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EDITORIAL

The Fifth issue of CPJ Law Journal, now fully devoted to the publication of research articles, is being published with more than 20 research articles. The articles have been received from various Universities and Colleges all over India. The research papers, articles, book reviews, court notes and case notes were invited for publication from all over India. It has been possible to publish some of selected articles only due to constraints of space. A workshop on research methodology was held to guide the faculty and students in helping them to undertake the research projects useful to the society.

Legal education, as the College is providing, is the education of individuals who intend to become legal professionals or enter judiciary as judge or those who intend to become the law makers as legislators or those who simply intend to use their law degree to some end, either related to law (such as politics or academic) or business. The Mock Parliament is organized to make them familiar with the legislative procedure, Parliamentary debates, question hours and the methods of enactment of laws.

The School of law has been providing legal education to the students of B.A.LL.B(H) and BBA.LL.B(H) by inter-active teacher taught discussions and case-basis teaching along with PSDA (Personal Skills Development Assessment) so that they could be professionally competent lawyers after five years course. For this purpose, the students under the guidance and supervisions of teacher- mentors are made to learn the techniques of seminar, conferences, debates, workshop, watching movies related to the topics, historical places and monuments. The moot-court organized to inculcate the sense of responsibility in the court room proceedings, preparation of pre-trial papers and develop the art of drafting and pleading in the students.

The Editorial Board is finding much pleasure to convey its cordial thanks with utmost sincerity and gratitude to all the learned contributors to this issue of the journal and it was only due to their valuable work, the Journal has been able to gain acknowledgement in the legal literary field. Our Board has edited some of the articles to shape them up in the run of this issue and sometimes to avoid repetition of ideas. The Editorial Board may be excused for the same. Our thanks also go to such authors who had sent their articles for the journal but could not be included due to constraint of space or repetition of the subjects or otherwise.

The Editorial Advisory Committee has provided valuable guidance to the Editorial Board from time to time. We convey our thanks to each and every member of the Committee. The Management of the Institute is to be thanked for giving appreciations, showing continuous interest and providing sufficient funds for the publication of the issue. All the members of the Editorial Board are thankful for the same. Finally the printers deserve the thanks for doing a meticulous job in the timely publication of this issue with a quality print and elegant cover and design.

— **Dr. K.B. Asthana**

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CONTENTS

Human Rights in India: Maladies and Remedies

Prof. M. Afzal Wani[1]

1. The Ground and Context

Seen in the context, India is multi-racial, multi-cultural and multi-lingual country. The ethnic groups in India are Indo-Aryans (72%), Dravidians (25%) and Mongols "scheduled tribes" and "other backward classes" (3%). For their betterment, advancement and equalization, many provisions have been incorporated in the Constitution of India, 1950 and other statutes providing a legal frame-work with necessary institutional apparatus. In spite of its diverse population India offers universal adult franchise and no one is denied inclusion in electoral rolls only on the ground of religion, race, caste, sex or any of them (Article 325, Constitution of India, 1950). All citizens enjoy the right to participate in public affairs and access to employment in public services, and "reservations" have been provided in favour of scheduled castes, scheduled tribes and other backward classes to share the fruits of democracy and development.

Scheduled castes are the people who have been placed by the *verna* system of Hindu Society at its lowest rung. There are four *varnas*- Brahmins (priestly *verna*), Kshatriya (soldiers), Vaishysas (commercial class) and the Shudras (termed as scheduled castes, supposed to perform menial and degrading jobs). Under the caste-mindset they are considered as 'impure' and 'untouchables'. Though the caste system has much weakened, but the latent 'caste tension' continues to exit which sometimes spills over into considerable violence. Since under the caste system, no person is allowed to shed his caste status, there is consequent denial of dignity and fraternity resulting into oppression through autocracy. As regard Scheduled Tribes there are numerous groups of ethno-tribal people throughout the length and breadth of the country. In northeast India there are about two hundred groups of ethnic people belonging to major races, like, Negrites, Proto-Australoids, Mongoloids, Mediterraneous, Brachycephals and Nordics. The tribal population belongs to palaco-Mongoloids. Some common tribes are Bodo, Nya, Khasi and Mero. The socio-ethics groups of Jharkhand are Oraon, Mundas, Ho, Santhals. Gonds are Madhya Pradesh and Bhels in Rajasthan. The tribes in North East India have since prehistoric ages down to the modern times, enjoyed their separate cultural identity and political autonomy. Pursuant to that in the independent India, a special status has been guaranteed to them under Schedules VI of the Constitution. In spite of that there have been political uprisings in these regions which have opened up a new and long chapter of human rights violations in this region. They usually face indiscriminate army raids,

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custodial torture, custodial killings, gang rape, mental shocks, suicide on arrest and general risks to life. Various combing operations are conducted by the armed forces in region under the Armed Forces (Special Powers) Act, 1958 as amended up-to-date. The main problems of tribal people, which need to be looked into on priority are illiteracy, their drinking habits, threat from wild life (especially from those affected by deforestation) and displacement by developmental projects.

Besides scheduled castes and scheduled tribes, the Constitution of India authorizes preferential treatment for certain sections of the people of India, namely "other backward classes" without any definition and exclusive methods or agency to identify them. Some clarity comes only from the Constituent Assembly Debates (CAD)- reflecting the policy that " a backward class is a class or community which is backward in the opinion of the government". Article 10(3) of the Draft Constitution provided that " Nothing in this Article shall prevent the state from making any provision for the reservation in appointments or posts in favour of any backward classes of citizens who, in the opinion of the state, are not adequately represented in the services under the state. But the Constitution ultimately adopted no definition of the term" backward" but left it to be judicially settled. About this Mr. T.T. Krishnamachari's observation is notable: "Perhaps the Supreme Court would have to find what the intention of the framers was as to who should come under the category of backward classes".

The Supreme Court dealt with the issue in many cases and the most acceptable criterion for identifying backward classes is the 'community cum means' test. Therefore, a backward class of citizens are those who are economically, socially and educationally weak irrespective of their being part of any community or caste.

It implies that the social, economic and educational factors should be examined together for the purpose of determining the backward status of a group of citizens. So the economic factors may be examined along with caste and community factors. The reality is that in a country like India, it is not possible to follow one and the only criterion for determining backwardness and nor can the caste be totally excluded from consideration. For determining backwardness of any community all the above mentioned criteria should be taken into account. All the Constitutional safeguards available to schedule castes and scheduled tribes enumerated above, are available to "other backward classes" also. Reservation in educational institutions and jobs is the most important available to them.

2. Constitutional and Legal Protection of the Underprivileged

Protection under the Constitution

The important safeguards, general and special, are as briefly enumerated below:

Removal of disability, liability, restrictions or conditions with regard to access to shops, public restaurants, hotels and places of public resort, maintained wholly or partially out of the state funds or dedicated to the use of general public.

1. Reservation for appointment in public services under the state as backward citizens, not adequately represented in the service of the state.
2. Abolition of untouchability and forbidding of its practice in any form.
3. Limitation by law on the general rights of all citizens to move freely, reside and settle in any part of India in the interest of any scheduled tribes.
4. Throwing open by law Hindu religious institutions of a public character to all classes and sections of Hindus.
5. Promotion of, with special care, the educational and economic interests of the weaker sections of the people, and in particular of the scheduled castes and scheduled tribes.
6. Protection of scheduled castes and scheduled tribes and weaker sections of the society from social injustice and all forms of exploitation.
7. Duty of every citizen to promote harmony and spirit of common brotherhood amongst all the people of India transcending religious, linguistic, regional and sectarian diversities.
8. Duty of every citizen to renounce practices derogatory to the dignity of women,(which include Dalit women who are most vulnerable to violence).
9. Reservation of the seats in the Parliament [Lok Sabha] and state legislatures [Vidhan Sabhas] to scheduled castes and scheduled tribes in proportion to their population.
10. Setting up of advisory councils and separate departments in states and appointment of special officer at the centre to promote their welfare and safeguard their interests.
11. Introduction of the pachayati Raj providing safeguards for proper representation of the members of the scheduled castes and scheduled tribes by reserving seats for them in the grahm panchayats and other local bodies.
12. Taking of protective administrative measures in the designated scheduled and tribal areas.
13. Prohibition of traffic in human being and forced labour (of which the primary victims have been the underprivileged groups.

3. Establishment of Commissions

In 1978, under Article 338, Commission for Scheduled Castes and

Scheduled Tribes was appointed-

1. to investigate and monitor all matters relating to the safeguards provided for the scheduled castes and scheduled tribes under the Constitution or under any other law for the time being in force or under any order of the government and to evaluate the working of such safeguards;
2. to inquire into specific complaints with respect to the deprivation of rights and safeguards of the scheduled castes and schedule tribes;
3. to participate and advise on the planning process of socio-economic development of the scheduled tribes and to evaluate the progress of their development under the union and any state;
4. to present to the President, annually and at such other times as the Commission may deem fit, reports upon the working of those safeguards;
5. to make in such reports recommendations as to the measures that should be taken by the union or any state for the effective implementation of those safeguards and other measures for the protection, welfare and socio-economic development of the scheduled castes and scheduled tribes'; and
6. to discharge such other functions in relation to the protection, welfare and development and advancement of the scheduled tribes as the President may, subject to the provisions of any law made by Parliament, by rule specify.

In 2003, the Constitution (Eighty-Ninth Amendment) Act, 2003 was passed which provided for the bifurcation of the existing National Commission for Scheduled Castes and scheduled tribes and establishment of separate commissions for scheduled tribes under Article 338 of the Constitution. Realizing the geographical and cultural differences between the scheduled castes and scheduled tribes and their problems, the move to establish a separate Commission for Scheduled Tribes was started after the creation of a new Ministry of tribal affairs in 1999. The new Commission for the Scheduled Tribes is to consist of a chairperson and two other members and the National Commission for the Scheduled Castes would consist of a chairperson, vice-chairperson and three other members. A new Article 338A has been inserted in the Constitution defining the duties and powers of the Commission for Scheduled Tribes. The Commission has been assigned the duties:

1. to investigate and monitor all matters relating to the safeguards provided for the scheduled tribes under the Constitution or under any other law and to evaluate the working of such safeguards;
2. to inquire into specific complaints with respect to the deprivation of these rights and safeguards;

3. to participate and advise on the planning process of socio-economic development of the scheduled tribes and to evaluate its progress;
4. to present reports upon the working of those safeguards and make recommendations as to the measures that should be taken for the effective implementation of those safeguards and other measures; and
5. to discharge such other necessary functions in relation to the protection, welfare, development and advancement of the scheduled tribes.

To make the working of the Commission effective it has been given the power to:

1. summon and enforce the attendance of any person from any part of India and examine him on oath;
2. requiring the discovery and production of any relevant document;
3. receive evidence on affidavits;
4. requisitioning any public record or copy thereof from any court or office;
5. issuing commission for the examination of witnesses and documents and take any other necessary steps.

The Union and the State governments have been made duty bound to consult the Commission on all major policy matters affecting scheduled tribes.

4. Safeguard under other laws

4.1. ***The Civil Rights Act, 1955***

The Untouchability (Offences) Act,1955, which was amended by the Untouchability (Offences) Amendment and Miscellaneous Provisions Act, 1976 has been renamed as the Protection of Civil Rights Act, 1955, provides penalties for preventing a person, on the ground of untouchability, from enjoying rights occurring out of abolition of untouchability. Enhanced penalties have been provided for subsequent offences committed by the accused. Any person who is convicted of an offence under the Act is disqualified from contesting election to Parliament and state legislature for a period of six years commencing from the date of such conviction.

The offences under the Act include doing of anything, on the ground of untouchbility to any person which may amount to refusal of;

1. access to any shop, public restaurant, hotel or place of public entertainment; or
2. the use of any utensil, and other articles kept in any public restaurant, hotel, dharmshala, sarai, or musafirkhana for the use of the general public or of any section thereof; or

3. the practice of any profession or the carrying on of any occupation, trade or business or employment in any job; or
4. the use of, or access to, any river, stream, spring, well, tank, cistern, water-tap or other watering place, or any bathing ghat, burial or cremation ground, any sanitary convenience, any other place of public resort which other members of the public, or any section thereof, have a right to use or have access to; or
5. the use of, access to, any place used for a charitable or a public purpose maintained wholly or partly out of State funds or dedicated to the use of the general public or any section thereof;
6. the enjoyment of any benefit under a charitable trust created for the benefit of the general public or any section thereof; or
7. the use of, or access to any public conveyance; or
8. the construction, acquisition or occupation of any residential premises in any locality, whatsoever; or
9. the use of any dharmshala, sarai or musafirkhana which is open to the general public, or to any section thereof; or
10. the observance of any social or religious custom, usage or ceremony or taking part in, or taking out, any religious, social or cultural procession; or
11. the use of jewelry and finery;
12. admission to any hospital, dispensary, educational institution, or hostel established or maintained for the benefit of the general public or any section thereof; or
13. entitlement to any service any person at the same time and place and on the same terms and conditions at or on which such goods are sold or services are rendered to other persons in the ordinary course of business.

The offences are punishable with imprisonment for a term of not less than one month and not more than six months and fine of one to five hundred rupees.

Also the Act prescribes punishment for other offences arising out of "untouchbility", like-

1. molestation;
2. boycott;
3. insult;
4. obstruction to enjoy property;
5. compelling any person, on the ground of "untouchabilty" to do any scavenging or sweeping or to remove any carcass or to flay any animal or to remove the umbilical cord, etc.; or

6. abetting any such offence etc.

Some other like offences are also punishable under the Act. The maximum punishment is three to six months imprisonment and a fine of one hundred to five hundred rupees. Licenses of the institutions involved in any such offences can also be suspended or cancelled, as the case may be.

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

The Act is an additional measure to prevent commission of offences of atrocities against the members of the scheduled castes and scheduled tribes and to provide for special courts for the trial of such offences and for the relief and rehabilitation of the victims of such offences.

The offences covered under the 1955 Act are generally covered by this Act also. Some significant offences defined by the Act include:

(a) forcing a member of a scheduled caste or a scheduled tribe to drink or eat any inedible or obnoxious substance;
(b) doing act with intent to cause injury, insult or annoyance to any member of a scheduled castes or a scheduled tribes by dumping excreta, waste matter, carcasses or any other obnoxious substance in his premises or neighbourhood;
(c) forcibly removing clothes from the person of a member of scheduled caste or a scheduled tribe or parading him naked or with painted face or body committing any other similar act which is derogatory to human dignity;
(d) wrongfully occupying or cultivating the land of any member of the scheduled caste or scheduled tribe;
(e) compelling or enticing a member of scheduled caste or a scheduled tribe to do 'begar' or other similar forms of forced or bonded labour.
(f) forcing or intimidating a member of a scheduled caste or a scheduled tribe not to vote a particular candidate or to vote in a manner other than that provided by law;
(g) instituting any false, malicious or vexatious suit or criminal or other legal; proceedings against a member of scheduled caste or a scheduled tribe;
(h) giving any false or frivolous information to any pubic servant about a member of a scheduled caste or a scheduled tribe;
(i) assaulting or using force on any woman belonging to a scheduled caste or a scheduled tribe with intent to dishonour or outrage her modesty;
(j) using ones position to dominate the will of a woman belonging

to a scheduled caste or a scheduled tribe and use that position to exploit her sexually to which she would not have otherwise agreed;

(k) corrupting or fouling the water of any spring, reservoir or any other source ordinarily used by members of the scheduled castes or scheduled tribes so as to render it less fit for the purposes for which it is ordinarily used;

(l) some other like offences.

For the purpose of providing for speedy trial, the state governments have been required with the concurrence of the Chief Justice of the High Court concerned, to specify for each district, a court of session to be a special court to try offences covered by this Act.

For every such court, the state government has to specify a public prosecutor or appoint an advocate for not less than seven years, as a special public prosecutor for the purpose of conducting cases in that court.

The state governments have to take other necessary measures to prevent atrocities on the scheduled castes and scheduled tribes, which may include:

(a) the provision for adequate facilities, including legal aid, to the persons subjected to atrocities to enable them to avail themselves of justice;

(b) the provisions for traveling and maintenance expenses to witnesses, including the victims of atrocities, during investigation and trial of offences against them;

(c) the provision for the economic and social rehabilitation of the victims of the atrocities;

(d) the appointment of officers for initiating or exercising supervision over such prosecutions of offenders;

(e) the setting up of committees at appropriate levels to assist the government in formulation or implementation of such measures;

(f) creating provisions for a periodic survey of the working of these measures with a view to suggesting measures for their better implementation;

(g) the identification of the areas where the members of the scheduled castes and the scheduled tribes are likely to be subjected to atrocities and adoption of such measures so as to ensure safety for them.

The central government is supposed to take necessary steps to co-ordinate all such measures taken by state government and to place every year on the table of each House of Parliament, a report on such measures taken by itself

and by the state government.

5. Patterns of Human Rights Violation

Some reports of the National Human Rights Commission, other commissions for the protection of rights of the people and the daily newspapers show specific patterns of violence against the underprivileged people reflecting denial of human rights to them. Some such reports are reproduced here. The pattern has not changed in the last few decades of efforts of the commissions, courts and other institutions.

5.1. Violation of right to social security

Sh.Itwari s/o Sh. Mangat sing R/o Kaboolpur Bangar, Ballabgrh vide his complaint dated 28.5.98. complained to the National Commission for SC/ST that his daughter Saroj was allegedly kidnapped by non-SC person of the village named Rampal (Gujrat). The matter was taken up with the S'P Faridabad and pursued vigorously. The police activated by registering a case at balabgarh u/s 362, 366, 506, and 376 of I.P.C. The abducted girl was traced and handed over to the parents. The accused was arrested and sent to jail. The police authorities were further asked to follow-up the case of compensation in accordance with SC & ST (POA) Act, 1989 and Rules thereto. The District Welfare Officer, Faridabad has recommended the case of compensation as per the SC & ST (POA) Act, 1989 and arrangements are being made to provide compensation to the tune of Rs. 50,000/- to the victim.

5.2. Violation of Right to Life

The case was taken up on the basis of a news-item "Parivar main Mattam aur Gaon main Khamoshi" in the "Navbharat Times" dated 2.5.1998. It was published in the said daily on 28.4.98 that a Scheduled Caste youth named Anil s/o sh. Mahabir Singh Balmiki, aged 21 years, resident of village- Depal, P.S. Hansi, District- Hissar was allegedly murdered by Dhoop Singh, Satyavan and Kapoor Singh and Dalbir Singh. The culprits used conventional weapons to kill, like gandasa, Kulhad etc. The Commission immediately took up the case with the Deputy Commissioner and superintendent of Police, Hissar to take action as per I.P.C. and relevant sections of SC & ST (POA) Act, 1989. The relevant copies of records were called for them from the police like FIR, caste status of the victim and the accused, post-mortem report of deceased etc. The case was pursued effectively. All the culprits behind the murder were arrested and sent to jail. The Deputy Commissioner, Hissar directed the concerned authorities to arrange compensation to the dependents of the deceased in accordance with SC&ST(POA) Rules, at the earliest.

5.3. Wrongful Confinement and Deprivation of Liberty & Dignity

Shri Hawa Sing and other Villagers of village-Gulkani, District- Jind

(Haryana) represented to this Commission that he and his brother Balbir were illegally confined in the House of Sarpanch and Mercilessly beaten by Sarpanch and other six persons on 14.9.97. Besides, Hawa Singh was also implicated in a false case of liquor with the help of local police. Commission summoned Deputy Commissioner and Superintendent of Police, Jind to enquire into the same. It was proved that Sh.Hawa Singh was kept illegally confined by the Sarpanch and his party on the night of 14.9.97 and the complainant was implicated in a false case and was also beaten up by the Sarpanch and his henchmen. As per the medial report of the doctor, injuries were inflicted to Hawa Sing, while he was kept in the residence of the Sarpanch. The victim was forced to wear 'Ghaghari' and paraded in the village with garland of shoes by the police. A case u/s 323/324/325/190/3 42/347/364/452/500/506/511 of IPC and u/s 7 of PCR Act was registered against accused persons and the police.

5.4. Violation of Right to freely participate in the cultural life of the community

The incident of the blinding of Dalit boy appeared in the news-item published in "The Times of India" dated 18….98. The National Commission for SC & ST immediately took up the case with the District Collector, Ahmedabad and also pursued the issue through Sate Office of the commission at Ahmedabad. The incident occurred at Dhandhuka village. The victim was watching T.V. along with other children of the village at a shop of a Panwala named Sh. Bhikhabhai Chikhabhai Koli Patel. The victim Sanjay, a scheduled caste, got injured when the shop-owner (panwala) threw lime-paste on the children in a fit of anger who were creating disturbance. The boy went to his house weeping and narrated the whole incident. The victim was taken to Viranagar Missionary Eye Hospital the next day by the victim's grandfather. The treatment did not prove helpful and the victim was taken to Civil Hospital, Ahmedabad and ultimately to another private Hospital for special treatment. Unfortunately due to severity of the injury the victim lost sight in one eye. Grandfather of the victim took up the case by lodging a complaint at Barwala police Station in Ahmedabad. A case was registered by the police under IPC and SC/ST (POA) Act, 1989. The accused was arrested. The District Welfare Officer while pursuing the case sanctioned an amount of Rs. 50,000/- as compensation to the victim.

A news item published in 'The Hindustan Times' dated 28.04.98 with a caption "when cruelty showed its ugliest face in Rajasthan man reined like wild animal". A Scheduled Caste grocer was paraded with his nose pierced and a cord put through as a sort of reins in Naksoda village of Dholpur for refusing to sell *bidis* on credit to *gujjar* boys. The matter was taken up with SP, Dholpur for detailed report. The State Officer, Jaipur of the Commission made a spot enquiry in the case and it was reported that some gujjar boys visited Shri Rameshwar (victim) in his shop and his refusal to sell certain items to them on loan till the

earlier loan was repaid, resulted in altercations. On 25.04.98, five non-SC persons caught hold of Shri Rameshwari and assaulted him and put a rope in his nostrils. They confined him in a house. A case (No. 123/98) u/s 365, 147, 323, 326 of IPC and 3(1) (3), 3(2)(5) of SC/ST (POA) Act,1989 was registered. On the basis of medical report it was proved that the nose of the victim was pierced and a cord put through it. All accused were arrested and a case was filed in the court. Further the Commission also wrote to the concerned authorities to provide relief/ rehabilitation to the victim under SC/ST (POA) Rules, 1995.

5.5. Atrocity in educational institutions

Based on press reports, which appeared in newspapers and also on receiving representation from SC students in University College of Medical Sciences, Delhi about the incidents of atrocities on them in the college/ hostels and campus of UCMS and GTB, Hospital, Delhi on the night of February, 22/23, 1999, the Chairman of the Commission ordered on-the-spot enquiry of the incident where 12 SC students were beaten by non-SC students and insulted publicly. A resident doctor of GTB hospital was also beaten and insulted who was on emergency duty. The Vice-Chairman, Shri Kameshwar Paswan and Shri Ajit Singh, Assistant Director visited the spot of the incident at GTB Hospital premises of University college of Medical Sciences at Dilshad Garden and hostels. They met victim SC/ST students and the Principal of UCMS, other professors and related persons. The team also held a meeting with Additional Deputy Commissioner of Police, North-East, ACP & SHO of concerned Police Station, Dilshad Garden and called for a detailed report of the incident. On hearing the views of above persons the commission suggested the concerned police officials and Principal of the college to taken action against the accused and give relief/protection to SC/ ST students. The police registered the case after lapse of ten days of incident. When the Commission's team visited only PCR Act 1955 was included. The Vice-Chairman asked police officials to include the relevant sections of the SCs/ ST (POA) Act, 1989 and take immediate action against accused and rehabilitation of SC victims. On the intervention of the Commission the police officials told the Commission the police had registered five cases against the general category students. The Commission has sent on-the-spot Enquiry Report to the Vice Chancellor and Chairman of Governing Body of University College of Medical Sciences. Meanwhile the Governing Body of University college of Medical Sciences setup one man enquiry Committee headed by a former Delhi High Court Judge to look into the matter.,. The Commission's Recommendations have not been carried out so far and the case is held up due to procedural formalities. The victim SC students have failed to get the justice due to delaying tactics of the Governing Body of the University College of Medical Sciences. At last a compromise between SC students and non-SC students was said to have been arrived at. The cases were then stated to be pending for consideration in the Court. The Commission was pursuing then case with Vice-Chancellor of Delhi

University and Chairman Governing body of the college.

5.6. Deprivation of right to education

In two cases in SC students of Diploma Course in Industrial Instrumentation had to pay a fee of Rs. 1060/- instead of Rs. 500/- and they were told that concession of fee for SC/ST had been stopped. One SC-student of B. Tech. was not given scholarship by the B.R. Ambedkar regional Engineering college, Jabalpur and one SC girl, in spite of securing First Division in M. Pharma examination, was not awarded research fellowship without any reason even though she applied for the same three times. In one representation it is alleged that funds under Centrally Sponsored Scheme of post-matric Scholarship are being misused in Bihar and in another representation it is alleged that one SC student of M.Phil in Central Unversity, Hydrabad was sanctioned Rs. 5000/- as merit scholarship in the year 1995 and a cheque was issued to him in this regard. The student was refused the scholarship amount. All India Federation of SC/ST and ministers Employees Welfare Associations, Delhi then represented that revised rates of post-matric Scholarship Scheme be implemented.

A case of non-implementation of reservation policy in M.Phil and Ph.D courses by Delhi University was brought to the notice of the Commission. Some SC students who had passed M.A. in Hindi had applied for M. Phil. Course in Hindi in the North Campus. As per UGC guidelines, reservation for SCs and STs had to be provided in all courses at all levels. Accordingly, out of 30 seats for M. Phil (Hindi) Course 5 seats were to be reserved for SC and two seats were to be reserved for ST candidates but the Head of Department of Hindi in Delhi University was reported to have give admission to 3 SC students only. This was a clear case of violation of reservation policy meant for SCs &STs. The Commission urged that the Delhi University should review the decision of the Academic Council at the earliest and provide reservation in M. Phil/Ph. D courses at the earliest. Other Universities should also follow the guidelines regarding the reservation in admission in M. Phil, courses in letter and sprit.

6. Schemes for Amelioration

Some popular schemes introduced by the government for amelioration of the lot of the unprivileged are:

(a) Jawahar Rozgar Yojna;
(b) Swarn Jayanti Grahni Swarozgar Yojna;
(c) Vridhi Pension Yogna;
(d) Community Forest Management; and
(e) Some other like schemes.

7. Conclusion

The main factors to rights violation among the underprivileged citizens

are ignorance, age-old-mindset, unguided responses to ordinary human instincts (obsessions and pride) and insensitivity to human sufferings. In a situation rampant with these factors mere recognition or conferment of rights by law is not sufficient. The strategy that can help in such a grim situation is "human rights education". It can open ones mind to look to new horizons of human-hood. Further, it can produce guided responses to ordinary human instincts and breed sensitivity to realize the pain suffered by fellow men. Human rights education is, therefore, the best tool to make any body able to assert his/her rights and show respect for others rights.

Seen in this context, human rights education should be the primary measure adopted for the amelioration of the denigrated positions of the weak and the underprivileged sections of the society. It, however, needs to be emphasized that human rights education should be for all and it should begin with birth. Formally it should start in schools at the primary level. For general public awareness campaigns should be launched and carried forward tirelessly.

Let every Indian realize through this measures that ideal of Vivekananda to "conquer the world or die" cannot be attained by showing ignorance and disrespect to human rights but by coming forward as champions of human rights education at home and abroad.

*Curriculum:*The courses of human rights education should be designed with reference to the basic human rights perspective as well as local situations. Some principles of addressing the basic rights perspective and local situation should be adopted while designing courses for teaching or creating awareness about human rights of underprivileged, an attempt should be made to develop modules for teaching at school, college and university levels in the light of following guidelines:

Class I-V: keeping in view the fact that proper structuring of feelings of the child can go a long away in developing understanding and sensitivity about human rights. The lessons in languages, moral/social sciences and history in the form of stories/ events, biographies, poems etc. should be human rights oriented. Each lesson should be in non-discriminatory language and reflective of human spirits with reference to anecdotes from the lives of heroes. Lessons of self help and helping others with a feeling of oneness should be dominating. Morning prayers at schools should also be in the human rights perspective.

