use of words “a reasonable and fair provision and maintenance” includes within its contemplation the future needs of the divorced woman.

3.) The Muslim Women (Protection of Rights on Divorce) Act,1986, will not apply to a muslim women whose marriage has been solemnized either under the Indian Special Marriage Act 1954 or a Muslim women whose marriage was dissolved either under Indian Divorce Act, 1969 or Indian Special Marriage Act, 1954.

4.) When a petition is filed by divorced muslim women for her maintenance before a family court, section 7 of the Family Court Act, 1984 would be applied. In view of section 20 of Family Courts Act 1984, the provisions of Family Courts Act shall have overriding effect over all other law for the time being in force including the provisions of Muslim Women (Protection of Rights on Divorce) Act,1986. Any suit or proceeding for maintenance filed before family Court by any women including muslim women be governed by provisions of Section 125 Cr.P.C, which is a common law applicable to all the women and thus Family Courts are competent to decide the application of muslim divorced women under section 125 Cr.P.C. as was held in the Shabana Bano case.

5.) The court proceeding under section 125 Cr.P.C. if is of the opinion that the matter relates to reasonable and fair provision and maintenance to divorced muslim women it would be open to him to treat the application under Muslim Women(Protection of Rights on Divorce) Act,1986, instead of rejecting the same because the proceeding under section 125 Cr.P.C. and claim made under Act could be tried by one and the same court as was held in the Iqbal Bano's case.

Conclusion

It is a common belief that the men are superior to women. It was on this sense of belief that the Muslim husband was relieved of his obligations to his divorced his wife after the period of iddat. The payment of mahr was considered to be sufficient to be absolved from the liabilities. The decision of the court in the Shah Bano case was a humble attempt by the court to tilt the balance towards the secular legislation rather than following the personal laws. Thus the case of Shah Bano can be seen as an attempt by the courts to move towards the mandate of the constitution to apply uniform civil code. But always the political considerations have overpowered the benefits. To appease the Muslim minority the government came up with the Muslim Women (Protection of Rights on Divorce) Act, 1986. It reaffirmed the muslim personal law as to the liability of the husband. But court cleverly interpreted the legislation to aid the divorced muslim women. In Danial Latifi case it held the legislation valid. It also held that the quantum of maintenance must be "reasonable and fair" and therefore last her a lifetime. It has a unique feature of no ceiling on quantum of maintenance. The courts further diluted the provisions by granting the powers to the Family Courts to dispose off the case filed under sec 125 Cr.P.C. till the time divorcee gets remarried.

In all the decisions courts have taken pro-women approach. Whenever the question arises the court has tried to help the women. Presently, the situation is such that the divorced muslim women can claim maintenance under the Muslim Women(Protection of Rights of Divorce) Act, 1986 or under section Cr.P.C. The courts have tried to bring the situation of the Muslim close to that of the Hindu women and attempted to achieve the goals of uniform civil court.

But this attempt only by the courts have shown that the legislatures and the executive have failed to carry out the mandate of Art 44 of the Indian Constitution. Its a high time that other organs of the state should introspect themselves and do their bit of job. Also the upholding the

constitutional validity of the act even though it annulled the directions of the court shows that the judiciary is working impartially without prejudices. This shows that the courts check the validity of the legislation on the basis of the four corners of the constitution and are the real guardian of the constitution.

Thus time have changed. The women are being aware of their rights and becoming more capable. The attempts by the court is a welcomed step of granting rights to divorced muslim women at par with other religions. It is just a move towards the uniform civil code. But still more is hoped from the other two organs of the State and not just by judiciary to improve the conditions of the divorced muslim women.

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WOMAN AS A KARTA OF HUF- ISSUES AND CHALLENGES

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ABSTRACT

Hindu society has grown tremendously and has progressed in line with the fortitude of the contemporary times and so has the status of women changed radically not only in the legal domain but socially too. A female was a part of the Hindu joint family, even prior to The Hindu Succession Amendment Act, 2005. A Hindu joint family consists of a common ancestor and all his lineal male descendants up to any generation along with their wives (or widows), and unmarried daughters of the common ancestor and of the lineal male descendant[1]. The Hindu Succession (Amendment) Act, 2005 made a daughter a coparcener in the ancestral property of her father and she was conferred with the same rights and duties as a son. It appears that with the inclusion of daughters of a coparcener with equal rights as those of sons, the ascension of a daughter as karta or manager cannot be ruled out.[2] This however would be dependent upon several factors like the presence of other senior males in the joint family or her interest in the position of the karta.

This Paper Shall Discuss Woman as a Karta of Huf-Issues and Challenges.

Key Words: Woman, Karta, Challenges, Ancestral, Property, Coparcener.

The Hindu society has grown tremendously and has progressed in line with the fortitude of the contemporary times and so has the status of women changed radically not only in the legal domain but socially too. A female was a part of the Hindu joint family, even prior to The Hindu Succession Amendment Act, 2005. A Hindu joint family consists of a common ancestor and all his lineal male descendants up to any generation along with their wives (or widows), and unmarried daughters of the common ancestor and of the lineal male descendant[3].

The joint family property is managed by the karta who is also known as the manager, he occupies a pivotal position in the joint family. A karta, has certain unique powers and rights over the joint family property and as a head of the family he acts on behalf of other members. He is the master and cannot be questioned or held accountable except on the account of misappropriation, fraud or conversion.[4]

Who could be a karta?

Ordinarily, the senior most male member is the karta in the joint family[5]. He does not owe his position to an agreement o the consent of the other copaceners, he is entitled to that position because it is the eldest in the joint family. So long as he is alive, may be aged, infirm or ailing, he is entitled to kartaship[6].

But could a female be the kartaof a Hindu undivided family property if she was the eldest surviving member of the joint family?

The first time when this issue came up, it was infront of the Nagpur H.C. in *Laxminarayan* case[7]. The H.C. after critically scrutinizing the facts and the law, firmly held that where all coparceners are minors; their mother could be the Karta[8].

When the matter came to the S.C. in *I.T v. Seth G.S. Mills*[9], settling the matter for once, the S.C. held that only a coparcener could be a karta. After reviewing the relevant authorities the S.C. took the view that the mother or any female could not be a karta of the HUF. This judgement overruled the judgment of Nagpur H.C. in *Laxminarayan* case[10]. It was further stated by the S.C. that coparcener ship is an essential qualification for the manager ship of a joint Hindu family and since a widow is not a coparcener, she has no legal qualifications to become the manager of a joint Hindu family. It will be contrary to all accepted norms of Hindu law to suppose that the senior most female member of the joint family can never be manager in any situation. At best she could be the guardian of her son but she cannot be the manager of the joint family for she is not a coparcener. In another case, the A.P. H.C. held that a wife cannot act as a karta of the joint family on the ground of her husband's absence.[11]

It was also held that a widow or a mother cannot represent the family in a suit[12] and that any alienation by the widow of coparcenery property is not permissible[13] because they are not a coparcener and thus cannot be the manager or karta of the HUF.

This view was followed by several H.C's and very recently also the Bombay H.C in *Jagannath Rangnath Chavan v.Damoji puapu v. Rao*[14] held that

> *"A female member (widow) of joint family shall not act as Karta because she is not coparcener to absolute ownership of property."*

Changes Affected by the Hindu Succession (Amendment) Act, 2005

The Hindu Succession (Amendment) Act, 2005 made a daughter a coparcener in the ancestral property of her father and she was conferred with the same rights and duties as a son[15]. It appears that with the inclusion of daughters of a coparcener with equal rights as those of sons, the ascension of a daughter as karta or manager cannot be ruled out. [16] This however would be dependent upon several factors like the presence of other senior males in the joint family or her interest in the position of the karta.

As discussed earlier, there can be three types of females in a Hindu Joint family, daughter in law (this includes widow) unmarried daughter and married daughter.

The Hindu Succession (Amendment)Act, 2005 made the daughter a coparcener, which clearly means that a coparcener could only be that person who has taken birth in that Hindu joint family. Since the daughter in law's family of birth is different therefore even now her status remains the same and she cannot be the karta of her family of marriage. Further, the widow of the male descendant also cannot be a karta for same reasons and the S.C's ruling in *G.S.Mills*[17] case holdswell.

As far as the daughter is concerned, post the 2005 amendment, she gained the status of a coparcener and thus for all practical purposes she was made subject to same liabilities and duties and enjoyed the same rights as the son[18]. As per the traditional Hindu laws, upon the death of the karta the eldest surviving coparcener steps into the shoes of the coparcener and

takes the charge as the new manager of the Hindu joint family. After the amendment, if the eldest surviving member is the unmarried major daughter then she can take charge as the karta by the virtue of the fact that she has the status of a coparcener now[19]. But her mother or the widow though being the eldest surviving member cannot be the karta because she is not a coparcener in her family of marriage; although she would have been in the best position to look after the family property and the children.

The Supreme Court in *Tribhovan Das Haribhai Tamboli v. Gujarat Revenue Tribunal and Ors*[20] held that the senior most members in a HUF would become the Karta.

"The manager-ship of the Joint Family Property goes to a person by birth and is regulated by seniority and the Karta or the Manager occupies a position superior to that of the other members. A junior member cannot, therefore, deal with the joint family property as Manager so long as the Karta is available except where the Karta relinquishes his right expressly or by necessary implication or in the absence of the Manager in exceptional and extra-ordinary circumstances such as distress or calamity effecting the whole family and for supporting the family or in the absence of the father whose whereabouts were not known or who was away in remote place due to compelling circumstances and that is return within the reasonable time was unlikely or not anticipated."

In the case of *Ram Belas Singh v. Uttamraj Singh and Ors*[21], the Patna H.C. held that after the Hindu Succession (Amendment) Act, 2005 which substituted Section 6 of the Act and provided that in a joint Hindu family governed by Mitakshara law, the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son and will have the same rights and liabilities in the coparcenary property as she would have if she had been a son and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener.

The Constitution also provides for a positive protection in favour of women viz. the fundamental rights[22] as well as the Directive Principles for State Policy[23].

The Hindu Succession (Amendment) Act, 2005 is a beneficial and welfare piece of legislation as it was placed on the statute book with the objective of benefitting a woman in the society and to ensure women are granted substantive rights in the realm of property laws.Hereinafter is an extract from the objects and reasons of the Hindu Succession (Amendment) Act, 2005.

"The retention of the Mitakshara coparcenary property without including the females in it means that the females cannot inherit in ancestral property as their male counterparts do. The law by excluding the daughter from participating in the coparcenary ownership not only contributes to her discrimination on the ground of gender but also has led to oppression and negation of her fundamental right of equality guaranteed by the Constitution."

Case Analysis: Sujata Sharma V. Manu Gupta[24]

The Delhi H.C. very recently pronounced a landmark judgement[25] on this issue stating that a woman can bekarta of a Hindu joint family and clarified on various issues.

The issue which was decided in this case was whether the plaintiff, being the first born amongst the coparceners of the Hindu Undivided Family property, would by virtue of her birth, be entitled to be its Karta. The defendants had reservations on the contention of the plaintiff.

The right of the eldest male member of a coparcenary extends to the female members also[26]. In the present case insofar as the plaintiff is concerned, she is the eldest member of the coparcenary, and her being a female cannot be seen a disqualification from being its Karta since this disqualification has been removed by thechanges brought about under Section 6 in the year 2005.

The Hon'ble Supreme Court in *Sukhbir Singh v.Gaindo Devi*[27], held that Section 4 of the Hindu Succession Act, 1956overrides all customs, texts, etc. to the extent that they provide anything contrary to what is contained in the Act.

It will be a very peculiar and odd thing to say that while females would have equal rights of inheritance in a Hindu Undivided Family property, this right could nonetheless be curtailed when it comes to the management of the said property.

The above discussion clearly suggests that the impediment which prevented a female member of a HUF from becoming its Karta was that she did not possess the necessary qualification of co-parcenership.[28] As discussed earlier, that the amended Section 6 of the Hindu Succession Act is a socially beneficial legislation and it gives equal rights of inheritance to Hindu males and females. Its objective is to recognize the rights of female Hindus as coparceners and to enhance their right to equality in the realm of property laws. Therefore, curtailing or fettering the statutory guarantee of enhancement of their rights would not be interpreting the law in its true spirit. Now that this disqualification has been removed by the 2005 Amendment, there is no reason why Hindu women should be denied the position of a Karta in the HUF. If a male member of an HUF, by virtue of his being the first born eldest, can be a Karta, so can a female member[29].

The Delhi H.C.firmly held that there can be no restriction in the law preventing the eldest female coparcener of an HUF, from being its Karta nordoes her marriage alter the right to inherit the coparcenary property to which she succeeded in terms of Section 6 of the Hindu Succession (Amendment) Act, 2005.

As far as a married daughter is concerned, she continues to be a coparcener in her father's family but she ceases to be a member of the joint family because after marriage she becomes a member of the joint family of her husband's family[30].

In the instant case, the plaintiff was a married woman and still the H.C. didn't differentiate on this fact and delivered the judgment in her favor. Moreover, differentiating on this ground would invite criticisms from several platforms, because a differentiation between a married daughter and a married son would not be a reasonable differentiation[31] under Art. 14 of the Constitution and thus would be violative of right to equality. If the son doesn't lose his karta-ship on his marriage why should a daughter upon marriage relinquish the karta-ship?

Conclusion

It may be noted that the Hon'ble Delhi H.C. on this issue has interpreted the law in its true spirit. By removing the limitations on the right of a woman to be a karta of the Hindu joint family property, a new way has been paved by the Court for further granting and recognizing a woman's rights without any prejudice or discrimination. But going on other line of reasoning, upon the marriage of a daughter, all her ties in her family of birth are severed and she becomes a member of her husband's joint family. Under these circumstances, if she

remains the karta of the HUF property of her father's joint family, then the question to be pondered upon is that whether her decisions with regard to the HUF property will be independent from the influences of her husband and his family? They can have an impacton her decisions which may result in detrimental consequences.

These are some areas which require clear scrutiny by the legislature or the judiciary, only then this major reform in the realm of inheritance laws would give substantive and formal rights to the woman without any scope of ambiguity or mischief.

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TOWARDS DECIMALIZATION OF INDIAN POLITICS: NEED OF THE HOUR

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ABSTRACT

Famous philosopher and activist Naom Chomsky points out that "For the powerful, crimes are those that others commit." Probably that's why our dear old politicians are unable to spot the black sheep in our flawed structure. The "Theory of Separation of Power" in literal sense is just a theory in today's democracy. Democracy as the governance was the central plinth of our Constitutional Scheme enshrined by the framers of the Constitution. The ultimate aim evidenced by the Constitutional debates and from their personal writings put emphasis on that each and every individual to become stakeholder in the political process. For this purpose the Citizens were given power to elect their representative. Thus representative government gets its legitimacy through people who are sovereign which was kernel of our democracy enshrined in our Constitution. Over the time democracy and conducting of free and fair election is considered to be as the basic feature of our Constitution. But entry of criminals in politics is an extremely serious problem. The evil of Criminalization of Politics calls for special attention of the people because its subject mainly revolves around the vested interests of politicians of all hues as such the people can never hope that the politicians would take any initiative to rectify this evil. The prevailing trend is spreading like cancer. It is basically nullifying all the constitutional safeguards of democracy; that is, it is spoiling bureaucracy by making it partial and even threatens judiciary; and thus is destroying the basic foundation of democracy. Thus paper is an attempt to look at the legal frame work, role of judiciary in curbing the criminalization of politics and suggestions of various commissions.

Key Words: Criminalization, Politics, Representation, Democracy, Election.

"Democracy disciplined and enlightened is the finest thing in the world. A democracy prejudiced, ignorant, superstitious, will land itself in chaos."

M.K. Gandhi.

Napoleon once said that the great difficulty with politics is that there are no established principles, thus he noted that politics and principles have seldom gone together. If at all they

did, it was generally in the nature of an exception or the principle itself was distorted to suit the political objectives. Growing criminalization of politics and politicization of criminals have taken heavy toll on policing in country. But unfortunately recently, Indians have witnessed a crisis of empathy, quality, fairness, integrity and honesty among the members of its legislatures both at the Center and State. Not only is there a serious question of lying over the fairness of electoral procedure, but much bigger concern being, the kind of people entering into the polity of India with the Preamble to the Constitution providing for the political justice.

The Republic of India being one of the largest democracy in the world. The Preamble to the Constitution of Indian begins with "WE THE PEOPLE OF INDIA" underlying the spirit of the democracy in India. In which free and fair election[1] are considered to be the back bone for effective functioning of the democracy. Conducting of election has a long term effect on the functioning of countries like India where there is no right to bring back the ineffective representative, and once representative are elected it becomes difficult to govern by those who are unsuited for office which they are elected for. Thus pre-election measures plays an important role in prohibiting these people from being elected which would affect the functioning of the government. Criminals in India play a very important role in the conducting of elections, both as candidates and as party workers.

There is no common consensus among the various political parties to stop them from being elected as the representative. Thus, in the absence of the political will to curb criminals from entering into politics. The Judiciary often plays an important role in protecting the democracy and promotion of free and fair elections.

Free and Fair Election Basis of Democracy

Democracy as the governance was the central plinth of our Constitutional Scheme enshrined by the framers of the Constitution. The ultimate aim evidenced by the Constitutional debates and from their personal writings put emphasis on that each and every individual to become stakeholder in the political process. For this purpose the Citizens were given power to elect their representative. Thus representative government gets its legitimacy through people who are the sovereign, which was kernel of our democracy enshrined in our Constitution. Over the time democracy and conducting of free and fair election has been considered to be as the basic feature of the Constitution.

"It is beyond the pale of reasonable controversy that if there be any unamendable features of the Constitution on the score that they form a part of the basic structure of Constitution, it is that India is a Sovereign Democratic Republic." [2]

Importance of free and fair election roots from two factors, instrumentally central role in selecting the persons who will govern the people and legitimate action of the popular will. Thus stressing on the role of free and fair election in democracy. Apex court in ***Mohinder Singh Gill v. Chief Election Commissioner,***[3] *has observed:*

"Democracy is government by the people. It is a continual participative operation, not a cataclysmic periodic exercise. The little man, in his multitude, marking his vote at the poll does a social audit of his Parliament plus political choice of this proxy. Although the full flower of participative Government rarely blossoms, the minimum credential of popular government is appeal to the people after every term for a renewal of confidence."

In order to ensure free and fair election the Parliament has enacted Representation of Peoples Act 1951 which provides for the disqualification for the Member of Parliament and State legislatures. Thus, if the criminal elements of the society who are accused of breaking law which their predecessors gave and which they are themselves entrusted with, would it be according to the vision of our founding fathers and in nature of democracy and rule of law. In *K.Prabhakaran v. P. Jayarajan*[4] where it was said that,

"Those who break the law should not make the law. Generally speaking, the purpose sought to be achieved by enacting disqualification on conviction for certain offences is to prevent persons with criminal background from entering into politics and the house – a powerful wing of governance."

A three judge bench of Supreme Court in *Public Interest Litigation v Union of India*[5] in which court raised the standard of the qualifications for the appointment of the public office, in order to uphold and preserve the integrity of the institution. Hence the spirit of the judgment being it is not only imperative for the candidate of such office to have highest integrity, but at the same time independently the integrity of institution must be preserved. Thus having criminal elements in the politics whether they are convicted or not, no doubt tarnishes the latter, as well as the former.

Criminalization in Politics

In spite of the best intentions of the founding fathers, the fear of nexus between the criminal and politics was widely expressed from the first general elections in 1952. But this nexus, to somewhat changed in 1970. Earlier politician have suspected to link to the criminal networks, but latter we can see that persons having criminal record itself began to enter into the field of politics.[6] The same thing was confirmed in Vohra Committee report in 1993 and again in 2002 in National Commission to Review the Working of the Constitution (NCRWC). Vohra committee pointed out the rapid growth in network and the link between the criminals and politicians, bureaucrats and media persons[7]. The report of NCRWC went one step forward and found out that criminals now began to seek the direct access by becoming ministers and legislators themselves[8].

Since the judgment of*Union of India v. Association for Democratic Reform*[9] which made it possible to analyze the criminal record of candidate, by making it mandatory for every candidate to disclose his assets and any criminal record against him by submitting affidavit to the Election Commission, failing of which might result in their disqualification.

In the ten years since 2004, 18% of the total candidate contesting either National or State elections have criminal cases pending against them (11,063 out of 62,847). In those 5,253 are charged with the heinous offences such as of rape, murder, attempt to murder, crime against the women, Prevention of Corruption Act 1988. 152 Candidates had 10 or more serious cases pending, 14 candidates had 40 or more such cases and 5 candidates had 50 or more cases against them.[10]

The 5,253 candidates with serious cases together charged had around 13,984 serious charges against them. Further of these, 31% cases were of murder and other offence related to human body 4% were the cases of rape and offence against the women, 7% related to kidnapping and abduction, 7% is related to robbery and dacoity, 14% being related to forgery and

counterfeiting including of government seals and stamps and 5% related to breaking the law during the elections[11].

Further if we take a look at the criminal background, it is to be seen that these instances are not only related to candidates contesting the elections but can also be found in the winners as well. Out of these 5,253 candidates having serious criminal charges against them 1,187 went on winning the elections they contested i.e. 13.5% of 8,882 winners analyzed from 2004 to 2013,including both serious and non-serious charges, 2,497 (28.2%) of the winners had 9,993 pending criminal cases.[12]

According to the Association of Democratic reform 21% of the MPs in the present LokSabha are facing serious criminal offences such as rape, murder and dacoity and in 2016 state assembly elections36% of the MLAs declared criminal cases among them,[13] as many as 186 (34%) winners out of 541 had declared criminal cases against them[14]. The majority party BJP among whom 98 winning candidates (35%) out of total 282 are facing criminal charges[15]. Irony over here is that chance of winning election by candidates with criminal record was 16% then person having no record was 5%, in 16[th]LokSabha election.[16] Further, the prevalence of MPs having criminal charges have increased over time. If we look in 2004 24% of the LokSabha MPs had criminal cases pending against them and in 2009 it increased to 30%.[17] Same is the situation across the states with 31% or 1258 out of 4032 sitting MLAs have pending criminal cases against them and half being serious offences.[18] But if we look some states have much higher percentages of MLAs with criminal record such as in Uttar Pradesh it is 47% of MLAs have criminal case pending in courts.[19]

From the data above, it is clear that about one third of the elected candidates at the Parliament or at the State Legislative Assemblies have some criminal record. Data also suggested that about one fifth MLAs have cases pending which have proceeded to the stages of charges being framed by the court at the time of the elections.[20] The more disturbing thing after looking the data is that person winning percentage of person having criminal record is more than that person who don't have any criminal background. Statisticssuggest 12% of persons win that don't have any criminal record and on average 23% persons win having criminal some sort or the other criminal record.

Thus it is somewhat clear that persons having criminal record have far better chances of winning the elections.[21] Furthermore not only the political parties select the persons with criminal background and evidences suggest that the untainted representative later become involved into criminal activities. [22]

Legal Framework

The prevention of criminals into politics can be accomplished by prescribing certain qualification and disqualifications that will prevent the person from entering into the politics or preventing a person from occupying seat in parliament or state legislatures. Article 84 provides for the qualification for the members of the parliament and Article 102 provides for the disqualification for membership and corresponding provisions regarding state legislative is given in Article 173 and 191. Further Chapter IX A of IPC specifically deals with the offences relating to the elections it compromise of nine sections dealing with various offences such as bribery, under influence personation at elections. Section 171 G provides fine for the false statement in regards toelections and illegal payment in regards to the election. Section 171 E

provides fine of Rs. 500 for failure to keep election account. Although in IPC provisions are made check the offences relating to the elections but only nominal punishment is given.

Further, the Parliament in his power has enacted the Representation of Peoples Act, 1951 Section 8 of the act provides for the list for the certain offences if person find convicted of them would be disqualified from being the member of the parliament and state legislature. Section 8 (1) list number of offences conviction under any of them irrespective of the quantum of punishment or fine would make them disqualified, Section 8(2) further laid down certain offence under which if a person is convicted would only be disqualified for six months. Section 8(3) provides for the residuary provision which provides for if any candidate being convicted for any offence and imprisoned for two years or more he is disqualified, disqualification operates from the date of conviction and continues for period of six years from the date of release.

Thus scheme of disqualification laid down by the Representation of Peoples Act, 1951 clearly laid down that if a person who is convicted of some criminal activity is unfit to be the representative of the people. With respect to filling of affidavits candidate of any state or national assembly election is required to furnish the information regarding its assets, liabilities, education qualification and criminal record if any. Failure to furnish the information or concealment or giving false information is an offence under Section 125 of the Representation of Peoples Act, 1951 and provides imprisonment for six months if failure to provide information or concealment or furnishing the false information. But these offence are not listed under Section 8 (1) and (2), thus a conviction of person under Section 125 would not be disqualified from contesting the election. Further it is not an offence under corrupt practices which would be a ground of setting aside election. Hence there is little consequence for the offence of filling a false affidavit, as a result this practice is at rampant.

Judiciary's Approach in Decriminalizing Politics

Preamble of the Constitution provides for the political justice to the citizens. When the criminals are becoming part of the legislature, then securing any form of social, political and economic which is enshrined in our preamble is hollow promise. It is evident from the declaration made by the candidates in 2014 and 2009 general election which showed that more than 275 criminal cases were pending against 76 of the successful candidates in LokSabha. Over thepast few decades, entry of criminals into the field of politics has been increasing as evident from the Vohra Committee report. In *Anukul Chandra Pradhan, Advocate Supreme Court v. Union of India,* [23] the Court realized that criminalization of politics is bane to the society, negotiation to democracy and subversive to the free and fair election. Thus, the criminalization of politics calls for the special attention of the people because the subject revolves around vested interest of the politicians; as such people can never hope that the politicians would take any kind of initiative to rectify this evil. This trend is spreading like cancer. It is nullifying all the Constitutional safeguards of our democratic nation.