Class VI-X: practical importance of every person in the society, whether rich or poor, big or small, should be emphasized by explaining institutional or organizational functioning. Lessons about Constitutional foundations of the polity and society should be introduced in a gradual manner from class VI to class X along with case studies. General knowledge, quiz competition, social service programmes, should be a part of the curriculum for human rights education. In all

such lessons and programmes, the non discriminatory language of human rights should be conspicuous.

Class X to XII: In these classes case studies about socially and educationally backward sections of the societies should be made compulsory. To keep a track on the Human Rights violations within and outside the country and to prepare brief reports on them should be made compulsory.

At this stage creation of general awareness about the provisions of International Bill of Rights and the Constitution of India, providing for the protection of the underprivileged, should also be started.

Students may be required to reflect on the minimum standards of human life in terms of education, fraternity, economy and other kinds of participation among human beings *inter se*. Reports published by national and international bodies should be will discussed to create awareness among students on comparative basis.

Under graduate level: At the under graduate level, all the courses should be given human rights orientation befitting each discipline, e.g., engineering, medicine etc. Extracurricular activities should also be given same orientation. Human rights may be introduced as a separate optional subject like history, sociology, etc. This should also be introduced as a subject in competitive exams, besides being a part of general knowledge test.

Post graduate level: At the post graduate level, students should be trained to deal with day to day human rights issue in the society. Their conceptual level should be raised to enable them to rely on the original documents and other sources and to write comments on them. They should be asked to prepare project reports on various human rights problems related to the underprivileged groups. The students should be trained to study the problems about the enforcement of norms and impact of legislations and judicial decisions.

Problem of caste class, communal riots should be well focused at this level and the students should be associated with relevant NGOs for internship.

Legal Recognition of Gender Identity of the Transgender/Hijras

Prof. G.S. Karkara[1]

Gender identity is one of the most-fundamental aspects of life, which refers to a person's intrinsic sense of being male, female or transgender or transsexual person. A person's sex is usually assigned at birth, but a relatively small group of persons may be born with bodies, which incorporate both or certain aspects of both male and female physiology. At times, genital anatomy problems may arise in certain persons, their innate perception of themselves, is not in conformity with the sex assigned to them at birth and may include pre and post-operative transsexual persons and also persons who do not choose to undergo or do not have access to operation and also include persons who cannot undergo successful operation. Countries, all over the world, including India, are grappled with the question of attribution of gender to persons who believe that they belong to the opposite sex. Few persons undertake surgical and other procedures to alter their bodies and physical appearance to acquire gender characteristics of the sex which conform to their perception of gender, leading to legal and social complications since official record of their gender at birth is found to be at variance with the assumed gender identity. Gender identity refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body which may involve a freely chosen, modification of bodily appearance or functions by medical, surgical or other means and other expressions of gender, including dress, speech and mannerisms. Gender identity, therefore, refers to an individual's self-identification as a man, woman, transgender or other identified category.

Transgender is generally described as an umbrella term for persons whose gender identity, gender expression or behaviour does not conform to their biological sex. Transgender (TG) may also takes in persons who do not identify with their sex assigned at birth, which include Hijras/Eunuchs who describe themselves, as 'third gender' and they do not identify as either male or female. Hijras are not men by virtue of anatomy appearance and psychologically, they are also not women, though they are like women with no female reproduction organ and no menstruation. Since Hijras do not have reproduction capacities as either men or women, they are neither men nor women and claim to be an

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institutional `third gender'. Among Hijras, there are emasculated (castrated, nirvana) men, non-emasculated men (not castrated/akva/akka) and inter-sexed persons (hermaphrodites). TG also includes persons who intend to undergo Sex Re-Assignment Surgery (SRS) or have undergone SRS to align their biological sex with their gender identity in order to become male or female. They are generally called transsexual persons. Further, there are persons who like to cross-dress in clothing of opposite gender, i.e. transvestites. Resultantly, the term 'transgender', in contemporary usage, has become an umbrella term that is used to describe a wide range of identities and experiences, including but not limited to pre-operative, post-operative and non-operative transsexual people, who strongly identify with the gender opposite to their biological sex; male and female. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom and no one shall be forced to undergo medical procedures, including SRS, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity.

1. International concern for Transgender Persons

The United Nations has been instrumental in advocating the protection and promotion of rights of sexual minorities, including transgender persons. Article 6 of the Universal Declaration of Human Rights, 1948 and Article 16 of the International Covenant on Civil and Political Rights, 1966 (ICCPR) recognize that every human being has the inherent right to live and this right shall be protected by law and that no one shall be arbitrarily denied of that right. Everyone shall have a right to recognition, everywhere as a person before the law. Article 17 of the ICCPR states that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation and that, everyone has the right to protection of law against such interference or attacks.

International Commission of Jurists and the International Service for Human Rights on behalf of a coalition of human rights organizations, took a project to develop a set of international legal principles on the application of international law to human rights violations based on sexual orientation and sexual identity to bring greater clarity and coherence to States human rights obligations. A distinguished group of human rights experts has drafted, developed, discussed and reformed the principles in a meeting held at Gadjah Mada University in Yogyakarta, Indonesia from 6 to 9 November, 2006, which is unanimously adopted the Yogyakarta Principles on the application of International Human Rights Law in relation to Sexual Orientation and Gender Identity. Yogyakarta Principles address a broad range of human rights standards and their application to issues of sexual orientation gender identity.

UN bodies, Regional Human Rights Bodies, National Courts,

Government Commissions and the Commissions for Human Rights, Council of Europe, etc. have endorsed the Yogyakarta Principles and have considered them as an important tool for identifying the obligations of States to respect, protect and fulfill the human rights of all persons, regardless of their gender identity.

United Nations Committee on Economic, Social and Cultural Rights in its Report of 2009 speaks of gender orientation and gender identity as follows:-

'Sexual orientation and gender identity' Other status as recognized in article 2, paragraph 2, includes sexual orientation. States parties should ensure that a person's sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivor's pension rights. In addition, gender identity is recognized as among the prohibited grounds of discrimination, for example, persons who are transgender, transsexual or intersex, often face serious human rights violations, such as harassment in schools or in the workplace.'

2. Development of Human Rights Jurisprudence

The most important lesson which was learnt as a result of Second World War was the realization by the Governments of various countries about the human dignity which needed to be cherished and protected. It is for this reason that in the U.N. Charter, 1945, adopted immediately after the Second World War, dignity of the individuals was mentioned as of core value. The almost contemporaneous Universal Declaration of Human Rights (1948) echoed same sentiments.

The underlined message in the aforesaid documents is the acknowledgment that human rights are individual and have a definite linkage of human development, both sharing common vision and with a common purpose. Respect for human rights is the root for human development and realization of full potential of each individual, which in turn leads to the augmentation of human resources with progress of the nation. Empowerment of the people through human development is the aim of human rights

There is thus a universal recognition that human rights are rights that `belong' to every person, and do not depend on the specifics of the individual or the relationship between the right-holder and the right-grantor. Moreover, human rights exist irrespective of the question whether they are granted or recognized by the legal and social system within which we live. They are devices to evaluate these existing arrangements: ideally, these arrangements should not violate human rights. In other words, human rights are moral, pre-legal rights. They are not granted by people nor can they be taken away by them.

In international human rights law, equality is found upon two complementary principles: non-discrimination and reasonable differentiation. The principle of non-discrimination seeks to ensure that all persons can equally enjoy and exercise all their rights and freedoms. Discrimination occurs due to

arbitrary denial of opportunities for equal participation. For example, when public facilities and services are set on standards out of the reach of the TGs, it leads to exclusion and denial of rights. Equality not only implies preventing discrimination (example, the protection of individuals against unfavorable treatment by introducing anti-discrimination laws), but goes beyond in remedying discrimination against groups suffering systematic discrimination in society. In concrete terms, it means embracing the notion of positive rights, affirmative action and reasonable accommodation.

Nevertheless, the Universal Declaration of Human Rights recognizes that all human beings are born free and equal in dignity and rights and, since the Covenant's provisions apply fully to all members of society, persons with disabilities are clearly entitled to the full range of rights recognized in the Covenant. Moreover, the requirement contained in Article 2 of the Covenant that the rights enunciated will be exercised without discrimination of any kind based on certain specified grounds or other status clearly applies to cover persons with disabilities.

3. Position of Transgender Persons in India

Historical background of transgender in India is that they were once treated with great respect, at least in the past, though not in the present. Transgender people, as a whole, face multiple forms of oppression in this country. Discrimination is so large and pronounced, especially in the field of health care, employment, education leave aside social exclusion.

Hijras can be considered as the Western equivalent of transgender/ transsexual (male-to-female) persons but Hijras have a long tradition/culture and have strong social ties formalized through a ritual called *`reet'* (becoming a member of Hijra community). There are regional variations in the use of terms referred to Hijras. For example, Kinnars (Delhi) and Aravanis (Tamil Nadu). Hijras may earn through their traditional work: *`Badhai'* (clapping their hands and asking for alms), blessing new-born babies, or dancing in ceremonies. Some proportion of Hijras engage in sex work for lack of other job opportunities, while some may be self-employed or work for non-governmental organisations.'[2]

3.1. Legal Status during British Period

Section 377 of the Indian Penal Code, 1860, prior to the enactment of the Criminal Tribes Act, 1871, criminalized all penile-non-vaginal sexual acts between persons, including anal sex and oral sex, at a time when transgender persons were also typically associated with the prescribed sexual practices. In a judgment of the Allahabad High Court in Queen Empress v. Khairati,[3] wherein

2 See UNDP India Report, (December, 2010).
3 (1884) ILR 6 All 204.

a transgender person was arrested and prosecuted under Section 377 on the suspicion that he was a `habitual sodomite' and was later acquitted on appeal. In that case, while acquitting him, the Sessions Judge stated as follows:

> `This case relates to a person named Khairati, over whom the police seem to have exercised some sort of supervision, whether strictly regular or not, as a eunuch. The man is not a eunuch in the literal sense, but he was called for by the police when on a visit to his village, and was found singing dressed as a woman among the women of a certain family. Having been subjected to examination by the Civil Surgeon (and a subordinate medical man), he is shown to have the characteristic mark of a habitual catamite' " the distortion of the orifice of the anus into the shape of a trumpet and also to be affected with syphilis in the same region in a manner which distinctly points to unnatural intercourse within the last few months.'

Even though, he was acquitted on appeal, this case would demonstrate that Section 377, though associated with specific sexual acts, highlighted certain identities, including Hijras and was used as an instrument of harassment and physical abuse against Hijras and transgender persons.

A Division Bench of the Supreme Court in Suresh Kumar Koushal and another v. Naz Foundation and others,[4] has already spoken on the constitutionality of Section 377, IPC.

A legislation to supervise the deeds of Hijras/TG community, called the Criminal Tribes Act, 1871, was enacted, which deemed the entire community of Hijras persons as innately `criminal' and `addicted to the systematic commission of non-bailable offences'. The Act provided for the registration, surveillance and control of certain criminal tribes and eunuchs and had penalized eunuchs, who were registered, and appeared to be dressed or ornamented like a woman, in a public street or place, as well as those who danced or played music in a public place. Such persons also could be arrested without warrant and sentenced to imprisonment up to two years or fine or both. Under the Act, the local government had to register the names and residence of all eunuchs residing in that area as well as of their properties, who were reasonably suspected of kidnapping or castrating children, or of committing offences under Section 377 of the IPC, or of abetting the commission of any of the said offences. Under the Act, the act of keeping a boy under 16 years in the charge of a registered eunuch was made an offence punishable with imprisonment up to two years or fine and the Act also denuded the registered eunuchs of their civil rights by prohibiting them from acting as guardians to minors, from making a gift deed or a will, or from adopting a son.

4 (2014) 1 SCC 1: AIR 2014 SC 563.

3.2. Independent India

The Criminal Tribes Act, 1871 has been repealed in August 1949. Indian Law, on the whole, only recognizes the paradigm of binary genders of male and female, based on a person's sex assigned by birth, which permits gender system, including the law relating to marriage, adoption, inheritance, succession and taxation and welfare legislations. Unfortunately, we have no legislation in this country dealing with the rights of transgender community. Constitution makers could not have envisaged that each and every human activity be guided, controlled, recognized or safeguarded by laws made by the legislature.

International Conventions and norms are significant for the purpose of interpretation of gender equality. Article 1 of the Universal declaration on Human Rights, 1948, states that all human beings are born free and equal in dignity and rights. Article 3 of the Universal Declaration of Human Rights, 1948, states that everyone has a right to life, liberty and security of person. Article 6 of the International Covenant on Civil and Political Rights, 1966 affirms that every human being has the inherent right to life, which right shall be protected by law and no one shall be arbitrarily deprived of his life. Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights provide that no one shall be subjected to torture or to cruel inhuman or degrading treatment or punishment. United Nations Convention against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment (dated 24th January, 2008) specifically deals with protection of individuals and groups made vulnerable by discrimination or marginalization. Para 21 of the Convention states that States are obliged to protect from torture or ill-treatment all persons regardless of sexual orientation or transgender identity and to prohibit, prevent and provide redress for torture and ill-treatment in all contests of State custody or control. Article 12 of the Universal Declaration of Human Rights and Article 17 of the International Covenant on Civil and Political Rights state that no one shall be subjected to `arbitrary or unlawful interference with his privacy, family, home or correspondence'.

4. Judicial interpretation

In *National Legal Services Authority* v. *Union of India and others,*[5] the members of Transgender Community sought a legal declaration of the gender identity than the one assigned to them, male or female, at the time of birth and their prayer was that non-recognition of their gender identity violates Articles 14 and 21 of the Constitution of India. Hijras/Eunuchs, who also fall in that group, claim legal status as a third gender with all legal and constitutional protection. Thus the issue pertaining to the constitutional and other legal rights of the transgender community and their gender identity and sexual orientation was

5 AIR 2014 SC 1863.

before the Supreme Court.

The Supreme Court held that when we examine the rights of transsexual persons, who have undergone SRS, the test to be applied is not the `Biological test' , but the `Psychological test', because psychological factor and thinking of transsexual has to be given primacy than binary notion of gender of that person. Seldom people realize the discomfort, distress and psychological trauma, they undergo and many of them undergo ' Gender Dysphoria, which may lead to mental disorder. Discrimination faced by this group in our society, is rather unimaginable and their rights have to be protected, irrespective of chromosomal sex, genitals, assigned birth sex, or implied gender role. Rights of transgenders, pure and simple, like Hijras, eunuchs, etc. have also to be examined, so also their right to remain as a third gender as well as their physical and psychological integrity.

Various judicial pronouncements and legislations on the international arena highlight the fact that the recognition of `sex identity gender' of persons, and `guarantee to equality and non-discrimination' on the ground of gender identity or expression is increasing and gaining acceptance in international law and, therefore, be applied in India as well.

The Courts in India would apply the rules of International law according to the principles of comity of Nations, unless they are overridden by clear rules of domestic law.[6] In the case of *Jolly George Varghese v. Bank of Cochin,*[7] the Supreme Court applied the above principle in respect of the International Covenant on Civil and Political Rights, 1966 as well as in connection with the Universal Declaration of Human Rights. India has ratified the above-mentioned covenants; hence, those covenants can be used by the municipal courts as an aid to the interpretation of statutes by applying the Doctrine of Harmonization. But, certainly, if the Indian law is not in conflict with the International covenants, particularly pertaining to human rights, to which India is a party, the domestic court can apply those principles in the Indian conditions.

Article 51 has to be read along with Article 253 of the Constitution. If the Parliament has made any legislation, which is in conflict with the international law, then Indian Courts are bound to give effect to the Indian Law, rather than the international law. However, in the absence of a contrary legislation, municipal courts in India would respect the rules of international law. In *His Holiness Kesavananda Bharati Sripadavalvaru* v. *State of Kerala,*[8] it was stated that in view of Article 51 of the Constitution, the Court must interpret language of the

6 See: *Gramophone Company of India Ltd. v. Birendra Bahadur Pandey,* (1984) 2 SCC 534: AIR 1984 SC 667 and *Tractor Export v. Tarapore & Co.,* (1969) 3 SCC 562, *Mirza Ali Akbar Kashani v. United Arab Republic,* (1966) 1 SCR 319 : AIR 1966 SC 230.

7 (1980) 2 SCC 360: AIR 1980 SC 470.

8 (1973) 4 SCC 225: AIR 1973 SC 1461.

Constitution, if not intractable, in the light of United Nations Charter and the solemn declaration subscribed to it by India. In *Apparel Export Promotion Council* v. *A. K. Chopra,*[9] it was pointed out that domestic courts are under an obligation to give due regard to the international conventions and norms for construing the domestic laws, more so, when there is no inconsistency between them and there is a void in domestic law. [10]In *Vishaka and others* v. *State of Rajasthan and others,*[11] the Supreme Court under Article 141 laid down various guidelines to prevent sexual harassment of women in working places, and to enable gender equality relying on Articles 11, 24 and general recommendations 22, 23 and 24 of the Convention on the Elimination of All Forms of Discrimination against Women. Any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into those provisions, e.g., Articles 14, 15, 19 and 21 of the Constitution to enlarge the meaning and content thereof and to promote the object of constitutional guarantee.

Thus the principles the International Conventions, including Yogyakarta principles, which are not inconsistent with the various fundamental rights guaranteed under the Indian Constitution, must be recognized and followed, which has sufficient legal and historical justification in our country.

The basic spirit of our Constitution is to provide each and every person of the Nation equal opportunity to grow as a human being, irrespective of race, caste, religion, community and social status.

Article 14 of the Constitution of India states that the State shall not deny to 'any person' equality before the law or the equal protection of the laws within the territory of India. Article 14 does not restrict the word `person' and its application only to male or female. Hijras/transgender persons who are neither male/female fall within the expression `person' and, hence, entitled to legal protection of laws in all spheres of State activity, including employment, healthcare, education as well as equal civil and citizenship rights, as enjoyed by any other citizen of this country.

Hijras/transgender persons have been facing extreme discrimination in all spheres of the society. Non-recognition of the identity of Hijras/transgender persons denies them equal protection of law, thereby leaving them extremely vulnerable to harassment, violence and sexual assault in public spaces, at home and in jail, also by the police. Sexual assault, including molestation, rape, forced anal and oral sex, gang rape and stripping is being committed with impunity and

9 (1999) 1 SCC 759: AIR 1999 SC 625.

10 See also *Githa Hariharan (Ms) and another v. Reserve Bank of India and another,* (1999) 2 SCC 228 : AIR 1999 SC 1149, *R.D. Upadhyay v. State of Andhra Pradesh and others,* (2007) 15 SCC 337 and *People's Union for Civil Liberties v. Union of India and another,* (2005) 2 SCC 436.

11 (1997) 6 SCC 241: AIR 1997 SC 3011.

there are reliable statistics and materials to support such activities. Further, non-recognition of identity of Hijras/transgender person results in them facing extreme discrimination in all spheres of society, especially in the field of employment, education, healthcare etc. Hijras/transgender persons face huge discrimination in access to public spaces like restaurants, cinemas, shops, malls etc. Further, access to public toilets is also a serious problem they face quite often. Since, there are no separate toilet facilities for Hijras/transgender person, they have to use male toilets where they are prone to sexual assault and harassment. Discrimination on the ground of sexual orientation or gender identity, therefore, impairs equality before law and equal protection of law and violates Article 14 of the Constitution of India.

Articles 15 and 16 prohibit discrimination against any citizen on certain enumerated grounds, including the ground of `sex'. The discrimination on the ground of `sex' under Articles 15 and 16, therefore, includes discrimination on the ground of gender identity. The expression `sex' used in Articles 15 and 16 is not just limited to biological sex of male or female, but intended to include people who consider themselves to be neither male or female. Article 15(2) to (4) and Article 16(4) read with the Directive Principles of State Policy and various international instruments to which India is a party, call for social equality, which the TGs could realize, only if facilities and opportunities are extended to them so that they can also live with dignity and equal status with other genders.

Gender identity lies at the core of one's personal identity, gender expression and presentation and, therefore, it will have to be protected under Article 19(1) (a) of the Constitution of India. A transgender's personality could be expressed by the transgender's behaviour and presentation. State cannot prohibit, restrict or interfere with a transgender's expression of such personality, which reflects that inherent personality. Often the State and its authorities either due to ignorance or otherwise fail to digest the innate character and identity of such persons. The values of privacy, self-identity, autonomy and personal integrity are fundamental rights guaranteed to members of the transgender community under Article 19(1)(a) of the Constitution of India and the State is bound to protect and recognize those rights.

Article 21 is the heart and soul of the Indian Constitution, which speaks of the rights to life and personal liberty. Right to life is one of the basic fundamental rights and not even the State has the authority to violate or take away that right. Article 21 takes all those aspects of life, which go to make a person's life meaningful. Article 21 protects the dignity of human life, one's personal autonomy, one's right to privacy, etc. Right to dignity has been recognized to be an essential part of the right to life and accrues to all persons on account of being humans. In Francis Coralie Mullin v. Administrator, Union Territory of Delhi,[12]

12 (1981) 1 SCC 608 (paras 7 and 8) : AIR 1981 SC 746

the Supreme Court held that the right to dignity forms an essential part of our constitutional culture which seeks to ensure the full development and evolution of persons and includes `expressing oneself in diverse forms, freely moving about and mixing and comingling with fellow human beings'.

Recognition of one's gender identity lies at the heart of the fundamental right to dignity. Gender constitutes the core of one's sense of being as well as an integral part of a person's identity. Legal recognition of gender identity is, therefore, part of right to dignity and freedom guaranteed under our Constitution. Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed under Article 21 of the Constitution of India.

5. Conclusions

Even in the absence of any statutory regime in this country, a person has a constitutional right to get the recognition as male or female after SRS, which was not only his/her gender characteristic but has become his/her physical form as well.

Though in the past, TG in India was treated with great respect, that does not remain the scenario any longer. Attrition in their status was triggered with the passing of the Criminal Tribes Act, 1871 which deemed the entire community of Hijara persons as innately `criminal' and `adapted to the systematic commission of non-bailable offences'. This dogmatism and indoctrination of Indian people with aforesaid presumption, was totally capricious and nefarious. There could not have been more harm caused to this community with the passing of the aforesaid brutal Legislation during British Regime with the vicious and savage this mind set. To add insult to the irreparable injury caused, Section 377 of the Indian Penal Code was misused and abused, as there was a tendency, in British period, to arrest and prosecute TG persons under Section 377 merely on suspicion. To undergo this sordid historical harm caused to TGs of India, there is a need for incessant efforts with effervescence.

There may have been marginal improvement in the social and economic condition of TGs in India. It is still far from satisfactory and these TGs continue to face different kinds of economic blockade and social degradation. They still face multiple forms of oppression in this country. Discrimination qua them is clearly discernable in various fields including health care, employment, education, social cohesion etc.

The TGs are also citizens of this country. They also have equal right to achieve their full potential as human beings. For this purpose, not only they are entitled to proper education, social assimilation, access to public and other places but employment opportunities as well. The Supreme Court declared that Hijras, Eunuchs, apart from binary gender, be treated as `third gender' for the purpose

of safeguarding their rights under Part III of our Constitution and the laws made by the Parliament and the State Legislatures. Transgender persons' right to decide their self-identified gender was also upheld and the Centre and State Governments were directed to grant legal recognition of their gender identity such as male, female or as third gender.

6. Suggestions

In *National Legal Services Authority* v. *Union of India and others,*[13] the Supreme Court directed the Centre and the State Governments

a) to take steps to treat them as socially and educationally backward classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments.
b) to operate separate HIV Sero-survellance Centres since Hijras/ Transgenders face several sexual health issues.
c) should seriously address the problems being faced by Hijras/ Transgenders such as fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies, social stigma, etc. and any insistence for SRS for declaring one's gender is immoral and illegal.
d) should take proper measures to provide medical care to TGs in the hospitals and also provide them separate public toilets and other facilities.
e) should also take steps for framing various social welfare schemes for their betterment.
f) should take steps to create public awareness so that TGs will feel that they are also part and parcel of the social life and be not treated as untouchables.
g) should also take measures to regain their respect and place in the society which once they enjoyed in our cultural and social life.

The need is to accept these suggestions at an early date by the Legislature. Art. 21 guarantees enjoyment of life by all citizens of this country with dignity, viewing these human rights in terms of human development. The concepts of justice social, economic and political, equality of status and of opportunity and of assuring dignity of the individual incorporated in the Preamble, clearly recognize the right of one and all amongst the citizens of these basic essentials designed to flower the citizen's personality to its fullest. The concept of equality helps the citizens in reaching their highest potential.

Kant was of the view that at the basis of all conceptions of justice, no matter which culture or religion has inspired them, lies the golden rule that you should treat others, as you would want everybody to treat everybody else, including yourself. When Locke conceived of individual liberties, the individuals

13 AIR 2014 SC 1863.

he had in mind were independently rich males. Similarly, Kant thought of economically self-sufficient males as the only possible citizens of a liberal democratic State. These theories may not be relevant in today's context, as it is perceived that the bias of their perspective is all too obvious to us. In post-traditional liberal democratic theories of justice, the background assumption is that humans have equal value and should, therefore, be treated as equal, as well as by equal laws. This can be described as `Reflective Equilibrium'. The method of Reflective Equilibrium was first introduced by Nelson Goodman in `Fact, Fiction and Forecast' (1955). However, it is John Rawls who elaborated this method of Reflective Equilibrium by introducing the conception of `Justice as Fairness'. When we combine Rawls's notion of Justice as Fairness with the notions of Distributive Justice, to which Noble Laureate Prof. Amartya Sen has also subscribed, we get jurisprudential basis for doing justice to the Vulnerable Groups which definitely include TGs. Once it is accepted that the TGs are also part of vulnerable groups and marginalized section of the society, we are only bringing them within the fold of aforesaid rights recognized in respect of other classes falling in the marginalized group. This is the minimum riposte in an attempt to assuage the insult and injury suffered by them so far as to pave way for fast tracking the realization of their human rights.

The Doctrine of Escheat or Bona Vacantia

Dr. Venoo Rajpurohit[1]

Escheat is a common law doctrine, which transfers the property of a person who dies without heirs to the State. It serves to ensure that property is not left in "limbo" without recognized ownership. The most common reason that an escheat takes place is that an individual dies intestate, meaning without a valid Will indicating who is to inherit his or her property, and without relatives who are legally entitled to inherit in the absence of a Will. A state legislature has the authority to enact an escheat statute. Ordinarily, the property subject to escheat is all the property within the state belonging to the original owner upon his or her death. Although initially the doctrine was applicable solely to real property, it presently extends to personal property, including such intangibles as bank accounts and shares of stock. Certain other types of property can also be the subject of escheat for lack of a known owner.

When real or personal property is abandoned, or when legal owners or heirs of such property cannot be identified, the state in which the property is located takes control of it. After a specified period of time during which the state attempts to find the owners, it takes ownership of the property, free to use or sell it at will. Section 3 of the Kerala Escheats and Forfeitures Act, 1964 (An Act of the Kerala State Legislature dealing with the administration, supervision, custody and disposal of escheats and unclaimed property) provides that where a person dies intestate and without leaving legal heirs, all his property shall be escheat and shall belong to the Government.

1. Law in England

The common Law of England recognizes the right of the Crown to take property by escheat or as *bona vacantia.* Escheat proper was the lord's right of re-entry on real property held by a tenant dying intestate without lawful heirs. It was an incident of feudal tenure and was based on the want of a tenant to perform the feudal vices.[2] On the tenant dying intestate without leaving any lawful heirs his estate came to an end and the Lord was in by his own right and not by way of succession or inheritance from the tenant.[3] In most cases, the land was escheated to the Crown as the lord paramount, in view of the gradual elimination of intermediate or *mesne* lords since 1290. The Crown takes as *bona vacantia* goods in which no one else can claim a property. In *Dyke* v. *Walford,*[4] it was said that, "it is the right of the Crown to *bona vacantia* to property which

1 Assistant Professor, Five Year Law Course, University of Rajasthan, Jaipur
2 see *Halsbury's Laws of England,* Vol. 16, Art. 830.
3 see *Attorney-General of Ontario* v. *Andrew F. Mercer,* (1883) 8 AC 767 (772).
4 (1848) 5 Moo PC 434 (496) : 13 ER 557 (580).

has no other owner." The right of the Crown to take as *bona vacantia* extends to personal property of every kind.[5] Escheat of real property of an intestate dying without heirs was abolished in 1925 and the Crown now takes all his properties as *bona vacantia*. On the dissolution of a company, the Crown took its real property by escheat and its personal property as *bona vacantia.* Technical escheat of the property of a dissolved company was abolished in 1929 and today under Sec 354 of the English Companies Act, 1948 all the property and rights of a dissolved company is deemed to be *bona vacantia* and accordingly belongs to the Crown.