Judiciary have actively participated in order to curb the menace of criminalization of politics through various seminal judgment and attendant to the government and election commission over various provisions of The Representation of the People Act, 1950 and 1951, Indian Penal Code, 1860 and the Constitution. Judgment of the Supreme Court to curb the criminalization can be divided into three parts. *Firstly*it introduces transparency into electoral process;

*secondly*greater accountability for public office and, *thirdly*decisions those seeks to remove corruption in public life.

In *Union of India v Association of Democratic reform*[24] the Judiciary took the first step towards decriminalization of politics. In its judgment the Supreme Court specifically directed the election commission to call for certain information on affidavit from the candidates those who are contesting either state or parliamentary elections, particularly relevant to the point of criminalization of politics, it mandates the candidate to furnish the information regarding whether the person had been Convicted/ Acquitted/ Discharged of criminal offences in the past, if convicted the quantum of punishment. The justification of judgment was based on fundamental right of electors to know the antecedents of the candidates who are contesting for the public office. Such right to know is the embedded into foundational meaning of freedom of speech and expression guaranteed to all citizens under Article 19(1) (a).

In *PUCL v Union of India*[25] in which the Court held Section 33B of the Representation of People (Third Amendment) Act, 2002 *ultra vires* the Constitution, as it sought to reduce the judgment of Court in ADR case, as the candidates needs to furnish only those information which is specifically mentioned under the Amendment Act. The Court while striking it down held that it nullified the Courts previous decision and infringed the elector's right to know, a constituent of the fundamental right to free speech and expression and hindered free and fair election which is part of basic structure of Constitution.

Supreme Court's Judgment in *Lily Thomas v. Union of India*[26] has sought to foster the greater accountability for those holding elected offices. In this case Supreme Court struck down controversial Section 8(4) from the Representation of Peoples Act, 1951 being *ultra vires* the Constitution as it allows the MPs and MLAs who are convicted while serving as member to continue in the office until the appeal against such convictions are disposed of, two important aspect can be noted in the judgment is that Parliament does not have competence to provide for the different grounds for the disqualifications of applicants for membership and sitting members, and differing dates being unconstitutional in light of Article 101(3) and 190(3) of the Constitution as it provides that a person has to vacate his seat from the date of disqualification.

In another famous case of *PUCL v. Union of India*[27] also known as *'NOTA'*case the Court held that provisions of the Conduct of the Election Rules, 1961 which requires a person disclosure of its identity in case he intends to register no vote, being unconstitutional in light of Article 19(1)(a) as right to freedom of speech and expression also includes right to freely choose a candidate or reject. Thus by allowing the voters to show their dissatisfaction against the candidate of their constituency for any reason whatever. When the impact of this decision is taken in the view with that of *Lily Thomas* it is clear that judiciary don't want any criminal elements entrenched in parliament to continue their position.

The Hon'ble Court had observed in *Manoj Narula v. Union of India and Ors.* [28], that the Criminalization is an anathema to the sacredness of democracy. The previously existing law, had carefully and clearly laid down the terms which would have prevented the entry of the pathogens into the politics of the nation.

The validity of the same section has been repeatedly held in *Mahendra Kumar Shastri v. Union of India and Anr.,*[29] that the disability imposed by the Section 62(5) of the

Representation of People Act 1951, is equally applicable to all persons similarly situate mentioned therein and they are even prevented from contesting the election or offering themselves as candidates for such election. The provision had been held reasonable and in public interest to maintain purity in electing people's representatives and there is no arbitrariness of discrimination involved.

The aforementioned observations highlight that the object of the original law was to prevent criminalization of politics and maintain the probity in elections and that any provision which furthers the aim and promotes the object is to accepted as sub-serving a great constitutional purpose. Whereas, the amendment seeks to over-turn the effects of the original law, thus paving way for the entry of people with criminal antecedents into the field of politics.

The validity of the original law has been upheld in the *Jan Chaukidar (Peoples Watch) case*[30], which clearly highlights the attempt made by the law-makers, to prevent people belonging to a certain category of those who wish to participate in an, election, thus disenfranchising them. With the Amendment, the law-makers sought to defile the constitutional spirit and make a mockery of the political system.

It is contended that provisions have been made in the election law to exclude persons with criminal background of the kind specified therein from the election scene as candidates and voters with the object to prevent criminalization of politics and maintain propriety in elections, as has been observed by the Honorable Court in *Anukul Chandra Pradhan, Advocate Supreme Court v. Union of India and Ors.,*[31] The same has been reiterated in the case of one *K. Prabhakaran v. P. Jayarajan*[32]**.**

In accordance with the above discussed issue, it can be concluded that criminalization can corrode the fundamental core of elective democracy and, consequently, the constitutional governance, affecting the sovereignty of the nation and many other offences. Henceforth, it can be seen that the nexus between the politicians, bureaucrats and criminal elements in the society has been on rise, the adverse effects of the same are being felt on various aspects of social system.

Suggestions for Curbing the Criminalization

Recently the Law Commission of India submitted its 244threporton Electoral disqualification. The report follows up the judgment of the Supreme Court issued directives, in the Public Interest Litigation filed by an NGO Public Interest Foundation[33] related to decriminalization of politics. The report of the commission mainly deals with the issue relating to the disqualification of candidates with criminal backgrounds and what are consequences of filing a false affidavit, and mainly it dealt with at what stage disqualification is to be triggered. Thus the major recommendations of the commission follows:

The commission dealt with the three stages where the disqualification can be trigged and decided upon the framing of the charges.

1. Conviction: the current practice is unable to curb the criminalization of politics owing to long delays in trial and rare convictions, thus it become difficult to disqualify the person as only few person are convicted. The law must evolve to curb this practice as effective deterrent.

2. Filing of police report: the stage of filing a police report there is no application of judicial mind, as after filing of police report a thorough investigation is done by the police which file either a charge sheet or closure report with the Magistrate. Then upon filing of charge sheet, charges are framed and then court look into the matter and evidence presented by the prosecution see what offence is committed by accused if any. Thus it would not be appropriate stage where disqualification may be affected.
3. Framing of charges- if we look when charge sheet is filed by the police it is simply put forwarding the material collected during investigation to the court to consider the different provisions accused had to be charged with. Thus at this stage there is no *prima facie* of guilt of the accused by the court. But enlarging the scope of disqualification at framing the charges in certain offence does not violates any fundamental or constitutional right of the candidate, and right to be elected is neither a fundamental right or common law right[34] held by Supreme court time and again. Hence the disqualification at this stage with adequate safeguards can help in curbing the criminalization of politics.

a. Safeguards at framing of charges[35].

i. Only those offences which attracts the maximum punishment of five years or above should be included in this provision.

ii. Charges filed within the one year before the date of the scrutiny of nominations for an election would lead to disqualification.

iii. Disqualification will operate until the acquittal by trial court or period of six years whichever is earlier.

iv. For the charges against the sitting MP and MLAs the trial must be speedy and on day to day basis.

v. But if the trial is not concluded within the one year the MP and MLAs may be disqualified at expiry of one year or all the benefit a person is receiving from the office should be suspended at the end of one year.

vi. Disqualification at this stage must be made retrospectively, and the person having charges pending at the time of this law came into effect must be disqualified from contesting the elections.

Another ground of disqualification proposed by the commission was false affidavit as ground for disqualification. Conviction on the charges of filing false affidavit should be included as the ground for disqualification, its punishment must be enhanced from six months imprisonment to two years imprisonment[36], and filing of the false affidavit should means as the corrupt practice.

National Commission to Review Working of the Constitution recommended that the amendment to the Representation of People Act 1951 should be made, in which any person charged with the offence punishable with the imprisonment of maximum of five years or more should be disqualified for being chosen or being the member of parliament and the state legislatures, on the expiry of the period of one year from the date charges were framed against him by the court in that offence and unless cleaned during that one year period. He shall be continue to be disqualified till the decision of the court. It was suggested that similar provisions must be made for the sitting members also.

Conclusion

Democracy being one of those inalienable fundamental features guaranteed by Constitution of India and forms the basic feature held by Supreme Court in plethora of cases. The concept of democracy as visualized by the Constitution, it is the representation of the people in parliament and state legislature by the method of election in parliament. Thus people have the major stake in the functioning of the government, such form of government is bound to succeed as it is based on the popular support of the people, but at the same time today the entry of the criminals into the politics is on rise, thus entry of criminals into politics must be stop at any cost. If it is not checked, it will destroy the whole system, because for democracy to survive, rule of law must prevail and it is necessary, that the best available men must be chosen as people's representative for the proper governance of the country. If persons with the criminal antecedents would be allowed it will destroy the rule of law. Number of committees and commission have examined the issue of the criminalization of politics however the problem is increasing day by day, parliament has taken effort to keep the check on the evil of criminalization of politics but the problem remain there despite of their best efforts by amending the laws. Supreme Court to some extent has tried to curb the criminalization of politics through its judgments and radical suggestions, but somehow these suggestions are not acceptable to politicians. Hence, considering the facts and the scenario of the Indian politics discussed so far, it is necessary to understand that reform in the entire electoral process is indeed the need of the hour. As still, there remainsa wide gulf between the preaching and practice in today's era.

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COMPANY LAW v. SICA: THE EFFECT OF THE LANDMARK JUDGMENT IN M/S MADURA COATS LTD v. M/S MODI RUBBER Ltd & Anr.

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ABSTRACT

The Hon'ble Supreme Court came up with a landmark ruling M/S Madura Coats Ltd V. M/S Modi Rubber Ltd & Anr.[1] that settled a huge debate on the conflicting provisions related to the provisions of the Sick Industries Special Provisions Act(SICA) of 1985 over the Companies Act. The Supreme Court observed that different situations can arise in the interplay between the Companies Act and the Sick Industries Special Provisions Act(SICA) in the matter of winding up of a Company. The Judgment is clear on the application of the provisions in respect of conflicting opinions. The enactment of the new Companies Act 2013 meant that most of the statutory provisions applicable to Companies other than the Companies Act like the SICA would be consolidated. Likewise, the provisions related to the SICA have been incorporated into the Companies Act 2013 in Section 253. However, the new Companies Act 2013 makes many fundamental changes while consolidating the core of the SICA. The most important change being the abolition of the BIFR.

Key Words: Companies, Act, Sick, Industries, Special, Provisions, Case, Comment.

M/S Madura Coats Ltd V. M/S Modi Rubber Ltd & Anr

The Supreme Court of India while delivering a Judgment on an Appeal to wind up M/S Madura Coats Ltd V. M/S Modi Rubber Ltd & Anr.[2] on the 29th of June 2016 came up with a landmark ruling that settled a huge debate on the conflicting provisions related to the provisions of the Sick Industries Special Provisions Act(SICA) of 1985 over the Companies Act. The three judge bench consisting of JJ. Jagdish Singh Kehar, madanB. Lokur and C. Nagappan dismissed the writ petition stating that its exercise of analyzing the previous judgments on the issue is merely an academic one. Although, the SICA has been repealed and most of the provisions related to the winding up of the Sick Companies are included in the new Companies Act, 2013; the Judgment is clear on the application of the provisions in respect of conflicting opinions.

Facts of the Case

In the year 2002, the Petitioner Company had filed Company Petition No 1 in the Allahabad High Court for winding up the Respondent Company on the allegation that it has become unable to pay its huge undisputed debts. Eventually, after two years of adjournment, the Company Court passed an order on 12th March 2004 holding that on account of the incapacity

of the Respondent Company to pay up its huge debts, it is just and equitable that it must be wound up.

However, before this order was passed, the respondent Company had made an application for a reference under the Sick Industries Companies Act (1965) to the Board of Industrial and Financial Reconstruction(BIFR) on 3rd February 2004 which was received by the BIFR the next day. The Reference was scrutinized and registered as Case No 153 of 2004 on the 17th of March 2004.

Aggrieved by the Company Court Order of 12th March 2004, the Respondent Company appealed before the division bench of the High Court and Leave to Appeal on the Judgment was passed subsequently on 24th February 2006. The High Court referred the matter to the Supreme Court and hence the Appeal reached the Supreme Court.

In between 2006 and 2011, the following incidents took place. Pursuant to the Case before the BIFR, the petitioner Company had not participated in any of its proceedings. During the proceedings before the BIFR, a Draft Rehabilitation Scheme(DRS) for the revival of the Company was filed and advertised on 18th January 2008. There were some disagreements in the course of the proceedings before the BIFR, but none was raised by the Petitioner Company. The BIFR finally issued certain directions, one of which was sanctioning the Rehabilitation Scheme under Section 19(3) and Section 19(4) of the SICA. Madura Coats had not challenged any of these settlement provisions. Moreover, the respondent Company had paid more than fifty percent of the dues as per the settlement scheme to the petitioners by means of a Cheque which was en cashed by the petitioners on 19th December 2011.

Issues before the Court

The Supreme Court observed that different situations can arise in the interplay between the Companies Act and the SICA in the matter of winding up of a Company.

1) When the winding up proceedings are Pending before the Company Court and a Reference is made before the BIFR.
2) When proceedings are pending both before the BIFR and the Company Court but no order of winding up has been passed against the Company.
3) Where a winding up order is passed by the Company Court but is stayed in appeal.

Findings of the Court

Referring to the first situation, the Supreme Court observed that a similar situation had arisen in the Real Value Case[3] where winding up proceedings were initiated and the appointment of a Provisional Liquidator was under challenge. The Supreme Court in that case had concluded that the reason why after a reference is registered after scrutiny, it becomes mandatory for the BIFR to conduct an enquiry so as to ensure that the assets should not be sold nor the Company be wound up. Here, the Court reiterated the position by stating equivocally that the enquiry under Section 16 of the SICA must be treated to be commenced as soon as the registration of the reference is completed after scrutiny and that action against the company's assets under the Companies Act must remain stayed until a final decision is taken by the BIFR.

For the second issue, the Court took the view in Tata MotorsLtd v. Pharmaceutical Products of India Ltd[4] that the provisions of the SICA would prevail over the provisions of the Companies

Act. Then, the Court had relied upon the ruling in NGEF Ltd v. Chandra Developers (Pvt) Ltd[5]. to conclude that the Company Court and the BIFR do not exercise concurrent jurisdiction. "Till the Company becomes a Sick Company having regard to the provisions of sub-section (4)of Section 20 [of the SICA], BIFR alone shall havejurisdiction as regards sale of its assets till an order of winding up is passed by a Company Court."

The Supreme Court referred its own decision in Risabh Agro[6] wherein it was held that the provisions of the Section 22 of the SICA would be attracted even after an order of winding up has been passed. It was noted that a winding up order passed under the Act is not the culmination of the proceedings before the Company Court but is in effect the commencement of the process which ultimately wouldresult in the dissolution of the company in terms of Section481 of the Act.

Finally, observing the above as a matter of law, the Court also held that in view of the subsequent developments and the fact that Madura Coats had participated before the BIFR and has already obtained its dues in respect of the rehabilitation scheme approved and sanctioned by the BIFR, the Supreme Court dismissed the appeal.

Ratio

"Whatever be the situation, whenever a reference is made to the BIFR under the Sick Industries Act (SICA), the provisions of the latter would come into play and they would prevail over the provisions of the Companies Act and proceedings under the Companies Act must give way to proceedings under the Sick Industries Act."

Impact of the Judgment

The enactment of the new Companies Act 2013 meant that most of the statutory provisions applicable to Companies other than the Companies Act like the SICA would be consolidated. Likewise, the provisions related to the SICA have been incorporated into the Companies Act 2013 in Section 253. However, the new Companies Act 2013 makes many fundamental changes while consolidating the core of the SICA. The most important change being the abolition of the BIFR. The powers and functions of the BIFR have been changed to the Company Law Board with any appeal, reference or proceedings pending before the BIFR standing abated. The respective Company is allowed to make references to the Board within 180 days from the commencement of the Act.

At this juncture, it is also important to note that the new Act does not make any note about the overriding effect of the provisions of the Sick Industries. This is in the juncture when the Statute elaborately defines what a Sick Company is and what are the various provisions related to the revival of the sickness. A judgment that the provisions of the SICA would prevail over the Companies Act, though not retrospective in operation can therefore be used in this context, when two conflicting claims are present before the Company Law Board.

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RIGHT TO PRIVACY IN THE DAWN OF INFORMATION AND COMMUNICATION TECHNOLOGY: SHOULD WE REALLY NEED ZERO INTERFERNCE?

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ABSTRACT

Internet is the breaker of all geographical barriers but this virtual city is the challenger of individual privacy. India has witnessed itself recent phenomenal digital growth for future IT destination. Such growths and schemes lack unique characteristics such as anonymity and difficulty of attribution. Privacy, security and right to information are three edges of a triangle. This art unfurls the originating penumbras of privacy quoted in the landmark judgments under the Indian Constitution and traces the evolution of notions of privacy from the premature surveillance cases to privacy safeguards. A harmonious balance is required among the cyber security, cyber crime and Right to privacy in the era of borderless cyber space keeping in mind that 'There is right of privacy with the right to live'. We need more matured awareness about both the issues and the existing regulations to achieve perceptible change.

Key Words: Digital, Privacy, Security, Interference, Cyber, Crime.

India has witnessed itself recent phenomenal digital growth for future IT destination. Internet is the breaker of all geographical barriers but this virtual city is the challenger of individual privacy. Privacy being have ornamental value makes it matter of great concern and cost. That's why breach of same is dynamic and evolving with innovative technologies. Privacy, security and right to information are three edges of a triangle. This art unfurls the originating penumbras of privacy quoted in the landmark judgments under the Indian Constitution and traces the evolution of notions of privacy from the premature surveillance cases to privacy safeguards. A harmonious balance is required among the cyber security, cyber crime and Right to privacy in the era of borderless cyber space keeping in mind that 'There is right of privacy with the right to live' A right to privacy per se would give the wronged party a right to damages against another private party unlike a constitutional right to privacy, which only gives rights to the state.

Jurisprudence: Over-Sighting of Privacy

Privacy being have ornamental value makes it matter of great concern and cost. That's why breach of same is dynamic and evolving with innovative technologies. A right to undisturbed

privacy is not yet recognized results interruption in it has become the order of the day. A right to privacy per se would give the wronged party a right to damages against another private party unlike a constitutional right to privacy, which only gives rights to the state.[1] During the framing of constitution whole world was struggling against the World War II, inhuman excesses of Nazi Government. It seems that our wise framers had forget to gift fundamental right to Privacy even having lessons from World War II, inhuman excesses of Nazi Government, consequences of which are coming in front us. The main committee has deleted provisions for not intercepting in correspondence, telegrams and telephones.[2] Why we don't need a fundamental right to privacy?

It is should promoted inclusion of right to privacy as one of the fundamental rights.[3] Alladi Krishnaswami Ayyar vehemently dissented most vocal critically as "inclusion of such provisions as fundamental rights will lead to endless complications and difficulties in the administration of justice". It was thought that, if citizens have a fundamental right to privacy of correspondence, this would come in the way of the criminal justice system.

Hon'ble Jeevan Reddy, J.[4], has articulated that "The right to privacy as an independent and distinctive concept originated in the field of tort law, under which new cause of action for damages resulting from invasion of privacy was recognized. This right has two aspects which are two faces of the same coin – (1) the general law of privacy which affords a tort action for damages resulting from an unlawful invasion of privacy and (2) the constitutional recognition given to the right to privacy which protects personal privacy against unlawful governmental invasion".

According to Justice Mathew [5]:

> *"Our founding fathers were thoroughly opposed to a police Raj. Therefore, the court must draw boundaries upon these police powers so as to avoid breach of constitutional freedoms. While it could not beside that all domiciliary visits were unreasonable, still while interpreting them, one had to keep the character and antecedents of the person who was under watch as also the objects and limitation under which the surveillance could be made. The right to privacy could be restricted on the basis of compelling public interest."*

Art. 21 guarantee a fundamental right to privacy which includes the 'right to be left alone'.[6] This right is not absolute and it is subservient to the 'right to information' and 'larger public interest'.[7] It fades out in front of the right to information and larger public interest.[8] In 2010, the Delhi HC opined that on a through perusal of the preamble and S. 8(l)(j) of the RTI Act, 2005 it could be inferred that any information relating to personal information which would cause unwarranted invasion of the privacy of the individual are not to be given unless a larger public interest justified the disclosure of such information.[9] So, if this right is not found to be a fundamental right, there would be no legal basis for the 'tortious' right to privacy to survive.

Constitutional Provisions

Art. 21 gifts absolute power to the state on breach of the rights of an individual only if subject-matter is of national interest, morality, public tranquility, security etc. The rights are categorized in several nomenclatures like the privileged communication, withholding of documents, domestic affairs, matrimonial rights etc. That's why disclosures of private information are justified under certain circumstances[10] but "liberty" U/A 21 is comprehensive

enough to include "privacy" also. Our constitution does not expressly declare right to privacy as a fundamental right but the essential ingredient of personal liberty.[11] Acc. to Anglo-Saxon jurisprudence privacy is recognized as an important aspect of liberty of human beings.[12] Reintroduction of this right as organic right[13] was upheld by Mathew J. and subject matter of evolution.[14]

The issue of tapping of telephone[15] which could not be curtailed '*except according to procedure established by law which is just, fair and reasonable'*. It is well established that the telephonic conversations often of an intimate and confidential character, tapping of same is a serious invasion of privacy.[16] It is an exercise of right to freedom of speech and expression protected[17] subject to maintaining privacy of others.[18] S. 5(2) of Telegraph Act, 1885 allows the telephone tapping whose constitutional validity of this provision has not been questioned. No human effort is made except provisions, these are: The UDHR, 1948 and Art. 17 of ICCPR, 1966 provide for right of privacy and do not go counter to Art. 21. Moreover, common law theory of torts shields the privacy as applied by the Indian Courts, traditional law and Constitution of India. Bill Gates said[19] "Loss of privacy is another major worry where the network is concerned".

We allow a life insurance company to examine our medical records, before it determine whether it wants to assure our mortality. An insurance company may also want to know whether we indulge in any dangerous pastimes, such as hang gliding, smoking, or stock car racing. Should we insurer's computer be allowed to cruise the network for records of our purchases to see whether there is may information to examine our communications or entertainment records to develop a psychological profile? How much information should a state or agency be allowed to see? Hence, we'll need to define both practical and legal limits of privacy.'

Information Technology Act, 2000, India

The S. 43(a) of the IT Act, 2000 (herein after referred as Act of 2000) states the pros and cons of several acts which derives the penalty for damage to computers and their systems etc. S. 66 deals with the hacking of computer. In the line of explanation of the legal provisions, S. 72 deals with the breach of confidentiality and privacy and its penal cost.

Simon Davies highlighted that[20] "CCTV may turn out to be the most obvious and onerous future intrusion, CCTV systems have moved in the space of 15 years from 'first generation' to Second generation to the modern 'third generation' systems that rate integrated with software to automatically recognize faces and to analyze individual behaviors which is another serious concern" Recently, collection& use of personal information as a commodity by corporations with little regard for the privacy of individuals has reached epidemic proportions.[21] It causes lagging of law.

Identification of net users is the most controversial area, but the companies are developing new ways to improve identification and merge user identities with the real name and personal information. The Cookie allows advertising network companies that can track users across thousands of sites. Several specifications has been developed by the internet Engineering Task Force for the next versions of the Internet's underlying protocols called IPv6 that will assign a unique permanent ID number to every device hooked into the net- one day including

our refrigerator and VCR. It marks a question that who requires cookies when ones refrigerator will inform on him?

Digital India - is Vital Target?

The present Government is dreaming of digital India without estimating the extent of privacy breach and type of breach happened due to cyber crime in past years. Factually, IT is source of survival in Indian companies; breach of same destroys stake of company as well as the nation. Professional safeguard regarding privacy is a commercial safeguard than legal safeguard.

The present government has considered the enactment of a privacy law in the country. It is well known that the Government of India facilitates surveillance by US and interchanging of data through e-mails. It resulted in increasing of quantum of financial loss and privacy related cases in the nation due to cyber attacks. Though balancing of cyber security and right to privacy is extremely complex. In absence of any statute on privacy which can care data privacy and protection is need of this time. This futuristic digital India needs institution of legal framework on privacy. The Government agencies are able to obtain information from a third party more easily which gives expansion to ability of the government to obtain information from third party affects both businesses and individuals. It is a touchy issue and an infringement of privacy. Such issues concerning performance and latency are problematic.

In view of enormous data, very sensitive in nature, being consigned to cyber space each day particularly in the light of Government's visionary UIDAI programme and digital India, the government should not jeopardize the privacy of citizens.[22] The Government cannot take plea that S. 43(A) is based on self- regulation. Our government is still proposing the similar statute but it is yet to take shape in the below mentioned issues:

A. Cloud Computing

It has in spite of gifting benefits has raised privacy and confidentiality risks. Its efficiency, flexibility, easy set up and cost computing privacy risks. The users connect to the cloud, which appears as a single entity as opposed to the traditional way of connecting to multiple servers located on company premises.[23] IT managers can modify the technology without customers consent. Similarly, Act of 2000 allows other party to seek data from cloud service provides without consent of user. So, such disclosures create threat to laws, principles and interest. The privacy regulations impose dramatic impact between external cloud and traditional IT. This concept brings numerous uncertainties concerning compliance with privacy regulations.

B. Spam & Spyware: Need Stiff Penalty

It is a junk or unwanted instant message which is keeping rising. Its victims are facing the unavailability of laws likewise the SPAMs one. Spyware results in the draining computer's resources, less speed of internet connection, spy on user's surfing, and even forcibly redirect user's web browser. We lack legislation in this regard. Uninterested mobile users who get calls from telemarkets could register with the national do not call service. It kept tight-lipped on whether those users would be spared the incessant rain of SMSs from such markets. It needs casting of stiff penalties upon concerned authorities.

C. Directories: Other Mysteries

The individual are included in public directories automatically but they are entitled, free to charge, to be omitted from a printed or electronic directory at his request. The individual must

be given the opportunity to opt-out with respect to inclusion of some or all of their data in the directory.