The doctrine of technical escheat of the real property of a dissolved company was abolished in England in 1929 and Section 354 of the Companies Act 1948 further provides that all property and rights of a dissolved company shall be deemed to be *bona vacantia*, i.e property of the Crown.

2. Law in India

The right of the government to take by escheat for want of an heir or successor or as *bona vacantia* for want of a rightful owner has been recognized in our country for a long time. Statutes 16 and 17 Victoriae, C. 95, S. 27, an Act to provide that "all real and personal estate within the said territories escheating or lapsing for want of an heir or successor, and all property within the said territories devolving, as *bona vacantia* for want of a rightful owner, shall (as part of the revenues of India) belong to the East India Company in trust for Her Majesty for the service of the government of India."

By Section 54 of the Government of India Act, 1858 the existing provision was continued in force and was construed as referring to the Secretary to State in Council in place of the company. Section 20 (3) (iii) of the Government of India Act, 1915 provided that the revenues of India received for His Majesty would include "all movable or immovable property in British India eschewing or lapsing for want of an heir or successor, and all property in British India devolving as *bona vacantia* for want of a rightful owner."

Section 174 of the Government of India Act, 1935 provided:

> "Subject as hereinafter provided any property in India accruing to His Majesty by escheat or lapse or as *bona vacantia* for want of a rightful owner shall if it is property situate in a Province, vest in His Majesty for the purposes of the Government of that Province, and shall in any other case vest in His Majesty for the purpose of the government of the Federation."

Article 296 of the Constitution of India now provides:

> "Subject as hereinafter provided, any property in the territory

5 see *In re, Wells; Swinburne-Hanham* v. *Howard,* 1933-1 Ch 29 (49).

of India which if this Constitution had not come into operation, would have accrued to His Majesty or, as the case may be, to the Ruler of an Indian State by escheat or lapse, or as *bona vacantia* for want of a rightful owner, shall if it is property situate in a State, vest in such State, and shall, in any other case, vest in the Union."

These enactments show that in this country the government takes by escheat immovable as well as movable property for want of an heir or successor. In this country, escheat is not based on artificial rules of common law and is not an incident of feudal tenure. It is an incident of sovereignty and rests on the principle of ultimate ownership by the State of all property within its jurisdiction. "Private ownership not existing, the State must be owner as ultimate lord"[6]. The rules of English feudal law relating to *mesne* lords are not applicable, and consequently the zamindar could not take by escheat the land of a tenant dying without heirs. The right of escheat belongs to the government only[7].

The government has the right to take all property within its jurisdiction by escheat for want of an heir or successor and as *bona vacantia* for want of a rightful owner.[8] Consequently, the property of an intestate dying without leaving lawful heirs and the property of a dissolved corporation passes to the government by escheat or as *bona vacantia*. The property taken by escheat or as *bona vacantia* belongs to the government, subject to trusts and charges, if any, previously affecting it.[9] Likewise, in this country, the government took by escheat or as *bona vacantia* all the properties of a company dissolved under the Indian Companies Act, 1913 except in so far as its right was cut down by that Act.[10]

According to *Giridhari Lal* vs. *Government of Bengal,*[11] the Privy Council held that the Crown could not take an estate unless it affirmatively would establish that there were no other heirs. In *Collector of Madura* vs. *Mootoo Ramalinga Sethupathi,*[12] the Privy Council held that in the Dravidian country, in the absence of authority from husband, a window might adopt a son with the assent of his kindered. Such adoption is valid and hence the British Government cannot escheat such estate. In *Collector of Machilipatnam* v. *Kavaly Venkatiah,*[13] the Privy Council held that when the Crown would take the property as the

6 see *Collector of Masulipatam* v. *C. Venkata Narainapah,* (1859-61) 8 MIA 500, 525 (PC).

7 see *Ranee Sonet Kooer* v. *Mirza Himut Bahadoor,* (1875-76) 3 Ind App 92, 101.

8 see *Bombay Dyeing and Manufacturing Co.* v. *State of Bombay,* 1958 SCR 1122, 1146 : AIR 1958 SC 328, 339; *Supdt. and Remembrancer of Legal Affairs, West Bengal* v. *Corporation of Calcutta,* 1967-2 SCR 170, 204 : AIR 1967 SC 997, 1016.

9 *M/s. Plerce Leslie an Co. Ltd.* v. *Miss Violet Ouchterlong Wapshare and others,* AIR 1969 SC 843.

10 P.B. Mukherjee, J., expressed a similar opinion *In re, U. N. Mandal's Estate Private Ltd.,* AIR 1959 Cal 493 at p. 498.

11 12 MIA 448.

12 (1968) 12 MIA 397.

13 8 MIA 500.

ultimate heir, it would take it as if it were an ordinary heir ... and have duties to perform ceremonies of the deceased, whose lands were escheated, and also to pay the debts if any to the debtors.

The property of an intestate is to escheat to the government only when the intestate left no heir qualified to succeed to his or her property, in accordance with the provisions of the Hindu Succession Act, 1956.[14] In *Abdul Rahman* v. *Prasony Bai and another,*[15] the Supreme Court held that if a person died leaving his heir or legal representative, the question to treat a property, as ''escheat'' would not arise. In *Mangal Singh & Ors.* v. *Kehar Singh & Ors.,*[16] the Punjab and Haryana High Court has held that prior to enforcement of Hindu Succession Act, 1956, the agriculturists were governed by custom in matters of succession and that the property of Rajputs will not escheat but it will revert to the other members of the same community to the extent of equal shares.

In *State of Rajasthan & Ors.* v. *Board of Revenue & Ors.,*[17] the High Court of Rajasthan while interpreting the Rajasthan Escheats Regulationm Act, 1956 observed that their Lordships of Hon'ble Supreme Court in *State of Bihar* v. *Radha Kishna Singh & Ors.,*[18] has held that when the Government put forwards a claim of escheat, a heavy onus lies on it to prove the absence of any heir of the deceased anywhere in the world and normally Court frowns on the escheat being taken by the State unless the essential conditions for escheat are fully and completely satisfied. The Supreme Court had observed:

> "It is well settled that when a claim of escheat is put forward by the Government the onus lies heavily on the appellant to prove the absence of any heir of the respondent anywhere in the world. Normally, the Court frowns on the estate being taken by escheat unless the essential conditions for escheat are fully and completely satisfied. Further, before the plea of escheat can be entertained, there must be a public notice given by the Government so that if there is any claimant anywhere in the country or for that matter in the world, he may come forward to contest the claim of the State. In the instant case, the States of Bihar and Uttar Pradesh merely satisfied themselves by appearing to oppose the claims of the plaintiffs-respondents. Even if they succeed in showing that the plaintiffs were not the nearest reversioners of late Maharaja, it does not follow as a logical corollary that the failure of the plaintiffs' claim would lead to the irresistible inference that there is no other heir who could at any time come forward to claim the properties.''

14 *Debabrata Mondal and Anr.* v. *State of West Bengal & Ors.,* AIR 2008 Cal 13.
15 AIR 2003 SC 718.
16 (2007-1) 145 PLR 498.
17 AIR 2008 Raj. 33
18 (1983)3 SCC 118 in para 272 : AIR 1983 SC 684, Para 270.

In *Ikbal & Ors.* v. *Board of Revenue, Ajmer & Ors.,*[19] it was held that under Section 6(5) of the Rajasthan Escheats Regulation Act, 1956, the Collector ought to have obtained full information from public records and made a thorough enquiry before declaring the property as escheat because property of a citizen cannot be so lightly usurped by the State by recourse to the Act.[20]

3. Religious Endowments

Thus in *Punjab State through Collector, Ludhiana* v. *Gram Panchayat, Village Chak Kalan,*[21] it was held that **a**fter the death of owner, the land was escheated to the Provincial Government as no one was found to have been appointed as his Chela. He was also not survived by any male or female heir.

4. Muslim Law

Where a deceased Muslim has no legal heir under Muslim law, his properties are inherited by Government through the process of escheat. State is regarded as the ultimate heir of every deceased.

5. Hindu Law

Section 29 of the Hindu Succession Act, 1956 deals with the provisions of Escheat.

19 AIR 2008 (NOC) 2081.

20 *State of Bihar* v. *Radha Kishna Singh & Ors.,* (1983) 3 SCC 118 and *State of Rajasthan & Ors.* v. *Board of Revenue,* S.B. Civil Writ Petition No. 3554/98 decided by the High Court on 25.7.2007 relied upon.

21 AIR 2010 (NOC) 916 (P. & H.).

LGBT Issues: Law, Society and Religion

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Konpal Preet Kaur[2]

Equity has to do with everyone having access to fair and equal treatment under the law, regardless of race, social class or gender. Social Justice extends the concept of equity to include human rights as part of the social contract. Prejudices, non-sanctions by religion and discrimination are deeply imbedded in our value system.

Gender is a central aspect of human existence. World practices discrimination against persons based on their sexual orientation or gender identity. Criminalizing relationships based on one's sexual orientation or gender identity violates fundamental human rights. People everywhere should be treated equally, with dignity and respect. LGBT needs to be provided equity globally and also social justice. It should preserve human dignity and worth of the person and provide developmental support . The main principles guiding the rights approach on sexual orientation relate to equality and non-discrimination. Human rights activists seek to ensure social justice and guarantee the dignity of lesbians, gays and bisexuals.

In this article, the author reviews research evidence law relating to Homosexuality in different parts of the world The author offers a conceptual framework of laws in different countries. Indian laws shall be discussed in detail in the light of the latest case law where criminalizing sections of the statute were repealed and later overruled. The article analyses the history of LGBT community. It also analyses how the LGBT community is perceived in different religions. It shall explain the stigma, prejudice, and discrimination in the society. The researcher shall look at the effects of different sexual orientation on the society. It shall also discuss the international conventions that could be used as a tool to force countries to provide the homosexuals social justice and rights in the society. The reasons for prejudices shall be collectively analysed in the end in the light of the complete research and suggestions to combat the situation shall be compiled.

1. Introduction

Sexual orientation is an enduring emotional, romantic, sexual or affectional attraction to another person. It is not similar to gender identity, which can be defined as psychological sense of being male or female. A different sexual

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orientation means non-adherence to cultural norms for feminine and masculine behavior. Sexual orientation is a relatively recent notion in human rights law. Prejudices, non-sanctions by religion and discrimination are deeply imbedded in our value system.

Gender is a central aspect of human existence. World practices discrimination against persons based on their sexual orientation and gender identity. Criminalizing relationships based on one's sexual orientation or gender identity violates fundamental human rights. It limits person's ability and hinders effective public health responses. People everywhere should be treated equally, with dignity and respect,. They should be able to utilize their fullest potential irrespective of their sexual orientation. Criminalization laws reflect poorly on a country's commitment to protecting the human rights of its people[3].

It is estimated that 78 countries criminalize homosexuality, with seven countries allowing the death penalty for those convicted of having consensual same-sex relationships.[4] There is a global trend of increased violence and discrimination towards LGBT people and their supporters.[5] The report documents that LGBT persons are directly at risk for arrest and violence, and also highlights the negative impact of criminalization laws on LGBT allies committed to human rights and social justice.

Criminalization laws can be put in as institutional heterosexism and can negatively impact the ability of LGBT youth and adults. LGBT needs to be provided equity globally and also social justice. It should preserve human dignity and worth of the person. LGBT Community deserves equal representation and developmental support. The main principles guiding the rights approach on sexual orientation relate to **equality** and **non-discrimination**. Human rights advocates, lawyers and other activists seek to ensure social justice and guarantee the **dignity** of lesbians, gays and bisexuals.

Lesbians, gays and bisexuals do not claim any 'special' or 'additional rights' but the observance of the same rights as those of heterosexual persons. Lesbian, gay, bi-sexual and transgendered (LGBT) persons are denied - either by law or practices - basic civil, political, social and economic rights.

2. History of LGBT

The history of LGBT people dates back further than most people may think. Some incorrectly believe that being lesbian, gay, bisexual or transgender (LGBT) is a contemporary movement. History demonstrates, however, that as long as there have been people, there have been LGBT people. LGBT

3 http://www.socialworkblog.org/practice-and-professional-development/2014/03/global-lgbt-equity-is-a-social-justice-issue/.
4 Ibid.
5 US Department of State Report 2013 Country report on Human rights practice.

communities have played an important role in the history of the world. Most people in orthodox countries like India oppose the LGBT movement as being a mark of modernization or of aping the west. In modern cultures, a myth has been spread, mostly by religious groups, that homosexuality is primarily a modern phenomenon. Most men in ancient Greece and Rome engaged in at least occasional homosexual contact, and a significant number of the marriages consummated in both civilizations were homosexual.[6] Homosexuality as such was celebrated in the arts, theatre and in cultural activities. The ancients did not view gender as a determining factor of who should love or be married. Ancient view of homosexual sex was that it was harmless as long as both parties were fully consenting. In most African cultures, it was considered to be nothing more than child-play. We have vast literature, which says that homosexual relationships were widely acknowledged and were not considered immoral. In many primitive societies, such as Africa and the Pacific Islands, the patterns seen are often the same as those seen in ancient Greece and Rome. Adolescent would often, engage in frequent homosexual relations. They would then make a choice - going on to find a wife and abandon their same-sex partner or continue. A lot of ancient texts like the Bible, the Quran etc. mention about homosexuality in its condemnation and criticism. This is a proof of its existence since the very beginning.[7]

3. Effects of different Sexual Orientation

Marriage has been universally acknowledged throughout history as a legal contract between a man and a woman. This should have emotional and sexual fidelity, along with childrearing. But homosexual marriage does not follow this concept Furthermore, marriage is an extremely wide-spread practice within any society and has many legal and moral issues attached to it. So, when marriage is redefined, the society is dramatically affected. Recognizing and giving rights to LGBT means changing the laws of the land. Gay Marriage means a redefinition of sexual morality, and with it, other sexually related practices will be affected, and this can be harmful. The ramifications are vast, and they affect society and religion, etc. Few of them can be enumerated below.[8]

1. It can bring huge financial and emotional stress.
2. The health risks are enormous to themselves and others. The fact is that homosexuals do not live as long as heterosexuals due to the health risks associated. Though HIV/AIDS cannot be called a homosexual disease, the fact is that it is highly prevalent among the gay and lesbian community due to their great number of sex partners. The collateral damage to the rest of society, as far as health risks, cannot be denied.

6 Venkat V (2008)" From the shadows" Frontline Vol 25 No 3 Feb 16-29.
7 Tharu S and Niranjan T(2009)"Problems of contemporary theory of gender" in Menon N, editor Gender and Politics in India , New Delhi and Oxford University press.
8 http://carm.org/gay-marriage-harm accessed on Oct 10, 2014.

3. Gay Marriage means having the morals of the minority forced upon the majority. The percentage of homosexuals in society is less than 5%, so it is like making the other 95% accept their style of life .
4. Gay Marriage reduces the number of children born in society and it shall have an impact on stability of population
5. Gay Marriage hurt religious sentiments. People consider spiritual issues to be extremely important. This kind of change harms a person's spiritual and emotional health. It forces government to get involved in changing laws which automatically affect everyone in society.

The world today stands divided on various factors. People look for reasons to discriminate with each other. There are so many reasons that create a divide - religion, sex, caste, creed, race, physical appearances, territories, psychological conditions. Human beings have created another criterion for widening this divide, the people have agreed upon discriminating love and sexual interests.

LGTB is an abbreviation that stands for lesbians, gay, transgender and bisexual. Informally, they can be said to be the persons with some different sexual or love interests than the persons with usual thought process. The term lesbians refer to the women who are romantically and/or sexually attracted to women. The term gay refers to men who are sexually and/or emotionally attracted towards men. The term transgender is an umbrella term used to describe people whose gender identity differs from that usually associated with their birth sex. While a bisexual person is someone who is emotionally and/or sexually attracted to persons of both sexes. These persons are differentiated and debated upon only because of the reason of their different sexual orientation and different love interests. Basically LGBT persons are the ones which lead a different life from the main stream or they can be said to be the persons who are not in sync with the gender that they were born with because of some natural complications or by the mere reasons of their interests and inclinations.[9]

At present, the world is divided in its opinion regarding such persons. Some parts of world practice utmost cruelty and disguise against such persons denying them the basic human rights, totally disapproving of the interests of such persons reasoning their views on religion, values and such acts being unnatural and offensive; while there are various regions of the world which accept such relationships and people are not treated with adverse diversification

4. Discriminations Practiced

Many counties have criminal provisions on practicing homosexuality. In many countries lesbians, gays and bisexuals are denied equality in rights and

9 Khanna S Gay rights In: Humjinsi: A resource book on Lesbian Gay and Bisexual Rights in India. Fernandez B Editor Indian Centre for Human Rights and law 2003 pp 55-65.

before the law. Many countries have a higher age of consent for same sex relations in comparison with opposite sex relations. Sexual orientation is omitted in anti-discrimination laws, constitutional provisions or their enforcement. Therefore, Right to Non Discrimination is denied. Death penalty is applicable for sodomy in many counties. Therefore, Right to life is violated. Right to privacy is also denied in such cases. Inhuman treatment is infringed upon by police practices, in investigations or in the case of lesbians, gays and bisexuals in detention. Trials are affected by the prejudices of judges and other law enforcement officials. The LGBT Community has no right of free expression in the society. The *right to work* is the most affected among the economic rights and they are discriminated at work place. Their rights in society are also affected when they have to disclose the identity of their spouse.

5. Laws in Various Countries

There are certain nations like Iran, Saudi Arab, Yemen, Sudan, which disapprove of homosexuality and impose death penalty for practicing homosexuality. Certain advanced nations like Canada, Brazil, Argentina, South Africa, Sweden, Oslo, Spain and France are progressive countries, which legalize same- sex marriage.

5.1. ***United States of America***

LGBT rights in the United States have evolved over time and vary greatly from state to state. Sexual activity between consenting adults and adolescents of a close age of the same sex has been legal nationwide since 2003, pursuant to the U.S. Supreme Court ruling in Lawrence v. Texas .[10] Age of consent in each state varies from age 16 to 18. LGBT rights related laws including family and marriage, laws vary in most of the states. Additionally, some states offer civil unions or other types of recognition which offer some of the legal benefits and protections of marriage. Adoption policies in regard to gay and lesbian parents also vary greatly from state to state. Some allow adoption by same-sex couples, while others ban all unmarried couples from adoption.

5.2. ***Iran***

Iran is a country which derives its roots from religion. It is in strong opposition of the LGBT rights. Homosexuality is a crime punishable by imprisonment, corporal punishment, or even execution of the accused. Any type of sexual activity outside a heterosexual marriage is forbidden. Transsexuality in Iran is legal if accompanied by a sex change operation. All sexual relations that occur outside a traditional, heterosexual marriage (i.e. sodomy or adultery) are illegal and no legal distinction is made between consensual or non-consensual sodomy. They are considered a crime and carry a maximum punishment of death. Forced homosexual relations (rape) often results in execution.

10 539US 558(2003).

5.3. ***United Kingdom***

LGBT rights in the United Kingdom have evolved dramatically over time though they still vary by jurisdiction in the four nations of the United Kingdom. In UK Christianity and homosexuality clashed. Same sex sexual activity was characterised as sinful and, under the Buggery Act 1533, was outlawed and punishable by death. LGBT rights first came to prominence following the decriminalisation of same-sex sexual activity across the UK between 1967 and 1982. Since the turn of the 21st century, LGBT rights have increasingly strengthened in support.

Some discrimination protections had existed for LGBT people since 1999, but were extended to all areas under the Equality Act 2010. In 2000, Her Majesty's Armed Forces removed its ban on LGBT individuals serving openly. Transgender people have had the right to change their legal gender since 2005. The same year, same-sex couples were granted the right to enter into a civil partnership, a similar legal structure to marriage, and also to adopt in England and Wales. Scotland later followed on adoption rights for same-sex couples in 2009 and Northern Ireland in 2013. Laws permitting Same-sex marriage were passed for England and Wales in June 2013.Britain provides one of the highest degrees of liberty in the world for its LGBT communities.,

5.4. ***Pakistan***

Being open about sexual orientation is considered a taboo in many parts of Pakistan. However, in large cities like Lahore, Karachi, Islamabad, and even Peshawar there is a large community of LGBT. Disapproval of LGBT lifestyle also stems from religious and patriarchal beliefs. Pakistan does not have civil rights laws to prohibit discrimination or harassment on the basis of real or perceived sexual orientation. Same-sex marriages and civil unions in Pakistan have no legal recognition. Pakistani law is a mixture of both Anglo-Saxon colonial law as well as Islamic law, both, which prescribe criminal penalties for same-sex sexual acts. The Pakistan Penal Code of 1860, originally developed under colonialism, punishes sodomy with a possible prison sentence.

5.5. ***India***

Section 377 of the Indian Penal Code 1861, introduced during the British rule of India, criminalises sexual activities "against the order of nature". They are termed as Unnatural offences:and are punishable with imprisonment for life, or with imprisonment which may extend to ten years, and shall also be liable to fine. Section 377, criminalizes homosexual sex. Even consensual heterosexual acts are punishable under this law.

AIDS Bhedbhav Virodhi Andolan [11]in 1991 published Less than Gay: A Citizen's Report, which spelled out the problems with Section 377 of Indian Penal Code and asked for its repeal. Naz Foundation (India) Trust, an activist group, filed a public interest litigation in the Delhi High Court in 2001, seeking legalisation of homosexual intercourse between consenting adults. In 2003, the Delhi High Court refused to consider a petition regarding the legality of the law, saying that the petitioners, had no locus standi in the matter. Naz Foundation appealed to the Supreme Court against the decision of the High Court to dismiss the petition on technical grounds. The Supreme Court decided that Naz Foundation had the standing to file a PIL in this case and sent the case back to the Delhi High Court to reconsider it on merit.[12]

It was pleaded that Section 377 IPC is based on traditional Judeo-Christian moral and ethical standards and does not enjoy justification in contemporary India. It relied upon 172nd Report of the Law Commission which had recommended deletion of Section 377 The Delhi High Court discussed the question whether morality can be a ground for imposing restriction on fundamental rights.

It was also felt that public health measures are strengthened by decriminalization of such activity, so that they can be identified and better focused upon. Section 377 IPC was based on a conception of sexual morality specific to Victorian era[13]. Enforcement of Section 377 IPC adversely contributes to pushing the infliction underground and makes risky sexual practices go unnoticed and unaddressed. It was felt that it is not within the constitutional competence of the State to invade the privacy of citizen's lives or regulate conduct to which the citizen alone is concerned solely on the basis of public morals. Eventually, in a historic judgement delivered on 2 Jul 2009, Delhi High Court overturned the 150 year old section, legalising consensual homosexual activities between adults.. In a 105-page judgement, a bench of Chief Justice Ajit Prakash Shah and Justice S Muralidhar said that if not amended, section 377 of the IPC would violate Article 14 of the Indian constitution, which states that every citizen has equal opportunity of life and is equal before law.

The Supreme Court of India of 11 December 2013 delivered a judgement in case of Suresh Kumar Menon v Naz Foundation [14] and overturned the Delhi High Court judgement . They ruled homosexuality to be a criminal offence setting aside the 2009 judgement given by the Delhi High Court. The bench of justices G. S. Singhvi and S. J. Mukhopadhaya however noted that the Parliaments should

11 ABVA(1999) For People Like us

12 *Naz Foundation* v. *Govt of NCT of Delhi* 160 Delhi Law Times 277 (Delhi High Court 2009)

13 Geetanjali Mishra, Decriminalising homosexuality in India, Reproductive health matters Vol 17 No 34, Criminalisation (Nov 2009) pp 20-28.

14 Civil Appeal No.10972 OF 2013, Arising out of SLP (C) No.15436 of 2009).

debate and decide on the matter. A bench of justices upheld the constitutional validity of Section 377 of Indian Penal Code. The central government has filed a review petition on 21 December 2013. Naz Foundation has also filed a review petition against the Supreme Court order on Section 377. On January 28, 2014 Supreme Court dismissed the review Petition filed by Central Government, NGO Naz Foundation and several others, against its December 11 verdict on Section 377 of IPC.

5. Transgenders in India

The transgender commonly referred as hijras are an ancient community in the Indian subcontinent with members in Pakistan and Bangladesh. They are classified as the third sex and have their own gender role.[15] They can be described as man minus maleness and man plus woman. They are not considered either because of their inability to reproduce. In the Indian subcontinent, great emphasis is placed on one's ability to have children. Someone who is unable to have children is not considered a true man or woman. Therefore, hijras are a separate identity, who fit into neither category, with aspects of both genders. In the case of National Legal Services[16] Authority V. Union Of India & Ors Supreme court created the "third gender" status for hijras or transgenders. Earlier, they were forced to write male or female against their gender. The SC asked the Centre to treat transgender as socially and economically backward. The apex court said that transgenders will be allowed admission in educational institutions and given employment on the basis that they belonged to the third gender category. The bench clarified that its verdict pertains only to eunuchs and not other sections of society like gay, lesbian and bisexuals who are also considered under the umbrella term 'transgender'.

6. LGBT and Religion

6.1. ***Islam***

LGBT is influenced by the religious, legal and cultural history of the nations with a sizable Muslim population, along with specific passages in the Qur'an and statements attributed to the Prophet Muhammad (Hadith). Hadiths traditionally are not interpreted because their language is understood to be simple matter of fact language. The traditional schools of Islamic law based on Qur'anic verses and hadith consider homosexual acts a punishable crime and a sin. Today in most of the Islamic world, homosexuality is not socially or legally accepted. In Countries like Afghanistan, Iran, Mauritania, Nigeria, Saudi Arabia, Somalia, Sudan, the UAE, and Yemen, homosexual activity carries the death penalty.

15 PUCL(peoples Union for Civil Liberties) (2003) Human rights "Violation against the transgender community : a study of Hijras and Kothi Sex workers in Bangalore, India , Karnataka (Peoples Union for Civil Liberties).

16 WP (civil) 400 of 2012 with WP(civil) 604 of 2013.

Alternatively, same-sex sexual intercourse is legal in five Muslim-majority nations (Albania, Turkey, Bahrain, Jordan, and Mali). In Albania there have been discussions about legalizing same-sex marriage. Homosexual relations between females is legal in Kuwait (but homosexual acts between males are illegal). Lebanon has had recent internal efforts to legalize homosexuality. Even in regions where homosexuality is not, illegal it is seen as a shame by most families, and privately executing the punishments required by Islamic law may be seen as morally justified.

Most Muslim-majority countries have opposed moves to progress LGBT rights at the United Nations, in the General Assembly and/or the UNHRC. However, Albania and Sierra Leone have signed a UN Declaration supporting LGBT rights. OIC member- state Mozambique provides LGBT rights protections in law in the form of non-discrimination laws, and discussions on legally recognizing same-sex marriage have been held in the country. The hadith (sayings and actions of Muhammad) show that homosexuality was not unknown in Arabia. Given that the Qur'an is vague regarding the punishment of homosexual sodomy, Islamic jurists turned to the collections of the hadith and seerah (accounts of Muhammad's life) to support their argument punishment These are clear but harsh. The four schools of medieval shari'a (Islamic law) disagreed on what punishment is appropriate .Hanafi school held that it does not merit any physical punishment, on the basis of a hadith that "Muslim blood can only be spilled for adultery, apostasy and homicide" The Hanbali school held that sodomy is a form of adultery and must incur the same penalty, i.e. death. Modern scholars of Islam interpret homosexual activity as a punishable offence as well as a sin. There is no specific punishment prescribed, however, and this is usually left to the discretion of the local authorities on Islam. In India, where Muslims form a large minority, the largest Islamic seminary (Darul Uloom Deoband) has vehemently opposed recent government moves to abrogate and liberalize laws from the British Raj era that banned homosexuality.

6.2. ***Christianity***

Christian denominations have a variety of beliefs about sexual orientation, including beliefs about same-sex sexual practices and asexuality.[17] Denominations differ in the way they treat lesbian, bisexual, and gay people. Asexuality is relatively new to public discourse, few Christian denominations discuss it. It is believed that Asexual people do not exist. Sexuality is a gift from God and thus a fundamental part of our human identity. Same-sex sexual relationships have traditionally been considered a sin within Christianity. However, some contemporary Christian denominations do not agree with this and ordain openly bisexual people, perform same-sex marriages, and accept

17 Miller A, Sexuality and Human rights. Discussion paper: Geneva International Council on Human Rights Policy: 2009.

openly bisexual parishioners (for example, the United Church of Christ and the Metropolitan Community Church.) Lesbians face different social and cultural preconception than gay men, making their experience in Christianity sometimes dissimilar to that of gay men, although lesbianism has also traditionally been considered a sin within Christianity.