The directives need the safeguards against the nuisance of automatic call forwarding and subscribers must be able to impede the forwarded calls by uncomplicated request to the service provider. However, it is reality that the visitor must be informed only once before the deposit of a large number of cookies challenges these shields. The right of websites to make access conditional on receiving of cookies also weakens the privacy rights.

D. Social Networking: Need Zero Interference

Social Networking is the communication of people online through social networking websites like LinkedIn, Facebook etc. The users generally post their personal information which clearly gives rise to privacy issues. However, social networking sites use click-wrap agreements 'I agree, user has accepted the T&Cs and would likely have waived some of his privacy rights. These T&Cs of said agreements are usually easily unreadable and users tend to click 'I accept' without reading anything. These sites may not provide sufficiently security measures as there are no SSL logins provided. This makes easier for third parties to hack the user account. The information obtained through these websites can be used to identity online theft, physical stalking, and blackmail. Facebook claimed that they used cookies for security purposes only while, the cookies place on the user's computer automatically downloaded webpage even after the user had logged out.[24] It is again unwanted interruption. However, certain agencies are increasing pressure on these websites to build effective security systems to enable exchange of messages and information without violating privacy rights. [25] Users can only wait for perceptible change in the direction of privacy.

E. Privacy Bill: Inside the Pipeline

Privacy bill is still in pipeline and yet to be enacted. Privacy is the interest that individuals have in sustaining a personal space, free from interference by other people and organizations. [26] This notion has several dimensions like the privacy of personal data known as "data privacy" or "information privacy". Clause 3(2) of the said bill prescribes maintenance of the confidentiality of communication and safeguards for their interception. It aims that person can legitimately claim that data which need not be automatically available to other people, the person should have a substantial degree of control over the data and its use.

F. Information Privacy: Is Survaillance Obligatory?

Through cookies and tracking software, website owners are able to follow consumers' online activities and gather information about their personal interests and preferences. Despite having substantial benefits, consumers are still extremely concerned about the privacy of their personal information in the online marketplace. [27] The software applications are made complicated and prohibitively expensive by technological constraints.

The privacy issues are not only different in scale but also in their nature from those that arose in the past. There is a particular concern about the use of information gathered from children, who may lack the ability to recognize and appreciate privacy concerns that are much more serious than before. It is to be examined the legal and policy response is and what it ought to be. It is evident that Indian legislature has largely ignored the subject of privacy of personality identifiable information. S. 72 is only single provision having limited scope, narrow

application and significant only to offences by authorities such as adjudicating officers, members of CRAT and Certifying authorities under the statute. No particular authority concerned with understanding the importance of the issue and bringing in regulations to curb unscrupulous use of personal information.

It is vital that legislators recognize that the safety of personally identifiable information is fundamental if one requests to foster a safe and trustworthy electronic environment- the avowed idea of the IT Act. This is one annulled in law and policy that just cannot be overlooked while, TRAI customer preference regulations, 2010 granted supplementary alternatives to the customer. Every service provider, who is , every service provider is required to maintain and operate a register called as ‘Provider Customer Preference Register’ for registering the preference of their subscriber under either ‘fully blocked category’ and ‘ partially blocked category’. [28]

A service provider has to ensure that a telemarketer shall, before sending any SMS to a telecom subscriber, cleanse the telecom number of the subscriber with the database received from National Customer Preference Register.[29] It is significant to note that transactional messages are exempted from these abovementioned regulations. These messages are typically from bank/insurance companies to telecom service providers giving information relating to their account or railways/airline to their passengers regarding their schedules.[30] Hence, they maintain privacy to some extent.

Conclusion

It is unclear that whether the options provided under the Act of 2000, are the only options or merely that if either of these options is used, the concerned business is “deemed” to have complied with its obligation to use “reasonable security procedures”. This appears to be a case of one step forward and two steps backward. Last but least, we need a government agency to implement the rules in pro-active, business minded manner to get perceptible change.

This valuable constitutional right can be canalized only by civilized processes. We need a comprehensive and people friendly policy pertaining to protection of privacy of citizens’ harmonious relation between the safeguards with the privacy right.

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RIGHT TO EDUCATION: AN ILLUSION OR REALITY

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ABSTRACT

Right to education is not a new concept in Indian legal system. Right to education can be traced from Ancient India. Even the international communities such as United Nations and others have time and again urged its members to work towards education for all. Various international conventions and treaties encourage education for all the people. Billions of dollars are given in Aid to under developed countries in order raise the literacy rate. Education is the important key by which most of the problems and be solved. But the sad state is that the underdeveloped countries spend more in commercial infrastructural development than on intellectual development. This caused the under developed countries to remain in the process of developing all throughout. Even women education has be given importance by the international organizations. Article 45, of the Indian Constitution before the Eighty-sixth Amendment, gave the mandate to the state to attain the right to free education within ten years from the commencement of the Constitution. But the pity irony is that, it took more than five decades to include this right in the Part III of the Constitution and six decades to enact a statue on this right. It is one of the most neglected right in our country. Because of illiteracy India is facing many socio-economic problems such as poverty, population, unemployment etc. etc. Indian judiciary has taken the first step in realizing the dream of free education for all. It was judiciary which mad Right to education a fundamental right, much before the legislatures could do so.

In this paper I will be dealing with various important international instruments which speak about Education.

Key Words: Right, Education, Indian, Constitution, Legal, System, Children.

"Education is the most powerful weapon which you can use to change the world"

–Nelson Mandela

There are certain rights without which other rights cannot be effectively realized. These rights can be termed as core rights. Right to Education is one of them. Nelson Mandela has rightly said that it is the most important weapon to change the world. Education is the most important right without which you cannot exercise other rights in an effective manner. Education is an investment in the future. But this right has been neglected. Millions of children in our country are out of schools. This has led to various social and economical problems in India like poverty, unemployment etc. every year our country in its budget makes provision for education. Many laws and policies are made by us, but implementation of these policies is not up to the mark.

Even the international communities such as United Nations and others have time and again urged its members to work towards education for all. Various international conventions and treaties encourage education for all the people. Billions of dollars are given in Aid to under developed countries in order raise the literacy rate. Education is the important key by which most of the problems and be solved. But the sad state is that the underdeveloped countries spend more in commercial infrastructural development than on intellectual development. This caused the under developed countries to remain in the process of developing all throughout. Even women education has be given importance by the international organizations. In this paper I will be dealing with various important international instruments which speak about Education.

Right to education is not a new concept in Indian legal system. Right to education can be traced from Ancient India. Article 45, before the Eighty-sixth Amendment, gave the mandate to the state to attain the right to free education within ten years from the commencement of the Constitution. But the pity irony is that, it took more than five decades to include this right in the Part III of the Constitution and six decades to enact a statue on this right. It is one of the most neglected right in our country. Because of illiteracy India is facing many socio-economic problems such as poverty, population, unemployment etc. etc. Indian judiciary has taken the first step in realising the dream of free education for all. It was judiciary which mad Right to education a fundamental right, much before the legislatures could do so.

Meaning of Education

To understand the actual meaning of Right to education it is important to know the connotation of the term education. For this it is important first to distinguish education from mere literacy. There is a thin but major line plays a central role in formulating framework and action plan in international and national arena. Moreover, the broader understanding of the concept of education will help to understand the magnitude of Right to education as human rights. In a wider sense, education means "all activities by which a human group transmits to its descendants a body of knowledge and skills and a moral code which enable that group to subsist"[1] whereas, in narrower sense, education connotes teaching and instruction in specialised institutions. To be more precise, it means formal teaching or instruction, comprising primary, secondary and higher education.[2]

From this these two aspects of definition, the significance of education can be drawn. It the way by which the level institutions (be it primary, secondary or tertiary with their diverse stream) facilitate to realize their existence in the society. In other words, all the basic necessities that human beings need to survive and develop in the society can be by far achieved, if he or she has proper orientation to education.[3]

Post-Independence Educational System in India

India got its Constitution enforced on 26 November 1950, in which Article 45[4] a directive principle promising right to education to children until the age of fourteen years, and this was to be attained by the state within ten years from the commencement of the Constitution. But the pity irony is that it took India five decades to recognize Right to education as fundamental right. And almost six decades to pass Right to education Act. The path of achieving Right to education was not easy. For better understanding of this right let us see the historical development of this right.

'In November 1948, under the Chairmanship of Dr.Radhakrishnan, University Education Commission was appointed by the Government of India. The commission made various recommendations regarding right to free and compulsory education for all. In the year 1950, when India got its Constitution**,** Article 45[5] a directed the state to ensure right to education to children until the age of fourteen years, and this was to be attained by the state within ten years from the commencement of the Constitution. But it took much more time than expected. In the year 1952-53, Secondary Education Commission was appointed to modernize the India's education system.[6]

To realize the dream of Right to education many schemes were made, such as, the Radhakrishanan commission, the Kothari commission and the National Policy on Education which laid emphases on science and technology. The National council of Educational Research & Training (NCERT) was formed in the year 1961, with an objective of advising the government of policies and programmes to improve education system in India.

1968 National policy on Education (NPE)

On the Bases on the report of the Education Commission, the government announced the first National Policy on Education in 1968, which called for a "radical restructuring" which equalise opportunities in order to achieve national integration and greater cultural and economic development.

1986 National policy on Education (NPE)

This Policy reaffirming the goal of universalisation of elementary education but failed to recognise the 'Right to Education'. This was also criticised for having introduced non-formal education in India. This policy expanded the Open University system where Indira Gandhi National Open University was established.

1992 National policy on Education (NPE)

The 1986 policy was reviewed by the Acharya Rammurti Committee in 1990, and this committee reformed the 1986 policy by formulating the 1992 policy. The committee recommended that this right should be made a Fundamental Right under Part III of the Constitution of India. However, immediately this recommendation was not implemented.[7] India after participating in the World Conference on Education for All in 1990, received international focus for free and compulsory education. In the year 1992, India also ratified the United Nations Convention on Right of the Child.[8]

The Supreme Court first recognized the right to education as a fundamental right in ***Mohini Jain v. Union of India***[9]. In this Judgment the Supreme Court observed that:

'Right to life' is the compendious expression for all those rights which the courts must enforce because they are basic to the dignified enjoyment of life. It extends to the full range of conduct which the individual is free to pursue. The right to education flows directly from right to life. The right to life under Article 21 and the dignity of an individual cannot be assured unless it is accompanied by the right to education. The State Government is under an obligation to make endeavour to provide educational facility at all levels to its citizens. (para 12)[10]

In 1993 the Supreme Court narrowed the ambit of the fundamental right to education as propounded in the Mohini Jain case in the case of ***J P Unnikrishnan vs. State of Andhra Pradesh,***[11]**.** The Court observed that:

"The right to education which is implicit in the right to life and personal liberty guaranteed by Article 21 must be construed in the light of the directive principles in Part IV of the Constitution. So far as the right to education is concerned, there are several articles in Part IV which expressly speak of it. Article 41 says that the "State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickens and disablement, and in other cases of undeserved want". Article 45 says that "the State shall endeavour to provide, within a period of ten years from the commencement of this constitution, for free and compulsory education for all children until they complete the age of fourteen years". Article 46 commands that "the State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation. The three Articles 41, 45 and 46 are designed to achieve the said goal among others. It is in the light of these Articles that the content and parameters of the right to education have to be determined. Right to education, understood in the context of Articles 45 and 41, meant: (a) every child/citizen of this country has a right to free education until he completes the age of fourteen years and (b) after a child/citizen completes 14 years, his right to education is circumscribed by the limits of the economic capacity of the state and its development. We may deal with both these limbs separately."[12] (para 44).

Saikia (1997) Committee

The ministry of Human Resources Development in the year 1996 appointed the Saikia Committee under the chairman of Mr. Muhi Ram Saikia, Mister of State for Human Resources Development, Government of India, to consider the proposal of making Right to elementary education a fundamental right.[13] The committee recommended amendment to the Constitution by making Right to free Education a fundamental right up to the age of 14 years.[14]

165th Law Commission Report[15], 1998

The Law Commission suomoto took up the issue of right to education in its 165th Report in 1998. 'Referring to the Constitution (Eighty-third Amendment) Bill, 1997, Law Commission in its report in paragraph 6.1.4 stated:

"The Department of Education may perhaps be right in saying that as of today the private educational institutions which are not in receipt of any grant or aid from the State, cannot be placed under an obligation to impart free education to all the students admitted into their institutions. However, applying the ratio of Unnikrishnan[16] case, it is perfectly legitimate for the State or the affiliating Board, as the case may be, to require the institution to admit and impart free education to fifty per cent of the students as a condition for affiliation or for permitting their students to appear for the Government/Board examination. To start with, the percentage can be prescribed as twenty. Accordingly, twenty per cent students could be selected by the concerned institution in consultation with the local authorities and the parent-teacher association. This proposal would enable the unaided institutions to join the national endeavor to provide education to the children of India and to that extent will also help reduce the financial burden upon the State." [17]

The Constitution (Eighty-Sixth Amendment) Act, 2002

Based on the report of the Law Commissions of India and the recommendations of the Standing Committee of Parliament, the Part III, Part IV and Part V were amended by passing The Constitution (Eighty-Sixth Amendment) Act, 2002.

Now the Article 21A, Article 45 and Article 51A(k) after the amendment look as under –

"Article 21A. Right to Education. – "*The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine".*[18]

Article 45. Provision for early childcare and education to children below the age six years.- "*The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years."*[19]

Article 51A (k): **"***who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years."* [20]

The supreme Court in *Unnikrishnan* case, other than making right to education a fundmental right had also held that *"The private educational institutions have to and are entitled to charge a higher fee not exceeding the ceiling fixed in that behalf*"[21]

The above scheme which was framed by the Supreme Court in the *Unnikrishnan*'*s* case was held to unreasonable in *T.M.A Pai Foundation v State of Karnataka*[22] in respect of private unaided educational institutions.[23] The Court was of the opinion that: "The scheme in *UnniKrishnan's* case has the effect of nationalizing education in respect of important features, viz., the right of a private unaided institution to give admission and to fix the fee." [24] (para 38)

The scheme in *Unnikrishnan's*case was further replaced by the Supreme Court in *Islamic Academy of Education v. State of Karnataka*[25] *and P.A Inamdar v. State of Maharashtra.*[26] Regarding the matter of admission and fee fixation in private unaided educational institutions continues,[27] with Courts has time and again improved this scheme through its various decisions.[28]

In the case of *Superstar Education Society v. State of Maharashtra*[29] the Supreme Court held that, "*It is the duty of the State Government to provide access for education. Unless new schools in the private sector are permitted it will not be possible for the State to discharge its constitutional obligation...the same time ensuring that the schools follow the parameters and conditions prescribed by the Education Code*"(para 11).

In 2008, the Supreme Court in *Ashok Kumar Thakur v. Union of India*[30] held that "*Union of India to set a time-limit within which this Article is going to be completely implemented. This time- limit must be set within six months. In case the Union of India fails to fix the time-limit, then perhaps this work will also have to be done by the Court. The right to free and compulsory education is perhaps the most important of all the fundamental rights. For without education, it becomes extremely difficult to exercise other fundamental rights*."(para 10)

Right of Children to Free and Compulsory education Act, 2009.

Ultimately the parliament passed the above Act on 3rd September 2009, in compliance of the mandate laid in Article 24A of the Constitution of India. India became one of the 135 Countries to make education a fundamental right with effect from April 1, 2010 when RTE

was enforced.[31] The then Prime Minister of India Dr.Manmohan Singh said on this Act: " we are committed to ensuring that all children, irrespective of gender and social category, have access to education- an education that enables them to become responsible and active citizens of India" [32]

The Constitutionality of this Act was challenged in *Society of Unaided Private Schools of Rajasthan v. Union of India*[33], where the Supreme Court held that this Act is Constitutional valid.

Legal Framework in India Regarding Right to Education

The following constitutional and statutory provisions provide the existence of Right to Education in India.

A. The Constitution of India

- Article 21A of Constitution of India:

"The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine"

Education is an important facet of human rights. International agencies like United Nations and UNESCO lay down the obligation on the member states to make education as a right for the children. Considering the international obligations and socio-economic conditions prevalent in India, the Article was added in the constitution to impose an obligation on the state to provide free and quality education to the children in government aided institutions. Under Articles 21 and 21A of the Constitution, therefore, a child has a fundamental right to claim from the State free education up to the age of 14 years.[34]

- Article 39 (f) of Constitution of India:

"That children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment."

This Article requires the state to ensure for its people adequate means of the livelihood, fair distribution of wealth, equal pay for equal work. Interpretation of sub clause (f) also imposes an obligation on the State to make laws which provides the children with facilities and primary education which itself make them, self-confident and protects them against exploitation. Child cannot develop to be a responsible and productive member of the society unless an environment is created which is conducive to his social and physical health.[35]

- Article 45 of Constitution of India.

"*The State shall endeavor to provide, early childhood care and education for all children until they complete the age of six years"*

The Constitution of India by the Eighty-six amendment in the 2002 replaced the earlier words of article which follow "The State shall endeavor to provide within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years". Whereas the previous article after 45 years of the enactment, failed to serve the purpose but still the new amendment imposes the obligation on the government to fulfil the aim. Article 45 was the only Directive Principle which had a

built-in time frame for achievement, another indication of the great significance accorded to it by the framers of the Constitution[36]

- Article 46 of Constitution of India

"*The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.*"

Constitution of India gives a direction to the State to make law regarding the educational interest of the weaker section of the society which includes Schedule Castes and Schedule Tribes along with economically weaker sections of the society. The Supreme Court in the case of *Shantistar Builders* v. *Narayan KhimalalTotame and Ors,*[37] held that a person drawing the income below the reasonable living standard also constitutes weaker sections of society.

- Article 51A (K) of Constitution of India

"*Who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years.*"

The provision was added by the 86th Amendment in the year 2002 as a fundamental duty. Though these duties are not enforceable, yet they are in the form of guiding principles and impose a duty on the parents or guardian of a child to assist him in attaining education. He purpose is to prepare them for elementary education and to provide early childhood care and education for all children until they complete the age of six years and the appropriate government has to take necessary steps for providing free pre-school education for such children. Further, the Act also cast a duty on every parent or guardian to admit or cause to be admitted his or her child or ward, as the case may be, for an elementary education in the neighborhood school, which is in conformity with Article 51A(k) of the Constitution.[38]

B. Right to Education Act, 2009[39]

In pursuance to Article 21A of Constitution of India, the Parliament of India enacted the Right to Education Act on 4 August 2009. The Right of children to Free and Compulsory Education (RTE) Act, 2009, which came into force on 1st April, 2010 after 62 years of independence, reflects the important changes brought about in the existing framework to give a legal sanctity to a requirement that has been neglected for a long period of time. India has now joined the league of countries that provide the Right to Educations as a constitutional security and ensure free and compulsory education. The Central Government along with the respective State Governments are collectively responsible for enforcement of the right of free and compulsory education under RTE Act and Constitution of India. Let us now see the salient features of this Act.

- Right to education to every child between the age group of 6 to 14 years.
- Rights of disable children to education between the age group of 6 to 18 years.
- Centralize mode of implementation of this Act.
- No holing back or expulsion of children.
- Prohibits teachers from giving private tuitions.
- Management of government schools by Parents teaches association.

- No admission test or interview in government schools.
- Right to transfer to other school.

Conclusion

After examining the various provision of laws and judicial decision in India we can see how right to education has been neglected. Since independence our countries faced with different problems of poverty, unemployment, population growth etc. etc.

India made a long delay in incorporating right to education as a fundamental right. If it wasn't the judiciary who took the first step in making it a fundamental right, then it would have perhaps taken a decade if not more. The framers of the constitution had made it clear in Article 45, that the state had the duty to realise the right within ten years. But it took almost five decades to incorporate it in the Part III of the Indian Constitution, and almost six decades to enact a statue on this subject. Due to various reason India like its neighbours, is unable to send all its children to schools. Had India made this right a fundamental right and enacted a statue earlier, I think to great extent illiteracy would have gone down. India should understand that it is only through education that India can be developed nation. As the RTE Act is a new legislation it won't be an easy road ahead. India needs to invest a lot in Education, and this investment will surely pay rich dividends in future. India should also try and uplift the women and other weaker sections of the country.

I personally feel that India has a long way to go in realizing the education for all. It is not only the enactment of Law that is important, it is also the implementation of the enacted laws that play the vital role. I also feel the judiciary should step in and see that the right is strictly implemented to all without exceptions. Other than the Courts and legislature it is also the duty of citizens, NGOs and other socially spirited persons and organization that have to raise their voice against any sort of violating of this Right. Last but not the least, if we really want these countries to be developed than it is only education by which we can be developed.

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RIGHT TO SPEEDY TRIAL AT NATIONAL AND INTERNATIONAL LEVEL: HISTORICAL ANALYSIS

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ABSTRACT

Speedy trial is the essence of criminal justice and there can be no doubt that delay in trial by itself constitutes denial of justice. Various international instruments have shown concern towards speedy trial. The philosophy of Right to Speedy Trial has grown in age. Nature is guided by principles which become translated into ethical terms and so called laws in the form of various Vedas, Smritis etc. as well as in the lives of men.Initially the British sought to alter certain aspects of existing Muslim law that governed the country. Attempts were made to regularize and professionalize police conduct and there were reforms by Lord Warren Hastings and Lord Cornwallis to create more independence for courts and outlets for appeal. But by the end of the 18th century delays continued to plague the Criminal Courts. Throughout the 20th century, and during the first decade of the 21st, there have been various proposals offered to address the backlog in criminal trials. It is a basic principle of justice that it should be delivered without delay. Accordingly various measures have been taken up for the realization of Speedy Trial. The recurrent conflict of interest between 'delayed trial' and 'speedy trial' has bewildered the legal policy planners, legislators, researcher and the courts. The Supreme Court of India on several occasions has expressed its concern in respect of delay caused in courts. A number of steps have been formulated by state but the object of speedy trial remains a myth and has not, so for, translated into reality. In its quest to arrest the delays and conquer arrears, several committees and Commissions have suggested measures over a long period of time, though they have not been acted upon expeditiously further deepening the malaise in justice–delivery mechanism of India.

Key Words: Speedy, Trial, Historical, Analysis, Concept, Background, National, International.

The quest for justice has been an idea which mankind has been aspiring for generations down the line. Criminal Law seeks to provide order in the society; without which human beings would be driven by individual aspirations, greed and false ego. All human-beings are born with 'passions', 'emotions' and enviousness'. The instinct of human beings are always guided by one of the following-vices, as they are called: (i) *Karma,* (ii) *Krodha,* (iii) *Mad,* (iv) *Moh,* (v) *Lobh,* (vi) *Aohankar* and (vii) *Matsar.* All these find place in the modern definitions of the 'Crimes' and 'Offences'. Either one or more of the above factors from the reasons for the commission of the any or the other offences. Truly admitting that Hindu Law is based on *'Sruties', 'Shastras'* and *"Smrities'* and Muslim Law is based on Muslim Shara-law.

In india, the king was not the law- maker but was supposed to administer justice to the people. It was ordained to the king: "though shall punish those who deserve punishment, and if you fail to do so, the stronger would roast the weaker, like a fish on the spit.[1] And thus emerged the system of 'Criminal Courts' popularly known as *"Kantaka Shodhana.*"[2] It is revealed from the elaborate system laid down by Kautilya which has commendable provisions fixing a time limit for the parties to present evidence. The system provides for limited time of 3 days extending over to 3 fortnights for presenting facts and examination of witnesses.[3]

The right to a speedy trial is an ancient right that can be traced as to the reign of Henry II (1154-1189), when the English Crown was promulgated referred to as the Assize of Claredon, a legal Code comprised of 22 articles, one of which promised speedy justice to all litigants.

References to a speedy trial date back to the twelfth century and the Assize of Claredon, followed by its presence in the *Magna Carta* of 1215, as well as in the famous tomes of Sir Edward Coke.[4] And because of this sacred "entitlement … had been present in English law for over half a millennium,"[5] it should not be surprising that revolutionaries in colonial America valued this right.[6] It is a truism that the Constitutional philosophy propounded as right to speedy trial has grown in age by almost two and a half decades, the goal sought to be achieved is yet a far-off peak. India achieved independence from Britain in 1947 and its Constitution came into force in 1950. The members of the Constituent Assembly did not include explicit language enshrining a defendant's right to a speedy trial. It was only after the lifting of Emergency the Court in a concerted effort began examining the importance of not letting the incarcerated languish behind bars. The most aggressive protector of individual liberties Justice *P.N. Bhagwati established for the first time that a defendant had a fundamental right to speedy trial under Article 21 of the Constitution of India.*[7]

On the other hand, ***in United States of America***, the Sixth Amendment (forming a part of Bill of Rights) provides that *"in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall be committed, which district shall have been previously ascertained by law and to be informed of the nature and cause of the accusation to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favour and to have the assistance of counsel for his defense."*[8]

The United States of America is the only country which has enacted a legislation to implement the constitutional guarantee of speedy trial to all accused persons. The Act is known as the Speedy Trial Act which was passed in 1974. The Act prescribes a set of time limit for carrying out major events in criminal proceedings. The Act requires the trial of a defendant should commence within 70 days from the date of filing of the indictment or from the date on which the defendant appears before a judicial officer of the Court, whichever is later. The indictment must be filed within 30 days from the date of arrest or service of summons. If a violation of the provisions of Speedy Trial Act occurs, the indictment against the defendant must be dismissed. The District Court, however, retains the discretion to dismiss the indictment either with or without prejudice.

Moreover, in order to ensure that accused person are not rushed to trial without an adequate opportunity to prepare their cases, the Congress amended the Act in 1979 to

provide a minimum time period during which trial must commence. The Amended Act provides that trial may not begin less than 30 days from the date the defendant first appears in Court, unless the defendant agrees in writing to an earlier date.

In United Kingdom, speedy trial is strictly ensured as is evident from the fact that they have completely revised their Criminal Justice Act in 1967; 1982; 1988;1991 and 1993 (Five times in 25 years and Four times in 10 years).

Right to Speedy Trial under Various International Instruments

Speedy trial is the essence of criminal justice and there can be no doubt that delay in trial by itself constitutes denial of justice. Various international instruments have shown concern towards speedy trial and an effort is made to identify those instruments as under:

A. Right to Speedy Trial under European Convention on Human Rights, 1950

The right to be tried within a reasonable time is guaranteed under Article 5(3) and 6(1) of the European convention. While Article 5(3) deals with the pre-trial stage, Article 6(1) relates to the trial on a criminal charge.

Article 5(3) of the European Convention on Human Rights 1950 provides[9]: “Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial.”

Article 6 of the European Convention on Human Rights[10] is a provision of the European Convention which protects the right to a fair trial. In criminal law cases and cases to determine civil rights it protects the right to a public hearing before an independent and impartial tribunal within reasonable time.

B. Right to Speedy Trial under International Covenant on Civil and Political Rights, 1966[11]

Article 9(3) of the International Covenant on Civil and Political Rights, 1966 says that “any person arrested or detained on a criminal charge shall be brought promptly before a judge or other official authorized by law and shall be entitled to trial within reasonable time or to release.”[12] The right to a fair trial is protected in Articles 14 and 16 of the ICCPR which has over one hundred and seventy State signatories and includes a promise to afford defendants the right to a speedy trial.

Article 14 states that[13]

(1) "All persons shall be equal before the courts and tribunals……

(2) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

(3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

(4) In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

(5) Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

(6) When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

(7) No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

C. Right to Speedy Trial under Universal Declaration of Human Rights, 1948

Article 8 of Universal Declaration of Human Rights, 1948 lays down that[14] "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law."Article 10 of the Universal Declaration of Human Rights is associated with the right to speedy trial and provides that[15] "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

D. Right to Speedy Trial under the American Convention on Human Rights

Article 7(5) of the American Convention on Human Rights provides that[16] "any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time".

E. African Charter on Human and People's Rights

Article 7 (1) (d) of the African Charter[17] on Human and People's Rights provides: "every person has the right to be tried within a reasonable time by an impartial court or tribunal".

F. Convention on the Rights of the Child, 1989

Article 40(2) (b) of the Convention on the Rights of the Child, provides[18]: "Every child alleged as or accused of having infringed the penal law has at least the following guarantee: Article 40(2)(b)(iii) - to have the matter determined without delay by a competent, independent and impartial authority or judicial body"

G. ICC Statute, 1998

Article 64(2) of the ICC Statute 1998 provides[19]: "The Trial Chamber shall ensure that the trial is … expeditious Article 67(1)(c) of the ICC Statute provides[20] that the accused shall be entitled "to be tried without undue delay".

H. Statute of the Special Court for Sierra Leone, 2002

Article 17(4)(c) of the Statute of the Special Court for Sierra Leone 2002 provides[21]: "In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality: to be tried without undue delay."

I. Statute of the Special Tribunal for Lebanon, 2007

Article 16(4) of the Statute of the Special Tribunal for Lebanon, 2007 provides[22]: "In the determination of any charge against the accused pursuant to this Statute, he or she shall be entitled to the following minimum guarantees, in full equality:

(c) To be tried without undue delay"

J. Canada LOAC Manual, 2001

Canada's LOAC Manual (2001), in its chapter on rights and duties of occupying powers, states that accused persons "must be brought to trial as rapidly as possible." Similarly, in Canada, Section 11(b) of the Canadian Charter of Rights provides that "any person charged with an offence has the right to be tried within a reasonable time." The expression "charged with an offence" has been held that the right to reasonable trial arises only after the person is charged, so that the reasonable time to be calculated from the time of indictment and any pre indictment delay would not be a violation of section 11(b).

K. New Zealand Military Manual, 1992

New Zealand's Military Manual (1992) provides: "Internees charged with disciplinary offences are entitled to a speedy trial".

L. Spain LOC Manual, 1996

Spain's LOAC Manual (1996) provides that judicial criminal proceedings in occupied territory shall not last longer than the usual delay.

M. United Kingdom of Great Britain and Northern Ireland

The UK Military Manual (1958) provides: "The investigation of charges against a prisoner of war shall be carried out as quickly as circumstances permit and in such manner that his trial will take place as quickly as possible. The manual further states that in occupied territories, the accused "must be brought to trial as rapidly as possible".

In United Kingdom, Article 6(1) of the Constitution of United Kingdom guarantees a right to hearing within a reasonable time in both civil and criminal cases.[23]

N. Afghanistan's Criminal Procedure Code for Military Courts, 2006

The Code states: "The military judge may, for reasonable cause, grant a continuance at the request of either party, provided that it does not violate the speedy trial right of the accused."

Right to Speedy Trial in India: A Retrospection

The philosophy of Right to Speedy Trial has grown in age. Nature is guided by principles which become translated into ethical terms and so called laws in the form of various *Vedas, Smritis* etc. as well as in the lives of men. Whatever laws (*dharma* under ancient Indian context) were developed have a sole purpose of investing justice because; unjust law is no law. Administration of justice when institutionalized in ancient India, had sole purpose to regulate the values prevailing and to uphold *Dharma.* Ancient India had a extremely advanced administrative structure – wherein social ordering matured into legal ordering and where concept of controlled power had become a well recognized norm. In ancient Indian civilization great importance was placed to *Dharma* and there was existing a democratic multi-dimensional system based on *"Rajdharma"* match able to the present Indian Constitution. In true sense at that time administration of justice was not the function of the king but the people themselves in their various *Kulas*, *Srenis, Gana, Guilds* etc. though one of the predominant purpose of institution of kingship was administration of justice.

The legal system in ancient India was primarily governed by five kinds of legal literature on priority basis. *Vedas/shrutis*,[24] *Dharmashastras,*[25] *The Smiritis*,[26] *Mimams*,[27] *Nibandas* or commentaries and digests.

Administration of justice was to be regulated by these texts and treatises. Customs and *sadacharas* were also applied. Most important thing about all these legal sources to uphold *'dharma'* was that they were 'ethically sound' (with certain exceptions)[28] and took care and divided power in whole among society at equal basis.

On the other hand the unique feature of ancient India was its homogeneity as to the system of governance and law, even though the vast area of India was never ruled by a single ruler. In contrast Europe was divided into only a handful of countries and yet the system of governance and law differed greatly for each European king had made its own laws in exercise of its sovereign power.

The close scrutiny of ancient treaties and commentaries reveals that the system had uniquely distinct features but was closer to a republic in its essence. There was high separation of powers prevailing in ancient India between the work of legislature, executive and judiciary.[29]

The Indian foundation of law cannot be stressed in any single jurisprudence. It is influenced by many races and nationalities in India. Like the Aryans, the Greeks, the Huns the Afghans, the Moguls, the Dutch, the Portugeese, the French and the English. Out of these the English left the permanent marks a culture and civilizations in India.

Under Regulation Acts, 1774, 1801 and 1873 the Supreme Courts were established at Madras, Bombay and Fort Williams in West Bengal respectively. These Supreme Courts were having the jurisdiction to issue writs. Further by the High Courts Act, 1861 these Supreme Courts were converted into High Courts. Under that Act, it provide that, "The High Courts to be

established should have and exercise all jurisdictions, every power and authority whatever in any matter vested in any of the Courts in the same presidency abolished under the said Act at the time of abolition of such last mentioned Court."[30]

Further the Government of India Act, 1935 provides "The Jurisdiction of and the law administered in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in the court, including any power to make rules of the court and to regulate the sittings of the court and of the members thereof sitting alone or in division courts, shall be the same as immediately before the commencement of Part III of this Act."[31] Hence there were only three presidencies in British India which were having the writ jurisdiction. These provisions are also reflected in the India Constitution in 1950. Article 32 deals with writ jurisdiction of Supreme Court and Article 226 deals with the jurisdiction of High Courts of every state. It is true that, Indian judicial system reflects English judicial system.

Jagmohan Singh in his book focused his analysis exclusively on the experiences of the northern Indian State of Kashmir.[32] The opening Chapter of his study describes how as early as ancient Hindu times, adjudicators, or those who were known as the "law-givers not only concerned with the frequent granting of adjournments (i.e. continuances) but also with the time period for which an adjournment could be granted."[33] The author goes on to argue that in ancient India, as well as subsequently in the Islamic Mughal period (particularly between the 16th-18th centuries), the providing of speedy trials was "held in high esteem"[34] by the various rulers of the day.[35] The reveals that towards the end of the Mughal dynasty, the criminal justice process became "lax, sluggish, corrupt, crude archaic, inhumane and over-burdened,"[36] and it was this system that the British inherited during the mid to late 1700s.

Initially the British sought to alter certain aspects of existing Muslim law that governed the country. Attempts were made to regularize and professionalize police conduct and there were reforms by Lord Warren Hastings and Lord Cornwallis to create more independence for courts and outlets for appeal.[37] But by the end of the 18th century delays continued to plague the Criminal Courts.[38] A back of a uniform set of criminal laws throughout the colony, less-than-competent adjudicators, corruption, and insufficient defense counsel were some of the contributing factors.[39]

In order to address these problems, the second half of the 19th century saw the passage of the Indian Penal Code, 1862 and Code of Criminal Procedure, 1882. The British established a series of Law Commissions to study how best to ensure that defendants would have their say in court.[40] Throughout the 20th century, and during the first decade of the 21st, there have been various proposals offered to address the backlog in criminal trials. For instance, the first comprehensive study of prison problems was made by the Jails Committee of 1919-1920, Law Commission prescribed numerous suggestions regarding the "Congestion of under-trial prisoners in jail in 1979, the Mulla Committee to study Indian prisons situation in 1980-1983 etc. Further, there have been several directives for improving the under-trial predicament by the National Human Rights Commission, 1993. There are over 63,000 cases pending in the Supreme Court (as on July 31, 2012) and 4.3 million cases in various High Courts (as of December 31, 2011) and the total number of criminal cases pending before District and Sessions courts is about 1.90 crore cases. 2.7 crore cases are pending in lower courts across the country.

The enormity of the task calls for urgent action from the government. The logo of the Supreme Court depicts, *"Yadho dharmasthadho Jayah"* which means, "Victory is where justice reigns.

When justice is denied by any society, expectations darken into depression". The Constitution of India aspires for justice in all its forms: social, economic and political. Although justice is meant to be "simple, speedy, cheap, effective and substantial", yet it remains vague to Indians and one of the major reasons are these delays in the dispensation of justice. India has firm belief in the proverb "justice delayed is justice denied".

It is a basic principle of justice that it should be delivered without delay. Accordingly various measures have been taken up for the realization of Speedy Trial. The recurrent conflict of interest between 'delayed trial' and 'speedy trial' has bewildered the legal policy planners, legislators, researcher and the courts. The Supreme Court of India on several occasions has expressed its concern in respect of delay caused in courts. A number of steps have been formulated by state but the object of speedy trial remains a myth and has not, so for, translated into reality. In its quest to arrest the delays and conquer arrears, several committees and Commissions have suggested measures over a long period of time, though they have not been acted upon expeditiously further deepening the malaise in justice–delivery mechanism of India.

Conclusion

To sum up findings on Speedy trial, the right to be tried within a reasonable time has always been a matter of great concern among all the countries of the world. The quest for justice has been an idea which mankind has been aspiring for generations down to line. Hence from the aforementioned discussion find that administration of justice in India was to be regulated by ancient texts, treatises and commentaries namely, *Vedas, Shrutis, Dharmashastras, Smritis, Mimamsa, Nilandas* or commentaries and digests. There was homogeneity as to the system of governance and law in ancient India. After analysis the historical background of right to speedy trial also find references to a speedy trial which date back to the twelfth century and the Assize of Claredon, followed by its presence in the *Magna Carta* of 1215, as well as in the famous tomes of Sir Edward Coke.

The analysis revealed that United States is the first country which has enacted a legislation to implement the constitutional guarantee of speedy trial to all accused persons. The Act is known as the Speedy Trial Act, 1974. It reveals that provision for speedy trial are made in different International covenants, charters and the Constitution of various countries around the world.

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    Article 6 reads as follows:

    In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

    Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
11. *International Covenant on Civil and Political Rights*. (1966). http://www.ohchr.org/en/ professionalinterest/pages/ccpr.aspx. (accessed on 06.08.2016).
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16. American Convention on Human Rights. (n.d.). http://www.oas.org/dil/treaties_B-32_ American_Convention_on_Human_ Rights.htm. (accessed on 14.08.2016).
17. African Charter on Human and People's Rights adopted by the eighteen ordinary session.
18. The Convention on the Rights of the Child is the first legally binding international instrument to incorporate the full range of human rights—civil, cultural, economic, political and social rights. In 1989, world leaders decided that children needed a Special Convention just for them because people under 18 years old often need special care and protection that adults do not. The leaders also wanted to make sure that the world recognized that children have human rights too.

    The Convention sets out these rights in 54 articles and two Optional Protocols. It spells out the basic human rights that children everywhere have: the right to survival; to develop to the fullest; to protection from harmful influences, abuse and exploitation; and to participate fully in family, cultural and social life. The four core principles of the Convention are non-discrimination; devotion to the best interests of the child; the right to life, survival and development; and respect for the views of the child. Every right spelled out in the Convention is inherent to the human dignity and harmonious development of every child. The Convention protects children's rights by setting standards in health care; education; and legal, civil and social services.
19. Article 64 Functions and powers of the Trial Chamber

    The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.
20. Article 67 Rights of the accused : In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality: (c) To be tried without undue delay.
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24. They are *Rigveda, Yajurveda, Samaveda* and *Atharvaveda.* They contain only some rudiments of law.
25. There are works which can really be regarded as law proper – Laws and rules of conduct regulating the entire gamut of human activity. This necessarily involves the civil and criminal laws.
26. The three principal *smiritis* which are still considered as a source of present day laws are (a) the Code of *Manu* (*manavadhar masastra*) compilled some time between 200 B.C. to

100 A.D. (b) the Code of *Yajanavalkya* written sometime between 100 B.C. to 300 A.D. and (c) the Code of Narada written between 100 A.D. to 300 AD.

27. This is to understand the real meaning of the provisions of those authorative text. It is principles of interpretation.
28. On the basis of equality principles some of the provision of the ancient Indian legal text were not sound for example in Katyayan 65-57. it is written in respect of the appointment of judges that "where *bramana* endowed with enumerated qualities is not available, *kshatriya* or *vaisya* with like qualification should be appointed, but the king should carefully avoid the appointment of *sudras*, a grossly unethical provision.
29. In the ancient India King was denied the legislative power, legislative people were not executive, judges were separate from king and kings duty was only to pronounce the judgment given by judges of his court.
30. Section 9. (1961). *High Courts Act.*
31. Section 223. (1935). *Government of India Act.*
32. Singh, Jagmohan. (1997). *Right to Speedy Justice for Undertrial Prisoners*.
33. Ibid., pp. 20.
34. Ibid., pp. 29.
35. Note, while there is little actual empirical evidence to confirm this type of view, there is jurisprudential literature that discusses the trial process in those ancient days, as well as the substantive equity of the laws themselves. See generally ROBERT LINGAT, LES SOURCES DU DROIT DANS LE SYSTEME TRADITIONNEL DE L`INDE [THE CLASSICAL Law of India] 67, 219-22 (J. Duncan M. Derret trans., Munshiram Manoharlal Publ's First Indian Ed. 1993) (1973) (discussion of laws favoring certain groups over others (e.g., Brahmins) in ancient India); 3 P.V. KANE, HISTORY OF DHARMASASTRA 246-410(1946); VARDHAMANAN UPADHYAYA, DANDAVIVEKA (Bhabatosh Bhattacharya trans., Asiatic Society Bibliotheca Indica 301, 1973).
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37. Ibid., pp. 31-32.
38. Ibid., pp. 31-36.
39. Ibid., pp. 33-34. See Krishnan, Jayanth K. (2007). Outsourcing and the Globalizing Legal Profession. 48 *WM. & Mary L. Rev*. 2189.
40. Ibid., pp. 35-36. See also Pachauri, Surendra Kumar. (1999). *Prisoners and Human Rights* 77-83.

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COMBATING TERRORISM FOR PROTECTION OF HUMAN RIGHTS

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ABSTRACT

Over the past decades, the international community has identified global terrorism as a major threat to peace, security, and stability. Since September 11, 2001, intensified counter-terrorism debates and responses, including national, multilateral, and regional approaches, have been marked by trends posing complex challenges to the protection of international human rights and fundamental freedoms. In the efforts to protect the right to life and security of the person against terrorist acts, a broad range of fundamental rights have come under increasing threat, in the Eurasian region as well as in Western nations such as the United States. The climate of fear created by the fight against terrorism has facilitated the undermining of universal human rights principles, and national security has often been invoked as justification for questionable government action affecting fundamental rights and freedoms recognized under both domestic and international law. A major challenge to counter-terrorism efforts on national, multilateral, and regional levels is how to ensure that these concerns are fully addressed.[1] Human Rights are those rights which people are entitled by virtue of their humanity. Human rights mean the rights relating to life, liberty, equality of the individual guarantee provided by the Constitution or embodied in the International Covenants and enforceable by the Courts of Law. Human rights are high – priority norms. Maurice Cranston held that human rights are matters of "paramount importance" and their violations are "a grave affront to justice". These rights are essential for all the individuals as they are consonant with their freedom and dignity and are conducive to physical, moral, social and spiritual welfare.[2]

Key Words: Combating, Terrorism, Protection, Human, Rights.

Nature of Human Rights

Human rights are generally defined as those rights which a person possesses by his simple characteristic of being a human. Moreover, these are those rights which are available to a

person and protect his interests, freedom, dignity and other rights against the interference and excesses of states and their agents. Major human rights corpus includes civil, political, cultural, economic, and social rights, and is universal in nature because these are available to all human beings.[3] In other words, human rights are inherent to all human beings, irrespective of nationality, race, sex or any other distinction.[4]

Terrorism

The terrorist acts are defined by the United Nations in generic and non binding terms, as those "*criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes.... whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them*"[5].

It is constantly being emphasized to adopt a comprehensive definition of terrorism and therefore a separate convention on terrorism is recommended to be adopted. In this regard, the General Assembly is currently working towards the adoption of a comprehensive convention against terrorism, which would complement the existing anti-terrorism conventions. Its draft *Article 2*, contains a definition of terrorism which includes "unlawfully and intentionally causing, attempting or threatening to cause" : "(a) death or serious bodily injury to any person; or (b) serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or (c) damage to property, places, facilities, or system, resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act."[6]

Moreover, the United States Department of Defence has defined the notion of terrorism that it is "the calculated use of unlawful violence or threat of unlawful violence to inculcate fear; intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological."[7]

Combating Terrorism for Protection of Human Rights[8]

The issue of terrorism has become more prominent particularly after September 11. Acts of terrorism and non state actors became a big threat for the World. But at times human rights and their protection becomes a big problem in facing as well as countering terrorism.[9] As we have noticed that the acts of terrorism are injurious for the society, in the same way sometimes acts to combat terrorism become so. Under international law all the states are bound to take effective measures against terrorism, but in doing so human rights of every society and individual must be protected in the best possible manner because both, taking effective measures against terrorism and protection of human rights are objectives of international and must not supersede each other.[10]

The central role of human rights and State obligations when countering terrorism

After the adoption of the United Nations Global Counter-Terrorism Strategy by the General Assembly in its resolution 60/288 the World community has started adopting measures towards the protection of human rights in the fight against terrorism. They have pledged to ensure that all the measures being taken in the fight against terrorism are in accordance with

their general obligations under international law. This was further discussed in the World Summit Outcome, adopted by the General Assembly in 2005, and respect of human rights during fight against terrorism was emphasized, and particularly human rights relevant to refugee law, international criminal law and international humanitarian law. [11]

At the domestic level one may criticize the other states, but at the international level it is rarely seen that human rights abuses committed by a state outside its own territory are criticized or noticed by the international community. But in the present scenario certain rules have been developed under which concept of state responsibility has been realized.[10] At various occasions Security Council also criticized states on promoting terrorism.[11] Moreover, recently at times action has been taken against various states, organizations, and even individuals who were alleged to have violated human rights.

The flexibility of human rights law

After September 11, although the USA has taken steps against terrorism, but the USA administration failed to understand that in what manner international law can be applied to the situation.[12] Therefore on the one hand where to fight against terrorism is an obligation under international law in the same way respect and to ensure of the protection of human rights is also an equal obligation of the states under international human rights law.[13]

States can limit certain human rights

However, keeping in view the circumstances of the case and all the international human rights instruments, states can limit certain human rights for a specific time period. For instance right to freedom of expression, the right to freedom of association and assembly, the right to freedom of movement, and the right to respect for one's private and family life, but in doing so every state should observe a number of conditions, in order to restrict abuse of this authority.[14]

Specific Human Rights Challenges in the Context Of Terrorism[15]

The right to life

It is alleged that human rights violations are committed by different groups and non state actors during terrorism, but states are also seen involved in the commission of the violations of human rights, and that is primarily based on lack of accountability and transparency.[16] Right to life is a fundamental human right, in absence of which one will not be able to enjoy any further human right. In counter terrorism policy although states are obliged to take appropriate measures against terrorism but they have endangered the life of citizens, especially with regard to targeted killings as alternative to their arrest and trials. Carpet bombing and targeted bombing is also a practice which has been adopted by the states on the pretext of countering terrorism, as the former has been witnessed in tribal areas by Pakistani armed forces, and the later has been seen in the shape of drone attacks by the USA.[17]

Challenges to the absolute prohibition against torture

Torture is a serious human rights violation under the international law, and has been defined in *Article 1* of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[18] The prohibition of torture and other cruel, inhuman or degrading treatment or punishment is a norm of customary international law, and a rule of *jus cogens*[19] hence is a binding norm of international law. Convention against torture strictly prohibits such a like

practice by the states and especially with regard to extracting information or confessional statements by the suspects, which has often been noted being committed by the states who claim that they are fighting terrorism.[20]

Transfer of individuals suspected of terrorist activity

All the suspects of terrorism should be dealt with in accordance with the provisions of international law, and no detention, arrest, or transfer of suspects should be made without due process of law. But unfortunately especially after 9-11, the practice of the states goes against these principles. Suspects of terrorists were extradited; transferred and deported even some of them were asylum seekers. All this was done in violation of the principle of non refulgent which is said by the jurists as a principle of *jus cogens*. Moreover forced disappearance is also prohibited under *Article 16* of the International Convention for the Protection of All Persons from Enforced Disappearance, and also recognized in *Article 7* of the International Covenant on Civil and Political Rights.[21]

Liberty and security of the person

Some states have introduced new provisions in their criminal law procedure to effectively counter terrorism, but these steps may be in violation of worldly recognized norms of human rights and without due process of law. These provisions include inclusion of provisions regarding the bail, remand and arrest of these suspects. For instance, pre-trial detention which can be effected before any specific charge, administrative detention, to prevent a person from committing or associating in commission of any offence, control orders, to control a situation while keeping a person in detention, and compulsory hearings, which allows authorities compulsory questioning and gathering information from the suspects may be cited in this context.[22]

Human Rights Violations by the State and its Agencies

Human rights violations are committed by the states in various situations. For instance, during search operations, encounters, which are sometimes genuine and at other times fake, especially with regard to Pakistan Police, opening fire in crowded areas, during detention and interrogation even if the accused has been detained without following any legal order. These violations of human rights result for a number of reasons, for instance, lack of transparency and accountability, inadequate training and education among security personnel in observing human rights, lack of scientific investigation skills and tools among the police, deficient information to, and investigation by, the police, and a moribund judicial system. Sometimes people raise their voice on these violations being committed as state terrorism. For instance the Supreme Court of India noted in ***D.K. Basu v. State of West Bengal*** that:

> "*State terrorism is no answer to combat terrorism. State terrorism would only provide legitimacy to terrorism: that would only be bad for the state, the community and above all the Rule of Law. The State must, therefore, ensure that the various agencies deployed by it for combating terrorism act within the bounds of law and not become law unto them*".[23]

Moreover, unfortunately, even after Independence, our army and police are trained on colonial footings, and that is the main reason behind their violations of human rights and state terrorism.[24]

Principle of Non-Discrimination, Terrorism and Human Rights

Principle of equality before the law and non-discrimination is one of the fundamental principles of international law and every legal system. *Article 2, paragraph 1*, of the International Covenant on Civil and Political Rights lies down that every state party has to observe this principle with regard to any person present at its territory and jurisdiction.[25] But as we have noted earlier by introduction of a discriminatory legal procedure to these terrorism suspects violates this fundamental principle. Human rights committee in this context has revised its general comment on *Article 14 of ICCPR, in 207*, and has added that right to fair trial and equality before the law is the key element in the enjoyment of international human rights.[26]

Surveillance, data protection and the right to privacy

According to *Article 17 ICCPR*, unlawful and arbitrary interference in the privacy of certain individuals is prohibited under international law. But this has been practice which continues with regard to suspects of terrorism which not only violates their individual right to privacy for the purpose of collection of data and other information, rather in some cases their family members and homes are not protected.[27]

Currently, suicide bombing is the aspect of terrorism that tends to arouse greatest public concern. This is partly because it is so difficult to combat. Suicide bombing undoubtedly brings another dimension to terrorist attacks. Past security measures have been premised on the assumption that terrorists will wish to escape alive (hence procedures such as matching airline passengers with their hold baggage). Suicide bombing is effective because it evades such measures.