Christianity has traditionally regarded homosexuality to be an immoral practice (or vice) and most major Christian continue to hold this view, including the Roman Catholic Church, The New Testament is more ambiguous about gender-variant identities than the Old Testament. Eunuchs are indicated as acceptable candidates for evangelism and baptism, as demonstrated in a story about the conversion of an Ethiopian eunuch. No. of early Christians (such as Saints Sergius and Bacchus) entered into homosexual relationships, and certain Biblical figures had homosexual relationships, despite Biblical injunctions against sexual relationships between members of the same sex.

6.3. ***Hinduism***

Hindu philosophy has the concept of a third sex or third gender (*tritiya-prakriti* - literally, "third nature"). This category includes a wide range of people with mixed male and female natures such as effeminate males, masculine females, transgender people, transsexual people etc. Such persons are not considered fully male or female in traditional Hinduism, being a combination of both. They are mentioned as third sex by nature (birth) and are not expected to behave like ordinary men and women. They often keep their own societies or town quarters, perform specific occupations (such as masseurs, hairdressers, flower-sellers, domestic servants, etc.) and are generally attributed a semi-divine status. Their participation in religious ceremonies, especially as cross-dressing dancers and devotees of certain temple gods/goddesses, is considered auspicious in traditional Hinduism. The Hindu god Shiva is often represented as Ardhanarisvara, with a dual male and female nature.

In the Hindu narrative tradition, stories of gods and mortals changing gender occur. Various Hindu deities connected with gender diversity are Ardhanarisvara (the hermaphrodite form of Shiva); Ayyappa (a god born from the union of Shiva and Mohini, a female incarnation of Vishnu); Chaitanya Mahaprabhu (an incarnation of Radha and Krishna combined); and countless others. There are also specific festivals connected to the worship of such gender-variant deities, some of which are famous in India for their cross-dressing devotees. In the Mahabharata, the hero Arjuna takes a "vow of eunuchism," (Vrihannala). Another important character, Shikhandi, is born female, but raised as a boy. Hindus have many sacred texts and different communities give special importance to different texts. Even more so than in other religions, Hindus also foster disparate interpretations of the meaning of various texts. The Vedas, which form the foundation of Hinduism for many, do not refer explicitly to

homosexuality, but Rig-Veda talks about *Vikruti Evam Prakriti* (perversity/ diversity), People of a third gender (*tritiya-prakriti*), not fully men nor women, are mentioned here and there throughout Hindu texts such as the Puranas but are not specifically defined. Modern readers often draw parallels between these and modern stereotypes of lesbian, gay, bisexual and transgender sexual identities. The Manusmriti, which lists the oldest codes of conduct that were proposed to be followed by a Hindu, admonishes homosexual behavior only mildly.

7. Conclusion And Suggestions

There exist three separate worlds of vision regarding LGBT persons. [18] Somewhere they are given equal or even special rights in comparison to the others while somewhere they are penalised and even slaughtered for practising such sexual diversifications; while exist certain nations which keep a blind eye towards such acts. But a majority of nations do not accept such practices because of the paradoxes prevailing in the society. There are a lot of misconceptions or myths prevailing in the societies regarding such acts, like them being a consequence of the advanced modern day outlooks or them only being an act of lust. People totally overlook the other aspects like the natural deformities or inclinations and formulate their opinions considering themselves to be superiors by the only reason of being heterosexuals. The eastern countries, specifically the Asian and Middle Eastern nations have the worst situation as they practise immense brutality towards such persons under the veil of religion, while the western countries also are not in complete agreement with this concept and a very few of them have given a nod of assent to such acts that too in the very recent times including the U.S.A. It is also observed that even in the countries where equal or special rights are given to such persons, there still are reported cases of bias or brutal racist activities against the LGBT persons. It is therefore true that it is not only the statutes or the government of countries that creates a problem, but the main problem is in the mindset of people and that is what needs to be changed.

In a democratic world where one has complete freedom of choice, one should not be compelled to chose sexual orientation, when a person feels or is born with certain disorders or habits the others should respect his or her inclination and choice of life. We need to respect the religious and social sentiments but one's personal choices of sexual orientation also need to be considered. As long as the concerned acts of sexuality of the LGBT persons are within four walls and are not being practiced in public and as long as they are not making any absurd gestures of public display of affection, and as long as the two individuals involved are consenting adults, such acts should be permitted. These acts are a pure matter of choice and therefore if not allowed should not be criminalized as well.

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18 Nivedita Menon , Sexuality, caste , governmentality: contest over 'gender' in India, Feminist Review No 91 <bold>South Asian Feminisms:</bold><italic>negotiating new terrains</italics>(2009)pp94-112.

7.1. International Law that can Prevent Discrimination

The binding treaties can be used to force government to respect the treaty provisions that are relevant for the human rights of LGBT. The following international and regional treaties determine standards for the protection of lesbian, gay, bisexual and transgendered persons:

1. ILO Convention (No. 111) on Discrimination in Employment or Occupation (1958) (article 1) - This treaty of the International Labour Organization does not itself prohibit discrimination on the basis of sexual orientation, but permits state parties to add additional grounds.
2. International Covenant on Civil and Political Rights(ICPPR) (1966) (article 2, 26) For sexual orientation the Covenant – It is a main international treaty on civil and political rights. In 1994, the Human Rights Committee held that the references to "sex" in Articles 2, paragraph 1, (non-discrimination) and 26 (equality before the law) of the ICCPR should be taken to include sexual orientation. Human Rights Committee created a precedent within the UN human rights system in addressing discrimination against lesbian, gays and bisexuals.
3. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) (article 1).
4. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979).
5. Convention on the Rights of the Child (1989) (article 2). Article 2 of the Children's Convention prohibits discrimination and requires governments to ensure protection against discrimination.

United Nations High Commissioner for Refugees (UNHCR) has recognized in several Advisory Opinions that gays and lesbians qualify as members of a "particular social group". [19]

7.2. Suggestions

1. REMOVAL OF DISCRIMINATORY PROVISIONS: Provisions like those of Section 377 of the IPC must be scrapped and the LGBT persons should not be punished by the reason of their sexual orientation.
2. EQUAL RIGHTS: The LGBT persons should have their fundamental rights and should be treated equally with the others.

19 http://www.hrea.org/index.php?base_id=161

3. SPECIAL REFORMS: This class of persons being a vulnerable section of the society, there should be enacted certain special reforms to preserve the dignity of such persons.
4. ABOLISHMENT OF HATE CRIMES: it must be ensured that the discriminatory behaviour they face specially in the form of Hate crimes must be abolished.
5. MARRIAGE & ADOPTION: The LGBT couples should also be allowed to marry and adopt children as per the civil unions norms as they are of equal competence to the heterosexuals in every aspect.

Almost all the nations of the world enjoy democracy wherein the citizens enjoy their fundamental rights which impliedly includes the right to privacy in one's life. Everyone has a choice to decide how they wish to and with whom they wish to spend their life with and the world should respect this decision of an individual. Curbing or criminalising homosexuality on grounds like religion is absolutely unfair. They should also be recognized as normal persons and should not be deprived of any privileges or rights for the reason of them being born different or choosing to be different

LGBT persons are made to suffer the most not because of the legal systems but because of the stereotypical mentality of the society. No. of misconceptions are prevalent in the society and moment they are removed the legal systems would automatically be compelled to be adapted according to the changing society.

Treatment of Unborn in Indian Criminal Laws

Dr. Sunanda Bharti[1]

1. Introduction

Hoards of policies and schemes for the welfare of Expectant Woman (henceforth expecting mother) and unborn/newborn are conceptualised and implemented by the government in India. The intention behind such schemes is to ensure protection to the EM so that she is able to carry her child to term in a safe and healthy environment. The literature does not reflect the same concern for the unborn child. For healthy development of society, it is logical that not only the EM but also the unborn be *legally* protected. The perpetrators of any sort of crime against unborn children be made accountable for their acts.

The purpose of the paper is to advocate for foetal rights and personhood from the time of conception on one hand and supporting abortion on the choice of woman for instance, in cases of extreme detachment of the EM from the unborn with the result that she does not want to carry on with the pregnancy. It is submitted it is not a paradox and such delicate balance is legally achievable.

2. Current Scenario: India

Traditionally speaking, since, legal relations of rights, duty, power, liability etc, can arise only between persons, the legal position of the foetus in criminal law raises difficult questions. This is because a foetus cannot be a victim for lack of legal personality.[2] The law of homicide denies the unborn child any independent legal personality, and consequently fails to protect it, whatever its stage of gestational development.[3]

Admittedly, even a full term foetus of 40-41 weeks gestation does not enjoy protection of the law of homicide, but a newly born child receives the same protection equal to an adult, by virtue of being born alive and attaining independent existence. Differential treatment to the foetus as against a newly born child gives rise to the anomalies and inconsistencies in the legal principles relating to the unborn child.

It is not that the entire corpus of Criminal Law does not offer any protection to the foetus.[4] However, the desire of Criminal Law to protect the

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1 LL.M, Ph.D. (Delhi), Assistant Professor, Faculty of Law, University of Delhi. For instance the '*Janani-Shishu Suraksha Karyakram*' (JSSK) and *Mamata* in Orissa, for the welfare of EM and newborns.

2 This has been detailed later.

3 See generally *D v Berkshire County* (1987) 1 All ER 20. The USA deals with it differently.

4 The law of homicide however has been consistent in this denial.

unborn child manifests in creation of less severe crime of procuring a miscarriage.[5] This paper seeks to establish that in order to acknowledge foetal[6] personality in criminal laws, it is necessary to criminalise that conduct which injures or causes death of an unborn child, so that the unborn gets protection from conception (read fertilization) until birth.

In the Indian context, it translates into amending the IPC, 1860 to include culpable homicide, murder, all kinds of hurt etc and attempts thereof as applicable to the unborn. Thus, the term 'person' in the Code should include an unborn child at every stage of gestation from conception until birth.[7] Till then the courts should creatively interpret the expression 'person' to include the unborn s the definition is inclusive and the statute provides no hindrance for placing such a meaning by the courts in proper cases.

The USA has substantially been able to treat the unborn as a person through the Unborn Victims of Violence Act, 2004. There are two questions to which we need to find answer. . First, are the policy makers, the Legislature and the Judiciary willing and inclined to accept or bestow legal personality in favour of the unborn?[8] The second question is whether recognition of the foetus as a victim would be understood in the same sense as an adult victim[9]. The first question presents the greater hurdle while the second would fall into place, if the first were accepted.

3. Protection to Unborn in USA

Increasing attacks on EM leading to the deaths of their unborn children resulted in the US Legislature promulgating this law. It enables that the assailants who attacked or murdered the EM would, in some States, which have adopted the legislation, be prosecuted on two separate counts - attack on, or the death of the woman plus the death of or injury to the unborn in certain circumstances. The US legislation extends protection to the foetus in more than 60 federal crimes including murder, manslaughter, killings in the course of drug-related activities, death caused as a result of sexual abuse, injuries or killings in the course of interstate domestic violence and so on.[10]

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5 For instance, section 312 of the IPC 1860 makes causing miscarriage a punishable offence. Sections 313-316 enact various offences relating to the foetus .

6 The expression 'foetus' has been used interchangeably with 'unborn', though medically speaking foetus is very specifically defined on the basis of gestational age.

7 See IPC, 1860, s 11 which states that 'the word person includes any company or association or body of persons, whether incorporated or not'.

8 Legal personality is read in favour of many entities. Whether the foetus be legally recognised as a victim is more a question of political will than technical difficulty.

9 Whether it would merit the same punishment as in case of independent adults is not answered.

10 Title 18 USC ch 90A, s 1841: Protection of unborn children. (a)(1) Whoever engages in conduct that violates any of the provisions of law listed in subsection (b) and thereby causes the death of, or bodily injury (as defined in section 1365) to, a child, who is *in*

4. Unborn Victims of Violence Act, 2004 (USA)

The Act recognizes that when the accused attacks an EM, and injures or kills both her and her unborn child, he claims two human victims. [11] Importantly, half the states of the USA provide protection to unborn without making such protection contingent on viability[12]/gestational age.

The provision reads : (d) The term 'unborn child' under the Act means a child *in utero*, and the term 'child *in utero*' or 'child, who is *in utero*' means a member of the species homo sapiens, at any stage of development, who is carried in the womb.[13] Perhaps the most radical part of the law is that it applies to the accused whether or not he knew of the existence of (the pregnancy), and whether or not the accused intended to cause the harm to the foetus.[14] It hence entrenches the *Doctrine of Causation* - that, one takes one's victim as one finds him. The pregnant condition of the woman may be equated with and operates in the same way as a haemophilic patient for instance. It is a medical condition which is not necessarily apparent from outside, but which will render the consequences of an otherwise 'normal' assault so much the worse. To elaborate the analogy, the mere fact that the pregnancy of the woman who is assaulted is not visible would not entitle the accused to avoid liability by asserting that he was unaware of the condition. In other words, where the EM is still in the early stages of pregnancy, the law presumes that the assailant has accepted the risk that she might be pregnant.

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utero at the time the conduct takes place, is guilty of a separate offense under this section. (2)(A) Except as otherwise provided in this paragraph, the punishment for that separate offense is the same as the punishment provided under Federal law for that conduct had that injury or death occurred to the unborn child's mother.

11 Ever since 2004 when in USA the federal 'Unborn Victims of Violence Act, 2004 was passed, death of an unborn child became a prosecutable offence. As stated, presently the ratio of states, in the USA, that carry such provisions in their criminal law is 38: 12. See <http://www.ncsl.org/issues-research/health/fetal-homicide-state-laws.aspx> accessed 09 September 2013.

12 Briefly put, viability marks that stage of foetal gestation whereupon the unborn acquires the capacity to live independently (sometimes with artificial medical support) outside the mothers womb. The court decided that once the 'compelling' point of viability was reached, the state's interest in protecting potential life could even override the woman's right of bodily integrity.

13 Title 18 USC ch 90A, s 1841(d). It may be relevant to note that the Unborn Victims of Violence Act, 2004 amends Title 18, United States Code by inserting a new Chapter 90A relating to Protection of Unborn Children. Title 18 of the United States Code is the criminal and penal code of the federal government of the United States. It deals with federal crimes and criminal procedure.

14 Title 18 USC ch 90A, s 1841(a)2. (B) An offense under this section does not require proof that- (i) the person engaging in the conduct had knowledge or should have had knowledge that the victim of the underlying offense was pregnant; or (ii) the defendant intended to cause the death of, or bodily injury to, the unborn child. (C) If the person engaging in the conduct thereby intentionally kills or attempts to kill the unborn child, that person shall instead of being punished under subparagraph (A), be punished as provided under sections 1111, 1112, and 1113 of this title for intentionally killing or attempting to kill a human being. (D) Notwithstanding any other provision of law, the death penalty shall not be imposed for an offense under this section.

One positive outcome of such application of the Doctrine of Causation is that foetuses in the early stages of pregnancy also get protection of the Criminal Law. It is a marked shift from the traditional stand that afforded protection (if any) to the unborn only upon viability (that sets in only in the later stages) or upon live birth.[15]

In short, the Unborn Victims of Violence Act 2004 represents a significant development in the recognition of foetal rights. Although it does not specifically establish foetal personhood, it is nonetheless a remarkable achievement in that direction.

5. Legal Status of Foetus in Criminal Law in India

The legal status of foetus has to be found from the provisions of the Indian Penal Code and the Medical Termination of Pregnancy Act 1971 (henceforth MTPA, 1971).

6. Medical Termination of Pregnancy Act, 1971[16]

Prior to the MTPA, 1971, a pregnancy could not be terminated in India without attracting penal sanctions under the Indian Penal Code.[17] In 1971, the MTP Act was passed which provided for termination of certain pregnancies by registered medical practitioners (RMP's)[18]. The MTPA, 1971 diluted the rigors of the then prevalent law, though abortion was not provided for in all cases of pregnancy but only in specific cases. The MTPA, 1971 is a short legislation consisting of only 8 sections. Under the Act, termination of pregnancy is possible only if:

- the continuance of pregnancy would involve a risk to the life of the EM; or
- the continuance of pregnancy would involve a risk of grave injury to her physical or mental health[19]; or
- if there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.[20]

15 Details of this have been discussed later in the paper.

16 Only those provisions of the Act that have a bearing on the foetus and its personality have been discussed in this paper as the thrust is not on abortion but rather foetal personality.

17 Indian Penal Code 1860, ss 312 and 313 provide punishment for induced abortion.

18 Medical Termination of Pregnancy Act 1971, s 2(d) states that a registered medical practitioner means 'a medical practitioner who possesses any recognised medical qualification as defined in Cl.(h) of Sec. 2 of the Indian Medical Council Act 1956, whose name has been entered in a State Medical Register and who has such experience or training in gynecology and obstetrics as may be prescribed by rules made under this Act.

19 Medical Termination of Pregnancy Act 1971, s 3(2)(i).

20 Medical Termination of Pregnancy Act 1971, s 3(2)(ii).

However, such termination is dependent on the gestational age of the foetus. MTP can be performed only where:

- the length of the pregnancy does not exceed twelve weeks; or
- the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks: in this case the opinion of two registered medical practitioners in favour of the termination is essential.[21]

7. Saving the Life of EM

However, the pregnancy can be terminated validly irrespective of the length of the pregnancy if the termination of the pregnancy is *immediately* necessary to save the life of the EM.[22] It is essential that it should be the opinion of two registered medical practitioners formed in good faith.[23] On the basis of the above provisions India is considered a pro-life[24] country and the termination of pregnancy was envisioned by Parliament only in certain cases as a circumscribed activity.

8. Need to Revisit Regulation of Abortion in India

The MTPA, 1971 is a good law but must be updated and modified in the light of the changing societal needs and medical know-how. More specifically, the grounds for terminating pregnancies must be increased in number. It is not considered necessary to discuss the morality of abortion or the original need for it to be legalized. Suffice to say that it is but practical to accept it to be a part of cultural and social life of the modern times, but it must be regulated strictly. A liberal interpretation will invariably lead to some mothers obtaining abortions on trivial grounds say, inconvenience or embarrassment to themselves or as a birth control strategy.

Author subscribes to regulation of abortion by tweaking the existing MTPA, 1971. The contradiction that some extremist pro-life activists (demanding

21 Medical Termination of Pregnancy Act 1971, ss 3(2)(a) and (b).

22 Medical Termination of Pregnancy Act 1971, s 5.

23 Such opinion has to be certified under the MTP Regulations framed under the Act. In the form the reasons for forming the opinion also have to be stated. Further every RMP who terminates any pregnancy is required within three hours from the termination of the pregnancy to certify such termination in the said form where again the reason for terminating the pregnancy has to be specified: See Medical Termination of Pregnancy Regulations 1975, regs 3(1) and 3(2) published in the Gazette of India dated 4.10.75.

24 'Pro-life' is a term most commonly used to oppose abortion and support foetal rights. The term describes the political and ethical view, which maintains that foetuses are human beings, and therefore have a right to live. Contrary to this, 'Pro-choice' describes the political and ethical view that a woman should have complete control over her fertility and pregnancy. Proponents of this view hold that the expectant mother should have the right to abort/terminate her pregnancy even after viability of the foetus, as a matter of 'self determination rights.' Normally all legislations throughout the world seek to take a balanced view and do not provide for abortion after viability of the foetus, except in case the health interest of expectant mother or foetus or overwhelming social considerations so warrant.

complete ban on abortion) see in allowing abortion at all on one hand[25] and demanding legal personality for the foetus on the other can be countered by arguing that no jurisdiction protects all human life absolutely.[26] If enforcement of the MTPA is managed thus, in proper cases, the Act would be able to lessen the hardship caused when the women are forced to continue *with unwanted, unplanned or medically unfit pregnancies*. As aptly described by Thompson way back in 1971:

Refusal to allow the mother to terminate her pregnancy has the unpleasant result of compelling her body to be used as a life support machine[27] for the foetus, in order to bring it to term and in addition, to suffer the dangers and pain of childbirth. After the child's birth, these experiences may seriously impair the relationship between mother and child.

The unwontedness of EM does not go well for the unborn, who might be pitted to live a life of neglect and hardship, immediately since after birth.

9. Keeping Right of Abortion and Demanding Legal Personality for Unborn, not Contradictory

Though the thrust of this paper is to garner support for foetal personality and more realistic protection of the same through law, it is submitted that abortion should be available in proper cases. This is because the idea is not only to impress for legal personality for the unborn, so that it can enjoy right to life, but rather the idea is also to ensure that the new entrant to the world has a *meaningful life* replete with ample resources, nurturing mechanism and support system to grow into a mentally and physically healthy adult. If the unborn is unwanted to the extent that the host EM herself is unwilling or unable, under compelling circumstances, to carry the pregnancy to term, there is no logic in forcing the latter to deliver. It is suggested the way via which the EM can bail herself out of the situation should be legalized in general but such ways of obtaining legal abortions should remain minimal, and the activity must remain circumscribed/ regulated

While saying this, the foetal right to life is accepted to be treated on a lower footing than life of the expecting mother. If the child is unwanted, the emotional bond that is expected to exist between the foetus and the woman is absent. For all practical purposes, the woman does not see herself as a mother of that entity or the latter to be a part of her life. As already mentioned, though foetus should have a right to life, it must be life with dignity, a meaningful wholesome life which would not be possible, if the mother herself has not been able to form

25 They demand a complete ban on abortions.

26 There are killings in the nature of capital punishments for the prevention of further crime, and some others that are done in self-defense which are justified. Lawful abortion can as easily be seen as further instances of the same.

27 This is a classic analogy drawn by JJ Thomson in her famous article JJ Thomson, 'A Defense of Abortion' (1971) 1 Philosophy and Public Affairs 47.

any emotional bonding with the foetus/would-be child. The attempts must be made to provide therapy and consultation to the EM to persuade her to keep the baby.[28] This would not only reduce the instances of illegal and unsafe abortions, but would also go a long way in attaining some meaning for foetal personhood.

10. Caution required on Reforms

Despite what has been said above, a cautious approach is required in introducing more grounds for abortion. Certainly, there cannot be abortions being available on demand or request. The MTP Act, 1971 does not confer or recognise a right in any person to perform an abortion or terminate a pregnancy, except under the circumstances mentioned in the Act. Unlike the USA and the UK, even during the first trimester, the woman cannot abort at her will and pleasure; there is no question of 'abortion on demand'.[29]

The scheme of MTPA, 1971 refusing to provide abortion on request or demand thus encourages the use of family planning measures to prevent unwanted pregnancies. However, keeping the ground realities in mind[30], it also includes provisions, which ensure that safe, affordable, accessible and legally acceptable abortion services are available to women who need to terminate an unwanted pregnancy in dire circumstances.[31]

10.1 MTP not a tool for birth control

It has been held by a Division Bench of the Madras High Court that, 'section 3 of the Act is only an enabling provision to save the RMP's from the purview of the IPC, 1860. Termination of pregnancy under the provision of the Act is not the rule and it is only an exception'.[32] Hirve seconds the same by stating that Abortion policy in India is consistent with safeguarding reproductive rights as envisaged by International Conference on Population and Development (ICPD) and other international agreements. It does not advocate abortion as a family planning measure.[33]

10.2 A neutral party to protect foetal interests

Administration of the MTPA solely by the doctors reflects an 'over-

28 The importance of therapy, consultation guidance and state help in difficult situations women found themselves in has been highlighted in chs 3 and 4.

29 See Dr. Mukesh Yadav and Dr. Alok Kumar, 'Medical Termination of Pregnancy (Amendment) Act 2002-An Answer to Mother's Health & 'Female Foeticide'' (2005) 27(1) Journal of Indian Academy of Forensic Medicine.

30 Like rape, contraceptive failure, risk to life of EM etc.

31 Though here, some important new realities need to be included for instance, availability of legal abortions for unmarried women. See later paras for details.

32 *V Krishnan v G Rajanalia Madipu Rajan* (1994-1) 113 Mad LW 89 (DB).

33 See Siddhivinayak Hirve, 'Abortion Policy in India: Lacunae and Future Challenges' (May 2004) Centre for Enquiry into Health and Allied Themes (CEHAT) 10 (policy review).

medicalization' and 'physicians only' policy which may result in personal prejudices of RMPs coming into play while taking the crucial abortion related decisions. This fear is not wholly unfounded as the chances of this happening increase manifold in the absence of any guidelines for making relevant decision.

Most often, the doctors are left with only the EM to assist in the abortion decision. It is suggested that to ensure that the foetal interests do not go unguarded and un-advocated, a neutral party must be introduced into the Act (in addition to 2 doctors and the EM) to advance the foetal interests vis a vis the claims of the EM.

The role of this proposed party would be to ensure that the claim of the foetus to continued life is balanced against the claim of the mother to having her pregnancy terminated.[34] It would prevent abuse of the MTPA in the form of random abortions that create an impression as if the unborn is an easily discardable property.

10.3 Viability as Criterion for Deciding Possibility of Abortion

There is an urgent need to do away with the fixation of viability-connected-personality altogether and treat the foetus as a legal person from conception itself. Presently the jurisprudence on foetal rights revolves around the point of viability.[35] To elaborate, it is only if it can be established that the foetus was viable that it would get some semblance of personality and it is only upon viability that culpability can fixed on the perpetrator. Viability is that stage of foetal development when the foetus acquires the potential of sustaining itself and having meaningful life independent of the mother. The stage normally occurs anytime between 24 to 28 weeks. It is mostly taken as central to any crime/tort against the foetus. In other words, the unborn in order to be protected by Criminal (or even Tort Law) must have reached such a stage of development so as to be capable of being 'born alive'.

There should be no fixed upper time limit for abortion. The concept of viability draws a distorted and fundamentally wrong picture of the State being concerned about the welfare of the foetus as if it was a person.[36] While the truth is that in most of the crimes against the unborn, it does not have a standing as an independent victim. Almost always, foetus is taken as an adjunct of the EM.

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34 Jane ES Fortin, 'Legal Protection for the Unborn Child' (1988) 51(1) The Modern Law Review 54, 74.

35 Though in India, civil or criminal conviction of the defendant as against a viable foetus is yet to happen in a proper court of law. See *Kanta Mohanlal Kotecha v Branch Manager, United India Insurance Company Limited* 2006 Indlaw SCMAH 5 [Maharashtra Consumer Disputes Redressal Commission] para 12.

36 The projection of the State is that the foetus cannot be touched for purposes of abortion in the post viable stage as if it was a person; while the truth is that it has been consistently denied personhood. The author maintains that viability is has become a clumsy legislative substitute for imposing a properly thought out upper limit on abortion.

Consequently, it is suggested that the legislative fixed upper time limit of 20 weeks being too inflexible should be replaced by a no-limit case to case criterion. It is only logical because of three reasons:

(1) because the rate of individual foetal growth varies enormously, it is improper and futile to fix any limit;
(2) it would enable the State to focus on the health of the existing person (that is the EM) completely rather than bogusly adopt the shenanigan of caring for potential life by declaring that it would be illegal to end that potential life after a certain time limit and
(3) in any case, a fixed criterion would be challenged for its appropriateness and would be an issue of continuous contention considering the rapidly advancing medical knowledge.

Presently, the whole matter of viability seems to suggest as if a bargain has been struck between the EM and law that allows her, to enjoy the right of self determination[37] until viability sets in.

In the light of new medical developments and demands to treat foetus a person since conception, fixation to 'viability' should be done away with. The demand is to remove viability as a mark defining the limit at which right of self-determination expires for the pro-choice nations. For a pro-life nation like India, viability serves as a limit till when one can hope to induce a legal abortion under complying circumstances. It is projected thus because so called then, the State develops an interest in potential life. It is this miraculous and hypocritical shift in stand by both pro-life and pro-choice nations that is problematic. If the focus is on being pro-choice or pro-life (with some exceptions,), one should remain with the respective stand and say that abortion would be available so long as it does not endanger the life of the mother. Focus, hence, should remain with the EW.

Another problem with 'viability' as the upper gestational limit for abortions is that it creates an illusion of foetal personality. It falsely enables the State to claim as if it cares for the unborn and is concerned about its protection. In reality, it is a crude display of false respect for 'potential life'.[38] There should be no mark to decide personhood for the foetus. Foetus should be treated as a person, legal person from the very beginning of conception.