Attacks are often technically simpler as well: truck bombs of the kind that have killed thousands of people in Iraq can be exploded more easily if they are steered and detonated by a human driver. The fears they inspire, as well as the technical difficulties of combating them, often lead security agencies to overreact. In Iraq and other conflicts, many individuals have been shot in their vehicles because they have been mistaken for suicide bombers; in an infamous incident in London in 2005 a Brazilian was shot dead by police on the London Underground for the same reason.[28]

Many of the groups that have used suicide bombers – including *Hizb'allah in Lebanon, Hamas in Palestine, the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka, various Chechen national groups, different Iraqi factions* – have had the rational and often realizable goal of securing national self-determination. ***Pape*** argues that even *al-Qaeda* fits this pattern on the grounds that two of its stated demands were the expulsion of United States (US) troops from the Arabian Peninsula and of Israeli troops from Jerusalem. Both these aims are technically realizable (could be the subject of negotiation) and command political support.[29]

State terrorism

On the other hand at times terrorism may be committed on the part of states instead of individuals or individual groups. That form of terrorism may be in the shape of extrajudicial killings enforced disappearance, torture and so on. The term was used particularly when French government agents blew Rainbow warrior in 1985, and presently various human rights organizations are using the term frequently in Latin America and Middle East.[30]

Violations of the United States have been reported.[31] Later on other states also practiced the same in the so called war on terror.[32] The detainees of Guantanamo are the biggest example, how the prisoners can be prevented from their recourse to international and domestic law. The situation is described by The English Court of Appeal as a "legal black hole". "If you want a definition of this place, you don't have the right to have rights", wrote Nizar Sassi, a French detainee, on a postcard addressed to his family.[33]

But in June, 2004, the U.S. Supreme Court setting aside the previous ruling about the Guantanamo Bay detainees ruled in ***Rasul v. Bush*** that U.S. courts have jurisdiction to hear the petitions of *habeas corpus* filed by the detainees of war on terrorism, at the U.S. Naval Station in Guantanamo Bay, Cuba.[34]

International Position: Judicial Perspective

Over the years human rights have expanded not only vertically by ensuring their protection and promotion, but also horizontally by making human rights as the basis for good governance. These rights are non-negotiable and non-derogable and no compromise with their violation can be permitted by any civilized society.

In ***Rasul et al v. Bush Prez of USA***,[35] Judgment of a foreign court, the court had stressed on the absolute need for protecting Human Rights of the suspected terrorists and other such enemy combatants, including by providing them a right to council.

In ***A and others (appellants) (FC) and ors. v. Secretary of State for the Home Department,***[36] the Terrorist Crime and Security Act 2001 was in question. It was basically in response to the grave and inexcusable crimes committed in NY, Washington DC and Pennsylvania on 11th Sep. 2001, and manifested the government determination to protect the public against the dangers of international terrorism. By sec 21 of the Act the secretary of state was authorized to issue a certificate in respect of any such person and section 23 gave power to person to detain him either temporarily or permanently. The court said that even the terrorist had Human Rights and they need to be protected.

In ***Lam Chi Ming v. Queen***[37] in this case the privy council summarized rejection of an improperly obtained confession in not dependant only upon possible unreliability but also upon the principle that a man cannot be compelled to incriminate himself and the importance that it attaches in a civilized society to proper behavior by the police towards those in their custody.

The appellants summarized their argument by saying that *Article 6 of the ECHR* talks of a fair trial. They summarized their argument by saying that ***measures directed to counter the grave dangers of international terrorism may not be permitted to undermine the international prohibition of torture.*** In fact Article 3 of the European convention is an absolute prohibition, not derogation in any of the circumstances.

In ***Chhehl v. U.K***,[38] article 3 enshrines one of the most fundamental values of a democratic society. The court is well aware of the immense difficulties faced by the states in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victims conduct. Article 3 makes no provision for

exception and no derogation from it is permissible *U/A 15* even in the event of a public emergency threatening the life of a nation.

In ***Ireland v. UK***,[39] The courts taking a completely humanitarian approach against torture even against a terrorist said, even if it suspected that a terrorist knows the whereabouts of a bomb which is about to go off, the courts cannot ratify even the use of limited torture.

Magna Carta charter[40] of 1215, states that no free man shall be imprisoned or dispossessed except by the lawful Judgment.

The rise of terrorism and its curbing by the different agencies like the executive, the judiciary the basic question that arises is as to what extent it is appropriate for the courts to exercise close scrutiny, and when to show restraints.

In ***Marchiori v. The Environment Agency and the Secretary of State for Defence,***[41] the claimant challenged the Environment Agency's decision to issue authorizations under the radioactive Substances Act 1933, permitting the discharge of radioactive waste by ministry of Defence contractors at *aldermaston* and *burghfield*. As the court of appeal put it, the proceedings were essentially a vehicle to give effect to the claimant's objection to nuclear weapons. After reviewing the authorities the court of appeal said:-

> *"The grave a matter of state and the more widespread its possible effect, the more respect will be given, within the framework of the constitution, to the democracy to decide the outcome".*

Basically, judicial review would remain available to cure the *"theoretical possibility of actual bad faith on the part of the cabinet ministers making decisions of high policy"*.

In ***Abbasi and ors v. Secretary Of State for the Home department,***[42] he appeals against his capture by the United States forces in Afghanistan. In 1920 he was transported to Guantanamo Bay in Cuba. He was held captive for eight months without access to a court or any other form of tribunal or even to a lawyer. His mother brings the proceedings on the contention that there is a violation of his fundamental right, the right not to be arbitrarily detained.

Issue that arose was whether and to what extent can the English court examine whether a foreign state is in violation of the treaty obligation or public international law where the fundamental human rights are engaged. The court rejected the application in that case, because it could not be said that the government had in any way abused its wide discretion. It is noteworthy that the court rejected the suggestion that the government should have done more to object to the detention on legal grounds, accepting that it was open to the federal government to consider that *"the political significance of the decisions at issue was essentially more important than the effect of legal arguments on the position of the occupying powers"*.

It was stated that the extreme cases in which judicial review would lie in relation to diplomatic protection would be if the foreign and the commonwealth office were contrary to its stated practice to refuse even to consider whether to make diplomatic representations on behalf of a subject whose fundamental rights were being violated. In such unlikely circumstances it would be appropriate for the courts to make a mandatory order to the foreign secretary to give due consideration to the applicants case.

In another case of ***S. and Marper v. United Kingdom*,**[43] in that case the court of appeal held that it was not contrary to Article 8 of the convention for fingerprints and DNA samples taken from the suspected offenders to be retained in cases where the individual in question was either acquitted or the charge was dropped. The particular point that weighed heavily with the court of Appeal was that, in determining the issue, the court of appeal had to balance the benefit which the fingerprints and the DNA samples would achieve in the fight against crime on the one hand, as against the infringement of individual privacy which would be involved in their retention. In determining on which side of the line the answer fell, the court of appeal paid particular attention to the fact that the police were in a better position than the court to assess the scale of the contribution which the fingerprints and DNA samples could make to the prevention of crime.

Indian Position: Judicial Perspective

In a landmark Judgment in ***People Union for Civil Liberties v. Union of India,***[44] the Honorable Supreme Court reiterated the importance it gave to human rights and said:

> *"The state is to maintain a delicate balance between such state action and the human rights. Fight against terrorism be respectful to human rights. The constitution has laid down clear limitation on state action within the context of fight against terrorism".*

In the words of ***V.R.Krishna Iyer***, J:

> *"the true cause of terrorism is the struggle between social justice and the systematic suppression".*[45]

In yet another landmark Judgment in ***J&K v. J&K HC Bar Association***[46]*,* the Honorable Supreme Court protected the rights of terrorists. The Honorable court tried to strike a balance between innocent hostages detained by the militants in *Hazratbal shrine* - need to supply them with food, water, medical facilities, and sanitation facilities on the one hand and to flush out militants on the other. The Supreme Court in a magnanimous decision laid down guidelines saying that food, water, lights and sanitation be provided to the terrorist and the innocent hostages.

Protecting Human Rights While Countering Terrorism and International Law

The subject of counter-terrorism and human rights has attracted considerable interest since the establishment of the Counter-Terrorism Committee (CTC) in 2001. In Security Council resolution 1456 (2003) and later resolutions, the Council has said that States must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.[47]

Security Council resolution 1373 (2001), which established the CTC, makes one reference to human rights, calling upon States to

> *"take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum seeker has not planned, facilitated or participated in the commission of terrorist acts."*

The resolution's preamble also reaffirms the need to combat by all means, "in accordance with the Charter of the United Nations," threats to international peace and security caused by terrorist acts.

The Committee's initial policy on human rights was expressed by its first Chairman in a briefing to the Security Council on 18 January 2002: "*The Counter-Terrorism Committee is mandated to monitor the implementation of resolution 1373 (2001). Monitoring performance against other international conventions, including human rights law, is outside the scope of the Counter-Terrorism Committee's mandate. But we will remain aware of the interaction with human rights concerns, and we will keep ourselves briefed as appropriate. It is, of course, open to other organizations to study States' reports and take up their content in other forums*."[48]

A Pro-Active Approach[49]

With the establishment of the Counter-Terrorism Committee Executive Directorate (CTED) by Security Council resolution 1535 (2004), the Committee began moving toward a more pro-active policy on human rights. CTED was mandated to liaison with the Office of the UN High Commissioner for Human Rights (OHCHR) and other human rights organizations in matters related to counter-terrorism (S/2004/124), and a human rights expert was appointed to the CTED staff. In its reports to the Security Council submitted as part of its comprehensive reviews of the work of CTED, which were later endorsed by the Council, the Committee said that CTED should take account of relevant human rights obligations in the course of its activities (S/2005/800 and S/2006/989).

In May 2006 the Committee adopted policy guidance for CTED in the area of human rights, saying that CTED should:

- Provide advice to the Committee, including for its ongoing dialogue with States on their implementation of resolution 1373 (2001), on international human rights, refugee and humanitarian law, in connection with identification and implementation of effective measures to implement resolution 1373 (2001)
- Advise the Committee on how to ensure that any measures States take to implement the provisions of resolution 1624 (2005) comply with their obligations under international law, in particular international human rights law, refugee law, and humanitarian law; and
- Liaise with the Office of the High Commissioner for Human Rights and, as appropriate, with other human rights organizations in matters related to counter-terrorism.

No doubt every act of terrorism restricts rights of the people, but on the other hand every act in counter terrorism policy may restrict the human rights of the people.[50] So policy guidelines should be adopted which protect people from terrorism without any further violation of their universally recognized human rights standards.

At international level there are two schools of thought regarding the strategy employed by them to counter terrorism. On the one hand British school considers it a crime, and adopts measures to control it through local enforcement agencies such as Police in cooperation with other international organizations. On the other hand American school considers terrorism a war or threat of war and allows military use of force and other measures to combat.[51]

Conclusion

Terrorist activity has been a real and present threat, as well as a fundamental violation of human rights. However, state attempts to combat it must be human rights compliant and remain within the rule of law.

The process of globalization, make us believe that global problems such as Terrorism cannot be resolved without global solutions, based on the international legal framework. It is well known that the codification of new international legal norms is in fact a very slow mechanism. By other hand, the complex United Nations System does not have an effective interaction between their components, originating a duplication of efforts and the inexistence of mutual cooperation that allows the achievement of common goals. The Terrorism is a flagellum that the world has suffered many times and more and more threats are present, and more casualties are regretted after so many attacks.

In today's scenario we have also to see whether our laws serve our interests. The interests of an under developed country may clash with the interest of developed countries, though there will always be grey areas. Such a situation needs fearless and honest leadership. We have to beware that compelled by globalization or *'need to curb terrorism'* we may not be surviving the interest of the developed world. Just as terrorism is temporary, curbs on human rights also have to be temporary as human rights are permanent.[52]

We have to understand that every act of terrorism infringes on the human rights of the people. We also have to accept that laws restrict rights of the people, necessarily or unnecessarily. But we have to be clear that we have to define terrorism in the context of our country and have to devise temporary limitations on the rights of the people. International pressures may land us in situations which may push us into the lap of self appointed Inspectors of the world who need our markets and resources and are therefore keen to point out *'identity of interests'* in fighting 'international terrorism'.[53] Secretary – General ***Kofi Annan*** on 17 June,[54] 2004 (SG/SM/9372) said:

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

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ACCELERATING PUBLIC-PRIVATE PARTNERSHIP MODEL OF INFRASTRUCTURE PROJECTS IN INDIA: EXISTING FRAMEWORKS AND CHALLENGES

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ABSTRACT

In many countries across the globe, various sectors – such as toll roads, parking garages and airports – have embraced the concept of public-private partnerships (PPPs) since it provides essential capital while meeting a public need. There are multiple public benefits for a government entity, such as a municipal water or wastewater department, to consider when forming a PPP, and utilities are increasingly discovering the advantages. . Public private partnerships or PPPs are seen to have a significant role in bringing in much needed investments as well as efficiencies in utilization and management of resources. While private telecom services is a success story in India, the PPP constitutes comparatively a minor share in overall infrastructure building despite initiation of various policy measures and sector-related reform programmes. The promotion of good governance based on certain generally accepted core principles of accountability, transparency, fairness, efficiency, decency and participation, is a major responsibility of the government. Supported by the Asian Development Bank, Government of India therefore, has been focusing to create the enabling environment targeting on capacity building and institutionalization of PPPs across the country. The legal environment country wide, state specific legislation for infrastructure and PPPs, and, project specific contracts are the most critical aspects which govern attractiveness of infrastructure sectors and projects to the private sector, also government agencies, whether local governments or others, and thus it is important that they have sufficient awareness of key legal and contractual issues so that projects are well structured, contracted, implemented and monitored. This paper attempts to discuss legal and governance aspects of PPP Model of Infrastructure Projects and to explore the key elements that need to be present in the institutional environments surrounding the projects, namely clear rationale, political willingness, advocacy, predictability commitment in decision making and capacity to develop and monitor projects.

Key Words: Accelerating, Public-Private, Partnership, Model, Infrastructure, Challenges.

For the development of an economy, physical infrastructure is an integral part and provides basic services that people need in their every day life. The contribution of infrastructure to economic growth and development is well recognized as it has been seen that well developed physical infrastructure provides key economic services efficiently, improves the

competitiveness, extends vital support to productive sectors, generates high productivity and supports strong economic growth. To achieve meaningful growth, developing countries have to promote infrastructure development as infrastructure is vital to the nation's economic growth. Infrastructure may be considered to be the skeleton on which the society is built including highways, railways, ports, bridges, hydraulic structures, power plants, tunnels, municipal facilities like sanitation and water supply, and other facilities serving public needs. Adequate funding is required to construct and maintain the requisite infrastructure which has a positive effect in ensuring continuous economic development, apart from meeting basic needs. The immediate need for such projects coupled with chronic budget shortages experienced by public agencies encouraged the use of innovative financing and many countries, particularly, developing countries shortage of public funds have led governments to invite private sector entities to enter into long term contractual agreements for financing, construction and operation of capital intensive infrastructure projects. Physical infrastructure covering transportation, power and telecommunication through its forward and backward linkages facilitates growth; social infrastructure including water supply, sanitation, sewage disposal, education and health, which are in the nature of primary services, has a direct impact on the quality of life.

However, in proceeding towards this goal, developing countries face various constraints, among which, lack of advanced technology and inadequate public financial resources are two major drawbacks. To overcome or alleviate these constraints, developing countries are encouraging local and foreign private sector involvement in the provision of infrastructure projects or services. Global trends of privatization and reduced governmental roles extend to developed countries as well. Models of private sector involvement are[1]:

- Full Private Provision or FPP: In this case, the government allows complete ownership of the asset to private players. The government assumes no responsibility or risk. e.g., Hyderabad Metro and telecom.
- PPP schemes: In the case of PPPs, the investment is funded and operated through a partnership between the government and one or more private sector players. e.g., Delhi and Mumbai Airports.
- Private Finance Initiative or PFI: These schemes introduce the benefits of private sector management and finance into public sector projects and differs from privatisation since the responsibility of providing essential services to the public is not transferred to the private sector; nor is the asset-ownership transferred, e.g., in solid waste management, electricity distribution franchising and so on.

Today, in India, PPP is generally used to broadly connote all these models of private sector involvement in the infrastructure arena and is holistically termed as PSP or "private sector participation".

Basic Characteristics of a PPP arrangement

Infrastructure projects have long gestation period, are capital intensive, involve multiple risk to the project participants and are therefore complex. These are characterized by non-recourse or limited-recourse financing where lenders are repaid from only the revenues generated by projects. Even though PPPs have a long history in many countries, a clear and comprehensive rule covering the use of PPPs is deficient in both international and domestic levels. The

partners in a PPP usually through a legally binding contract or some other mechanism agree to share responsibilities related to implementation or operation and management of an infrastructure project. This collaboration or partnership is built on the expertise of each partner that meets clearly defined public needs through the appropriate allocation of: resources, risks, responsibilities and rewards.[2] These projects have a capital cost during construction and a low operating cost afterwards which implies that the initial financing costs are very large compared to the total cost. Further, a mix of financial and contractual arrangements amongst the multiple parties including the commercial banks, project sponsorers, domestic and international financial institutions and government agencies makes it further complex. The Government seeks to utilize private sector finance in the provision of public sector infrastructure and services and thereby achieve value for money. Value for money, defined as the effective use of public funds on capital project, can come from private sector innovation and skills in asset design, construction techniques and operational practices. It may also come from transferring key risks in design, construction delays, cost overruns and finance to private sector entities. However, in some cases the emphasis on risk transfer can be misleading as value for money requires equitable allocation of risk between the public and private sector.

What is Public-Private Partnership?

The expression public-private partnership is a widely used concept world over but there is no broad consensus on what constitutes a PPP. Broadly, PPP refers to arrangements, typically medium to long term, between the public and private sectors whereby some of the services that fall under the responsibilities of the public sector are provided by private sector, with clear agreement on shared objectives for delivery of public infrastructure and/ or public services. In order to achieve partnership, a careful analysis of the long term development objectives and risk allocation is essential. In addition, legal framework must adequately support this new model of service delivery and should be able to monitor and regulate the outputs and services provided. The Planning Commission of India has defined the PPP in a generic term as “the PPP is a mode of implementing government programmes/schemes in partnership with the private sector. It provides an opportunity for private sector participation in financing, designing, construction, operation and maintenance of public sector programme and projects”[3]. In addition, greenfield investment[4] in the infrastructure development has also been given more encouragement in India.

The PPP is also defined as “the transfer of investment projects that traditionally have been executed or financed by the public sector to the private sector, any arrangement made between a state authority and a private partner to perform functions within the mandate of the state authority, and involves different combinations of design, construction, operations and finance is termed as PPP model.”[5]

PPP offers monetary and non-monetary advantages for the public sector. It addresses the limited funding resources for local infrastructure or development projects of the public sector thereby allowing the allocation of public funds for other local priorities. It is a mechanism to distribute project risks to both public and private sector. PPP is geared for both sectors to gain improved efficiency and project implementation processes in delivering services to the public. Most importantly, PPP emphasizes value for money thereby focusing on reduced costs, better risk allocation, faster implementation, improved services and possible generation of additional revenue. A number of OECD countries have well established PPP programmes. Countries

with significant PPP programmes include Australia and Ireland while US has considerable experience with leasing. Many continental EU countries, including Finland, Germany, Greece, Italy, the Netherlands, Portugal and Spain have PPP projects, although their share in public investment remains modest. Reflecting a need for infrastructure investment on a large scale, and weak fiscal positions, a number of countries in Central and Eastern Europe, including the Czech Republic, Hungary and Poland, have embarked on PPP. There are also PPP programmes in Canada and Japan. The PPP in most of these countries are dominated by road projects. Similarly, the EU Growth Initiative envisages the use of PPP type arrangements primarily to develop trans-European road network.[6]

In UK's Private Finance Initiative (PFI), a form of PPP program, the public sector purchases services from the private sector under long-term contractsHowever, there are other forms of PPP used in the UK, including where the private sector is introduced as a strategic partner into a state-owned business that provides a public service.

The PPP is sometimes referred to as a joint venture in which a government service or private business venture is funded and operated through a partnership of government and one or more private sector companies. Typically, a private sector consortium forms a special company called a Public-Private Partnerships (PPP's or P3's) which is becoming a common tool to bring together the strengths of both sectors. In addition to maximizing efficiencies and innovations of private enterprise, PPPs can provide needed capital to finance government programs and projects, thereby freeing public funds for core economic and social programs. Public Private Partnerships (PPPs) present the most suitable option of meeting targets, not only in attracting private capital in creation of infrastructure but also in enhancing the standards of delivery of services through greater efficiency.

India, the leading destination:

The share of PPP in infrastructure sector was 24.5 per cent during 2002-2007, increased to 36 per cent during 2007-2012. This is expected to go up to 50 percent by 2017. India has had the most success, attracting more private investment in infrastructure in 2006 than any other developing country. But at the same time progress has been uneven, with some states having undertaken far more PPPs than others and in some sectors there is a much heavier use of PPPs as compared to others. In terms of frameworks for PPPs, some states have made more attempts to develop this, including development of cross sectoral units that play a vital role in the identification and preparation of PPPs. PPP in social and education sector: Public-private partnerships can revolutionise education in India and facilitate growth to help prevent millions of children missing out on quality education. They can raise the standards of education provision in India and help meet the demand for quality education from a growing middle class with increasing incomes. There is a need to focus on public-private partnership (PPP) in social sector too such as health and education. Some State governments have already taken steps in this regard, the emergency medical response service popularly known as '108 service' in Karnataka and Gujarat is a good example in this regard. An ambulance rushes to help those in need when a call is made to the toll-free number 108.[7]

Legal and Regulatory Framework

The PPP story began with private sterling investments in Indian railroads in the latter half of the 1800s. By 1875, about £95 million was invested by British companies in Indian

"guaranteed" railways. Or we could trace it to the early 1900s, when private producers and distributors of power emerged in Kolkata (Calcutta Electric Supply Corporation) and Mumbai, with the Tatas playing a prominent role in starting the Tata Hydroelectric Power Supply Company in 1911.Cut to the early 1990s, and one could postulate that it was then that the new-wave PPP movement started. A policy of opening electricity generation to private participation was announced by the central government in 1991, which set up the structure of independent power producers, or IPPs. The National Highways Act, 1956, was amended in 1995 to encourage private participation. In 1994, through a competitive bidding process, licenses were granted to eight cellular mobile telephone service operators in four metro cities and 14 operators in 18 state circles. But a date that would capture the essence of a clear historic shift, one could zero in on January 30, 1997, when the Infrastructure Development Finance Company was incorporated in Chennai under the initiative of the then Finance Minister P Chidambaram. The firm, promoted by the government of India, was set up on the recommendations of the "Expert Group on Commercialisation of Infrastructure Projects" under the chairmanship of Rakesh Mohan and Deepak Parekh was chosen as the first chairman. The purpose was that this would signal the government's seriousness in channeling private sector capital, expertise and management thereby giving boost to nation's infra development[8].

Efforts have been made to create the right enabling environment for the PPP story to unfold rapidly. These relate to enacting legislation for example, the Electricity Act, 2003; the amended National Highways Authority of India Act, 1995; the Special Economic Zone Act, 2005; and the Land Acquisition Bill. As also the creation of new institutions like regulatory authorities in telecom, power, roads and airports, implementing authorities like the National Highways Authority of India (NHAI), and financial institutions like the Infrastructure Development Finance Company, the India Infrastructure Finance Company and so on. A slew of model concession agreements across sectors created the template for private participation. Innovative financial interventions like viability gap funding, annuity models and stimulation of debt for infra have also added fiscal punch. The Planning Commission, the Department of Economic Affairs in the Ministry of Finance and the Prime Minister's Office have all played a stellar role in "making PPP happen". Many states, too notably Punjab, Gujarat, Maharashtra, Delhi, Karnataka and TamilNadu have built significant capacity to deliver on PPP.[9] Government of India has introduced several innovative Schemes aimed at promoting PPPs. to attract the private sector, commercially viable projects should be on offer and to inculcate the discipline of 'user pay principle' and provision of these services should be based on payment of tariff, Government must also fulfill its commitment towards inclusive growth which makes it obligatory to fix the tariffs based on the capacity of the common man to pay. Due diligence is also essential given the substantial contingent liability that could devolve on the State in such projects. Had someone in the late eighties asked about the future role of private capital and enterprise in Indian, when the state ran close to 100 per cent of public utilities, he would have received a look of bemused incredulity at such a possibility. In fact, India is today easily the world's largest PPP market.

Issues and concerns:

Despite improvements in physical infrastructure development in the country during the recent years, significant gap exists between demand and supply of critical infrastructure facilities,

which has become a binding constraint on the rapid pace of economic progress. In the case of power sector, the power shortage during the peak demand period has been much higher, which severely affects the industrial production and economic development. Employee productivity of railways in India is very low when compared to China, Korea, Brazil and Indonesia. Wagon shortage hinder the movement of industrial raw materials, coal, minerals, *etc.,* which affects the industrial production. Port container and air freight traffic is also very low in India as compared to other Asian economies. India's weak export infrastructure in the ports, congestion problem and insufficient bulk terminals are major constraints in this sector. Space is a major constraint in big cities to expand the basic infrastructure. The absence of well defined law to acquire land for public infrastructure development has also lead to slowdown in the urban infrastructure. Poor basic amenities in the rural areas are also a major concern, despite 72 per cent of the population living in villages.[10]

The UN Office on Drugs and Crime (UNODC) has also flagged loopholes in Indian laws' ability to curb such graft, and suggested that private partners in PPPs be designated as public officials to make them accountable under the Right to Information Act. This would not only bring such projects under the proposed laws but also protect whistleblowers and guarantee service delivery to citizens.[11]

When we look at the progress of infrastructure development so far, private participation and PPP arrangements in the development of public infrastructure have still faced several implementation challenges. These challenges typically involve tariff setting and adjustment, regulatory independence or dispute over contractual provision and risk sharing. It may be observed from the discussion so far, the PPP in the infrastructure development is picking up during the recent years, particularly in the road sector and to some extent in the airports and ports sectors. Telecom sector is considered to be a successful sector in attracting private participation on a large scale. This may be due to sector-specific policies and other factors such as Government commitment, increased private interest in these sectors, move towards better competitive process, greater availability of information, size of the projects, acceptable price and encouraging developer return, fiscal concessions, *etc.* However, considering the size and magnitude of the proposed and ongoing projects in the infrastructure sector as a whole, the lackluster response by the private participation and slow progress in some of the projects need to be reversed through investor friendly policies, transparent procedures and other conducive measures. The PPP model will not be feasible in all types of infrastructure but they are possible in many areas, which are to be exploited fully. The key to making PPP model acceptable is to create an environment where PPPs are seen to be a way of attracting private money into public projects, not putting public resources into private projects.[12] Towards this direction, the following measures need the attention of all concerned, to make not only the PPP model a success, but also to attract more private participation to upgrade the Indian infrastructure into a world-class. Increasing transparency of the bidding-out process: Even as India still has a long way to go on the Transparency International list, it is indeed heartening to see that there has been a sharp fall in "crony capitalism" in the award of PPP projects. Recent times have seen practically no complaints from the slew of NHAI projects bid out. Power bids have been ferociously fought. And airport bids were examples in ultimate transparency. Even as a lot of governance issues still remain in execution and implementation, few will disagree that the average newspaper reader can easily discover the bid-criteria point at which a private

player has been selected. E-auctions are adding to this credibility. The scams in telecom and other sectors have lead to "transparency alertness" in the media, the judiciary, civil society, and investigative and audit institutions.[13] The PPPs can run into controversy if the private partner is seen to have received unduly favourable treatment. This can be overcome by ensuring that the terms of concession agreements are transparent and protective of public interest.

Risk allocation and management: Since the projects in the infrastructure sector requires huge investments and involve much time frame for their execution, various risks, *viz.,* construction risk, financial risk, market risk, performance risk, demand risk and residual value risk are to be allocated appropriately among the constituents. The risks should not be passed on to on to others as and when arise, which would affect the cost and progress of the project and create unnecessary litigations. Too many risks assumed by Government will likely put unjustified pressures on taxpayers. On the other hand, too few will prevent potential private investors from participating in the venture.

Project Implementation criteria: Execution of infrastructure projects should have a clear choice about its implementation whether by the Government or private or both under PPP. Also, the technicality of the project should be clear regarding its soundness, viability and return. When we look at the PPP programme, while there are a number of successful projects, there have also been a number of poorly conceptualized PPPs brought to the market that stood little chance of reaching financial closure. Clear appraisal of the project before its execution would avoid many litigations. At the same time, it is important to avoid a possible bias in favour of the private sector.

Regulatory Independence: Though regulatory independence is vital for speedy implementation of policies, there are instances of disagreements between the regulatory authorities. To reduce the risk of arbitrary and ad-hoc policy interventions due to disagreement between the authorities, principles on key issues need to be specified upfront in sufficient detail.[14]

In the infrastructure sector, regulatory bodies like Telecom Regulatory Authority of India, Central Electricity Regulatory Commission, State Electricity Regulatory Commissions, Tariff Authority of Major Ports, National Highway Authority of India and Airport Authority of India have been established as autonomous agencies to regulate the activities coming under their jurisdiction.

Centre-State Disagreement: Execution of some of the projects like airport development, road, *etc.,* are delayed due to disagreement between the Centre and the State Governments in various aspects, particularly location choice, cost sharing structure, political disagreement, *etc.,* which need to be avoided with appropriate policies, political will, cooperation, coordination, dedication and determination.

Managing Cost, Time and ensuring government guarantee: Many of the projects under the PPP are delayed due to litigations, which lead to cost and time overruns in their implementation: Generally, investors look for Government guarantee for their investments and their return before entering into a venture. Constant changes in the procedures for offering Government guarantees discourage the investment opportunities. Though, Government guarantee for private investment is not a preferred option in the fiscal angle, transparent

policies and guidelines towards Government guarantee will provide clear perception and encouragement towards the PPP even in the risky areas of investment.[15]

Good Governance: Most important of all, Good corporate governance will succeed in attracting a better deal of public interest because of its apparent importance for the economic health of corporates and society in general. The corporate governance framework should ensure that timely and accurate disclosure is made on all material matters. The corporate governance practices of the parties involving in the PPP have to match with the benchmarking corporate governance practices with the best in the rest of the world.

Responsibilities of and Liabilities on the Govt.:

Each country has its own unique approach towards soliciting and evaluating PPP project proposals. Many countries have special legal instruments concerning PPPs. In India, infrastructure gaps exist in almost all the sectors, posing a serious threat to sustenance of the growth momentum. To augment the infrastructure facilities with private participation, the initiated policy measures have not met with significant success. Except for the telecom sector, which has witnessed a revolution and has been able to attract massive private investments, other sectors have faced with lacklustre response. Even in the telecom sector, though the overall tele-density has improved during the recent period, rural tele-density remains low, which needs to be dealt with appropriate policy measures. The status of the PPP in the infrastructure development in India, both in the Central Government schemes as well as State sponsored schemes, is not encouraging. Stable macroeconomic framework, sound regulatory structure, investor friendly policies, sustainable project revenues, transparency and consistency of policies, effective regulation and liberalisation of labour laws, and good corporate governance are the basic requirements, which define the success of the PPP model. The PPP model in the road sector has experienced with enthusiastic response. However, many of the road projects are faced with cost and time overruns on account of prolonging disputes in land acquisition, hurdles in the material movements, law and orders problems, etc. Efficiency in cargo handling needs to be enhanced through modernisation of port facilities to facilitate the trade. The PPP model projects in the airport sector are in slow progress and also restricted to major airports. Modernisation of some of the airports is yet to take-off due to procedural hassles and land acquisition problems. This brings to the fore a need for constructive and stable policy environment towards land acquisition for public utilities. The urban infrastructure bottlenecks need to be addressed through a development strategy, which encompasses efficient planning and organisation of the project, balancing the public-private interest, reinvigoration of electricity, water supply and transportation system and integration of finance and technology.[16]

International experience suggests that the success of PPP projects requires a single objective of better services for the public at a reasonable cost. This is achievable through realistic and reasonable risk transfer while addressing the public concerns. The Indian PPP model should adhere to such objectives and best practices to march forward on the success path. In this pursuit, easy availability of long-term private capital is an essential requirement. Fostering the Greenfield investments in the public infrastructure with appropriate user charges, transparent revenue and risk sharing agreements would transform the international capital inflows into productive ventures. Above all, selection of right PPP model for a right project at a right time through realistic planning would go a long way in providing meaningful and hassle free

infrastructure development, which ultimately would increase the infrastructure standards and thereby sustain the overall macroeconomic developments of the country. In addition, appropriate institutional framework is a prerequisite for the success of the PPP in the infrastructure development due to its size, investment requirements, structure and dimension. Foreign investment will freely flow into a country when there is sound, stable and predictable investment policy. Frequent changes in the policies will be an irritant to the investors, which is to be restricted in an emerging economy like India. Overall, in addition to sector-specific issues, the generic issues also need the attention of all concerned to make not only the PPP model a successful but also to attract more private participation to upgrade the Indian infrastructure into a world-class. The need for Public Private Partnership in the Indian infrastructure sector has been well recognized by the Government of India at the India Infrastructure Summit 2012, and the steps taken to encourage Public Private Partnerships are promising. Such steps include[17]:

- Creating the India Infrastructure Development Fund;
- Establishing Institutional Mechanism like the Indian Infrastructure Finance Company Limited to facilitate infrastructure development and PPP;
- Standardising contractual documents as sector specific Model Contracts;
- Concession Agreements;
- Standardising Bidding Documents;
- Relaxing the restrictions on foreign direct investment in most infrastructure sectors; and
- Fiscal Incentives including the Income Tax Act, 1961 and state laws to developers and lenders of Infrastructure Projects.

Such steps are particularly relevant in the context of India's estimated investment need in the infrastructure sector. To the uninitiated the governing frameworks of the various infrastructure sectors might appear to be maze of, institutional structures, arrangements rights, obligations and duties. However, when we look beyond the formal structures a crucial point of note is that parties (both private and public) are free to enter into valid and enforceable commercial arrangements so long as their business arrangements are compliant with the rules of entry (for example those regarding foreign direct investment) and the rules of the game for doing business in the industry concerned. Such commercial arrangements include:

- Providing suitable incentives for commercial activities and economic enterprise that best serve the national interest;
- Providing a facilitative business environment for stakeholders to transact business, with suitable risk- allocation and safeguards;
- Safeguarding scarce resources and strategic national interests; and enable the 'welfare objectives' of the state and 'economic objectives' of private entrepreneurs to be successfully integrated.
- Arrangements for partnering or collaboration in ventures between two or more persons including incorporation of specific entities with the rules for their functioning;

- Contracts for all or any of the following components/elements such as, sale or supply of goods, services or intellectual property rights-including business process, outsourcing (BPO),Engineering
- Procurement and construction (EPC), operations and maintenance, refurbishment and modernisation, Contracts permitting the use of certain assets, facilities and rights like leases, licences, concessions; and contracts for financing arrangements which could vary in complexity and sophistication from a sale and purchase of milk or a newspaper every morning to a thirty year power purchase agreement or concession to build, operate and transfer an airport.

In addition to governance and due diligence functions, the institutional framework nurtures and encourages new models and innovation and develops capacities to successfully discharge changing roles and responsibilities that PPPs require. The Government has supported the creation of nodal agencies such as the PPP Cells at a State or sector level.[18] Recognising that strengthening the capacities of different levels of government to conceptualize, structure and manage PPPs will lead to more and better PPPs, for that Department of Economic Affairs is facilitating mainstreaming Public Private Partnerships through Technical Assistance from Asian Development Bank (ADB). The primary objective is effective institutionalization of the PPP cells to deliver their mandate through provision of 'in-house' consultancy services to each of the selected entities at the Center and State level which helps in refining the PPP policy and regulatory framework. Under Strategy 2020, ADB will expand work with the private sector to generate greater economic growth in the region. Public private partnership (PPP) is seen as an important modality to achieve this objective, and Strategy 2020 emphasizes the promotion of PPPs in all of ADB’s core operations.[19]

Conclusion

Public-private partnership has played a significant role to boost the undergoing processes of national economic growth, targeting towards financing, designing, implementing and operating infrastructure facilities and public services such as health, utilities, education, and sanitation, etc that were traditionally provided by the public sector. The government of India is leading the process of promoting PPP projects in India to create a success story. However, the overall financing gaps in infrastructure are quite high as per the estimates of planning commission of India. The investment needs for infrastructure is enormous. India faces a very large financing gap which needs to be bridged by domestic as well as foreign and private sector investment. Stable macroeconomic framework, sound regulatory structure, investor friendly policies, sustainable project revenues, transparency and consistency of policies, effective regulation and liberalisation of labour laws, and good corporate governance are the basic requirements, which define the success of the PPP model. Expanding the use of PPP would enable the government to provide needed public infrastructure while minimizing both short and long-term expenditures, and also to capitalize on the private sector’s management skills, expertise, experiences, innovation, and alternative methods of funding. This can also have a significant impact on international commerce, especially as in an era of rising national debt and budget deficits. In the context of the global financial turmoil we are facing, PPPs play a vital role of economic stimulant in developing countries and sustainable growth in global scenario.

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INTERNATIONAL INVESTMENT LAW: NEED FOR INCLUSION OF A HUMAN RIGHTS CLAIM MECHANISM

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ABSTRACT

Despite the apparent opposition between human rights protection and international investment law, the fact is that they share many common features, the most important being the weak or vulnerable position of both individuals and foreign investors in relation to the state, which can take decisions affecting their rights and obligations without their participation. This reality has been one of the main justifications behind the grant of rights and protection to both individuals and foreign investors. Over the past five decades, the character of the international legal order has changed considerably in terms of norm development, the scope of regulated activity, and the actors upon whom international obligations fall. These changes have been brought about through an evolutionary process most often referred to as "globalization," whereby enhanced telecommunications, data technology developments, and dramatically increased flows in trade and transnational investment have altered the socioeconomic relationships that exist among states and between states and non-state actors. These technological advances, along with the adoption of international economic obligations under multilateral trade and bilateral investment treaties, have facilitated dramatic increases in global trade and investment and have permitted private economic actors to take advantage of more efficient global operations. Recognizing the political need to show that transnational investors should shoulder "responsibilities" in addition to the international "rights" to which they are granted access under investment protection treaties, this paper proposes counterclaim mechanism for use in future treaties. The mechanism would permit individuals who live in countries receiving foreign investment to bring claims against foreign investors for the violation of serious international rules by their agents or employees operating in the host country. Such rules would include safeguards for international human rights that might be violated in the operation of an investment.

Key Words: International, Investment, Law, Need, Inclusion, Human, Rights, Claim.

Transnational investment plays an important role in the prosperity and development of many countries, especially less developed countries. Without mechanisms to protect such investments, however, investors are reluctant to take the risk and bring their resources in a legally and politically turbulent foreign country. To address such concerns, several mechanisms have been developed to reduce the uncertainties associated with investing in such countries by providing assurances and security to foreign investors. International trade and investment are driving forces in the world economy and its increasing global interdependence and has long been a feature of an increasingly globalized world in which opportunities for foreign investment often exceed the prospects of home state investment. The quickening of modern transnational relations only serves to accelerate this process. These foreign investors, i.e. nationals of states other than the host state, have traditionally been considered to be particularly vulnerable to risks of a noncommercial nature such as nationalization and other regulatory measures interfering with the investors' legitimate expectations. The traditional remedy for aggrieved foreign investors was to petition their home state to take up their case on their behalf. This solution, known as diplomatic protection or espousal, however suffers from various drawbacks and has hence only played a comparatively marginal role. It subjects investors to the goodwill of their governments and the vagaries of international relations, putting control of litigation out of their hand.[1] Moreover, it does not in itself resolve the question of whether the host state's action was actually unlawful, which is a question of the law governing the investment and not a matter of the specific protection technique. Apart from the potentially suspicious domestic law of the host state, such rules governing the treatment of aliens and their property are found in public international law. Since customary international law standards on the protection of foreign investment were frequently marred by incessant disagreement, international treaties emerged as the principal source of norms in the international investment context. This treaty protection for investors first developed in the context of Friendship, Commerce, and Navigation (FCN) treaties; modern investment agreements are designed to facilitate the commercial interpenetration of nations.

International economic obligations have been designed to facilitate global trade, and thus can be seen as safeguarding the interests of private firms, even though their prosecution can only be undertaken through state-to-state dispute settlement. Moreover, through the development of a web of approximately more than 2000 bilateral treaties among approximately 170 countries, private actors have been provided with the right to prosecute core economic obligations through direct arbitration with a state. Mixed arbitration for the protection of foreign investors has actually existed for centuries, but until the 1960s it was normally pursued on an ad hoc basis through subrogation of a private actor's claim by its "home" state (i.e., the state of citizenship or incorporation). The exponential multiplication of bilateral investment treaties that has taken place since the 1960 which gained considerable steam in the 1980, has institutionalized the right of non-state actors to pursue mixed arbitration. Thus, on the economic front, international treaty norms have taken on a character that is clearly different from the state-centered obligations of past centuries.

Over roughly the same period, international human rights norms have also blossomed at an exponential rate. Much like economic obligations, most of these international human rights obligations possess the constitutional character of norms designed to protect individuals as against activities of the state. Analogous to economic obligations, international human

rights obligations have become, in many cases, prosecutable by non-state actors before impartial, international decision-making bodies. However, despite the fact that international economic and human rights obligations share a focus on protecting non-state actors and often provide an individualized mechanism for enforcement, there is one notable distinction: the effectiveness of enforcement.

WTO provides the legal framework for the multilateral trading systems for goods and services, including its advanced system of dispute resolution. A significant body of WTO case law rules on the balance between the trading rules and other societal objectives, such as the protection of human health or the environment. WTO agreements also go beyond traditional market access issues into the realm of domestic regulation, to consider intellectual property rights and international product and food safety standards.

International Investment Law Arbitration has also become an important part of this programme. In this subject, a large network of bilateral investment treaties (BITs) set the legal frameworks for the treatment of foreign investors and for the settlement of their disputes by international arbitration. The growth of investor-state arbitral awards is evidence of the emerging importance of international investment law.

Much has been written about the relative effectiveness of World Trade Organization (WTO) dispute settlement process in comparison to other forms of dispute settlement. But less has been written about the superior effectiveness of investor-state arbitration, under which a state must submit itself to commercial arbitration with a foreign investor (based upon a general statement of consent contained within the relevant treaty). While a mixed claims tribunal can only award compensation as relief, its award is normally eminently enforceable in most developed countries. With its inclusion in the North American Free Trade Agreement (NAFTA), mixed claims arbitration has become increasingly more popular, as investors have brought claims under investment rules that heretofore would have been brought, if at all, by their home states. Increased usage of these mechanisms has brought with it increased notoriety. Mixed claims arbitration has thus become the cause of anti-globalization groups concerned that the phenomenon of globalization has had a deleterious effect on living conditions throughout the world, particularly in the developing world. When it became widely known that states holding membership in the Organization of Economic Co-operation and Development (OECD) had begun negotiations on a multilateral investment protection agreement in 1996, concerned activists argued that the agreement would constitute a "corporate bill of rights" with no corresponding obligations to regulate the activities of its beneficiaries.

What these activists were essentially calling for is a quid pro quo: in exchange for international protection from potential abuses at the hands of host governments, corporations were to be held accountable for abuses for which they would be responsible under international law. This is different from the exchange that has historically typified such relationships, where the corporation submits itself to the disciplines of local law in exchange for international protection for its investment. In other words, the exchange had always been international protection in exchange for a foreigner's commitment to invest. Has the time come for a change?

This new legal order is one that increasingly recognizes individual rights, as against state action, in an almost quasi-constitutional pattern. This new legal order is one in which a plethora of treaties and international judicial doctrine have established and refined minimum standards for government action. However, notable cleavages remain between the effectiveness of enforcement mechanisms in the economic fields of trade and investment, as compared to the equally important fields of human rights, environment, and labor. The definition of investor and investment is key to the scope of application of rights and obligations of investment agreements and to the establishment of the jurisdiction of investment treaty-based arbitral tribunals. This factual survey of state practice and jurisprudence aims to clarify the requirements to be met by individuals and corporations in order to be entitled to the treatment and protection provided for under investment treaties. As far as the definition of investment is concerned, most investment agreements adopt an open ended approach which favours a broad definition of investment. Nevertheless recent developments in bilateral model treaties provide explanatory notes with further qualifications and clarifications of the term investment.[2]

Lack of Respect for Human Rights

Critics of foreign direct investment in developing countries argue that there is a pressing need for rules governing the conduct of multinational enterprises (MNEs). As one author has noted: "such entities are inherently difficult [domestic] regulatory targets, with enormous economic and political strength and the ability to move assets and operations around the world." Other critics have stated: Many MNEs' revenues today surpass the gross domestic products of several independent nation-states. MNEs' wealth, resources, and information technology make them key players not only within the nation-states in which they operate, but also in the international arena. Some MNEs have more to say about policies that govern international trade and finance than do many of the less developed countries. **Yet, driven by the search for profit, MNEs are often unaware of, or simply disregard, the adverse impact that their activities may and often do have on the spectrum of human rights.** The international scene is no longer just about formal, diplomatic relations between states, it has witnessed the emergence of increasingly powerful non-state actors; powerful in the sense that their activities have a major and direct impact on the lives of millions of people . . . . The problem is that their power is not matched by a corresponding degree of responsibility and accountability. Some MNEs have a budget that far exceeds that of many developing countries and still, there is no mechanism to hold them accountable for the violations of human rights that their activities generate. In many developing countries where these MNEs operate, the rule of law is ineffective; there are no legal remedies, and no possibilities of redress, which goes to say that the MNEs can act in near-total impunity.

It has accordingly been argued that a downward regulatory spiral (or a "race to the bottom") has ensued from competition among developing countries in order to attract foreign direct investment. Faced with competition, developing countries may relax or fail to enforce domestic regulatory standards, including human rights standards to the detriment of the health and well-being of their citizens. Whether the proof exists to sufficiently justify these theories on a macroeconomic level is an open question. Is it fair to say that foreign direct investment, once it has been committed to a particular country, is as highly mobile as these theories would

suggest? Is it also fair to say that large, wealthy transnational corporations are really more powerful than the governments or leaders of numerous developing countries?

While it may not be clear that transnational corporations (both large and small) wield the power alleged by some of their harshest critics, there is a considerable amount of evidence to suggest that foreign enterprises operating investments in the developing world have committed, or been complicit in, environmental, labor, and human rights abuses.

Human Rights Watch[3] has published extensive reports that purport to document human rights abuses undertaken in connection with foreign direct investment in numerous locations. For example, in India, a subsidiary enterprise of Enron Corporation had allegedly maintained extremely close ties to a local government that has allegedly engaged in the violent and unlawful repression of local protesters against the development of a hydroelectric project. Similarly, in the Niger Delta, political protests against the participation of transnational oil companies, such as Chevron and Shell, have allegedly met with brutal, systemic repression by government security forces. Others have noted how transnational corporations have benefited from the lower production costs that can be obtained through systemic violations of core labor and antidiscrimination standards in Asia and Latin America.[4]

Human Rights Claim Mechanism: An Alternative Solution?

As discussed earlier, there have been suggestions that a quid pro quo exchange of obligations should be imposed upon transnational investors who wish to take advantage of the protections afforded by an international investment treaty. While the prospect of a multilateral agreement on investment appears to be far off,[5] states continue to agree upon bilateral investment protection treaties. The potential exists for insertion of an enforcement mechanism in these bilateral agreements, an enforcement mechanism, for the prosecution of human rights violations committed by private parties whose activities will be protected under such agreements.

The major flaw of existing codes of corporate conduct and of the use of domestic tort mechanisms, such as the U.S. Alien Tort Claims Act, is their lack of enforceability or corporate codes, additional flaws exist in the lack of an impartial, independent adjudicatory mechanism to forge meaning out of indeterminate legal terms. Inclusion of an enforcement mechanism in bilateral investment agreements would largely address such weaknesses. This is because awards made under such a mechanism could be made enforceable on the same basis that awards made against a state party for a successful investment claim are enforceable by a claimant. The adjudication of human rights claims brought by affected individuals could be undertaken by an ad hoc tribunal established and operated on a basis similar to that under which investment claims can be pursued under the relevant treaty.

Most bilateral investment treaties provide the investor with a choice of commercial arbitration rules under which to bring a claim. The appropriateness of these rules for investment disputes has been questioned over the past few years, particularly with regard to whether hearings should be held in camera. However, the drafters of future treaty texts need only make minor changes to ensure openness of future proceedings. The rules themselves are general in scope, leaving considerable leeway for a tribunal to adopt the practices and procedures that suit the circumstances of the claim to be heard. Accordingly, the addition of potential compensation

claims for the violation of human rights by an investor/investment would not be difficult to accommodate.

Investment treaties also generally provide for the claimant's choice of at least one of the would-be arbitrators, as well as designation of an appointing authority. Whereas investment claimants might choose economic law scholars or lawyers, human rights claimants would probably choose human rights scholars or adjudicators (i.e., persons who have experience sitting on state-to-state human rights tribunals).

Moreover, whereas the integrity of domestic regulators and courts could be questioned with respect to the uniform and nondiscriminatory application of international human rights norms in any given country, tribunals established under a human rights protection mechanism, such as the one proposed herein, would not necessarily suffer from similar attacks on their credibility or impartiality. An international tribunal would hear prospective claims of ill-treatment at the hands of an investor/investment, with an international mandate and international law expertise rather than a local tribunal with no international law experience and potentially conflicting mandates.

The proposed claim mechanism would provide for the opportunity to receive compensation directly from the offending investor/investment. Such a mechanism would potentially represent a considerable improvement over the use of a trade-sanctions mechanism for alleged human rights violations. The proposed mechanism would simply be more economically efficient than the establishment of any trade-sanctions mechanism, because trade-sanctions mechanisms contemplate one state punishing another through application of some form of duty, quota, or ban for failure to enforce human rights norms domestically. Claims for compensation that are targeted against an individual firm for specific conducts are far more economically efficient and do not raise the potential for conflicts with multilateral trade regimes.

More importantly, however, the inclusion of a mechanism such as the one proposed herein improves upon the existing trends in international law, which have been leading towards the protection of individual rights by individuals as against individuals. It is recognized that the international legal landscape contains far more actors and interests than those of nation-states. The possibility of compensation being awarded under the proposed mechanism also provides a possible incentive for effective monitoring and prosecution of individual claims by NGOs[6].

The remedy of compensation for the breach of a human rights obligation has a long history in international treaty practice. While most treaties also provide for various forms of special or declarative relief, the prospect of receiving compensation not only provides the victims of human rights abuses with recognition and acknowledgement of the wrongs that have been committed, but it also provides them with a means of beginning to rebuild their lives. Accordingly, the principle of entitlement to compensation has been included in a draft Statement of Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law. In particular, the draft text provides: "In cases where the violation is not attributable to the State, the party responsible for the violation should provide reparation to the victim or to the State if the State has already provided reparation to the victim."[7]

The Basis for Liability Under the Proposed Mechanism

Under conventional international human rights law, states are obliged to ensure that each of their citizens enjoys basic rights and freedoms—not only insofar as states must not breach such rights or freedoms—but also by ensuring that the necessary legal and political conditions exist that will promote and protect the enjoyment of such rights and freedoms. This general obligation also includes the need to safeguard the rights of citizens as against the conduct of non-state actors. This line of reasoning was elaborated in the Velasquez Rodriguez Case,[8] in which the Inter-American Court of Human Rights concluded that Honduras was responsible for the extrajudicial disappearance of Mr. Rodriguez at the hands of individuals acting as government agents.

The court further concluded that the failure of the state apparatus to provide any sort of protection or remedy for Mr. Rodriguez constituted a violation of his rights under the American Convention on Human Rights. The existence of such a duty implies that at least some, if not many, forms of non-state activity must be relevant for the protection of individual human rights. It is interesting to note that most international investment agreements actually contain a customary international law exhortation to provide "full protection and security" to the investments of foreign investors. If such an obligation is to be imposed on states in respect of how they treat aliens and foreign investments, surely it must exist in respect of the kinds of treatment that must today be provided to individuals under modern international human rights law.