37 which is heavily regulated and rightly so in case of India - because abortion is not a matter of right but available only in the limited circumstances mentioned under section 3 of the MTPA, 1971

38 This display is more pronounced in case of pro-choice countries where abortion on demand or request is available and abortion as such is a part of the right of self-determination. The author maintains, that it is alright to take a pro choice stand, provided it be displayed consistently. It is hypocritical to maintain that an EM can abort as a matter of right (of self determination) and at the same time say that this right is available till the point of viability, as if to display some respect for potential life. It is important to decide where the right of choice commences and when it expires. Like any right in the nature of individual entitlement, the right of self-determination should also come with an expiry date. Moreover, it should also have reasonable restrictions imposed on the same so that arbitrary exercise is minimised.

Though the above suggestions also produce the same effect namely the position of the foetus would be contingent on the decision of the mother and her doctors in both cases. It marks a paradigm shift in the reasoning behind the same. (1) While earlier it was apparently foetal centric but hypocritical; now it becomes woman centric and more practical/logical. (2) It would at the same time mark the removal of viability as a criterion for determining 'life' for the foetus and pave a way for personhood of the foetus from conception rather than from viability and (3) the nations, whether pro-choice (USA) or pro-life (India) also would not have a cause of worry because they get their rights as they were - liberal and restricted respectively. It is just that the expiry of that right (already limited in case of India) is not dependant on the criterion of viability, but rather is variable and case sensitive - depending on whether the health of the mother permits the same.

Another problem in keeping 'viability' at 20 weeks under the MTPA, 1971 is that in the changed scenario of medical advancement, it may be detrimental to the woman as it may force her to seek unsafe abortion services and therefore 20 weeks rule should be removed.

11. Provisions Relatable to Foetus under IPC

Chapter XVI of the Indian Penal Code, 1860 under contains provisions dealing with the Unborn under the heading: 'Of the Causing of Miscarriage, Of Injuries to Unborn Children, Of the Exposure of Infants, and Of the Concealment of Births'. Sections 312-316 of the code are relevant to a child in the womb. Causing miscarriage under various circumstances is also punishable. The existence of these provisions gives a limited legal personality but to my mind is only a misconception and is not real.

11.1 Section 312: 'causing miscarriage'[39]

The following points or ingredients may be noted for section 312:

- The woman must have given her consent to the abortion.
- The abortion should not have been caused in good faith, to save the life of the EM.
- A distinction is made between an EM with child and an EM quick with child, the latter covering cases of advanced pregnancy (post 18 weeks gestation). The punishment is severe in case of the latter. Thus, the IPC still relies on a phenomenon (quickening) which has long been branded as obsolete and abandoned by the UK and the USA.[40]

39 Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both, and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine. ***Explanation****: A woman who causes herself to miscarry, is within the meaning of this section.*

40 These two countries are being quoted as they are a point of comparison in this paper.

11.2 Viability versus Quickening

The provisions in IPC use the term then in vogue 'quickening' which was the method of determining gestational age in that era which is now outdated and highly variable. Quickening was the standard, primitive to that of viability. In olden days when the mother evidenced the activity of the child or when it was crudely visible from outside the womb that the unborn could be treated as alive or capable of being born alive. It was only when it was born alive or displayed such capacity that it could be a subject of death/homicide or miscarriage[41] respectively. Hence, quickening performed an evidentiary function.

Miscarriage is the premature expulsion of the foetus from the mother's womb at any period of pregnancy before the term of gestation is complete. Medically, three different terms viz abortion, miscarriage and premature labour are used to denote this expulsion at different stages of gestation. The term abortion is used only when the ovum is expelled within the first three months, the term foetus when expulsion takes place between 4th to 7th month (before viability) and premature labour is used thereafter (for delivery of a viable child).

The author submits that any homicide of an unborn, beyond the purview of the MTPA, 1971[42] should be treated as murder that is, killing of a 'person'. A foetus in all stages of gestation should be taken as a 'person' irrespective of quickening or viability. It does not make sense to maintain that a viable foetus is a potential life while a pre-viable is not, one cannot be a soothsayer and decide the future of any unborn just on gestational age.

11.3 Miscarriage without woman's consent[43]

Section 313 of IPC provides for the following:

- No consent is given by the EM to the abortion. So, the accused, unlike section 312 cannot be the EM herself. It has to be a third party.
- The accused must have an intention to procure the abortion. So long as this intention is there it is immaterial whether abortion is caused or not.
- The abortion should not have been caused in good faith, to save the life of the EM. If this is the case, the accused stands absolved of all guilt.
- NO distinction is made between an EM with child and an EM quick with child.

41 Ratanlal and Dhirajlal, *The Indian Penal Code* (32nd enlarged edn, LexisNexis Butterworths Wadhwa, Nagpur 2012) 1794.

42 Which provides for grounds of legal abortion.

43 Whoever commits the offence defined in the last preceding section (that is section 312-causing miscarriage) without the consent of the woman, whether the woman is quick with child or not, shall be punished with imprisonment for life or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Though the offence has been treated to be graver than the previous one if the quantum of punishment is taken as the cue, it is required that the killing be treated as homicide and punished accordingly as in the USA. Unless this is done, any attempt at punishing the accused would be inadequate and spell of discrimination between various forms of human life inter-se.

11.4 Death caused by act done with Intent to Cause Miscarriage[44]

This provision entails double homicide because the death of the EM would in most of the cases also includes death of the foetus. However, the IPC does not recognize the latter as punishable. Such a provision trivializes the life of the unborn and makes a mockery of the governmental efforts towards making policies for the health and safety of the EM and unborn.[45]

11.5 Intent to Prevent Child being Born Alive[46]

This provision of the IPC is analogous to section 1 of the Infant Life Preservation Act, 1929 of the UK, which makes child destruction an offence. Both provisions seek to criminalise killing of the foetus during the process of childbirth.[47] The difference however, lies in the simplicity and un-ambiguity of the Indian provision. It does not go into the debate of whether the child in the womb is 'capable of being born alive' or not.

Nonetheless, in the context of foetal personality, the section does not augur well. The punishment for destroying the foetal life is inadequate despite intention to kill or prevent it from seeing the light of the day. This should be treated as homicide and murder in proper cases. However, obsessive attachment of the law to the outdated and archaic 'Born Alive Rule' prevents it from treating such foetal destruction as homicide. This approach is because of the technical glitch of the law of homicide being exclusively reserved for live human beings. Had the foetus taken live birth and thereafter killed, it would have attracted the homicide provisions of the IPC.

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44 Whoever, with intent to cause the miscarriage of woman with child, does any act which causes the death of such woman, shall be punished with imprisonment of either description for a term may extend to ten years, and shall also be liable to fine. If act done without woman's consent.—And if the act is done without the consent of the woman, shall be punished either with imprisonment for life or with the punishment above mentioned.

Explanation: *It is not essential to this offence that the offender should know that the act is likely to cause death*.

45 The Indian Govt. has introduced many plans for pregnant ladies for instance the '*Janani Suraksha Yojna*'. All such schemes are meant for the well-being of infant and the mother (*Jacha- Bacha*).

46 Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth, and does by such act prevent that child from being born alive, or causes it to die after its birth, shall, if such act be not caused in good faith for the purpose of saving the life of the mother, be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both.

47 Though in case of the UK Act because of the language used, the scope in practice has broadened.

11.6 Causing Death of Quick Unborn Child[48]

The Doctrine of 'Transferred Malice' should apply in such cases because the malice directed towards the EM results in the death of the foetus. This should be taken as culpable homicide of the foetus. However, again because of lack of legal personality in the foetus, the perpetrator escapes with lesser punishment. It is suggested that section 301 of IPC which deals with 'culpable homicide by causing death of person other than person whose death was intended' should be applied in such cases.[49] It would not only expose the accused to a graver punishment[50] but also acknowledge that the foetus was a person in its own right and not simply an adjunct of the mother.

Reverting to section 316, it must be highlighted that it protects, and that too indirectly, only a quickened foetus. The consequence being that in the early stages of pregnancy -the pre-quickening stage, there is no remedy available if the foetus dies in the circumstances mentioned in the section.

11.7 Culpable Homicide and Unborn[51]

Proceeding on to the general provisions of homicide section 299 states that culpable homicide would be committed if, (a) death is caused by doing an act with the intention of causing death, or (b) with the intention of causing such bodily injury as is likely to cause death, or (c) with the knowledge that he is likely by such act to cause death.

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48 Whoever does any act under such circumstances, that if he thereby caused death he would be guilty of culpable homicide, and does by such act cause the death of a quick unborn child, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Illustration: A, knowing that he is likely to cause the death of an EM, does an act which, if it caused the death of the woman, would amount to culpable homicide. The woman is injured, but does not die, but the death of an unborn quick child with which she is pregnant is thereby caused. A is guilty of the offence defined in this section.

49 Section 301: Culpable homicide by causing death of person other than person whose death was intended: If a person, by doing anything which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person, whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person whose death he intended or knew himself to be likely to cause.

50 Section 304: Punishment for culpable homicide not amounting to murder: Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death, or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

51 Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

Explanation 1.- ---

Explanation 2.----

Explanation 3.-The causing of the death of a child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.

Explanation 3 categorically introduces the Born Alive Rule when it comes to protecting the Unborn. 'Causing death of the unborn in the mothers' womb is not homicide; such an offence is punishable under section 315 of the Act.'[52] The essence is that so long as the foetus is completely inside the womb, it is not governed by the laws of homicide. If it is killed in that state, it may be miscarriage or any offence under sections 312-316, stated above, but not homicide. It begs logic that how and why an unborn (with complete potential for life) is denied any protection of the law of homicide and a newborn with howsoever precarious chance of survival becomes eligible for the same protection. Thus, the need to accord to foetus the status of 'person' by amending the IPC if our society desires o save female foetuses and infants. Not taking above steps would doubt the intention behind PNDT Act.

The problem lies in ability of breaking from past. Almost all ancient scholars believed the unborn to be outside the precincts of the laws of murder -it being devoid of any personality. The personality eludes the unborn till it takes live birth, upon which it becomes a 'person'. This is the status till date in India. In fact, the only country that has successfully broken the tradition is the USA.

12. Inadequacy of Current Criminal Law

There is much to be desired in relation to foetal protection. While the MTPA, 1971 is inadequate, the Indian Penal Code is outdated in the advanced medical scenario.

Loopholes

Four stems where the Criminal Law, whether it is a general Criminal Code or a specific criminal law does not come to the rescue (though it does so for an adult), are as follows:

(1) it is definitely not an offence to threaten to kill a foetus,
(2) it is not necessarily an offence to injure a foetus[53],

52 Ratanlal and Dhirajlal, *The Indian Penal Code* (32nd enlarged edn, LexisNexis Butterworths Wadhwa, Nagpur 2012) p 1295.

53 Unless, the injury is done with intent to procure a miscarriage (see details later). At this point, it must be mentioned and underscored that in this segment the author is not dealing with civil liabilities/tort action that may arise in case of pre-natal injury to the foetus. The probe here is whether the Criminal Law declares it to be an offence or not.

(3) it is not necessarily an offence to kill a foetus.[54] This is subject to the qualification of legal abortions.

(4) it remains arguable whether it is a criminal offence to cause the foetus injuries from which it dies after being born alive.[55]

Let us examine each of these as follows:

12.1 Threats to foetus, not an offence

The doctrine of right to self-defence, the world over deals with (1): defence of oneself, (2) defence of others and (3) defence of property. The legal provisions on self defence are worded around these three tenets only. 'Self-defense' and 'defense of others' are defenses that can be raised by a defendant which, if proven true, can provide a complete defense to criminal liability.

In India, section 96 and 97 primarily deal with self defence.[56] In 2010, the Supreme Court of India, in *Darshan Singh v State of Punjab*[57] laid down guidelines for right of private defence for citizens.[58] It is regretted that the guidelines do not endorse the view that an EM has a right of private defence in relation to her foetus.

In the US state of Michigan there has been an advancement in regard to the status of unborns in relating to the Doctrine of Self Defence. In *People of the State of Michigan v Kurr*, the Court ruled that that an EM could be justified in killing an attacker who would otherwise have killed her foetus.[59] In this case,

54 Sections 312 (causing miscarriage), 313 (causing miscarriage without woman's consent)-315 (preventing the child from being born alive or causing it to die after birth), and 316 (causing death of quick unborn child) do provide some instances which offer some protection to the unborn by providing for some punishment to the perpetrator in some instances. In the UK some protection is offered by the Offences Against the Person Act 1861, ss 58 and 59 (unlawfully procuring a miscarriage) and Infant Life Preservation Act 1929, s 1 (child destruction). The USA is on a different footing especially ever since the passing of the UVVA 2004.

55 Glanville Williams, *Textbook of Criminal Law* (2nd edn, Stevens & Sons Ltd 1983) 289.

56 Indian Penal Code 1860, s 96: Things done in private defence. – Nothing is an offence which is done in the exercise of the right of private defence. Section 97 IPC 1860 reads: Right of private defence of the body and of property.–Every person has a right subject to the restrictions contained in Section 99, to defend–

First.- His own body, and the body of any other person, against any offence affecting the human body;

Secondly.- The property, whether moveable or immoveable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass.'

57 (2010) Cr App 1057 of 2002 <http://indiankanoon.org/doc/1748156/> accessed 09 September 2013.

58 See <http://indiankanoon.org/doc/1748156/> accessed 09 September 2013.

59 *People v Kurr* 654 NW 2d 654 (2002): In 1999, Jaclyn Kurr suffered a miscarriage after being physically attacked by boyfriend, Antonio Pena. Jaclyn was more than 16 weeks pregnant with quadruplets when Pena punched her stomach multiple times. Jaclyn stabbed Pena in defense of her unborn children. Pena died, and Jaclyn was charged found guilty of manslaughter. On appeal, the Michigan Court of Appeals held that Jaclyn, as an EM,

the EM took the plea of 'defence of other' upon killing her abusive partner because she feared that his attack, although not fatal to her, would prove fatal to her unborn foetuses. The Michigan Court of Appeals allowed her to use the 'defence of others' argument to justify killing her attacker in order to protect her foetus.

Upon doing this, the court in -fact treated the foetus as a legal person because in cases of self defence, homicide of the assailant is justified if it is done to protect oneself or some other 'person'. The court categorised the foetus as 'other' person, thereby allowing its mother to plead justifiable homicide in killing to protect her foetus from imminent danger of death. There is no bar to Indian Judiciary and even before a verdict the enforcement agencies and prosecutors/police should take an initiative to challan a miscreant person for the same. It is believed that given the state of acceptance of rights after conception the judiciary would rise to the occasion and interpret the law pro foetus rights.[60]

Opening the defence of others argument to EM, the court basically implied that the foetus had an equivalent (legal) standing with its attacker. This ruling by the Michigan Court of Appeals has brought attention to an area of law that has long been neglected.[61]

If force is used in defense of another, the person using the force is not required to believe that his or her own life is at risk for the defense to apply.[62] The Indian Penal Code, under section 97 has a similar provision. Being so, the use of force/violence by the EM for protecting her *unborn* (and not herself) seems a natural extension of accepted criminal jurisprudence. There is no reason why her foetus cannot be accepted as that 'other person' in whose defence she commits the *actus reus*.

As an affirmative action towards protecting the EM and her unborn, the states of Oklahoma (in April 2009) and later Missouri (in June 2010) have adopted a unique legislation- the 'Pregnant Woman's Protection Act,' to include instances where an EM uses force to protect her unborn child (in defence of other). The primary intention behind the legislation is to ensure (1) that the affirmative right of an EM to carry her child to term is protected; (2) that affirmative defenses to criminal liability provided for under the concerned criminal law explicitly provides for an EM's right to use force including deadly force to protect her unborn child[63].

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was justified in using force – including deadly force – to protect the lives of her unborn children.

60 Discussion with Prof Ashwani Kr Bansal, Dean faculty of Law, University of Delhi. He said that the prosecution under charge of murder while driving rash and negligent was conceived only about 20 years back. Same way it needs to be tried.

61 Model Legislation & Policy Guide 2011, Americans United for Life <www.AUL.org/>accessed 22 January 2013. AUL is a non-profit, public-interest law and policy organization which holds the distinction of being the first pro-life organization in America, incorporated in 1971, before the infamous *Roe v Wade* decision.

62 Model Legislation & Policy Guide 2011, op cit.

63 Model Legislation & Policy Guide 2011, Americans United for Life <www.AUL.

12.2 Injury in utero, not an offence

The provisions of the IPC, 1860 cover only 'miscarriage or destruction' of the foetus in different circumstances and not some lesser injury to the unborn.[64] It is to be noted that the provision is inadequate since it would not cover a defendant who was simply reckless as to the foetus being injured as opposed to having the intention to induce miscarriage.

In order to protect the foetus from injuries simpliciter, that is injuries that do not cause death, there should be an offence of causing injury to a foetus in the following form:

Everyone commits a crime who (a) recklessly or negligently or purposely causes serious harm to a foetus[65]; or (b) being an EM recklessly or negligently or purposely causes serious harm to her foetus by any act or by failing to make reasonable provision for assistance in respect of her delivery.[66]

12.3 Causing the foetus to die in utero

The miscarriage provisions under sections 312-316 IPC, 1860 cover all those illegal abortions that do not pass the litmus test of the MTPA, 1971. And in effect they are not an offence *vis a vis* the foetus but an offence against the EM.

This is the limited legal protection afforded by Criminal Law because it does not cover cases where intention to induce miscarriage is absent. If the offender knows that the woman is pregnant and is reckless in dealing with her which results in miscarriage or injury[67]; or where he intends just to injure the foetus (as against intention to induce/procure miscarriage) there is no offence under sections 312-316 IPC, 1860. In fact in the latter cases, there would be no offence committed against the foetus in Indian law; the offence, if any would be of assaulting or wounding/hurting the EM. Hence, to re-emphasise, the point made earlier, it may not be an offence to kill the foetus because recklessness simpliciter which results in foetal death remains unaccounted for.

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org/>accessed 22 January 2013.

64 Under the Indian Penal Code 1860, s 313 the miscarriage may not happen and yet the accused may be punished for the attempt of causing miscarriage, so long as the intention to cause miscarriage was there. It must be marked however, that the punishment is for the attempt and not for any injury that may have happened to the foetus.

65 Serious harm excludes foetal destruction of 1929 Act; it also excludes miscarriage.

66 Matter modified and taken from the suggestions of the Law Reform Commission of Canada, 'Crimes against the Foetus' (1989) working paper 58/1989.

67 It may be noted here that 316 also may not be sufficient to inculpate the offender because though it deals with causing death of an unborn (quick) child, the offenders act must necessarily be such as would have made him guilty of culpable homicide of the mother. Act of any lesser gravity which exposes the foetus to the risk of injury or causes it injury/death is not counted.

12.4 Causing the foetus to die ex utero

The reference here is of a pre-natal injury and a live birth which is followed by the death of the baby as a result of those injuries. This is accounted for under section 315 of IPC, 1860 *provided* the act was done with the intention of preventing the child from being born alive or causing it to die after birth. In short, the *mala fide* intention in respect of the foetus should be present. There can be no offence under section 315 in the absence of the requisite intention. This, in effect translates into making the defendant unaccountable for the still birth or consequential death of the unborn if he recklessly or negligently hits the EM. Moreover even if the *mens rea* element of section 315 is fulfilled, the resulting death is not treated as homicide let alone murder. The author submits that this provision is unjust and must be amended along the lines of the US UVVA, 2004.

Authors like Temkin[68] argued to the extent that in case of foetal deaths (subsequent to live birth) due to pre-natal injuries[69], the liability of murder would be unjust because some liability could in any case be fixed on the perpetrator of crime—that is, alternatively, various offences of acting with intent to procure a miscarriage, attempted child destruction or wounding the woman could be charged.

It must be pointed out however, that all the above alternatives do not properly describe the offence that is the subject of discussion here. The foetus was an entity living in the safety of the womb till the time injury was inflicted upon the same. It took birth only to realise that the pre-natal injuries would prematurely and hence unjustly snuff the life out of it. Criminal liability can be clearly fixed here and hence one may not resort to bush beating and circle round the issue with peripheral in order to avoid acknowledging the harm for what it is -that is intentional killing, and hence murder. It may be noted that the same offence may unequivocally be branded as homicide if injuries were inflicted not on the foetus but a newborn.

It is the contention and argument of the author that in relation to the unborn, liability for homicide should arise for any post-natal death that results from a pre-natal injury, provided that the relevant mental element for the offence is satisfied. This is necessary if personality to the foetus is to have any meaning and weight.

Moreover, in-utero death should also be designated and punished as murder, if coupled with the requisite intention. This means that the offence of causing miscarriage should be reserved for (and confined to) only involuntary but negligent acts sans intention to cause miscarriage but that nonetheless result in one and all the rest intentional foetal deaths should be taken as homicides.

68 Jennifer Temkin, 'Pre-Natal Injury, Homicide and the Draft Criminal Code' (1986) 45 Cambridge Law Journal. 414.

69 As happened in the case of *Attorney Generals Reference*: (1998) AC 245, 254.

In other words, the *existing* offence of 'causing miscarriage' should cover only those foetal deaths that are caused recklessly. This way, the reduced punishment, as it stands today for causing miscarriage would also be justified. It may read as follows:

'Everyone commits a crime who (a) recklessly or negligently causes death of a foetus; or (b) being an EM recklessly or negligently causes death to her foetus by any act or by failing to make reasonable provision for assistance in respect of her delivery.'[70]

If this is done, the the criterion of quickening or viability that is the fount of differentiation in the severity/duration of punishment would also become otiose. It appears clumsy, inadequate and totally unjustified that to 'compensate' for the victim's lack of status, the offence category is reduced and punishment mitigated. Demolishing quickening (used by the IPC) or viability (used by the MTPA, 1971) is not impossible as it appears to be because of established conventions. It has been held by, first the courts and now solidified by the Legislature at least in the USA to a large extent.[71]

The final argument of the author is that irrespective of whether foetal death is branded as 'foetal homicide' or 'foetal destruction', the one thing that should remain clear is that the offence of causing miscarriage and all the rest of the offences revolving around the same under section 312-316 IPC, 1860 are inadequate and do not fully explain the crimes committed against the unborn. The foetus in the process of development in the womb and the process of being born is the same life form as a child ex utero. Hence, intentional foetal destruction should be deemed to have the same mental element as that for murder; in addition, it should cover the whole pregnancy and not only quickened or viable foetuses.

70 Matter modified but taken from the suggestions of the Law Reform Commission of Canada, 'Crimes against the Foetus', (1989) Working paper 58 <http://archive.org/stream/crimesagainstfoe00lawr#page/ 2/mode/2up> accessed 09 September 2013.

71 In *Commonwealth v Cass* 467 NE 2d 1324 (1984), the Supreme Court of Massachusetts ruled that a foetus was a person for the purposes of the Massachusetts vehicular homicide statute, and thus a potential homicide victim.

Summary Courts-martial under the Army Act

Anjana Rani[1]

The military discipline requires quick disposal of offences pertaining to persons subject to the Army Act 1950. In order to achieve this aim, justice in the army is dispensed through various types of tribunals vested with varying powers, which are constituted under the provisions of the Army Act, depending upon the nature and gravity of offences and ranks of the accused persons. These tribunals are called the Courts-Martial. A Summary Court-Martial has been used extensively, till recently the decisions of Summary Courts-Martial were considered final. Hardly any soldier approached civil courts against the award of a Summary Court-Martial. Appeals were addressed merely to superior officers in the army in the forms of petitions and provisions under the regulations of the army and were generally rejected. The trend is changing and the awards of Summary Court-Martial are being challenged in various High courts, Supreme Court and now in Armed Forces Tribunals. The commandant had practically no power to punish or reward his own men. Here, the need of a military court was felt, and thus created. This union of power enabled the commanding officer to convict and sentence a military offender

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Military law has undergone a sea change over the years. James Military Dictionary had the following to say in relation to military law: "The persons who are subjected to military law, and are amenable to trial by court-martial, are in the terms of Mutiny Act, all persons commissioned or in pay, as officers, non-commissioned officers, private soldiers, and all followers of an army"[2]. Military law, in the years gone by was directed chiefly at the enforcement of discipline and prosecution of the offenders. It was enacted by sovereign and enforced in his name by the commander. There was hardly an occasion to seek an opinion[3].

When a trial is conducted by a military court, it is called Court Martial. The military courts can award punishment to its personnel subject to military law. Some countries have no court-martial at the time of peace. Courts-Martial may

1 Assistant Professor, Punjabi Univerisity Regional Centre, Bhathinda, Punjab

2 Charles James, *Military Dictionary* 253 (T. Egerton, London, 1802).

3 Maj. Gen. Nilendra Kumar, *Military Law then, now and beyond* 67 (Judge Advocate General's Department, New Delhi, 2005).

be used to try prisoners of war for war crimes. Indian Army has four kinds of courts-martial which are: General Court-Martial (GCM), District Court-Martial (DCM), Summary General Court-Martial (SGCM) and Summary Court-Martial (SCM). According to the Army Act, army courts can try personnel for all kinds of offences except for murder and rape of a civilian, which are tried by a civil court.

A Summary Court-Martial may be held by the commanding officer of any corps, department or detachment of the regular army to which the accused belongs[4]. A Summary Court-Martial is legally offences of soldiers (Havildar and below) however grave, provided the same are not made punishable capitally or exclusively by a General Court-Martial. A Summary Court-Martial may pass any sentence that could be awarded under the Army Act in respect of the offence charged except a sentence of death or imprisonment for a term exceeding one year[5].

The system of Summary Court-Martial deserves special mention. It is presided over by the commanding officer of the unit. In fact he combines in himself the positions of the prosecutor and the judge. This goes contrary to the basic tenant of justice. A judge could never be the prosecutor. Therefore, there is a need for change in this regard. This assumes seriousness that Summary Court-Martial enjoys very wide powers exercisable without following the due process of law. Normally summary trials in the civil are meant for petty offences whereas it is not so in case of the Summary Court-Martial.

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1. Historical Development of Law

The East India Company had no regular army until the Anglo-French Wars (1744-46) necessitated raising regular troops. Major Stringer Lawrence,

4 Section 116, Army Act, 1950.

5 Summary Court-Martial and The Indian Judiciary, *available at:* www.legalserviceindia.com (visited on July 24, 2014).

6 *Union of India v. Bipan Lal,* Mil LJ 2006 J&K 90, *Ex. Sep. Yadav Dharam Nath v. Union of India,* Mil LJ 2009 Gau 138, *Ex. Sep. Ranjit Kumar v. Union of India and Others*, WP(C) No. 3357/2012 *available at:* http://indiankanoon.org (visited on Dec. 3, 2014).

7 *Supra* note 4.

in 1748, organised the Madras European Regiment and enlisted 2000 sepoys. Simultaneously, a code of military law was prepared with the help of 'Articles of War' then in force in England, though in modified form, the 'Articles of War' continued to exist under the denomination 'Rules for Mutiny and Desertion'. Military Secretary to the Bengal Presidency Army, at Allahabad, in 1859, informed the committee which had been appointed to go into the question of reorganisation of the army after the mutiny, that there had hardly been any restriction on the punitive power of the commanding officers, for the only rules in that respect framed on the eve of army organisation in 1796 provided that non-commissioned officer and soldier shall retire to his quarter or tent at beating the retreat, in default of which he was punished according to the nature of offence. At court-martial too, the procedures and composition could be changed as often as possible. Even though no sentence of a court-martial, in which the commanding officer of a regiment presided, could be executed till the garrison commander or the Governor had confirmed it, in actual practice this confirmation was seldom withheld, but in 1818, this dominating position of the commanding officer came to be questioned when forms of procedure were rendered more exact and the garrison commander was authorised to set aside the sentence of a court-martial according to his judgment. This, in the eyes of the 'Commissioners' was the first step towards indirectly weakening the power of the commanding officer[8].

Summary Courts-Martial were not introduced into the regular army till after the mutiny of the greater part of the Bengal Army in 1857. The discipline of the regular Indian Army had, for sometime before that catastrophe, seriously deteriorated and it was noticed that the irregular troops and more especially the Punjab Irregular Force, were in this respect in much better state than their comrades of regular army. This system appears to have had its origin in the union and this union enabled the commanding officer, as such to convict and sentence a military offender, thereafter to issue a warrant for the execution of his sentence which was respected by the civil and prison officials as emanating from him in his civil and magisterial capacity. When a new Indian Army came to be organised on the ruins of the old, it was realised that the hands of the regimental commanding officer must be strengthened if the evils which had led to the practical disappearance of the Bengal Army were to be avoided. With this object Summary Courts-Martial were at first introduced tentatively and were in 1869 definitely established as part of the legal machinery of the Indian Army. Now, they are the tribunals by far the most frequently utilised for the trial of military offenders[9].