But what kind of "activities" undertaken by the investor/investment should be the subject of a human rights claim? International law purists might argue that international human rights conventions impose little or no obligations on the activities of non-state actors and, to the extent that they do impose obligations, their breach is a matter of dispute between the states that are party to the applicable treaty. As discussed above, this is far too narrow a reading of the state of the international legal order today. Non-state actors have disparate and easily identifiable interests that do not necessarily conform to those of any particular state. These interests may themselves conflict among different types of non-state actors (here, the interests of transnational corporations, potential human rights claimants, and NGOs). In addition to possessing international legal interests, it would appear only prudent to conclude that non-state actors might also possess positive duties to act under such obligations.

If human rights are aimed at the protection of human dignity, the law needs to respond to abuses that do not implicate the state directly. . . . this does not mean that everything that a corporation does that might deleteriously affect the welfare of those in the corporation's sphere of operations is a human rights abuse, just as, for example, a tax increase that makes some people worse off financially is not a human rights abuse. Nor does it require ignoring the nexus to state action; as such a linkage may well serve to help clarify certain duties of corporations. But it does suggest that the recognition of some duties of corporations, far from being at odds with the purpose of international human rights law, is wholly consonant with it.

Based upon this analysis, there appear to be three grounds for investor liability for human rights abuses under the proposed mechanism. **First,** there is responsibility for the ways in which an investor/investment abets, or can be seen as complicit in, human rights abuses

perpetrated by state officials. **Second,** there is responsibility for acts of the investor/investment that constitute a de facto exercise of state power, whether delegated on an implicit or explicit basis. **Finally,** there is responsibility for acts of the investor/investment if its activities are clearly contemplated within the scope of the applicable norms in question.

The first of these categories is perhaps the easiest to independently establish. How can the breach of an international human right be absolved simply because one of the perpetrators does not hold public office, particularly if the right in question is regarded as fundamental (with individual liability likely attaching)? Ratner correctly notes that there should be certain lesser (or "secondary") treaty breaches that might only be amenable to activities of the state; however, insofar as such obligations can be perpetrated by a non-state actor, Ratner would hold them liable.[9] For example, if reports were accurate that Shell Oil's subsidiary in Nigeria provided the equipment used by state security forces to violently repress opposition to its investment and even paid their salaries, complicity in the violation of relevant obligations, such as the right to life and security of the person, would rest with Shell and its investment.

Conclusion

The international legal landscape has undergone a sea of change over the past five decades, and two of the most prominent areas that have affected, and been affected by, this change are international economic law and international human rights. Both systems of law have moved towards the articulation of non-state rights and interests in both norm development and in prosecution of norms. By grafting a human rights claim mechanism onto the existing structure of international investment protection treaties, one can both recognize the growing place of the transnational corporation in human rights law and practice and improve upon the Achilles heel of human rights effective enforcement. Through the establishment of an effective enforcement mechanism (perhaps based upon the draft provisions appended below), voluntary codes of corporate conduct can move from the realm of a public relations exercise to the role of an educative compliance mechanism. Without effective enforcement, human rights law will remain the weak sibling of international economic law.

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DOCTRINE OF BASIC STRUCTURE OF INDIAN CONSTITUTION

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ABSTRACT

A constitution is a set of laws and rules setting up to machinery of the government of a state and which defines and determines the relations between the different institutions and areas of government, the executive, the legislature and the judiciary; the central, the regional and the local governments. The Doctrine of Basic Structure�圓 is a doctrine to put a limitation on the amending powers of the Parliament so that the basic structure of the basic law of the land cannot be amended in exercise of its constituent power‘ under the Constitution. The first instance of the problem of validity of the Constitutional amendments arose on the issue of "right to property. Since then Supreme Court has from time to time made it clear that the Parliament had no power to take-away or abridge any of the Fundamental Rights guaranteed by the Constitution by way of constitutional amendments.

Key Words: Doctrine, Basic, Structure, Indian, Constitution.

With the end of Independence Struggle in 1947, India was to face a new struggle to live as an independent nation and at the same time, to establish a democracy based upon the ideals of justice, liberty, equality and fraternity. Therefore first task undertaken by independent India was to frame a constitution which represents the political, economic bind social ideals and aspirations of the vast majority of the Indian people. The present constitution of India was brought into force on 26th January, 1950. A constitution is a set of laws and rules setting up to machinery of the government of a state and which defines and determines the relations between the different institutions and areas of government, the executive, the legislature and the judiciary; the central, the regional and the local governments. Therefore well established principles are must for a constitution however there can be some variations which are the product of the varying conditions and circumstances that determine the principles of the constitution. The Constitution of India is not an exception to this rule and it has its own basic principles. A careful study of the Constitution reveals six basic principles which are embodied in it and which form the foundations of democracy in India. These are - (1) Popular sovereignty, (2) Fundamental rights, (3) Directive principles of state policy, (4) Judicial independence, (5) Federalism, and (6) Cabinet government.

The Doctrine of Basic Structure‘ is a doctrine to put a limitation on the amending powers of the Parliament so that the basic structure of the basic law of the land cannot be amended in exercise of its constituent power‘ under the Constitution. According to Edmund Burke, "a Constitution is an ever growing thing and is perpetually continuous as it embodies the spirit of

the nation. It is enriched at present by the past influence and it makes the future richer than the present." A rigid constitution can become a big hurdle in the path of the progress of the nation, as the political, economic and social conditions of the people goes on changing with time so for that reason provision of amendment of the Constitution is made with a view to overcome the difficulties of "we the people in Part XX of the Indian Constitution under Article 368 which deals with the amendment of the Constitution. It provides for three kinds of amendment i.e., **amendment by simple majority** of each house of Parliament- it is like an ordinary bill. Formation of new States, creation or abolition of Legislative Councils (Arts. 4, 169 and 239-A) is made by such procedure. Thus, amendment at the instance of the States, or amendment by State Legislatures, is included in such category. Amendments under this category are expressly excluded from the purview of Article 368; **amendment by special majority** means majority of "total members of each House and by a majority of at least two-third "present and voting. All amendments, other than those referred in amendment by simple majority, come within this category, e.g., powers of Election Commission; and **amendment by special majority and ratification by the States** in which the States are given an important voice in the amendment of these matters which are required to be ratified by the legislature of not less than one-half of the States.

However procedure for amendment was contained in the Constitution of India that came into force on 26 January 1950 but doubts were raised whether all or any of the provisions of the Constitution can be amended by following the specific procedure laid down in the Constitution? Whether people can be deprived of their Fundamental Rights or a state can be deprived of its High Court or its Assembly even with the special vote in Parliament and with the concurrence of the State concerned or half of the States? Similarly, can the Supreme Court be abolished by special majority of Parliament with the concurrence of the States?

In the case of Kesavananda Bharati v. State of Kerala, a thirteen-judge bench of the Indian Supreme Court, by a majority of 7:6, answered that question in the negative. It was held that the Parliament could only amend the Constitution to the extent that it did not "damage or destroy the basic structure of the Constitution." By subjecting Constitutional amendments to judicial review, the Court essentially placed a substantive non-legislative check upon the Parliament's amending power. M. K. Nambyar inspired by Professor Conrad brought this issue of necessary implied restraint to the amendment of the Constitution in I. C. Golakh Nath v. State of Punjab[(1967) 2 SCR 762.] but the Judiciary hesitated to pronounced this notion. Later on it was Nani Palkhivala who in Keshavananda Bharati Sripadagalvaru v. State of Kerala AIR 1973 SC 1461 (popularly known as the, Fundamental Rights Case which was a consolidated case name of the following cases- Raghunath Rao Ganpati Rao, N. H. Nawab Mohammed Iftekhar Ali Khan vs. Union of India, Shethia Mining and Manufacturing Corporation Limited vs. Union of India and Oriental Coal Co. Ltd. vs. Union of India) was able to successfully propounding the doctrine of Basic Structure of the Constitution.

The **Fundamental Rights**, **Directive Principles of State Policy** and **Fundamental Duties** are sections of the Constitution of India that prescribe the fundamental obligations of the State to its citizens and the duties of the citizens to the State. The Fundamental Rights is defined as the basic human rights of all citizens. These rights, defined in Part III of the Constitution, apply irrespective of race, place of birth, religion, caste, creed or gender. They are enforceable by the courts, subject to specific restrictions. The purpose of the Fundamental Rights is to

preserve individual liberty and democratic principles based on equality of all members of society. Dr Ambedkar said that the responsibility of the legislature is not just to provide fundamental rights but also and rather more importantly, to safeguard them.

Role of Judiciary in Basic Structure

The Shankari Prasad Case: The first instance of the problem of validity of the Constitutional amendments arose on the issue of right to property. The originally enacted Constitution included such provisions relating to property under Article 19 (1) (f) were contained in the original constitution. The Constitution further provided for the protection of right to property under Article 31. First Amendment Act, 1951 which introduced new Articles in the Constitution by the saving clause i.e., Articles 31-A 34 and 31-B 35. It was broadly declared in Article 31-A that any law providing for compulsory acquisition of property aimed at development of the state will not be unconstitutional merely because it is in conflict with Articles 14 and 19. Whereas Article 31-B introduced a new Schedule in the Constitution; the Ninth Schedule which laid down that any law included in this schedule would be immune from challenge in any court. The First Constitutional Amendment was challenged before the Supreme Court in Shankari Prasad vs. Union of India with the main issue whether the Constitution (First Amendment) Act, 1951 passed by the provisional Parliament is valid? The amendments were challenged on the ground that the word law under article 13(2) also includes the, law of the amendment of the Constitution and so the Articles 31-A and 31-B are invalid because they abridge the fundamental rights. To the issue that the definition of the word contained under Article 13 (3) (a)37 did not expressly refer to the „Constitutional amendments , the Court held that although amendment is superior to an ordinary legislation and hence it will not be hit by article 13(2). As the word law under article 13(2) ordinarily includes Constitutional amendment but it must be taken to mean the exercise of ordinary legislative power. Thus amendments made in exercise of the constituent power of the Parliament are not subject to Article 13(2) and such power includes the amendment of the fundamental rights as well. Court also observed - "We are of the opinion that in the context of Article 13 law must be taken to mean rules and regulations made in the exercise of ordinary legislative power and not amendments to the Constitution made in the exercise of constituent power with the result that Article 13(2) does not affect amendments made under Article 368." The Court using the literal interpretation resolved the conflict and upheld the validity of the First Amendment and also held that Article 368 empowers the Parliament to amend the Constitution without any exception that Fundamental Rights cannot be amended being the exception to Article 368. The Court also disagreed with the view that Fundamental Rights are inviolable. Thus, in this case the Supreme Court kept the law of amendment beyond the scope of Article 13(2) and thereby enabled the process of progress of the nation through the process of acquisition of property.

The Sajjan Singh Case: The Constitution (Seventeenth Amendment) Act, 1964 introduced a major change and put a number of laws in the Ninth Schedule, so as to keep them away from the judicial review. It affected, inter alia the Fundamental Rights under Article 31A. The validity of this Act was challenged in Sajjan Singh's case. The Court rejected this argument and held by majority that the - pith and substance of the amendment was to amend the Fundamental Rights and not to restrict the scope of Article 226. They minority view on this point was very different, Justice Hidayatullah observed - "I would require stronger reasons

than those given in Shankari Prasad to make me accept the view that Fundamental Rights were not really fundamental but were intended to be within the powers of amendment in common with the other parts of the Constitution and without concurrence of the states." Justice Mudholkar observed that Constitutional amendment be excluded from the definition of law under Article 13 and he also gave an argument that every Constitution has certain basic principles which could not be changed. The Court said that the decision in Shankari Prasad needs reconsideration and observed- "…if the arguments urged by the petitioners were to prevail, it would lead to the inevitable consequence that the amendment made in Constitution both in 1951 and 1955 would be rendered invalid and a large number of decisions dealing with the validity of the Acts included in the Ninth Schedule which has been pronounced by the different High Courts ever since the decision of this Court in Shankari Prasad s case was declared, would also be exposed to serious jeopardy. These are considerations which are both relevant and material in dealing with the plea urged by the petitioners before us in the present proceeding that Shankari Prasad s case should be reconsidered. The majority judgment in that case observed inter alia, that the principles expounded in Shankari Prasad's case were sound and valid and that the challenge to the validity of the impinged Act could, therefore, not be sustained.

I. C. Golakhnath Case: The strong reservations of the minority in Sajjan Singh case prompted Chief Justice Subba Rao to constitute a larger Bench (eleven judges) to reconsider the Constitutional validity of First, Fourth and Seventeenth Constitutional Amendments in view of the doubts expressed by Hidayatullah and Mudholkar JJ. By a majority of 6:5 it was held that the "Parliament had no power to amend the fundamental rights. Subbarao C.J., delivered the leading majority judgement (For himself, Sikri, Shelat, Shah and Vaidyalingam JJ.) whereas Hidayatullah J. delivering a concurring judgement. The two judgements reached the same conclusion although they took the opposite views as to the source of the amending power.

Supreme Court made it abundantly clear that the Parliament had no power to take-away or abridge any of the Fundamental Rights guaranteed by the Constitution by way of constitutional amendments. Speaking for himself and four concurring judges, Chief Justice K. Subba Rao summarised the main conclusions, which are:

1. The power of Parliament to amend the Constitution is derived from Articles 245, 246 and 248 of the Constitution and not from Article 368, which only deals with the procedure.
2. Amendment is law within the meaning of Article 13 of the Constitution and therefore if it takes-away or abridges the rights conferred by Part III covering Fundamental Rights, it is void.
3. Parliament will have no power from the date of the decision to amend any of the provisions of Part III of the Constitution so as to take-away or abridge the Fundamental Rights enshrined therein.

After this judgment, it felt that the Judiciary was becoming stumbling block, as by its decisions it was obstructing the government in introducing socio-economic reforms in the society. The Government declared that the Fundamental Rights were not sacrosanct and they could not stand in the way of socio-economic reforms. The 24th Amendment sought to restore

to Parliament the power of amending any of the provisions of the Constitution. The Government went ahead and passed the 25th amendment to insert Article 3 1(c) to enable Parliament to circumvent and by-pass Articles 14, 19 and 31. It raised the status of clauses (b) and (c) of Article 39 and curtail the power of Judicial review.

The Keshavananda Bharati Sripadagalvaru Case: The validity of the 24th and 25th amendments was challenged before the Supreme Court in Kesavananda Bharti's case. Kesavananda vs. State of Kerala, one of the milestones in the history of jurisprudence, was heard by the Supreme Court. The hearing lasted from November 1972 to April 1973. The case was heard by 13 Judges and their judgments were delivered on April 24, 1973.

The Government of India claimed that it had the rights as a matter of law to change or destroy the entire fabric of the Constitution through the instrumentality of Parliament's amending power; and that it should be trusted to exercise this seminal right wisely but not too well. It is argued that unlimited power of amendment is necessary to meet the democratically expressed will of the people and that the representatives of the people should be trusted not to abrogate in basic freedoms.

Six senior judges of the Supreme Court held as follows:

(i) Parliament's amending power is limited. While Parliament is entitled to abridge any fundamental right or amend any provision of the Constitution, the amending power does not extend to damaging or destroying any of the essential features of the Constitution. The fundamental rights are among the essential features of the Constitution; therefore, while they may be abridged, the abridgement cannot extend to the point of damage to or destruction of their core.

(ii) Article 31C is void since it takes away invaluable fundamental rights, even those unconnected with property.

Chief Justice Sikri observed - The expression amendment of this Constitution does not enable Parliament to abrogate or take away fundamental rights or to completely change the fundamental features of the Constitution so as to destroy its identity. Within these limits Parliament can amend every article. Justice Sikri had tried to tabulate the basic features of the constitution as follows:

(i) Supermacy of the constitution;

(ii) Republican and democratic form of government;

(iii) Secular character of the constitution;

(iv) Separation of powers; and

(v) Federal character of the constitution.

In the same case, Justice Hegde and Justice Mukherjee, included the sovereignty and unity of India, the democratic character of our polity and individual freedom to the elements of basic structure of the Constitution. Mukherjee and Hedge JJ. observed if the basic features are taken away to that extent the Constitution is abrogated or repealed, the amending power is subject to the implied limitations and Parliament has no power to emasculate or abrogate the basic elements of the Constitution.

Justice Khanna held that the limitation on the amending power only arose from the word amendment. He also observed that there is no such inherent or implied limitation on the amending power. He rejected the contention that the fundamental rights and the Preamble of the Constitution could not be amended at all. Justice Khanna also said that Parliament could not change our democratic government into a dictatorship or hereditary monarchy nor would it be permissible to abolish the Lok Sabha and the Rajya Sabha.

The majority judgment of the Supreme Court restricted the Parliament to exercise its amending power to alter the basic structure or framework of the Constitution.

Indira Gandhi's Case (1975): It was held in Kesavananda Bharti's case (1973) that while Parliament has the power under Article 368 to amend any part of the Constitution, the power cannot be so exercised as to alter or destroy the basic structure or framework of the Constitution; and this ratio was reaffirmed and applied in Indira Gandhi's case (1975) in which a constitutional amendment to make the Prime Minister's election to Parliament unassailable in a court of law was declared void.

In Indira Gandhi vs. Raj Narain, Justice Chandrachud found the following to be the fundamental elements of the basic structure of the Constitution:

(i) India as a sovereign, democratic republic;

(ii) Equality of status and opportunity;

(iii) Secularism and the freedom of conscience; and

(iv) Rule of law.

Minerva Mill's Case (1980)

Respecting the basic structure doctrine propounded in Kesavananda Bharti's case, the Supreme Court has declared in Minerva Mill's case that section 55 of the 42nd Amendment Act which introduced clauses 4 and 5 as void. According to the court the two clauses confer upon the Parliament vast and undefined power to amend the Constitution even so as to restrict it out of recognition. It has declared in unequivocal terms that the Constitution had conferred only a limited amending power on the Parliament and therefore, it cannot under the exercise of that limited power enlarge it into an absolute one. Though, the judges have differed in their views in this case, there is an unanimity of views about Article 368. The judges have upheld the view that the limited amending power is one of the basic features of our Constitution and therefore, the limitation on that power cannot be destroyed.

The Supreme Court has held that to abrogate the fundamental rights while purporting to give effect to the directive principles is to destroy one of the essential features of the Constitution.

The same Justice Chandrachud in Minerva Mills case added the amending powers of Parliament, judicial review' and 'balance between the Fundamental rights and the Directive Principles to the list of elements basic to the Constitution.

The substantial question before the Honourable Court in **I. R. Coelho** case was, whether on and after the date of Keshavananda judgement, it is permissible for the Parliament under Article 31B to immunize legislations from fundamental rights by inserting them into the Ninth Schedule and, if so, are the courts having any power to review these legislations? The judgment was delivered by a bench of nine judges. The then Chief Justice of India, Y. K.

Sabharwal observed – "When entire Part III (dealing with Fundamental Rights) is sought to be taken by a Constitutional amendment by the exercise of constituent power under Article 368 by adding the legislations in the Ninth Schedule, the question arises as to the judicial scrutiny available to determine whether it alters the fundamentals of the Constitution." The Court held that a law that abrogates or abridges rights guaranteed by Part III of the Constitution may or may not violate the basic structure doctrine. If former is the consequence of law, such law will have to be invalidated in exercise of judicial review power of the Court. The majority judgment in Kesavananda Bharti's case read with Indira Gandhi case requires that to judge the validity of each new Constitutional amendment, its effects and impacts on the rights guaranteed under Part III has to be taken into account and then it should be decided whether or not it destroys the basic structure of the Constitution.

Supreme Court's decision (on January 11, 2007) on subjecting laws placed in the Ninth Schedule of the Constitution to judicial review-on the ground of violation of fundamental rights forming part of the basic structure of the Constitution-is, in a sense, a natural institutional reaction to the ouster of jurisdiction in the early years of the republic. It was in 1951 that Parliament through the first amendment to the Constitution carved out the Ninth Schedule as an enclave where laws could be placed beyond judicial challenge on the ground of violation on any of the fundamental rights. That move was a reaction to the spate of challenges to land reform laws. Originally, the Schedule was intended to cover land reform and nationalisation laws besides laws to tackle concentration of economic power, and was only to be used sparingly. Yet, as the court has pointed out in its latest decision, the list expanded from 13 to 284, including many State laws. It is difficult to fault the court's reasoning that under the constitutional scheme, Parliament does not have a carte blanche to override all the fundamental rights, which is what the Ninth Schedule allows it to do. If in the early years of the Constitution the courts had conceded to Parliament an unfettered right to amend it, the Kesavananda Bharati case in 1973 introduced the doctrine that the basic structure and framework of the Constitution would be beyond the amending power. Following this line of reasoning, the nine-judge bench of the Supreme Court has now held unanimously that laws placed in the Ninth Schedule after 1973 are subject to judicial scrutiny on whether they violate fundamental rights forming part of the basic structure.

The Bench further said, "Since the power to amend the Constitution is not unlimited, if changes brought about by amendments destroy the identity of the Constitution, such amendmer1ts would be void. Secularism is one such fundamental right and equality is the other. It is impermissible to destroy Articles 14 (equality) and 15 (prohibition of discrimination on grounds of religion, race, caste, sex or place or birth) or abrogate or eliminate en bloc these fundamental rights. It may he noted that Parliament can make additions in the three legislative lists, but cannot abrogate all the lists as it would abrogate the federal structure."

Rejecting the contention that Parliament had unlimited power to enact any law and put it in the Ninth Schedule, the Bench said, "Article 31-B cannot be used so as to confer unlimited power. Article 31-B cannot go beyond the limited amending power contained in Article 368 (power to amend the Constitution)."

The court reminded the Government that equality, rule of law, judicial review and separation of powers formed part of the Basic Structure. "There can be no rule of law, if there is no

equality before the law. These would be meaningless if the violation was not subject to judicial review."

According to N. A. Palkhivala, the following are some of the essential features of the Constitution which Parliament cannot alter or destroy in the exercise of its amending power.

1. The supremacy of the constitution: Ours is a controlled constitution par excellence. All institutions, including Parliament, are merely creatures of the constitution and none of them is its master.
2. The sovereignty of India: This country cannot be made a satellite, colony or dependency of any foreign country.
3. The integrity of the country: The unity of the nation, transcending all the regional, linguistic, religious and other diversities, is the bed-rock on which the constitutional fabric had been raised.
4. The republican form of Government: India cannot be transformed into a monarchy.
5. The democratic way of life as distinct from mere adult franchise: There is a guarantee of fundamental rights to ensure justice, social, economic and political; liberty of thought, expression, belief, faith and worship; and equality of status and of opportunity.
6. A state in which there is no state religion: All religions are equal and none is favoured.
7. A free and independent judiciary: Without it, all rights would be writ in water.
8. The dual structure of the Union and the States: It permits centralisation and decentralisation to coexist.
9. The balance between the legislature, the executive and the judiciary: None of the three organs can use its powers to destroy the powers of the other two, nor can any of them abdicate its power in favour of another.
10. The amendability of the constitution according to the basic scheme of Article 368: The constitution must continue to be amendable without being alterable in its essentials.

A study of the evolution of the Indian Constitution and tussel between Juidiciary and Parliament reveal, so far there has been no consensus in this regard among the judges and no majority judgment is available laying down the features of the Constitution that may he considered basic. This situation is very unfortunate, the amending power should not be used for political stunts and manoeuvrings. When the Indian electorate becomes politically alert and conscious of their rights, the Government of the day will not be able to destroy the basic structure of the Constitution, through the process of amendment. The basic structure doctrine is a mean to give a momentum to the living principles of the Rule of Law and connotes that none is above the Constitution and the Constitution is supreme.

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CYBER CRIME: LEGAL SAFEGUARDS UNDER INFORMATION TECHNOLOGY ACT, 2000

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ABSTRACT

The growing danger from crimes committed against computers, or against information on computers, is beginning to claim attention in national capitals. In most countries around the world, however, existing laws are likely to be unenforceable against such crimes. This lack of legal protection means that businesses and governments must rely solely on technical measures to protect themselves from those who would steal, deny access to, or destroy valuable information. Self-protection, while essential, is not sufficient to make cyberspace a safe place to conduct business. The rule of law must also be enforced. Countries where legal protections are inadequate will become increasingly less able to compete in the new economy. As cyber crime increasingly breaches national borders, nations perceived as havens run the risk of having their electronic messages blocked by the network. National governments should examine their current statutes to determine whether they are sufficient to combat the kinds of crimes discussed in this report. Where gaps exist, governments should draw on best practices from other countries and work closely with industry to enact enforceable legal protections against these new crimes.

Key Words: Cyber, Crime, Legal, Safeguards, Under, Information, Technology.

As far back as the early 1990s, the Internet was argued to be a unique medium showing the fastest speed of diffusion in human history .Today, there are very few people whose lives are not affected beneficially and/or harmfully by the technology of the Internet era. On the positive side, the ability to share and exchange information instantaneously has provided unprecedented benefits in the areas of education, commerce, entertainment and social interaction. On the negative side, it has created increasing opportunities for the commission of crimes – information technology has enabled potential offenders to commit large-scale crimes with almost no monetary cost and much lesser risk of being caught. Compared to perpetrators of traditional economic motivated crimes (e.g., burglaries, larcenies, bank robberies), online fraudsters are relatively free of worry from directly encountering law enforcement and witnesses.

As crimes have advanced with technology, the breadth of online services and the number of users have continued to increase. We have witnessed that the Internet has made users‘ lives easier and has begun to link together varied segregated services (e.g., tele/communications, banking, investing, pharmacy, social interaction, education, entertainment) and devices (e.g., computers, servers, smart phones, even electronic chips in individual household air conditioning). The integration of such diverse technological applications coupled with the

rapid growth of online users make fraudulent activities likely to rise further, if no intervention is proposed and implemented.

Modes of Cyber Crime

1. Theft of telecommunications services

The "phone phreakers" of three decades ago set a precedent for what has become a major criminal industry. By gaining access to an organization's telephone switchboard (PBX) individuals or criminal organizations can obtain access to dial-in/dial-out circuits and then make their own calls or sell call time to third parties (Gold 1999). Offenders may gain access to the switchboard by impersonating a technician, by fraudulently obtaining an employee's access code, or by using software available on the internet. Some sophisticated offenders loop between PBX systems to evade detection. Additional forms of service theft include capturing "calling card" details and on-selling calls charged to the calling card account, and counterfeiting or illicit reprogramming of stored value telephone cards.

2. Communications in furtherance of criminal conspiracies

Just as legitimate organizations in the private and public sectors rely upon information systems for communications and record keeping, so too are the activities of criminal organizations enhanced by technology. There is evidence of telecommunications equipment being used to facilitate organized drug trafficking, gambling, prostitution, money laundering, child pornography and trade in weapons (in those jurisdictions where such activities are illegal). The use of encryption technology may place criminal communications beyond the reach of law enforcement.

The use of computer networks to produce and distribute child pornography has become the subject of increasing attention. Today, these materials can be imported across national borders at the speed of light (Grant, David and Grabosky 1997). The more overt manifestations of internet child pornography entail a modest degree of organisation, as required by the infrastructure of IRC and WWW, but the activity appears largely confined to individuals.

3. Telecommunications piracy

Digital technology permits perfect reproduction and easy dissemination of print, graphics, sound, and multimedia combinations. The temptation to reproduce copyrighted material for personal use, for sale at a lower price, or indeed, for free distribution, has proven irresistible to many. This has caused considerable concern to owners of copyrighted material. Each year, it has been estimated that losses of between US$15 and US$17 billion are sustained by industry by reason of copyright infringement (United States, Information Infrastructure Task Force 1995, 131).

4. Dissemination of offensive materials

Content considered by some to be objectionable exists in abundance in cyberspace. This includes, among much else, sexually explicit materials, racist propaganda, and instructions for the fabrication of incendiary and explosive devices. Telecommunications systems can also be used for harassing, threatening or intrusive communications, from the traditional obscene telephone call to its contemporary manifestation in "cyber-stalking", in which persistent messages are sent to an unwilling recipient.

5. Electronic money laundering and tax evasion

For some time now, electronic funds transfers have assisted in concealing and in moving the proceeds of crime. Emerging technologies will greatly assist in concealing the origin of ill-gotten gains. Legitimately derived income may also be more easily concealed from taxation authorities. Large financial institutions will no longer be the only ones with the ability to achieve electronic funds transfers transiting numerous jurisdictions at the speed of light. The development of informal banking institutions and parallel banking systems may permit central bank supervision to be bypassed, but can also facilitate the evasion of cash transaction reporting requirements in those nations which have them. Traditional underground banks, which have flourished in Asian countries for centuries, will enjoy even greater capacity through the use of telecommunications. With the emergence and proliferation of various technologies of electronic commerce, one can easily envisage how traditional countermeasures against money laundering and tax evasion may soon be of limited value

Law for Cyber Crime

Every Country has its own Law to stop Cyber Crime as in India, there is Information Technology Act, 2000 ("IT Act") which came into force on October 17, 2000. The main purpose of the Act is to provide legal recognition to electronic commerce and to facilitate filing of electronic records with the Government.

Information Technology Act, 2000

Information Technology Act, 2000 is India's mother legislation regulating the use of computers, computer systems and computer networks as also data and information in the electronic format. This legislation has touched varied aspects pertaining to electronic authentication, digital (electronic) signatures, cyber crimes and liability of network service providers. The Preamble to the Act states that it aims at providing legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as "electronic commerce", which involve the use of alternatives to paper-based methods of communication and storage of information and aims at facilitating electronic filing of documents with the Government agencies. This Act was amended by Information Technology Amendment Bill, 2008 which was passed in Lok Sabha on 22nd December, 2008 and in Rajya Sabha on 23rd December, 2008. It received the assent of the President on 5th February 2009 and was notified with effect from 27/10/2009.The IT Act of 2000 was developed to promote the IT industry, regulate ecommerce, facilitate e-governance and prevent cybercrime. The Act also sought to foster security practices within India that would serve the country in a global context. The Amendment was created to address issues that the original bill failed to cover and to accommodate further development of IT and related security concerns since the original law was passed. The IT Act, 2000 consists of 90 sections spread over 13 chapters [Sections 91, 92, 93 and 94 of the principal Act were omitted by the Information Technology (Amendment) Act 2008 and has 2 schedules.[Schedules III and IV were omitted by the Information Technology (Amendment) Act 2008].

The Information Technology (Amendment) Act, 2008

i. The term 'digital signature' has been replaced with 'electronic signature' to make the Act more technology neutral.

ii. A new section has been inserted to define 'communication device' to mean cell phones, personal digital assistance or combination of both or any other device used to communicate, send or transmit any text video, audio or image.

iii. A new section has been added to define cyber cafe as any facility from where the access to the internet is offered by any person in the ordinary course of business to the members of the public.

iv. A new definition has been inserted for intermediary.

v. A new section 10A has been inserted to the effect that contracts concluded electronically shall not be deemed to be unenforceable solely on the ground that electronic form or means was used.

vi. Section 67 of the IT Act, 2000 has been amended to reduce the term of imprisonment for publishing or transmitting obscene material in electronic form to three years from five years and increase the fine thereof from Rs.100,000 to Rs. 500,000. Sections 67A to 67C have also been inserted. While Sections 67A and B deals with penal provisions in respect of offences of publishing or transmitting of material containing sexually explicit act and child pornography in electronic form, Section 67C deals with the obligation of an intermediary to preserve and retain such information as may be specified for such duration and in such manner and format as the central government may prescribe.

Conclusion

Since users of computer system and internet are increasing worldwide, where, it is easy to access any information easily within a few seconds by using internet which is the medium for huge information and a large base of communications around the world. Certain precautionary measures should be taken by citizens while using the internet which will assist in challenging this major threat Cyber Crime. It can be seen that the threat of computer crime is not as big as the authority claim. This means that the method s that they introducing to combat it represents an unwarranted attack on human rights and is not proportionate to the threat posed by cyber-criminals. Part of the problem is that there are no reliable statistics on the problem; this means that it is hard to justify the increased powers that the Regulation of Investigatory Powers Act has given to the authorities. These powers will also be ineffective in dealing with the problem of computer. The international treaties being drawn up to deal with it are so vague that they are bound to be ineffective in dealing with the problem. It will also mean the civil liberties will be unjustly affected by the terms of the treaties since they could, conceivably, imply that everybody who owns a computer fitted with a modem could be suspected of being a hacker. The attempts to outlaw the possession of hacking software could harm people who trying to make the internet more secure as they will not be able to test their systems; therefore the legislation could do more harm than good. It is cleared from the previous studies and records that with the increment in technology cybercrimes increases. Qualified people commit crime more so, there is need to know about principles and computer ethics for their use in proper manner. Cybercrime and hacking is not going away, if anything it is getting stronger. By studying past incidents, we can learn from them and use that information to prevent future crime. Cyber law will need to change and evolve as quickly as hackers do if it has any hopes of controlling cybercrime. Law must also find a balance between protecting citizens from crime, and infringing on their rights. The great thing about the internet is how vast and free it

is. Will it be able to remain the same way while becoming tougher on criminals? Only time will tell. There will always be new and unexpected challenges to stay ahead of cyber criminals and cyber terrorists but we can win only through partnership and collaboration of both individuals and government. There is much we can do to ensure a safe, secure and trustworthy computing environment. It is crucial not only to our national sense of well-being, but also to our national security and economy. Yet India has taken a lot of steps to stop cybercrime but the cyber law cannot afford to be static, it has to change with

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RIGHTS OF WOMEN'S IN THE CONTEMPORARY WORLD

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ABSTRACT

This article explores the importance of women's rights in the fight for women's empowerment. It contributes to the theoretical debate on whether women's rights are compatible and complementary with the general concept of human rights, or rather irreconcilable. The use of the human rights framework for upholding women's rights has been criticized for: its male norm hidden behind a false universalism obscuring or even excluding women; its disregard for the limited choice of many women, its comprisal of a hierarchy of rights in which those most relevant to women's equality often do not rank the highest, its limited vocation in positively enforcing women's equality, its tension with multiculturalism and the problems related to the enforcement of such rights. The paper will discuss these claims and will provide counterarguments to them, and subsequently conclude that the liberal concept of human rights is the best vehicle for promoting women's rights.

Key Words: Rights, Women, Contemporary, World, Human.

This paper aims to bring a contribution to a debate between two feminist camps. On the one hand, some feminist authors argue that the liberal concept of human rights is useful for protecting women's rights. On the other side, arguments have been brought against the liberal framework and its usefulness for feminism. This is a historical dispute between those feminists arguing in favor of "working the human rights system to women's advantage" and those who had lost faith in the liberal philosophy, criticizing it on a variety of grounds. Following a discussion of the most important arguments brought into this debate, the paper will explore the strengths and weakness of the case made by each side. The paper aims to represent a critical investigation of the arguments in favor and against the connection between human rights and women's rights. Its methodology is analytical appraisal and criticism. Concluding, the article will argue in favor of using the framework of human rights for the accomplishment of gender equality, despite its limitations. Moreover, the study will show the importance of adopting context sensitive approaches when addressing complex instances of women's rights violations.

Liberal Concept of Women's Rights

Among the most widespread justifications dismissing the feminist vocation of the liberal concept of human rights, we encounter: the classical feminist distrust in its "false universalisms" and its "masculinist exclusions", and the limited understanding of equality as simply formal, not substantive. Furthermore, a feminist target for criticism is also liberalism's reliance on negative rights, without a positive duty to achieve equality imposed on the state. The liberal concept of "choice" is also attacked by some feminists, because it disregards the background situation which frames the preference of many women. A point of discontent is also determined by the primary focus of liberalism – especially neo-liberalism – on economic efficiency at the expense of human rights. Equally controversial is the perceived "hierarchy of rights" among the privileges included in the concept of human rights. Last, but not least, the situation of cultural diversity and its relation to women's rights in the framework of liberalism is a further point of tension.

In her presentation of the relation between human rights and women's rights, Katarina Tomasevski points out to the sexist character of the classical understanding of civil and political freedoms. She focuses on the language of the conventional discourse on human rights, which also impacted the application of the concept. Her view can be summarized by the statement that "he does not include her". To support her argument Tomasevski brings in the example of the People's act of 1867 which gave the right to all English men to choose their representation. Women who petitioned for the understanding of "men" as human, thereby including females unless otherwise explicitly stated, were denied.8 In addition, she points out that even in the contemporary terminology of human rights aiming for a gender-neutral approach, and sexism is still reflected in the content. At the formal level, the omnipresence of "him" in the law, leads to a symbolic exclusion of "her" rights, shadowing the "existence of women as half of humanity". At the substantive level, even if "she" is officially included in the text of the law, "his" right was traditionally protected and taken as the norm. In the classical understanding of individual rights, the law sought to protect the subject against the state. This resulted into the first generation of rights known as civil and political liberties. However, women's freedom is often restricted not only by state intervention, but also by community or family. Women's rights are often breached by non-state actors, such as private entities or individuals. The "invisibility" of women's rights violations, such as in the cases of rape and other sexual offences, has led to them being tabled as "particular", or supplementary and often seen as less imperative.

However one can also argue that by formally including women as bearers of rights, a significant progress towards the formal inclusion of women's rights in the language, as well as in the content of the law, has been achieved. Otherwise, said, recent developments in international law have been marked by the advancement towards shifting the discourse from its "androcentricity", or the male-norm. The engendering or gender mainstreaming of the concept of human rights has been seen as one of the most important preconditions for the effectiveness of its use for upholding women's rights. This transformative approach is defined by Teresa Rees as a process which aims at "deconstructing the underlying orientation of organizations" which uphold the advantage of the privileged of the advantaged group, in this case men's rights. Engendering an institution implies "recognizing that what is taken as the norm is not necessarily gender neutral". As Margaret Schuler stated "engendering human

rights means articulating a gendered concept of human dignity." An important example of this approach is the gender mainstreaming of the International Criminal Court's mandate. Mass rape during armed conflict was regulated as a distinct crime within the competence of the ICC, and defined as "a war crime and a crime against humanity"

Liberalism is also blamed by activists for women's rights for its shallow definition of equality. As described by Molyneux and Razavi, classical liberal writers such as John Stuart Mill and Thomas Hill Green have insisted on the necessity of imposing a positive duty upon the state to enforce the necessary conditions for equality. Yet, feminists take their view one step further, by criticizing even the more modern articulations of liberalism, which includes a greater focus on positive rights. One such criticism has been leveled at Rawls' theory of justice as being biased in favor of men, and disregarding inequality within the family. Therefore, the version of equality prophesied by liberalism is often seen by feminist as mere demagogy. In order for equality to become reality, supporters of women's rights often claim that negative rights, although unquestionably worthy of having are not sufficient. Such an approach is considered to be completely oblivious of the "background conditions" which prohibit women, as well as other groups from enjoying negative freedom. In most situations, women lack both the material and non-material resources to claim their rights.

Another source of feminist skepticism towards human rights results from their close association with market values. Human rights, in their classical understanding have been accused of permitting and justifying an unrestricted market, which tends to disadvantage women. According to this argument, human rights are instrumental to building a society of productive individuals, given the intensity with which property rights and regulated transactions are guarded. This is exemplified by Article of the Universal Declaration for Human Rights, which states "Everybody has the rights to own property… No one shall be arbitrarily deprived of his property". This claim is specifically relevant in the context of the post 1970's neo-liberal agenda. This political and economic outlook centers on the market and private property and seeks for a diminishing of the involvement of the state, and of public expenditure. Within these circumstances women, although still being granted formal rights, are far more likely than men to be negatively impacted. The causes for this situation are multiple, but most of them stem from women's traditional role in un-paid and underpaid work, as well as traditional gender stereotypes which tend to lower women's standing on the occupation market. Moreover, budget cuts negatively impact women due to the fact that the scarcity or the high price of childcare services limit women's access to the labor force.

In response, it can be argued that the connection between human rights and market values is not always clear-cut and can take different forms. Firstly, property rights are not seen as absolute and the level of redistribution and public expenditure varies from one state to another. For example, the Nordic states can both guarantee property and collect large budgets to use in the provision of public goods, including childcare services. Furthermore, even in situations in which redistribution and public provision of goods is not the norm, dynamic markets guaranteed by classical human rights can work to the advantage of women. Economic development can be used for improving women's social standing and thus also enabling them to claim their formal rights. As Diane Elson reflects upon the policy of the World Bank and the International Monetary Fund, "grow (th) first, redistribution later". Otherwise said, wealth

cannot be redistributed in the absence of a well-established economic system based on free-market.

Another point of tension between the feminism and the Universalist ambition of liberalism emerges when taking into account the reality of cultural diversity, both within societies and at the global level. On the one hand, some feminists support the claim that human rights are universal and can be used as a tool for worldwide liberation of women. Other feminists reject this and support cultural relativism: a claim that there are no moral differences between cultures. This group argues that Universalist human rights are nothing but an imperialist tool of dominating other cultures. The latter orientation is a reaction against a brand of liberalism which ignores differences. Both cultural relativism and this brand of feminism resist the idea of universal standards for women's rights. Moreover, they argue that such Western ideals of human rights have no relevance for cultures cherishing different values.

Nevertheless, all these arguments can be challenged by those feminists who do consider human rights and women's rights to be universal by claiming that most culturally specific norms are gender biased. Such customs are likely to have traditional and religious components which often place women in an inferior position as compared to men. Therefore, this camp opts for the "sasince "virtually all of the world's cultures have distinctly patriarchal pasts". However, according to Susan Moller Okin, Western liberal cultures "have departed for further from [it] than others". Therefore the spread of values such as human rights in other areas of the world would increase gender equality. Additionally, liberal feminists can also accommodate the notion of inter sectionalist: that the many categories in which people are placed can intersect, leading to overlapping layers of oppression. Liberal feminists can show that achieving universal aims such as freedom, equality and human rights can end inequality on any ground, including race and class.

Cultural Values About Women's Status

However, despite the potential threat represented by traditional cultural values for the improvement of women's status, the feminist camp disliking the notion of human rights can reply to the previous statement by pointing out the less equalitarian face of Western liberalism and to its colonial past. As Leti Volpp has well explained, conceptually placing "feminism versus multiculturalism" is founded on "fundamental logical flaws". This outlook is reliant on an image of the minority woman as a victim, constructed by the West. Therefore, in the name of cultural relativism, some sociologists and anthropologists have claimed that the alleged Universalist Western values reflected in the notion of human rights are not necessarily always more favorable to women as compared to the model provided by other (ancient) cultures. Even in the cases when human rights ideals are equally beneficial to women's status, they are not the only path to female emancipation. Therefore, they have argued that this individualist approach rooted in the culture of Europe and North America, appearing as superior and enlightening to other nations is in fact equally or more oppressive to women than the societies they are trying to reform. It is stated that this is a disguised form of post-colonialism. In line with this argument, it has been pointed out to the existence of cultural heritages with a more equalitarian potential, attributing an equal status to men and women. One such example is the ancient tradition and polytheistic religion of Hawaii. According to Lilikala Kame'eleihiwa's description of her heritage and of the customs of her land, from the very beginning of its genesis, the Hawaiian peoples cherished their female Goddess and supreme creator. In their

society, women are considered sacred because they give birth, therefore being assigned a decisive role in all ceremonies. According to mythology, women control "the moon, the tides, and the reefs" and hold the secret of fire contrasting to the Western culture, women were in full control of their sexuality and "multiple sexual relationships were affectionately regarded, and the children from such liaisons claimed higher rank as a result of having two or more fathers". Also contrasting to the European culture in which the domestic and care work is assigned to women and politics is reserved to men, the Hawaiian custom, cooking was men's attribute. Although women had "let [men] govern the land" it was the former from whom the power was derived, because female "sexual power and political power" were closely related, both being described by the same word "ai". Therefore, the argument that different cultures can take different paths to achieving equality between sexes is worth noting.

Nonetheless, there are also certain limits to the concept of cultural relativism. The main reason for rejecting this stance is that a minimal common standard of what feminists should aim for is desirable. The same way that concepts like absolute poverty can be defined as a universal standard, so should standards of gender equal? the principle is that women need "more, not less liberal individualism" and that women's individual wellbeing should not hold a secondary importance to the common good of their community. Last but not least she makes a point for the necessity of having cross cultural standards of human rights, and deems certain "Western" values, such as choice, as generally desirable to be achieved in any country. But this stands true as long as this choice represents a real alternative, and not just a formal right. In other words, it is important that meaningful alternatives are provided and that equality is interpreted in a positive way. Otherwise, the mere existence of unachievable choices gives ample ground to those criticizing the Universalist framework. There is a strong correlation between gender inequality and poverty. According to studies, the more underdeveloped a country is, the higher are the literacy, economic and life expectancy difference between men and women. Corruption has also been shown to correlate positively with gender inequality, as "results show that corruption is higher in countries where social institutions deprive women of their freedom to participate in social life," Therefore, while culture differs from one country to another, certain characteristics of countries, such as poverty, corruption and gender (in) equality are universal. Moreover, at the end of the day, researchers and policymakers need to be able to evaluate gender (in) equality according to a generally accepted set of criteria, in order to progress in this field.

How Can Women 'S Status be Improved

Finally, another strong feminist concern with regard to effectiveness of human rights for improving the equality between sexes lays in the mechanism of implementation and enforcement of these freedoms. The nature of the international relations and the importance attributed to sovereignty is an obstacle in the process of holding a state accountable for human rights. In fact, as Rebecca Cook shows, according to the jurisprudence literature, "international and regional human rights conventions have applied only sparingly to address violations of women's rights" Most countries have been selective in signing and ratifying such international agreements for the protection of women's rights. In order to becoming signatory parties some states have included "clauses of exemption on cultural and religious grounds" which greatly limited their responsibility for defending the freedoms in question. Such countries include all Muslim countries which have signed up to the Convention for the

Elimination of All forms of Discrimination Against Women (CEDAW) as well as Great Britain India and New Zeeland, with less reservations that the previous.

Yet, despite a mixed history of its success in implementation, it can be argued that international law remains the most effective tool for the enforcement of women's rights, across boundaries. Bound by customary and treaty law, states' obligation to uphold human rights is ensured by international law. Furthermore, this obligation of signatory parties has been significantly increased both with the augmentation of the rights to be secured but also with the inclusion of state's preventive prerogative. Also, states are currently required to "provide effective remedy" when human rights violations have been proven, and to compensate the victims. Within the context of economic interdependence economic sanctions can be used by the international community as a mechanism for the enforcement of human rights, as well as women's rights.

Bring to Close

As it can easily be concluded from the previous discussion of the most important arguments brought by feminists in favor and against the use of the notion of human rights towards the aim of gender equality, there is no clear winner in this debate. Both sides have formulated strong assertions which cannot be neglected in support of their stances. At the same time, however none of the positions has been so far sufficient for the improvement of the enforcement of women's rights worldwide. Therefore, this only shows the key importance of further examining the claims put forward in this debate in order to perfect the efficiency of the applicability of liberalism for social justice. The solution to today's problems cannot follow a single path and issues should be tackled by combining the best suited strategy presented by either of the sides engaged in this debate. Since the challenges faced by feminists today are most often context-dependent it is important to keep in mind all the alternatives available for empowering women. Nevertheless, international legislation rights should not be overlooked, and an engendering of the international institutions is absolutely necessary for further accommodating women's rights under the umbrella of human rights.

However, particular limitations to this inclusion of women's rights, and the stress on their particularity and need for protection, as their distinct human rights can also have a negative. A notable example in this sense is provided by the early history of the ILO, at the turn of the twentieth century. While the ILO Constitution of 1919 enumerates the principles of "equal pay for work of equal value", and acknowledges the equality between sexes, the underlying assumptions about gender differences are also encountered in the document. Although apparently gender-neutral, the envisioned prototype of the worker was male; while women engage in wage work were the addition. Women were listed in the category of groups to be specifically protected and concrete provisions were also included to specify the areas in which women were granted special benefits. Regulations included maternity benefits and prohibited night-shifts and strenuous work for women. Child rearing was always associated to women, and women's role as both mothers and workers was stressed, while men's role in connection to their children was overlooked. Therefore, in this case, the acknowledgement of, what was then perceived as, women's difference from men, translated into reasons for former's drawback or exclusion from employment. It was an implicit or explicit exclusion of female workers from certain areas, such as mines, and the segregation of female employees in other

areas. Consequently, this led to the declining of many women's economic independence from their families, which was not the desired outcome.

Similarly, but rather on a symbolic level, recent measures taken in order to halt the sex selection abortions and female infanticide in India, may also be interpreted as further reinforcing women's inferior status. The tradition restricting women from participating in many areas of life and obliges their parents to provide a substantive dowry for her. Meanwhile, poverty remains a widespread condition in India. These are the leading factors determining many Indian parents to opt for a way out of keeping their baby girls, which usually involves the death of the latter. A UNICEF report released in December 2006 revealed that "7,000 fewer female babies are born every day" as a result of sex-based abortions. "In 80 percent of India's districts, a higher percentage of boys are born now than a decade ago." Given that the mere prohibition of all such practices leading to the death of female fetuses and babies, together with the dowry custom, was not enough, the Indian government decided to undertake positive measures in order to stop the phenomenon. Legislators have decided to financially support parents in raising their daughters, by covering her insurance, "medial help and education assistance". In return, certain conditions must also be met by parents in order to benefit from this initiative. They have to prove the birth and registration of their female child, her immunization record and to register for school and postpone her marriage beyond the age of18 years. While this plan may lead to a decrease in sex-based abortions, which is undoubtedly a positive outcome, it could also have secondary effects, namely the official acknowledgement that girls are less valuable or desirable than boys. Therefore, it is worth noting that tacking such complex human rights violations is context dependent and requires extensive research on the local circumstances.

The main assertion of this paper is that, within the previously mentioned debate, there are weaknesses on both sides. Nonetheless it is most useful for the achievement of gender equality to employ the existing instrument of human rights while attempting to address and limit its potential side effects. In order to best address the eventual residual negative outcomes of the liberal approach it is most useful for feminists to combine their strategies.

Several arguments can be brought in favor of the usefulness of general human rights and of the liberal doctrine in general, for ensuring gender equality. Firstly, while this concept might seem blind to differences, a closer examination will reveal that is not, because a variety of concerns such as the claims of any disadvantaged group, including women, can be embraced by the human rights framework. True equality can only be achieved by incorporating social and economic rights and minority rights through a slow integrative process. Secondly, a departure from the concept of human rights can lead to far more inequality and injustice than the misapplication of these rights can induce. The cases of communism or of the Taliban regime are obvious examples. Thirdly, the inclusion of rights which are particularly relevant to women, such as reproductive rights, into the already established framework of human rights will grant the former greater legitimacy and a stronger enforcement mechanism. Finally, the applicability of the liberal doctrine is justified if we accept that gender equality can be achieved by allowing women to enter formerly male dominated spheres rather than to carve out spheres of their own. As history has shown, "separate but equal" is not equal at all.

Furthermore, this paper has provided a clear picture of the existing debate around the topic of human rights and women's rights, or rather the use of the first in order to promote the second.

The most important themes of disagreement between the two sides, presented in this paper were those referring to the classical Universalist, and masculinist character of liberalism and of human rights; the applicability of the concept of choice for women's rights; the positive and negative duties of the states in promoting gender equality as well as human rights in general; the hierarchy of human rights and its impact upon women's freedom; the relation between the economic aspect of liberalism, and neo-liberalism with feminism; and the triadic connection between liberalism multiculturalism and women's rights. Further academic inquiries can expand on these points of dissent and enrich the arguments of the debate. Due to the limitation in time and space, this paper could not comprise all the existing perspectives in this discussion and neither did it manage to include a comprehensive example for each claim. Yet, these shortcomings could provide an opportunity for further studies.

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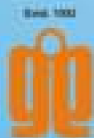

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