8 H. S. Bhatia, *Military History of British India* 222 (Deep & Deep Publications Pvt. Ltd., New Delhi, 2008).

9 Maj. Gen. A. C. Mangla, *Commentary on Military Law in India* 135 (Eastern Law House Pvt. Ltd, Calcutta, 1992).

2. Constitution of Summary Court-Martial

Summary Court-Martial is held by the commanding officer of any corps, department or detachment of the regular army, and he alone constitutes the Court. The proceedings are attended throughout by two other persons who are officers or junior commissioned officers or one of either. They are not to be sworn or affirmed and they do not take part in the proceedings. These persons have no right to vote in determining either the findings or sentence[10]. They may belong to any unit or units, but must be present, and be the same throughout the trial. They take no part in the proceedings, have no special duties but they present when the court sits in closed court. The court may consult them if it so desires. Their opinion is not binding on the court under Army Rule 109. An interpreter is necessary at a Summary Court-Martial when any evidence is given in a language which the court sworn or affirmed as such. In the case of *Vidya Parksh v. Union of India*[11], the Supreme Court has held that the commanding officer of the corps, department or detachment of the regular army to which delinquent army soldier belongs is quite competent under Section 116 of Army Act and constitution of the Summary Court-Martial by the commanding officer of the corps cannot be questioned as illegal or incompetent. The delinquent had not filed any objection before Summary Court-Martial.

The provision of Summary Court-Martial is peculiar to the Army[12]. Its composition reveals that it is unique and adverse to the principles of natural justice. The fundamental requirement of natural justice is that no one can be a judge of one's own case. The main snag in the Summary Court-Martial is that it is only the commanding officer of the accused who constitutes the court. He combines in himself the roles of investigator, prosecutor and the judge. The requirement of two other persons junior to the commanding officer to attend the court-martial is not of much consequence. The reason for this is that the junior officers would never be in a position to counter the claim of their superior. Moreover they are not required to take part in the proceedings. They have no right to vote in determining either the findings or the sentence.

It is submitted that the Summary Court-Martial should be held by an officer from a different unit or corps or department. This is most essential in order to introduce element of fairness in the holding of Summary Court-Martial. Beside this, the observers should also be of independent nature. Accordingly, they should also be detailed from different unit or corps or department.

3. Powers of Summary Court-Martial

Summary Courts-Martial may try any offence punishable under the

10 Section 116, Army Act, 1950.
11 1988 Cri LJ 705 (SC).
12 There is no such provision under the Air Force Act and Navy Act.

Army Act and committed by any person subject to the Army Act, 1950 under the command of the officer or warrant officer[13].

When there is no grave reason for immediate action and reference can without detriment to discipline be made to the officer empowered to convene a District Court-Martial or on active service, Summary General Court-Martial for the trial of alleged offender; an officer holding a Summary Court-Martial cannot try without such reference of any offence punishable under any of the Sections 34, 37 and 69[14] or any offence against the officer holding the Court[15].

Most military offences are of a simple nature. Unless there are strong reasons due to gravity of the offence or otherwise to remand an accused for trial by District Court-Martial or General Court-Martial, such offences can be adequately punished by a Summary Court-Martial. Officers commanding units when determining by what court the accused should be tried, should bear in mind, that the legislature, in conferring upon them the powers of Summary Court-Martial, intends that they will exercise these powers under Regulations of Army para 447[16]. In ordinary circumstances the following offences cannot be tried by Summary Court-Martial:

(i) Offences in relation to the enemy and punishable with death (Section 34)
(ii) Mutiny (Section 37);
(iii) Civil offences (Section 69); and
(iv) Offences against the officer holding the court (Sections 40, 41, 42, 59)

However the above offences can be tried by Summary Court-Martial, if the following conditions are satisfied:

(i) There is a grave reason for immediate action; and
(ii) Reference cannot without detriment to discipline be made to the officer empowered to convene a District Court-Martial or on active service a Summary General Court-Martial.

Sanction of the superior authority to try the case by Summary Court-Martial is recorded in the proceedings at the foot of charge-sheet and signed by the superior authority. Where it is necessary for the commanding officer of the accused to give material evidence for the prosecution, he should apply for a District Court-Martial so as to secure an impartial trial. In addition to the offences of serious nature and other serious offences should also generally be tried by

13 Section 120 (1), Army Act, 1950.
14 Sections 34, 37 and 69 refer to offences relating to enemy and punishable with death, Mutiny and civil offences.
15 Section 120 (2) and (3), Army Act, 1950.
16 *Supra* note 8 at 140.

General Court-Martial or District Court-Martial because Summary Court-Martial has limited punitive powers.[17]

Summary Court-Martial may pass any sentence that could be awarded under the Act in respect of the offence charged, except a sentence of death or imprisonment for life or imprisonment for a term exceeding one year. In cases where the officer holding the Summary Court-Martial is not of the rank of Lieutenant Colonel or above, a Summary Court-Martial shall not award any punishment exceeding a sentence of three months imprisonment. The maximum punishment awardable by Summary Court-Martial is imprisonment for one year if the officer holding the court is of the rank of the Lieutenant Colonel or above and for three months if such an officer is below that rank.[18]

Summary Court-Martial can also award other punishments mentioned in Section 71, e.g., dismissal from service, forfeiture of seniority, stoppages, etc. Imprisonment may be of either description rigorous or simple. It is difficult to lay down a definite rule in this regard, but, a consideration of personal interest of which would suffice to disqualify any officer to sit as a member of a General Court-Martial or District Court-Martial debars him from holding a Summary Court-Martial without previous reference. Offences under Sections 40 and 41 of Army Act when committed against a commanding officer fall under this category, and should not, except in case of emergency, be tried by Summary Court-Martial without previous reference to the officer empowered to convene a District Court-Martial for the trial of the alleged offender. Theft or misappropriation of property of which a commanding officer is either part-owner or trustee should also not, except as aforesaid, be tried by Summary Court-Martial without such reference. Where it is necessary for the commanding officer of the accused to give material evidence for the prosecution, he should apply to a District Court-Martial so as to secure an impartial trial[19]. To appreciate the ruling of the Supreme Court in the case of *Ranjit Thakur v. Union of India*[20]*,* Ranjit Thakur was tried by Summary Court-Martial for disobeying a lawful command. His offence consisted in his refusal to eat food while he has undergoing twenty-eight days imprisonment in unit custody. On a plea of guilty, he was found guilty and sentenced to suffer rigorous imprisonment for one year and dismissal from the service. His petition to superior authority was rejected. He challenged the proceedings of the Summary Court-Martial before the High Court of Patna, which also dismissed his writ petition *in limine*. Then he approached the Supreme Court by way of a special leave petition. At all events, the punishment handed down was so disproportionate to the offence, in itself to conclusive evidence of bias and vindictiveness. In the case of *Metropolitan*

17 Dr. D. C. Jain, *Military Law in India* 276 (Deep & Deep Publications Pvt. Ltd., New Delhi, 1984).
18 Section 120 (4) and (5), Army Act, 1950.
19 *Supra* note 8 at 141.
20 AIR 1987 SC 2386.

Properties C*ompany (F.G.C.) Limited v. Lannon*[21]*,* in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the Tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. Even if he was as impartial as could be nevertheless if right minded persons would think that in the circumstances there was a real likelihood of bias on his part, then he should not sit. Accordingly, the court having regard to the events of the case, came to the conclusion that the punishment awarded to be strikingly disproportionate to the offence committed. In the result the appeal was allowed and the proceedings of the Summary Court-Martial and subsequent orders were quashed. The Supreme Court with regard to the severity of the sentence was, judicial review generally speaking, is not directed against a decision, but is directed against the decision making process. The question of the choice and quantum of punishment is within the jurisdiction and discretion of the court-martial, but the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be as disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. It would ensure that if the decision of the court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction.

There is no provision for appointing a prosecutor or a defending officer in a trial by Summary Court-Martial. The prosecution is conducted by the court and the accused is entitled to have the services of a 'friend' who may be any person whose services the accused may be able to procure. He could only advise the accused on all points and suggest questions to be put to the witnesses, but he himself is not permitted to examine or cross-examine the witnesses or address the court.

4. Conclusion

Summary Court-Martial is composed of commanding officer of any army unit and can try an accused up to the rank of havildar. The commanding officer alone constitutes the courts, and act as judge and prosecutor and ensures that the interests of both the parties are safeguarded and that justice is done. Summary Court-Martial can be used to justify an undesirable or general discharge for frequent involvement of a discreditable nature with civil and military authorities. Summary Courts-Martial are meant to adjudicate minor offences promptly under a simple procedure. They are courts of limited jurisdiction. The Summary Court-Martial also is valuable when a military member needs to be taught a swift lesson that will serve as a message to others about to fall off the precipice of good order and discipline. Accused is not entitled to a lawyer in Summary Court-Martial. It is suggested that an option should be provided for engaging the defence counsel even at Summary Court-Martial.

21 (1969) 1 QB 577.

Formation of Marriage Contract in different Personal Laws in India

Dr. K.B. Asthana[1]

When we talk about the contract and formation of contract we need to satisfy the essentials of contract. Almost all the laws have been enacted by the English which has the impact of the English Common Law. Classical Hindu law is a category of Hindu law (dharma) in traditional Hinduism, taken to begins with the transmittance of the Vedas and ending in 1772 with the adoption of "A Plan for the Administration of Justice in Bengal" by the Bengal government. Law during the classical period was theologically based on the dharmasastra, and dharma which was traditionally delineated by "learned people" or scholars of the Vedas. According to the classical Hindu law marriage is sacramental form but when it have got the impact of English Common Law, its nature became a civil contract. Because which has been the requirement of the Hindu society and gradually the Hindu Society changes its form, nature, object, aim and need of the marriage. The industrial revolution, formation of colony, out sourcing of Hindu Community for jobs, the classical form has changed to some civil nature of contract. According to Vyavstha Chandrika[2], that marriage among Hindus though essentially a sacrament partakes also the nature of a contract. In Muslim personal laws, the according to the Quran the formation of marriage is already it's a civil contract. First and foremost thing is that the formation of contract is offer[3] and acceptance[4] must be one the same sitting and for the legal object which should bind both the parties. So it can be said that the Nikah is purposefully formatted which all the ingradients of essential condition of Nikah is fulfilled. And there is the provision of Mehr which is coming as a consideration. In *Manmohini* v. *Basant Kuma, t*he Calcutta High Court once observed that a Hindu marriage is "more religious than secular in character". But in *Anjona Dasi* v. *Ghose*[5], The court observed that suits relating to marriage deals with that which in the eye of the law must be treated as a civil contract, and important civil rights arise out of that contract. In Christian and Parsi there is also the observation of the contract and all the essentials of the contract are to be fulfilled in the formation of marriage.

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1 Assistant Professor, Chanderprabhu Jain College of Higher Studies and School of Law, paper presented as a speaker Formation of Marriage Contract in National Workshop organized by CPJ CHS and School of Law on 14th November, 2014.

2 Vol II P 432.

3 According to Sec 2 (a) Offer defined "when person signifies to another his willingness to do with a view to obtaining the assent of the other person to such act he is said to make a proposal".

4 According to Sec 2 (b) Acceptance defined "when the person to whom the proposal is made, signifies his assent, the proposal is said to be accepted".

5 6 Beng LR 243.

1. Indian Contract Act, 1872

Essential Elements of a Valid Contract according to Section 10, "All agreements are contracts if they are made by the parties

- Free consent of parties: The parties should give their free consent without any undue influence, fraud or coercion
- Competent to contract: The parties must be competent to make the contract.
- For a lawful consideration and
- With a lawful object,

2. Hindu Law

According to classical Hindu Law in Manusmriti, if man and woman is united for the marriage , they are united for forever till the last. " To be mothers were women created and to be fathers men, the Vedas ordain that 'Dharma' must be practiced by man together with his wife".[6] "He only is perfect man who consits of his wife himself and off springs."[7] "I hold your hard for Saubhagya that you may grow old with your husband, you are given to me by the just, the creator, the wife and by the learned people."[8]

Law as understood by the Hindus is a branch of dharma. Its ancient frame work is the law of the Smritis. The Smritis are institutes, which enounce rules of dharma. The traditional definition of Dharma is: 'what is followed by those learned in the Vedas and what is approved by the conscience of the citreous who are exempt from hatred and inordinate affection[9].

2.1. Nature and Concept of Hindu Marriage

A Hindu marriage is sacrament and not a contract as is the case which as for its object, the procreation and legalizing with a Christian marriage or with a Muslim marriage which has its objects the procreation of children and legalizing of sexual intercourse. To a Hindu, marriage is one of the twelve Samskars or a sacrament enjoined upon him by his religion of purifying the body from inherited taint, It is religious necessity rather than a mere physical luxury. It continues to be so even after the enactment of the Hindu Marriage Act, 1955, since its provisions are not inconsistent with the underlying spirit of Hindu marriage which creates and indissoluble tie between the husband and the wife.

Under the textual law, identity of castes was essential for a valid marriage,

6 Manu IX, 6.
7 Manu IX 45.
8 Manu VIII, 7 ponh.
9 *Manusmriti*, II, *1 Mehaitibi*, one of the earliest commentators on Manusmriti explains the term '*dharma*' as duty—Dharmashabdah Kartvyata vachanah, VII, 1. For Medhatithi, see p 21.

and in any case Pratiloma marriage, i.e. marriage between males of lower castes and females of higher castes were prohibited, though Anuloma Marriage, i.e., marriage between the males of higher castes and females of lower castes were permitted and recognized. With the enactment of the Hindu Marriage Validity Act, 1949, it no more remained necessary. A marriage between persons belonging to different sub-divisions, of the same caste, was however, not invalid; and this was expressly Hindu Marriage Disability removal Act, 1946 and Hindu Marriage Validity Act, 1949. Another essential feature was that the persons must not be related to each other within the prohibited degree i.e. they must not be of same gotra or pravara and msut not be sapindas. As to disability of being of the same gotra or pravara it was removed later by the Hindu Marriage Disabilities Removal Act, 1949, but the bar of sapindas relationship continued; though this was a difference of opinion between the two schools Mitakshara and Dayaybhaga, as to who are sapindas for marriage. The difference has bow been reconciled by the Hindu Marriage Act, 1955 which provides for a uniform list of such relationship.

2.2. Essentials of Marriage under the Hindu Marriage Act, 1955

(i) **Monogamy**: Neither party has a spouse living at the time of the marriage;

(ii) **Sanity**: At the time of the marriage, neither party-

(a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or

(b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

(c) has been subject to recurrent attacks of insanity;

(i) **Age of the Parties**: the bridegroom has completed the age of 21 years and the bride, the age of 18 years at the time of the marriage;

(ii) **Beyond Prohibited Degree**: in the parties are not within the degrees of prohibited relationship[10],

10 Sec 3 (i) (f) says that the Prohibited relationship is defined. (g) "degrees of prohibited relationship"-two persons are said to be within the "degrees of prohibited relationship"-
(i) if one is a lineal ascendant of the other; or
(ii) if one was the wife or husband of a lineal ascendant or descendant of the other ; or
(iii) if one was the wife of the brother or of the father's or mother's brother or of the grandfather's or grandmother's brother of the other; or
(iv) if the two are brother and sister, uncle and niece, aunt and nephew, or children of brother and sister or of two brothers or of two sisters;
Explanation.-For the purposes of clauses (f) and (g), relationship includes-
(i) relationship by half or uterine blood as well as by full blood;
(ii) illegitimate blood relationship as well as legitimate;
(iii) relationship by adoption as well as by blood and all terms of relationship in those clauses shall

unless the custom or usage governing each of them permits of a marriage between the two;

(iii) **Beyond Sapinda Relationship**[11]: the parties are not *sapindas* of each other, unless the custom or usage governing each of them permits of a marriage between the two;

2.3. Essential Ceremony for Marriage

This act does not prescribe any particular form of marriage. All that it lays down in section 7 is that:

(i) A marriage may be solemnized in accordance with the customary rites and ceremonies of either party there to.

(ii) Where such rites and ceremonies include the Saptapadi[12], the marriage becomes binding when the seven steps are taken.

As laid down by the Supreme Court in *Ram Singh* v. *Sushila Bai*[13], it is abdundantly clear from the provisions of section 7 essential is ceremonies and rites, pertaining to a Hindu Marriage, must be performed in order to make it valid and binding. The section does not dispense with the performance of essential ceremonies of marriage. Again in *Kanwal* v. *H.P. Administration,*[14] SC laid down that two things are necessary for solemnization of avalid marriage

(i) Unvocation before the sacred fire, and

(ii) Saptapadi, unless these two ceremonies are performed, the marriage will not be a valid marriage.

3. Muslim Law

According to Mulla, there are four formal sources of Muslim law, namely, Quran, Hadis (traditions of Priphet Mohmmad), Ijmaa (Consesnus of the founders of the law, or of the community), and Qiyas (Collection of rules or principles deducible by the methods of analogy and interpretation). The Muslims consider the Quran as the basis of their law, The Quran runs into about 6,000 verses, but only 200 deals with legal principles, and of these, only about 80 verses

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be construed accordingly.

11 Hindu Marriage Act, 1955 Sec 3 (f) (i) "sapinda relationship" with reference to any person extends as far as the third generation (inclusive) in the line of ascent through the mother, and the fifth (inclusive) in the line of ascent through the father, the line being traced upwards in each case from the person concerned, who is to be counted as the first generation; and (ii) two persons are said to be "sapindas" of each other if one is a lineal ascendant of the other within the limits of sapinda relationship, or if they have a common lineal ascendant who is within the limits of sapinda relationship with reference to each of them.

12 Saptapadi.

13 AIR 1970.

14 AIR 1966 SC 614.

deal with the law of personal status. Though Muslim law in India is not codified, yet some aspects of it have been regulated by the legislations viz. The Muslim Personal Law (Shariyat) Application Act, 1937, The Dissolution of Muslim Marriages Act, 1939 , etc.

4. Special Marriage Act

Under the special marriage act[15] marriage is an essentialially a civil contract. Non-age and lack of consent renders a marriage void. The Act lays down a civil ceremony for the marriage. The Special Marriage Act, 1954 replaced the old Act III, 1872. The new enactment has 3 major objectives:

1. To provide a special form of marriage in certain cases,
2. To provide for registration of certain marriages and,
3. To provide for divorce.

According to sec 4[16] of the said act the conditions relating to solemnization of special marriage.-

Notwithstanding anything contained in any other law for the time being in force relating to the solemnization of marriages, a marriage between any two persons may be solemnized under this Act, if at the time of the marriage the following conditions are fulfilled namely:

(a) Neither party has a spouse living:
(b) Neither party-

(i) is incapable of giving a valid consent to it in consequence of unsoundness of mind, or
(ii) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or
(iii) has been subject to recurrent attacks of insanity or epilepsy;

(c) the male has completed the age of twenty-one years and the female the age of eighteen years;
(d) the parties are not within the degrees of prohibited relationship:

Provided that where a custom governing at least one of the parties permits of a marriage between them, such marriage may be solemnized, notwithstanding that they are within the degrees of prohibited.

5. Christian Marriage Law

The Christian Law of Marriage in India is governed by the Indian Christian Marriage Act of 1872. A Christian marriage in India is also a conract

15 1954.
16 Special Marriage Act, 1954.

and it usually somnised by a Minister of Religion licensed under the Christian Marriage Act, 1872. It can also be solemnized by the Marriage Registrar.

Marriage, as is seen in Christian tradition, is not merely a civil contract nor is it purely a religious contract. It is seen as a contract according to the law of nature, antecedent to civil institutions and by itself an institution. A marriage among Christians is traditionally understood as the voluntary union for life of one man and one woman to the exclusion of all others, and Indian law follows suit, so that India does not allow for the possibility of same-sex marriage as it has been celebrated by some churches in other countries in recent years.

According to sec 4, marriages to be solemnized to Act[17], every marriage between persons, one or both of whom is or are a Christian, or Christians, shall be solemnized in accordance with the provisions of the next following section; and any such marriage solemnized otherwise than in accordance with such provisions shall be void.

Certain conditions have been laid down for a marriage to be valid under the Act. The parties to the marriage must be Christian as defined under section 3 of the Act or at least one of them must be a Christian and the marriage must have been solemnised in accordance with the provisions of section 5 of the Act by a person duly authorised to do so. The State Governments of the area have been authorised to grant and revoke the licences, granted in favour of certain persons, for the solemnization of marriages under the Act. As per the provisions contained in the Act, the marriage must be performed in a particular form duly entered in the Marriage Register, maintained for this purpose. The factum of marriage can be proved by producing the entries from this register. Other evidence can also be produced for this purpose. Version of the eye witnesses to the marriage, subsequent conduct of the couple living as husband and wife, can also be a good piece of evidence to prove the factum of a Christian marriage.2 Admission of either spouse is a relevant factor to prove the factum of marriage. A Christian Marriage can also take place at the house of the bride's mother and in that case the signing of Marriage Register is not essential under the Act.3 In a case before the Karnataka High Court reported in (1993 MLJ 31), it was held, "Christian marriage even if one of its parties in a Hindu cannot be dissolved by a decree of divorce under Section 13 of the Hindu Marriage Act." However, a Division Bench of the same High Court in its decision reported in (1995 MLJ 492), held that a marriage performed under the Christian Marriage Act and validly registered under the provisions of Special Marriage Act can be dissolved on the basis of mutual consent under Section 28 of the Special Marriage Act if the conditions laid down in that Section are fulfilled.

17 Indian Christian Marriage Act of 1872.

But according to sec 5 of the Act[18] the person/s by whom marriages may be solemnized — Marriages may be solemnized in India— (1) by any person who has received episcopal ordination, provided that the marriage be solemnized according to the rules, rites, ceremonies and customs of the Church of which he is a Minister; (2) by any Clergyman of the Church of Scotland, provided that such marriage be solemnized according to the rules, rites, ceremonies and customs of the Church of Scotland; (3) by any Minister of Religion licensed under this Act to solemnize marriages; (4) by, or in the presence of, a Marriage Registrar appointed under this Act; (5) by any person licensed under this Act to grant certificates of marriage between Indian Christians.

6. Parsi Laws in Formation of Marriage Contract

The Parsis came and settled down in India as a result of their persecution in their native land, Persia. They came largely from Persian Province 'Pers' or 'Pars' which the word 'Parsi' is derived. Parsis were greatly influenced by the Hindu customs.[19]

The Parsi marriage is also regarded as a civil contract though the religious recemony of *ashirwad* is essential for its validity. Literally meaning requisites to "blessing" , ashirwad is essential for its validity. *Ashirwad* means a prayer or exhortation to the paries to observe their marital obligations[20] . The marriage is solemnized by the Priest in the presence of two competent witnesses. According to sec 3 of the above act that validity of Parsi Marriages. - (1) No marriage shall be valid if-

(a) the contracting parties are related to each other in any of the degrees of or affinity set forth in Schedule 1; or
(b) such marriage is not solemnized according to the Parsi form of ceremony called 'Ashirvad' by a priest in the presence of two Parsi witnesses other than such priest; or
(c) in the case of any Parsi (whether such Parsi has changed his or her religion or domicile or not) who, if a male, has not completed twenty-one years of age, and if a female, has not completed eighteen years of age.

(2) Notwithstanding that a marriage is invalid under any of the provisions of sub-section
(1), any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate.

18 *ibid*
19 In fact, one of the conditions of their immigration to India imposed by the Hindu rules on them was that they would adopt Hindu customs of marriage. *See* D.F. Karka, History of Parsis (Vols I and II) (1884); S.K. Hodivala, Parsis of Ancient India (1920); Paras Diwan, Family Law Ninth Edition 2009.
20 Parshottam v. Meherbai, ILR (1880) 13 Bom 302.

Sec 4 of the act says regarding remarriage when unlawful.- (I) No Parsi (whether such Parsi has changed his or her religion or domicile or not) shall contract any marriage under this Act or any other law in the lifetime of his or her wife or husband, whether a Parsi or not, except after his or her lawful divorce from such wife or husband or after his or her marriage with such wife or husband has lawfully been declared null and void or dissolved, and, if the marriage was contracted with such wife or husband under the Parsi Marriage and Divorce Act, 1865, or under this Act, except after a divorce, declaration of dissolution as aforesaid under either of the said Acts.

7. Uniform Civil Code

Uniform civil code is a term which has originated from the concept of a civil law code. It envisages administering the same set of secular civil laws to govern different people belonging to different religions and regions. This supersedes the right of citizens to subject themselves to different personal laws based on their religion or ethnicity. The common areas covered by a civil code include: personal status rights related to acquisition and administration of property marriage, divorce and adoption Usage of this term is prevalent in India where the Constitution of India lays down the administration of a uniform civil code for its citizens as a Directive Principle, but has not been implemented till now. The secular Uniform Civil Code is opposed by Muslims, Christians and parties like the Indian National Congress and the Communist Party of India (Marxist). This is a contradiction to these parties' commitment to secularism, and has led to claims that they are pseudosecularist. Those in favour of a secular Uniform Civil Code are the Bharatiya Janata Party , the Rashtriya Swayamseva Sangh and the Vishwa Hindu Parishad. These are also referred to as "Communalists". Thus, in India, there exists a peculiar situation where the opponents of this law are called "Secularists" while those in favour of a secular law are termed.

8. Jews Laws in formation of marriage contract

Marriage among the Indian Jews is also regarded as a contract. A written contract called *Katuba* between the parties it is essential for the validity of marriage. A religious ceremony is also required.

9. Conclusion

In case *Hyde* v. *Hyde,*[21] Lord Pensance gave the following definition of marriage (it is treated as the classic definition of the Christian marriage, despite its flaws)

> "I conceive that marriage as understood in Christiandom may …be defined as the voluntary union for life of one man and one woman to the exclusion of all others.

21 (1860) 1 and D 130 at 123.

But since this definition emphasizes the indissolubility aspect of marriage, it is not correct under English Law. With the view avoiding this deficiency in the definition, in *Nochimson* v. *Nachimson*[22], the court of Appeal appended a gloss by saying that it should be the intention of the parties when they enter into marriage that it should last life. Though later it may be dissolved on any ground available to the parties including irretrievable breakdown of marriage. It seems that the lofty ideals of liberty and equality of the Industrial Revolution sweeping England and the continent of Europe, it no longer remained to regard marriage as indissoluble. It can also be said that the marriage is also regarded as a social institution and not merely a transaction between two individuals. The institution of marriage was hedged with legal protection. As the marriage is treated a religious sacrament in most of the religions but gradually the concept of marriage where the formation of civil contract arises. Muslim marriage has been defined as a civil contract for the purpose of legalizing sexual intercourse and procreation of children. It is not a sacrament but a contract, though solemnized generally with the recitation of certain verses from the Quran. Muslim law does not prescribe any religious service essential for solemnization. Justice Krishna Iyer in 'Islamic Law in Modern India' considered the concept of Muslim marriage and stated that "in its legal connotation, Muslim marriage is essentially a contract, though marriage as a social institution is regarded solemn all over the civilized world, including the Muslims."

22 (1930) 1 and D p. 271.

Smriti Provisions with Regard to Business Transaction, Legal Disputes, Inheritance & Debt Recovery in Ancient India- Readings from Kautilyan Arthasastra

Dr.Pushpraj Singh[1]

All sources of Indian traditions -Brahmanical, Buddhist and Jain - agree that Kautilya destroyed the Nanda dynasty and installed Chandragupta Maurya on the throne of Magadha. The name Kautilya denotes that he was of the Kutila gotra. The name 'Chanakya' means that he was the son of Chanaka, though 'Vishnugupta' was his personal name. Arthasastra was composed by Kautilya in probably between 321-296 BC, though there are doubts about the date of the composition of Arthasastra. A workshop held by the Indian Council for Historical Research, Delhi, concluded that the Arthasastra in its present form was a compilation made by a scholar, Kautilya, in 150 AD. But there is no doubt that Chandragupta Maurya ascended the throne around 321 BC. Arthasastra had never been forgotten in India, but the text itself was not available until, dramatically, a full text on palm leaf in the grantha script, along with a fragment of an old commentary by Bhattasvamin, came into the hands of Dr. R. Shamasastry of Mysore in 1904. And finally he published the text not only in Hindi but also in English in 1909. Arthasastra is a valuable document, which throws light on the state and society of India at 300 BC.

The Arthasastra is not a theoretical work. Rather it is a manual for the rulers and discusses the main philosophy and the principles of administration. In short, it is a book on political science that deals with the political, economic and military problems generally faced by the government. The ideas expressed by Kautilya in the Arthasastra are completely practical and unsentimental. Kautilya openly writes about controversial topics such as assassinations, when to kill family members, how to manage secret agents, when it is useful to violate treaties, and when to spy on ministers. Because of this, Kautilya is often compared to the Italian Renaissance writer Machiavelli, author of The Prince, who is considered by many as unscrupulous and immoral. Kautilya summarizes the duty of a ruler, saying, "The happiness of the subjects is the happiness of the king; their welfare is his. His own pleasure is not his good but the pleasure of his subjects is his good".

Arthasastra has on the whole 15 books, 150 chapters, 180 sections and 6,000 slokas. Kautilya's economic and political thoughts as found in Arthasastra

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are centered around the following areas: Life, role, excellence and qualities of a king; upright kingdoms; faithful citizens; the functions of governments; the duties of ministers, ambassadors, secretaries etc; planning and good process of decision-making; employment and the beauty of work; wealth and its role; a good army and the role of soldiers; agriculture and its importance; the various problems of the state like poverty, famine, crimes etc. In the present paper we shall discuss and appreciate Arthsastra provisions related to Business transactions, Inheritance, Debt, Deposit, Sale & Ownership.

1. Valid and Invalid Transactions

Arthasastra has attempted a scientific demarcation between Valid and Void transaction. It holds as void agreements (vyavahára) entered into in seclusion, inside the houses, in the dead of night, in forests, in secret, or with fraud. The proposer and the accessory shall be punished with the first amercement[2] the witnesses (srotri = voluntary hearers) shall each be punished with half of the above fine; and accepters shall suffer the loss they may have sustained. But agreements entered into within the hearing of others, as well as those not otherwise condemnable shall be valid. Those agreements which relate to the division of inheritance, sealed or unsealed deposits, or marriage; or those in which are concerned women who are either afflicted with disease or who do not stir out; as well as those entered into by persons who are not known to be of unsound mind shall be valid though they might be entered into inside houses. [3]

Transactions relating to robbery, duel, marriage, or the execution of the king's order, as well as agreements entered into by persons who usually do their business during the first part of the night shall be valid though they might be done at night. With regard to those persons who live most part of their life in forests, whether as merchants, cowherds, hermits, hunters, or spies, their agreements though entered into in forests shall be valid. If fraudulent agreements, only such shall be valid as are entered into by spies. Agreements entered into by members of any association among themselves shall be valid though entered into in private. Such agreements (i.e., those entered into in seclusion, etc.) except as detailed above shall be void. So also agreements entered into by dependent or unauthorized persons, such as a father's mother, a son, a father having a son, an outcast brother, the youngest brother of a family of undivided interests, a wife having her husband or son, a slave, a hired labourer, any person who is too young or too old to carry on business, a convict (abhisasta), a cripple, or an afflicted person, shall not be valid. But it would be otherwise if he were authorized.[4]

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2 A fine ranging from 48 to 96 panas is called first amercement; from 200 to 500 panas, the middlemost; and from 500 to 1,000 panas the highest amercement. See Chap. XVII, Book III, Arthasastra.

3 Chapter 1, Book III, Kautilya Arthasastra, translated by R.Shamashashtry, Bangalore, Government Press,1915, p.214.

4 Chapter 1, Book III, Kautilya Arthasastra, translated by R.Shamashashtry, Bangalore, Government Press,1915, p.214.

Even agreements entered into by an authorized person shall be void if he was at the time (of making the agreements) under provocation, anxiety, or intoxication, or if he was a lunatic or a haunted person. In all these cases, the proposer, his accessory, and witnesses shall each be punished as specified above. But such agreements as are entered into in person by anyone with others of his own community in suitable place and time are valid provided the circumstances, the nature, the description, and the qualities of the case are credible. Such agreements with the exception of orders (Adesa=probably a bill of exchange) and hypothecations may be binding though entered into by a third person.[5]

2. Division of Inheritance

Sons whose fathers and mothers or ancestors are alive cannot be independent (anísvarah). After their time, division of ancestral property among descendants from the same ancestor shall take place. Self-acquired property of any of the sons with the exception of that kind of property which is earned by means of parental property is not divisible. Sons or grandsons till the fourth generation from the first parent shall also have prescribed shares (amsabhájah) in that property which is acquired by means of their undivided ancestral property; for the line (pindah) as far as the fourth generation is uninterrupted (avichchhinnah). But those whose line or genealogy from the first ancestor is interrupted (vichchhinnapindáh, i.e., those who are subsequent to the fourth generation), shall have equal divisions. Those who have been living together shall redivide their property whether they had already divided their ancestral property before or they had received no such property at all. Of sons, he who brings the ancestral property to a prosperous condition shall also have a share of the profit. [6]

If a man has no male issue, his own brothers, or persons who have been living with him, (saha jívino vá), shall take possession of his movable property (dravyam); and his daughters, (born of marriages other than the first four), shall have his immovable property (riktham). If one has sons, they shall have the property; if one has (only) daughters born of such marriage as is contracted in accordance with the customs of any of the first four kinds of marriage, they shall have the property; if there are neither sons nor such daughters, the dead man's father, if living, shall have it; if he, too, is not alive, the dead man's brothers and the sons of his brothers shall have it; if there are many fatherless brothers, all of them shall divide it; and each of the many sons of such brothers shall have one share due to his father (piturekamamsam); if the brothers (sodarya) are the sons of many fathers, they shall divide it calculating from their fathers. [7]

5 Ibid, 215

6 Chapter V, Book III, Kautilya Arthasastra, translated by R.Shamashashtry, Bangalore, Government Press,1915,P.231

7 Ibid, 231

Among a dead man's father, brother, and brother's sons, the succeeding ones shall depend on the preceding ones if living (for their shares); likewise the youngest or the eldest claiming his own share. A father, distributing his property while he is alive, shall make no distinction in dividing it among his sons. Nor shall a father deprive without sufficient reason any of the sons of his share. Father being dead, the elder sons shall show favour to the younger ones, if the latter are not of bad character. [8]

The father being dead, his carriage and jewellery shall be the special share to the eldest; his bed, seat, and bronze plate in which he used to take his meals (bhuktakámsyam), to the middle-most;. and black grains, iron, domestic utensils, cows and cart to the youngest. The rest of the property, or the above things, too, may be equally divided among themselves. Sisters shall have no claim to inheritance; they shall have the bronze plate and jewellery of their mother after her death. An impotent eldest son shall have only 1/3rd of the special share usually given to the eldest; if the eldest son follows a condemnable occupation or if he has given up the observance of religious duties, he shall have only ¼ of the special share; if he is unrestrained in his actions he shall have nothing. The same rule shall hold good with the middlemost and youngest sons; of these two, one who is endowed with manliness (mánushopetah), shall have half the special share usually given to the eldest. [9]

3. With Regard to Sons of Many Wives

Sons of two wives of whom only one woman has gone through all the necessary religious ceremonials, or both of whom have not, as maidens, observed necessary religious rites, or one of whom has brought forth twins, it is by birth that primogeniture ship is decided. Shares in inheritance for such sons as Súta, Mágadha, Vrátya and Rathakára shall depend on the abundance of paternal property; the rest, i.e., sons other than Súta, etc., of inferior birth, shall be dependent on the eldest for their subsistence. Dependent sons shall have equal divisions. Of sons begotten by a Brahmin in the four castes, the son of a Brahmin woman shall take four shares; the son of a Kshatriya woman three shares; the son of a Vaisya woman two shares, and the son of a Súdra woman one share. [10]

The same rule shall hold good in the case of Kshatriya and Vaisya fathers begetting sons in three or two castes in order. An Anantara son of a Brahmin, i.e. a son begotten by a Brahmin on a woman of next lower caste, shall, if endowed with manly or superior qualities (mánushopetah), take an equal share (with other sons of inferior qualities); similarly Anantara sons of Kshatriya or Vaisya fathers shall if endowed with manly or superior qualities, take half or equal shares (with

8 Ibid, 232
9 Chapter V1, Book III, Kautilya Arthasastra, translated by R.Shamashashtry, Bangalore, Government Press,1915, p.234.
10 Ibid, 232

others). An only son to two mothers of different castes shall take possession of the whole property and maintain the relatives of his father. A Palrasava son begotten by a Brahmin on a Súdra woman, shall take 1/3rd share; a sapinda, (an agnate) or a kulya (the nearest cognate), of the Brahmin shall take the remaining two shares, being thereby obliged to offer funeral libation; in the absence of agnates or cognates, the deceased father's teacher or student shall take the two shares. [11]

4. Time of dividing inheritance

Division of inheritance shall be made when all the inheritors have attained their majority. If it is made before, the minors shall have their shares, free of all debts. These shares of the minors shall be placed in the safe custody of the relatives of their mothers, or of aged gentlemen of the village, till they attain their majority. The same rule shall hold good in the case of those who have gone abroad. Unmarried brothers shall also be paid as much marriage cost as is equal to that incurred in the marriages of married brothers (sannivishtasamamasannivishtebhyonaivesanikam dadyuh). Daughters, too, (unmarried) shall be paid adequate dowry (prádánikam), payable to them on the occasion of their marriages. [12]

Both assets and liabilities shall be equally divided. Poor people (nishkinchanáh) shall equally distribute among themselves even the mud-vessels (udapátram). In the opinion of Kautilya, it is unnecessary to say so (chhalam); for as a rule, division is to be made of all that is in existence, but of nothing that is not in existence. Having declared before witnesses the amount of property common to all (sámánya) as well as the property constituting additional shares (amsa) of the brothers (in priority of their birth), division of inheritance shall be carried on. Whatever is badly and unequally divided or is involved in deception, concealment or secret acquisition shall be redivided. [13]

Property for which no claimant is found (ádáyádakam) shall go to the king, except the property of a woman, of a dead man for whom no funeral rites have been performed, or of a niggardly man with the exception of that of a Brahmin learned in the Vedas. That (the property of the learned) shall be made over to those who are well-versed in the three Vedas. Persons fallen from caste, persons born of outcaste men, and eunuchs shall have no share; likewise idiots, lunatics, the blind and lepers. If the idiots, etc., have wives with property, their issues who are not equally idiots, etc., shall share inheritance. All these persons excepting those that are fallen from caste (patitavarjah) shall be entitled to only food and clothing. [14]

11 Ibid, 235
12 Chapter V, Book III, Kautilya Arthasastra, translated by R.Shamashashtry, Bangalore, Government Press,1915, p.232.
13 Ibid, 233
14 Chapter V, Book III, Kautilya Arthasastra, translated by R.Shamashashtry, Bangalore, Government Press,1915, p.234.

5. Special Shares in Inheritance

Goats shall be the special shares of the eldest of sons, born of the same mother, among, Brahmins; horses among Kshatriyas; cows among Vaisyas; and sheep among Súdras. The blind of the same animals shall be the special shares to the middle-most sons; species of variegated colour of the same animals shall be the special shares to the youngest of sons. In the absence of quadruped, the eldest shall take an additional share of the whole property excepting precious stones; for by this act alone, he will be bound in his duty to his ancestors.

6. Recovery of Debts

An interest of a pana and a quarter per month per cent is just. Five panas per month per cent is commercial interest (vyávahárikì). Ten panas per month per cent prevails among forests. Twenty panas per month per cent prevails among sea-traders (sámudránám). Persons exceeding, or causing to exceed the above rate of interest shall be punished with the first amercement; and hearers of such transactions shall each pay half of the above fine. The nature of the transactions between creditors and debtors, on which the welfare of the kingdom depends, shall always be scrutinized. Interest in grains in seasons of good harvest shall not exceed more than half when valued in money. Interest on stocks (prakshepa) shall be one-half of the profit and be regularly paid as each year expires. If it is allowed to accumulate owing either to the intention or to the absence abroad (of the receiver or payer), the amount payable shall be equal to twice the share or principal (múlyadvigunah). A person claiming interest when it is not due, or representing as principal the total amount of his original principal and the interest thereon shall pay a fine of four times the amount under dispute (bandhachaturgunah). [15]

A creditor who sues for four times the amount lent by him shall pay a fine of four times the unjust amount. Of this fine, the creditor shall pay ¾th and the debtor ¼th. Interest on debts due from persons who are engaged in sacrifices taking a long time (dírghasatra), or who are suffering from disease, or who are detained in the houses of their teachers (for learning), or who are either minors or too poor, shall not accumulate. A creditor refusing to receive the payment of his debt shall pay a fine of 12 panas. If the refusal is due to some (reasonable) cause, then the amount free from interest (for subsequent time) shall be kept in the safe custody of others. Debts neglected for ten years, except in the case of minors, aged persons, diseased persons, persons involved in calamities, or persons who are sojourning abroad or have fled the country and except in the case of disturbances in the kingdom (rájyavibhrama), shall not be received back. [16]

Sons of a deceased debtor shall pay the principal with interest (kusí dam). (In the absence of sons), kinsmen claiming the share of the dead man or

15 Chapter XI, Book III, Kautilya Arthasastra, translated by R.Shamashashtry, P.250.
16 Ibid, 251.

sureties, such as joint partners of the debt, (sahagráhinah pratibhuvo vá) shall pay the same. No other kind of surety is valid (Naprátibhávyamanyat); a minor, as surety, is inefficient (bálaprátibhavyam asáram = surety of a minor is not strong). A debt, the payment of which is not limited by time or place or both (asamkhyáta-desakálam), shall be paid by the sons, grandsons or any other heirs of the dead debtor. Any debt, the payment of which is not limited by time or place or both and for which life, marriage, or land is pledged, shall be borne by sons or grandsons. [17]

7. Regarding many Debts against One

Excepting the case of a debtor going abroad, no debtor shall simultaneously be sued for more than one debt by one or two creditors. Even in the case of a debtor going abroad, he shall pay his debts in the order in which he borrowed them or shall first pay his debts due to the king or a learned Brahmin. Debts contracted from each other by either a husband or wife, either a son or a father, or by any one among brothers of undivided interests shall be irrecoverable.

Cultivators or government servants shall not be caught hold of for debts while they are engaged in their duties (or at work). A wife, though she has (not) heard of the debt (pratisrávaní), shall not be caught hold of for the debt contracted by her husband, excepting in the case of herdsmen and joint cultivators (gopálakárdhasítikebhyah). But a husband may be caught for the debt contracted by his wife. If it is admitted that a man fled the country without providing for the debt contracted by his wife, the highest amercement shall be meted out; if not admitted, witnesses shall be depended upon. [18]

8. Witnesses

It is obligatory to produce three witnesses who are reliable, honest and respected. At least two witnesses acceptable to the parties are necessary; never one witness in the case of debts. Wife's brothers, copartners, prisoners (ábaddha), creditors, debtors, enemies, maintained persons, or persons once punished by the Government shall not be taken as witnesses. Likewise persons legally unfit to carry on transactions, the king, persons learned in the Vedas, persons depending for their maintenance on villages (grámabhritaka), lepers, persons suffering from bodily eruptions, outcast persons, persons of mean avocation, the blind, the deaf, the dumb, egotistic persons, females, or government servants shall not be taken as witnesses excepting in the case of transactions in one's own community. In dispute concerning assault, theft, or abduction, persons other than wife's brothers, enemies, and co-partners, can be witnesses. In secret dealings, a single woman or a single man who has stealthily heard or seen them can be a witness, with the exception of the king or an ascetic. On the side of prosecution masters against servants, priests or teachers against their disciples and parents against their sons

17 Ibid, 251.
18 Chapter XI, Book III, Kautilya Arthasastra, translated by R.Shamashashtry, P.252.

can be witnesses (nigrahanasákshyam kuryuh); Persons other than these may also be witnesses in criminal cases.[19] If the above persons (masters and servants, etc.) sue each other (parasparábhiyoge), they shall be punished with the highest amercement. Creditors guilty of parokta shall pay a fine of 10 times the amount (dasabandha) but if incapable to pay so much, they shall at least pay five times the amount sued for (panchabandham); thus the section on witnesses is dealt with.

9. Taking oaths

Witness shall be taken before Brahmins, vessels of water and fire. A Brahmin witness shall be told 'Tell the truth'; a Kshatriya or a Vaisya witness shall be told thus:--'If thou utterest falsehood, thou, do not attain the fruit of thy sacrificial and charitable deeds; but having broken the array of thy enemies in war, thou, do go a beggar with a skull in thy hand.'A Súdra witness thus:--'Whatever thy merits are, in thy former birth or after thy death, shall they go to the king and whatever sins the king may have committed, shall they go to thee, if thou utterest falsehood; fines also shall be levied on thee, for facts as they have been heard or seen will certainly be subsequently revealed.' If in the course of seven nights, witnesses are found to have unanimously made a false consert among themselves, a fine of 12 panas shall be levied. If they are thus found in the course of three fortnights, they shall pay the amount sued for (abhiyogam dadyuh).

If witnesses differ, judgment may be given in accordance with the statements of a majority of pure and respectable witnesses; or the mean of their statements may be followed; or the amount under dispute may be taken by the king. If witnesses give testimony for a less amount, the plaintiff shall pay a fine proportional to the increased amount; if they attest to a greater amount, the excess shall go to the king. In cases where the plaintiff proves himself stupid, or where bad hearing (on the part of witnesses at the time of the transaction) or bad writing is the cause of difficulty, or where the debtor is dead, the evidence of witnesses alone shall be depended on (sákshipratyayameva syát).

According to Kautilya:--It is the truth that witnesses have to hear (when they are called to attest to any transaction); if they have not minded it, they shall be fined 24 panas; if they have attested to a false case (without scrutinizing), they shall be fined half of the above fine. Parties shall themselves produce witnesses who are not far removed either by time or place; witnesses who are very far removed either by time or place; witnesses who are very far, or who will not, stir out, shall be made to present themselves by the order of the judges.

10. Concerning Deposits

The rules concerning debts shall also apply to deposits. Whenever forts or country parts are destroyed by enemies or wild tribes; whenever villages,

19 Ibid, 252-254

merchants, or herds of cattle are subjected to the inroads of invaders; whenever the kingdom itself is destroyed; whenever extensive fires or floods bring about entire destruction of villages, or partly destroy immovable properties, movable properties having been rescued before; whenever the spread of fire or rush of floods is so sudden that even movable properties could not be removed; or whenever a ship laden with commodities is either sunk or plundered (by pirates); deposits lost in any of the above ways shall not be reclaimed. The depositary who has made use of the deposit for his own comfort shall not only pay a compensation (bhogavetanam) to be fixed after considering the circumstances of the place and time but also a fine of 12 panas. Not only shall any loss in the value of the deposit, due to its use, be made good, but a fine of 24 panas also be paid. [20]Deposits damaged or lost in any way shall also be made good. When the depositary is either dead or involved in calamities, the deposit shall not be sued for. If the deposit is either mortgaged or sold or lost, the depositary shall not only restore four times its value, but pay a fine of five times the stipulated value (pancbabandho dandah). If the deposit is exchanged for a similar one (by the depositary), or lost in any other way, its value shall be paid.

11. Pledges

The same rules shall hold good in the case of pledges whenever they are lost, used up, sold, mortgaged, or misappropriated. A pledge, if productive, i.e. (a usufructory mortgage), shall never be lost to the debtor (nádhissopakárassídet), nor shall any interest on the debt be charged; but if unproductive (i.e., hypothecation), it may be lost, and interest on the debt shall accumulate. The pledgee who does not re-convey the pledge when the debtor is ready for it shall be fined 12 panas. In the absence of the creditor or mediator (prayojahásannidhána), the amount of the debt may be kept in the custody of the elders of the village and the debtor may have the pledged property redeemed; or with its value fixed at the time and with no interest chargeable for the future, the pledge may be left where it is. When there is any rise in the value of the pledge or when it is apprehended that it may be depriciated or lost in the near future, the pledgee may, with permission from the judges (dharmasthas), or on the evidence furnished by the officer in charge of pledges (ádhipálapratyayo vá), sell the pledge either in the presence of the debtor or under the presidency of experts who can see whether such apprehension is justified. [21]

An immovable property, pledged and enjoyable with or without labour (prayásabhogyhah phalabhogyová), shall not be caused to deteriorate in value while yielding interest on the money lent, and profit on the expenses incurred in maintaining it. The pledgee who enjoys the pledge without permission shall not only pay the net profit he derived from it, but also forfeit the debt. The rules

20 Chapter XII, Book III, Kautilya Arthasastra, translated by R.Shamashashtry, P.255.
21 Ibid, 257.

regarding deposits shall hold good in other matters connected with pledges.

12. Property Entrusted to another for Delivery to a Third Person

The same rules shall apply to orders (ádesa), and property entrusted for delivery to a third person (anvádhi). If, through a merchant, a messenger is entrusted with a property for delivery to a third person (anvádhihasta) and such messenger does not reach the destined place, or is robbed of the property by thieves, the merchant shall not be responsible for it; nor shall a kinsman of the messenger who dies on his way be responsible for the property. For the rest, the rules regarding deposits shall also hold good here. [22]

13. Borrowed or Hired Properties

Properties either borrowed (yáchitakam) or hired (avakrítakam) shall be returned as intact as they were when received. If owing to distance in time or place, or owing to some inherent defects of the properties or to some unforeseen accidents, properties either borrowed or hired are lost or destroyed; they need not be made good. The rules regarding deposits shall also apply here. [23]

14. Retail Sale

Retail dealers, selling the merchandise of others at prices prevailing at particular localities and times shall hand over to the wholesale dealers as much of the sale proceeds and profit as is realized by them. The rules regarding pledges shall also apply here. If owing to distance in time or place there occurs any fall in the value of the merchandise, the retail dealers shall pay the value and profit at that rate which obtained when they received the merchandise. Servants selling commodities at prices prescribed by their masters shall realize no profit. They shall only return the actual sale proceeds. If prices fall, they shall pay only as much of the sale proceeds as is realized at the low rate. But such merchants as belong to trade-guilds (samvyavaharikeshu) or are trustworthy and are not condemned by the king need not restore even the value of that merchandise which is lost or destroyed owing to its inherent defects or to some unforeseen accidents. But of such merchandise as is distanced by time or place, they shall restore as much value and profit as remains after making allowance for the wear and tear of the merchandise. For the rest the rules regarding deposits shall apply here. [24]

15. Sealed Deposits

The rules laid down concerning unsealed deposits (upanidhis) shall apply to sealed deposits also. A man handing over a sealed deposit to other than the real depositor shall be punished. In the case of a depositary's denial of having

22 Ibid, 257.
23 Ibid, 257.
24 Chapter XI1, Book III, Kautilya Arthasastra, translated by R.Shamashashtry, Bangalore, Government Press,1915, p.258.

received a deposit, the antecedent circumstances (púrvápadánam) of the deposit and (the character and social position of) the depositor are the only evidences. Artisans (káravah) are naturally of impure character. It is not an approved custom with them to deposit for some reliable reason. When a depositary denies having received a sealed deposit which was not, however, deposited for any reasonable cause, the depositor may obtain secret permission (from the judges) to produce such witnesses as he might have stationed under a wall (gúdhabhitti) while depositing. In the midst of a forest or in the middle of a voyage an old or afflicted merchant might with confidence put in the custody of a depositary some valuable article with certain secret mark, and go on his way. On his sending this information to his son or brother, the latter may ask for the sealed deposit. If the depositary does not quietly return it, he shall not only forfeit his credit, but be liable to the punishment for theft besides being made to restore the deposit. [25]

A reliable man, bent on leaving this world and becoming an ascetic, may place a certain sealed deposit with some secret mark in the custody of a man, and, returning after a number of years, ask for it. If the depositary dishonestly denies it, he shall not only be made to restore it, but be liable to the punishment for theft. A childish man with a sealed deposit with some secret mark may, while going through a street at night, feel frightened at his being captured by the police for untimely walking, and, placing the deposit in the custody of a man, go on his way. But subsequently put into the jail, he may ask for it. If the depositary dishonestly denies, he shall not only be made to restore it, but be liable to the punishment for theft. [26]

By recognizing the sealed deposit in the custody of a man, any one of the depositor's family may probably ask not only for the deposit, but also for information as to the whereabouts of the depositor. If the custodian denies either, he shall be treated as before. In all these cases, it is of first importance to inquire how the property under dispute came in one's possession, what are the circumstances connected with the various transactions concerning the property and what is the status of the plaintiff in society as to wealth (arthasámarthyam). The above rules shall also apply to all kinds of transaction between any two persons (mithassamaváyah). Hence before witnesses and with no secrecy whatever, shall all kinds of agreements be entered into; either with one's own or different people, shall the circumstances of the time and place be minutely considered first.

16. Rescission of Purchase and Sale

A merchant refusing to give his merchandise that he has sold shall be punished with a fine of 12 panas, unless the merchandise is naturally bad, or is dangerous, or is intolerable. That which has inherent defects is termed naturally

25 Ibid, 259.
26 Ibid, 260.

bad; whatever is liable to be confiscated by the king, or is subject to destruction by thieves, fire, or floods is termed as being dangerous; and whatever is devoid of all good qualities, or is manufactured by the deceased is called intolerable. Time for rescission of a sale is one night for merchants; 3 nights for cultivators; 5 nights for herdsmen; and with regard to the sale or barter of precious things and articles of mixed qualities (vivrittivikraye), 7 nights. Merchandise which is likely to perish sooner may, if there is no loss to others, be shown the favour of early disposal by prohibiting the sale elsewhere of similar merchandise which is not likely to perish so soon. Violation of this rule shall be punished with a fine of 24 panas or 1/10th of the value of the merchandise sold against this rule. A person who attempts to return an article purchased by him shall if the article is other than what is naturally bad, or is dangerous, or is intolerable, be punished with a fine of 12 panas. The same rescission rules that apply to a seller shall apply to the purchaser also. [27]

17. Resumption of Gifts, Sale without Ownership and Ownership

Rules concerning recovery of debts shall also apply to resumption of gifts. Invalid gifts shall be kept in the safe custody of some persons. Any person who has given as gift not only his whole property, his sons, and his wife, but also his own life shall bring the same for the consideration of rescissors. Gifts or charitable subscriptions to the wicked or for unworthy purposes, monetary help to such persons as are malevolent or cruel, and promise of sexual enjoyment to the unworthy shall be so settled by rescissors that neither the giver nor the receiver shall be injured thereby. [28]

Those who receive any kind of aid from timid persons, threatening them with legal punishment, defamation, or loss of money, shall be liable to the punishment for theft; and the persons who yield such aids shall likewise be punished. Co-operation in hurting a person and showing a haughty attitude towards the king shall be punished with the highest amercement. No son, or heir claiming a dead man's property shall, against his own will, pay the value of the bail borne by the dead man (prátibhávyadanda), the balance of any dowry (sulkasesha), or the stakes of gambling; nor shall he fulfill the promise of gifts made by the dead man under the influence of liquor or love. Thus resumption of gifts is dealt with.

As regards sale without ownership:--On the detection of a lost property in the possession of another person, the owner shall cause the offender to be arrested through the judges of a court. If time or place does not permit this action, the owner himself shall catch hold of the offender and bring him before the judges. The judge shall put the question; how the offender came by the property.

27 Chapter XV, Book III, Kautilya Arthasastra, translated by R.Shamashashtry, Bangalore, Government Press,1915, p.268.

28 Chapter XVI, Book III, Kautilya Arthasastra, translated by R.Shamashashtry, Bangalore, Government Press,1915, p.270.

If he narrates how he got it, but cannot produce the person who sold it to him, he shall be left off, and shall forfeit the property. But the seller, if produced, shall not only pay the value of the property, but also be liable to the punishment for theft. [29]

If a person with a stolen property in his possession runs away or hides himself till the property is wholly consumed, he shall not only pay the value, but also be liable to the punishment for theft. After proving his claim to a lost property (svakaranam kritva), its owner shall be entitled to take possession of it. On his failure to prove his title to it, he shall be fined 5 times the value of the property, (panchabandhadandah), and the property shall be taken by the king. If the owner takes possession of a lost article without obtaining permission from the court, he shall be punished with the first amercement. Stolen or lost articles shall, on being detected, be kept in the toll-gate. If no claimant is forthcoming within three fortnights, such articles shall be taken by the king. He who proved his title to a lost or stolen biped shall pay 5 panas towards ransom (before taking possession of it). Likewise the ransom for a single-hoofed animal shall be 4 panas; for a cow or a buffalo, 2 panas, for minor quadrupeds ¼th of a pana; and for articles such as precious stones, superior or inferior raw materials, five per cent of their value. [30]

Whatever of the property of his own subjects the king brings back from the forests and countries of enemies shall be handed over to its owner. Whatever of the property of citizens robbed by thieves the king cannot recover shall be made good from his own pocket. If the king is unable to recover such things, he shall either allow any self-elected person (svayamgráha) to fetch them, or pay an equivalent ransom to the sufferer. An adventurer may enjoy whatever the king graciously gives him out of the booty he has plundered from an enemy's country, excepting the life of an Arya and the property belonging to gods, Brahmins or ascetics. [31]

18. Ownership

As to the title of an owner to his property:--The owners who have quitted their country where their property lies shall continue to have their title to it. When the owners other than minors, the aged, those that are afflicted with decease or calamities, those that are sojourning abroad, or those that have deserted their country during national disturbances, neglect for ten years their property which is under the enjoyment of others, they shall forfeit their title to it. Buildings left for 20 years in the enjoyment of others shall not be reclaimed. But the mere occupation of the buildings of others during the absence of the king by kinsmen, priests, or heretics shall not give them the right of possession. The same shall obtain with regard to open deposits, pledges, treasure trove (nidhi),

29 Ibid,.-p.271.
30 Ibid,.-p.272.
31 Ibid,.-p.273.

boundary, or any property belonging to kings or priests (srotriyas). [32]

Ascetics and heretics shall, without disturbing each other, reside in a large area. A new comer shall, however, be provided with the space occupied by an old resident. If not willing to do so, the old occupier shall be sent out. The property of hermits, (vánaprastha) ascetics (yati), or bachelors learning the Vedas (Brahmachári) shall on their death be taken by their preceptors, disciples, their brethren (dharmabhrátri), or class-mates in succession. Whenever hermits, etc., have to pay any fines, they may, in the name of the king, perform penance, oblation to gods, fire worship, or the ritual called Mahákachchhavardhana for as many nights as the number of panas of their fines. Those heretics (páshandáh) who have neither gold nor gold-coin shall similarly observe their fasts except in the case of defamation, theft, assault and abduction of women. Under these circumstances, they shall be compelled to undergo punishment. [33]

19. Conclusion

Summing up we may conclude that Kautilyan Arthasastra is a very relevant treatise if we want to understand Smriti provisions with regard to Business Transaction, Legal Disputes, and Inheritance, Debt Recovery and other disputes of civil nature in Ancient India. The study of Kautilya is one of the significant ways in which we can become more self conscious about the strategic culture that we have, and in which we can contribute to its evolution. Tracing the relevance of Kautilya in modern India, Liebig described how Jawaharlal Nehru did thoroughly study the Arthasastra in the winter of 1930/31 while in prison.[34] Nehru's engagement with the KA is a first indicator of the 'manifest presence' of Kautilyan thought in modern India. The Arthasastra equates political governance with economic governance. The end is economic governance while political governance is the means. But as economic objectives are not realized in the absence of political ones, then political governance becomes an end and economic governance the means. 'The end justifies the means', this is supposed to be the basis of Kautilyan and Machiavellian philosophy. Political power and material wealth according to Kautilya are the means and ends of governance and good governance - political or economic - depends upon justifying the ends and means as the socio, economic and political conditions.

32 Chapter XVI, Book III, Kautilya Arthasastra, translated by R.Shamashashtry, Bangalore, Government Press,1915, p.272.

33 Ibid,.-p.273.

34 Talk by Michael Liebig, Visiting Fellow at IDSA, organized by The Military Affairs Centre at IDSA on 14th February 2014 on the topic "Relevance of Kautilya's Arthasastra for Modern India."

Right to Private Defence: An Analytical Study

Vijay Pal Singh[1]

The right of Private defence or self-defence is one which has come down from the ancient law-givers. Manu enjoined to resort to arms in self-defence[2] and the root of this concept may be found even in Anglo-American jurisprudence.[3] It is thus an indefeasible right which may be altered, but can never be abrogated. Nature prompts a man who is struck to resist, and he is justified in using such amount of force which will prevent a repetition. Also, the right of private-defence bases itself on the principle that under certain circumstances the conduct of a person is justified although otherwise criminal, and homicide committed in such nature has been termed as "excusable homicide", the slayer having performed a task which the state would have normally carried out.[4] Thus what the law requires the law permits. This is the reason why the right has been carefully restricted and also sacredly protected.

Thus, though the presence, legitimacy and requirement of the right of private-defence cannot be challenged, there are various contestable issues that the subject throws up. The judicial task of determining the force that can be validly used in private-defence to constitute a bona fide defence, the quandary over whether to adopt the objective or subjective approach to the 'reasonable apprehension of danger, the quantification of danger and amount of force to be used in defence, the time period over which this right continues in the face of 'immediate danger', the beginning and end of the act constituting 'self-defence', if the right should be extended to the protection (in good faith) of another person and whether the right of private-defence is to return to the aggressor in case of excessive use of force by the person whom he has attacked are some of these burning issues which have yet to be resolved and will continue to give food for thought to many a jurist and law-maker in the future.

1. Self-defence a Dynamic Concept

At one point in legal history, there was no concept of an exception to criminal liability and often men were hanged in cases of self-defence because such killing was not justifiable homicide.

Such a person was often at the mercy of Royal clemency.[5] However, when

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2 *Manu*, Ch. VIII, Verses 348-9.

3 Jack Lowery, "A Statutory study of self-defence and defence of others as an excuse for homicide", *University of Florida Law Review*, Vol. V, (1952), p. 58.

4 J.W. Cecil Turner, *Kenny's Outlines of Criminal Law* (19th ed.) (London, 1980), p. 141.

5 James Bar Ames, "Law and Morals", *Harv. L. Rev.,* Vol. 22, (1908), p. 98.

society advanced and the welfare state came into existence, the responsibility of protecting the person and property of individuals was taken over by the state. The judiciary was able to appreciate the need for recognising the right of individuals to protect them, and the legislature accordingly included it as a valid defence in the criminal code.

There are many practical definitions of the concept of self-defence[6] but basically it is the act of a person to defend his person or property without any aid of law. The concept of self- defence being extended to the protection of property was a slightly later development. The extent, definition and standards attached to this right, although fundamentally the same all over the world are subtly different. The manner in which the legislators of different countries have approached this sensitive topic must be appreciated in relation to the respective social conditions there which determine the expediency and legal requirements.

2. The Indian Position

The expression 'private defence' that has been used in the Indian Penal Code, 1860,[7] has not been defined therein. Thus, it has been the prerogative of the judiciary to evolve a workable framework for the exercise of the right. Thus, in India, the right of private defence is the right to defend the person or property of himself or of any other person against an act of another, which if the private defence is not pleaded would have amounted to crime.[8] This right therefore creates an exception to criminal liability.[9] Some of the aspects of the right of private defence under the IPC are that no right of self-defence can exist against an

6 *Chambers 20th Century Dictionary* (1972) defines self-defence—"defending one's own person, rights, etc."

The Oxford English Dictionary (Oxford, 1961.) defines it as "the act of defending oneself, one's rights or position specially in law."

Law Lexicon (1971) Vol. II, defines self-defence: "While the law does not expect from the man whose life is placed in danger to weigh with nice precision the extent and the degree of the force he employs in his defence, the law does insist that the person claiming such right does not resort to force which is out of all proportion to the injuries received or threatened and far in excess of the requirements of the case. In certain eventualities, it is the duty of the accused even to retreat in order to avoid danger to himself before inflicting fatal injury. This is a necessary corollary that follows from the right of self-defence being based on necessity."

Halsbury's Laws of England, Vol. 37 (3rd ed.) p. 146 connotes self-defence "Every person is justified in using reasonable force to defend himself and those under his care, but the force justifiable is such only as is reasonably necessary."

7 Hereinafter IPC.

8 R.D. Yadav, *Law of Crime and Self-Defence* (New Delhi, 1993), p. 18.

9 Sec. 96 of the IPC lays down that nothing is an offence which is done in the exercise of the right of private defence. Sec. 97 states that everybody has a right to defend his own body and the body of any other person against any offence affecting the human body and the property, whether movable or immovable of himself or of any other person against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass or which is an attempt to commit theft, robbery, mischief or criminal trespass.

unarmed and unoffending individual,[10] the right is available against the aggressor only and it is only the person who is in imminent danger of person or property and only when no state help[11] is available who can validly exercise this right. The right of private defence is a natural right which is evinced from particular circumstances rather than being in the nature of a privilege.

However, the most important and repeatedly used principle is that the law of self-defence requires that the force used in defence of the self should be necessary and reasonable in the circumstances. The amount of force to be used should have been no more than is necessary for the purpose of self-defence. But, in the moments of excitement and disturbed mental condition, this cannot be measured in golden scales.[12] Whether the case of necessity exists must be determined from the viewpoint of the accused and his act must be viewed in the light of the circumstances as they appeared on such occasion.[13] Specific limitations have also been provided for when the right cannot be validly exercised[14] and also the act specifies clearly the cases in which the right can extend to the causing of death of the aggressor,[15] as well as different degrees of harm to him.[16]

The reasonable apprehension can only be justified if the accused had an honest belief that there is danger and that such belief is reasonable warranted by the conduct of the aggressor and the surrounding circumstances. This brings in an iota of an objective criterion for establishing 'reasonableness.' The imminence of danger is also an important prerequisite for the valid exercise self-defence. Thus, there should be a reasonable belief that the danger is imminent and that force must be used to repel it.

3. English Law

As the common law system does not provide a statutory definition of self-defence, it is often the opinions of legal authorities that are relied upon. Black's Law Dictionary enumerates two elements which are necessary to constitute self-defence, namely

- accused does not provoke difficulty, and
- there must be impending peril without convenient or reasonable mode of escape.

10 *Gurbachan Singh v. State of Haryana*, 1974 SCC (Cri.) 674.
11 Sec. 99, IPC.
12 *Deo Narain v. State of U.P.*, (1973) 1 SCC 347.
13 Roy Moreland, *The Law of Homicide* (Indianapolis, 1952), p. 260.
14 Sec. 99, IPC.
15 Ss. 100 & 103, IPC.
16 Ss. 101 & 104, IPC.

On the other hand Glanville Williams' analysis of the elements is more comprehensive:-

- that the force is threatened against the person,
- that the person threatened is not the aggressor,
- that the danger of harm is imminent,
- that the force threatened is unlawful,
- that the person threatened must actually believe that a danger exists, that the use of force is necessary and that the kind and amount of force being used is required in the circumstances, and
- that the above beliefs are reasonable.

4. American Law

The prevailing position under American law is also very similar. Great importance is given to the following concepts when dealing with the concept of self-defence.

- requirement of reasonableness (a reasonable and honest belief is essential),
- there must be the requirement that the harm or attack defended against be reasonable regarded as imminent.

Only that amount of force should be used which reasonably appears necessary to prevent the threatened harm.[17]Thus, it can be seen that in the various legal systems of the world, there are certain common established principles pertaining to self-defence.

5. Foundations of the Right of Self-Defence

The concept of self-defence can be justified on the basis of many principles. It has both legal and moral foundations, having the backing of numerous philosophers and jurists who have for long considered it an inalienable right. It furthers the concept of sanctity of human life and is a recognition of the natural instincts of man. There is even a view that that the law of self-defence existed before the origin of human societies.[18] It is presumed that every individual has surrendered to society the right to be punished for crime and for infraction of individual rights. But the right of self-defence is retained by the individual for his personal safety and security. It is in conformity with the public welfare. Although the society may impose restriction in the exercise of this right but it cannot be taken away, as it was brought by the individual with him, when he entered the society. The recognition of right of self-defence is, thus the recognition of the natural instinct of man to defend him against danger.

17 *Supra*., n. 11, pp. 24-5.
18 Kenneth Abernathy, "Recent developments in the law of self-defence", *JAG Journal* Vol. 18-19 (1964-65), p. 305.

The evolution of the right is not only attributed to the concept of recognising the natural instinct of man but also the responsibility of the state for protection of life and property. It is the state which has the monopoly over violence for the protection and safety of life and property, these being its primary concern. It alone has the power and authority to settle disputes. But sometimes even a well organised and resourceful state cannot help. When suddenly confronted with an aggressor, people find themselves unable to avail of State protection. They cannot get time to approach the state officials and institutions. Under such circumstances, they must avail of their natural right of self-defence. The incapacity of the state to afford protection of life and property to all persons in all situations gives sanction for recognition of the individual's right of self-defence. The extent of right is regulated besides other factors by the capacity and resources of the state to afford protection. Mayne[19] aptly summed up the propositions which provide foundations for the law of self-defence:-

- that society undertakes, and, in the great majority of cases, is able to protect private persons against unlawful attacks upon their person and property;
- that, where its aid can be obtained, it must be resorted to;
- that, where its aid cannot be obtained, the individual may do every thing that is necessary to protect himself;
- but that the violence used must be in proportion to the injury to be averted, and must not be employed for the gratification of vindictive or malicious feelings.

Therefore, it can be construed that this inalienable right is based on the principles of paternalism and the role of the state in protecting its citizens. It is thus an important principle with regard to the right of self-defence that the nature of the right is such that it is to be used as a preventive and not retributive measure. In no case is it to be employed as a shield to justify aggression. The accused cannot invoke it as a device or pretence for provoking an attack in order to slay his assailant and then claim exemption on the ground of self-defence. It has been laid down in a number of cases that it is not a retributive but a preventive right.[20]

Thus, the foundation of the right lies in the social purpose that it serves. The courts have therefore laid down that the right is to be construed liberally. In *Munshi Ram* v. *Delhi Administration*[21] the Supreme Court observed that law does not require a person whose property is forcibly tried to be occupied by a trespasser to run away and seek protection of the authorities. The right of private defence serves a social purpose and that right should be liberally construed. Such a right

19 *Supra*., n. 11, p. 119.

20 *Deo Narain v. State of U.P.*, AIR 1973 SC 473; *Mukhtiar Singh and anr. v. State of Punjab*, 1975 Cri.L.J. 132; *Yogendra Morarji v. State of Gujarat*, AIR 1980 SC 660; *Vijay Pal and ors. v. State*, 1984 Cri. L.J.188.

21 AIR 1968 SC 702.

will not only be a restraining influence on bad characters but also will encourage 'manly spirit in a law abiding citizen.' This view was reiterated in *Smt. Sandhya Rani Bardhan* v. *State*[22] wherein the Guwahati High Court held that Ss. 96-106 IPC, which deal with the right to private defence are to be construed liberally. As a general rule, no person is expected to run away for safety when faced with grave and imminent danger to his person and property. The law as enacted does not require a law-abiding citizen to behave like a coward and take to his heels when called upon to face an assault or if confronted with an imminent danger. In fact, it held, that there is nothing more degrading to the human spirit than to run away in the face of peril.

Thus, the whole principle of private defence can be said to rest on the balancing of the harm and social interest theories. In order to justify the acts of the accused in cases of self-defence, the harm which arises from the acts and the social interests sought to be protected are to be balanced. When the accused deviates from the letter of the law, some harm is caused by his action. On the other hand, some amount of social benefit also arises out of his conduct. As a consequence of this balancing process, if more benefit than harm results to the society, the act of the accused is not blamed but justified in the interest of the society.[23] In this connection, Fletcher states that self-defence in the common law is justified by balancing the interests of the culpable aggressor against the interests of his innocent victim. He also describes a second model of self-defence that justifies the defensive action upon the right to resist aggressive force—"the notions of individual autonomy and the right to protect autonomy."[24]

Thus, in any legal system, the extent of the right of self-defence must remain in a state of flux regulated by external circumstances.[25] It is submitted that this position has been aptly summed-up by Dicey who writes, "….the rule must be a compromise between the necessity of allowing every citizen to maintain his rights against the wrongdoer on the one hand and the necessity on the other hand of suppressing private warfare. Discourage self-help, and loyal subjects become the slaves of ruffians. Over-stimulate self-assertion, and the arbitrament of the Courts you substitute with the rule of the sword or the revolver."[26]

6. Justification V. Excuse

An actor may commit the *actus reus* of an offence with the requisite *mens rea* and yet escape liability because he has a general defence. These defences therefore have a vital role of rule articulation and liability assignment in criminal law.[27]

22 1977 Cri. L.J. 245.
23 Note "Justification and Excuse in the Judaic and Common Law" *N.Y.Univ. Law Review*, Vol. 52, (1977), p. 600.
24 *Supra*., n. 11, p. 129.
25 For an overview of the comparitive structure of self-defence *see,* M. Sornarajan, "Excessive Self-Defence in Commonwealth Law, (1972) *I.C.L.Q*. 758.
26 A.V. Dicey, *Law of the Constitution* (3rd ed.) (London, 1889), App. Note III.
27 For a further analysis of the functions of defences *see, supra.,* n.3.

The various defenses to criminal liability can be classified into sub-groups:-[28]

- **exemptions** like immaturity and mental disorder.
- **excuses** such as intoxication, automatism, physical compulsion and impossibility, mistake or impossibility of fact, mistake and ignorance of law and duress and necessity.
- **justifications** of self-defence, protection of property, advancement of justice, etc.

Although the concept of exemptions is well settled, there is a raging debate over which defence constitutes a defence and which a justification. The guidelines to determine these are also developing. This distinction becomes important because through a functional analysis of criminal law it is possible to realise that justifications carry out a rule-articulation function while excuses to a large extent are used during liability assignment. The relevance of this is in the message that goes to the common man. A conduct which is excused for a particular person (which for example is a result of his physical impossibility) is not necessarily excusable for another person of dissimilar capabilities. On the other hand, a justification, regardless of the actor, will not give rise to criminal liability if the same circumstances exist once again.

The most basic difference between a justification and an excuse as exculpations is that we excuse the actor because he is not sufficiently culpable or at fault whereas we justify an act because we regard it as the most appropriate course of action even though it may result in harm that would, in the absence of justification, amount to crime. It would therefore be a mistake to lump all exculpations together. This would obscure the principles underlying criminal responsibility. It does not follow that a distinction between the two is unimportant merely because there is no formal one made in law. The reasons why, and the circumstances in which we would excuse may be altogether different from the corresponding reasons for justifications. We admit excuses as an expression of compassion for one of our kind. A plea for justification, by contrast, is founded upon law's preference, in social and policy terms, for one course of action in preference for another.

All justifications have the same internal structure; *triggering conditions* permit a *necessary* and *proportional* response. The triggering conditions are the circumstances which must exist before the actor will be eligible to act under a justification.[29] Thus, Justification defences are not alterations of the statutory definition of harm sought to be prevented or punished by an offence. The harm

28 Grant Smyth, "The Law Reform Commission of Canada and the Defence of Justification", *Criminal Law Quarterly,* Vol. 26, (1983-84), p. 121 at 122.

29 Paul Robinson, "Criminal Law Defences: A Systematic Analysis", *Columbia Law Review*, Vol. 8, (1982), p. 199 at 216.

caused by the justified behaviour remains a legally recognised harm which is to be avoided whenever possible. Under the special justifying circumstances, however, that harm is outweighed by the need to avoid an even greater harm or to further a greater societal interest.[30]

On the other hand, excuses admit that the deed may be wrong; but excuse the actor because conditions suggest that the actor is not 'responsible' for his deed. Each of the excuse defences has the following internal structure: a *disability* causing an *excusing* condition. The disability is a real condition of the actor at the time of the offence. The disability is a real condition with a variety of observable manifestations apart from the conduct constituting the offence.[31] Excuses therefore admit that the deed may be wrong, but excuse the actor because conditions suggest that the actor is nor responsible for his deed. He is exculpated only because his condition at the time of the offence suggests that he has not acted through a meaningful exercise of free-will and therefore is not an appropriate subject from criminal liability.[32]

See how self Therefore, the conceptual distinction becomes important because justified conduct is correct behaviour which is encouraged or at least tolerated. In determining whether conduct is justified, the focus is on ht *act*, not the actor. An excuse represents a legal conclusion that the conduct is wrong, undesirable, but the criminal liability is inappropriate because some characteristic of the actor vitiates society's desire to punish him. Excuses do not destroy blame; rather, they shift it from the actor to the excusing condition. The focus in excuses is thus on the *actor*. Acts are justified, actors are excused.[33]

7. Necessity v. Self Defence

To a layman, there is very little difference between self-defence and necessity. Necessity itself is usually a defence in criminal jurisprudence and negatives criminal liability. In common parlance, the right to self-defence is understood as the action taken to protect life and property from an adversary whereas the defence of necessity is taken up when it is pleaded by the accused that whatever he did was done due to "necessity" to take those measures to save life and property.

The right of self-defence implies that there is a human assailant, who is bound by a legal duty i.e. not to harm others, because everybody has a legal right to life and liberty. On the other hand, in case of necessity, there is no violation of legal right of an individual. In self-defence, the defender injures the perpetrator and embodiment of the evil situation, while in necessity, he harms a person who is in no way responsible for the imminent danger.[34]

30 *Ibid*., p. 213.
31 *Ibid*., p. 235.
32 *Ibid.,* p. 221.
33 *Ibid.,* p. 229.
34 Jerome Hall, *General Principles of Criminal Law* (Indianopolis, 1947), p. 401.

Self-defence presupposes the existence of some immediately apprehended grave danger through some human agency or one which is not a natural calamity. It is an action taken by the accused to counteract the immediate apprehended movement or action of the assailant, which is always controlled by human agency. Necessity, on the other hand, is something which can neither be conceived before hand nor can be seen or realised in advance. It is a situation which comes into existence suddenly on the spot and needs a quick and sudden solution. In necessity the element of any human agency is not always present.

8. The Principles of Private Defence and Indian Laws

The right of private defence of body or property commences only on reasonable apprehension of danger. This reasonable apprehension of danger to either body or property arises from an attempt or threat to commit the offence. The apprehension should be such as would be entertained by a reasonable person at the crucial time. It would, however, not extend to superstitious fears.[35] Likewise, every threat cannot justify a man to take up arms. He must pause and think whether the threat is intended to be put into immediate execution and whether the person uttering the threat has the capacity to carry it out.

In the modern age of science, where firearms are possessed and frequently used, the norms relating to commencement and termination of the right in respect of person and property are changing rapidly. Today, when death can be caused instantaneously with a single action which may not give any opportunity to defend, the basis of apprehension has substantially changed. Thus, the more fatal a weapon, the earlier it creates an apprehension of death. Thus, there can be no objective standards for determining these concepts, and every decision requires taking stock of the whole situation.

8.1. ***Commencement***

The right of private defence of body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit an offence. In other words, the law confers upon a person a right of defending himself against both actual as well as threatened dangers. It is not necessary that there should be an actual commission of the offence in order to give rise to the right of self-defence.

In *Nga Chit Tin v. The King*[36] the accused left his hut after being threatened by the deceased. Sometime afterwards the accused again returned to the hut on his own free will armed with a heavy stick and struck the same on the head of the deceased, which resulted in death. On these facts the Rangoon High Court held that when the accused was able to leave the hut unhurt, there was no

35 *State v. Dhiria Bhavji*, AIR 1963 Guj. 78.
36 1939 Cri. L.J. 725.

question of reasonable apprehension in his mind. But when her again came back to the hut and struck the deceased, the exercise of the right of private defence by the accused was not justified because the deceased committed no offence. It is immaterial what kind of threat was advanced by the deceased against the accused but the apprehension of danger to the body of the accused did not continue when he left the hut.

From this decision, it is evident that the right to private defence commences on a mere threat to commit an offence and it continues as long as such danger continues. Whereas a mere threat is sufficient in the case of an attack on the person, in the case of an attack on property, there must be more than a mere threat. It must be threat which is so imminent as to amount to an attempt to commit the offence.[37]

8.2. ***Continuance & Termination***

After an evaluation of decided cases, it is evident that for the exercise of the right of private defence of the body it is necessary that the reasonable apprehension of danger must continue at the time when the impugned injury is caused. *Ram Lal Singh v. Emperor*[38] illustrates the right of private defence. In this case, a person was mobbed and the crowd entered the building in which the accused had taken shelter. When a person saw this, he rushed in and brought out a gun and fired. It was held that he was justified because apprehension of danger to the body continued. Thus, it is necessary to prove not only that the right has commenced, but also that it has not come to an end.

Decided cases also reveal that the right to self-defence of body ends as soon as the danger has passed out. In *Emperor v. Ashrafuddin*[39] in the course of an altercation, the accused first wrested the axe that the assailant carried and then gave repeated blows to the deceased after he had been caught by his associate. The Court held that there was no right in these circumstances because the apprehension of danger did not continue after the deceased had been disarmed and seized by helper of the accused. From this decision it is evident that the element of being disarmed is enough for termination of the right. The Punjab High Court also held in *Ranjit Singh v. State*[40] that there could be no right to private defence in a case where the deceased started running away from the place.Unlike the private defence of body under Section 102, Section 105 IPC prescribes different periods of continuance for different offences against property.When the offence against property consists of theft, the possessor of property enjoys the right to retake his property till the offender has affected his retreat with the property, or the assistance of the public authorities is obtained, or the property has been recovered.

37 *Mohd. Rafi v. Emperor*, AIR 1947 Lah. 375.
38 22 W.R. (Cr.) 51 c.f. *supra*. n. 11, p. 137.
39 1942 Cri. L.J. 450.
40 AIR 1957 Punj. 306.

There has been much debate over the interpretation of the term 'till the offender has effected his retreat'. There was much uncertainty even at the time of drafting and it was even suggested that the privilege of this clause should operate till the offender is taken and delivered to an officer of justice. Although, the meaning of the expression remains vague, the Nagpur High Court is of the view that if the offender is retreating without property, the right of private defence does not continue during his retreat. But, if the offender is retreating with the property, the right continues during the retreat of the offender until the retreat is finally effected.[41] The Rajasthan High Court in *Amar Singh v. State*[42] observed that the right would come to an end when the offender has finally succeeded in finding an escape from the hot chasers. The Court added that it would depend on the circumstances of each case as to when the offender can be said to have finally escaped from the hot chase of the searching party.

The right of private defence in case of theft also terminates when the property has been recovered. One view supports the thought that the right continues even though the offender has affected his retreat until the property is recovered.[43] The other view holds that the right does not continue after the offender has affected his retreat with the property.[44] The relevant clause of Section 105 does not use the word "final" retreat and any interpretation other than that in the first view (*Jarha Chamar's case*) would render the clause in the section "or the property has been recovered" meaningless.

In *Panjab Rao v. Emperor*[45] the Court held that the burden of proof lies on the accused to prove that he had no time to have recourse to the public authorities before giving chase personally and exercising his right. The question whether the victim of theft had enough time to have recourse to the protection of the authorities is always a question of fact depending on the circumstances of each case.[46]

In the case of robbery, the right continues as long as the offender causes or attempts to cause to any person death or hurt or wrongful restraint or as long as the fear of instant death or of instant personal restraint continues. In the case of criminal trespass or mischief or housebreaking by night, the right of private defence of property continues as long as the offender is engaged in the commission of these offences. Law does not require that a rightful owner in peaceful possession of his property should run away, if there is an invasion of his right. Although law is not to make us cowards, the right is to be exercised in defence of property and not as a pretext for aggression.

41 *Punjab Rao v. Emperor*, 1946 Cr. L.J. 111.
42 AIR 1968 Raj. 11.
43 *Jurha Chamar v. Surit Ram*, 7 Cri L.J. 49.
44 *Mir Dad v. The Crown*, ILR 7 Lahore 21.
45 1946 Cri. L.J. 111.
46 *Kripa Ram v. Emperor*, 1947 Cri.L.J. 503.

8.3. **Reasonable Apprehension of Danger**

Reasonable apprehension of danger is one of the essential prerequisites of the right of private defence. The apprehension should be reasonable to a man of normal state of mind. But what constitutes a reasonable apprehension of death or grievous bodily injury is always a question of fact to be decided upon facts and circumstances of each case.

The source of the apprehension may be the weapon, the manner of its use, the mental and physical attitude of the person uttering the threat, his capacity to execute the threat, etc. the relative strengths of the combatants is sometimes relevant.[47] Reasonable apprehension does not extend to superstitious fears. It is not every idle threat that entitles a man to take up arms. He must pause and ponder whether the threat is intended to be put into execution. There are many occasions when people come across threats which were never intended to be taken seriously. There are also threats which the person uttering them has no capacity to put the same into immediate execution such as threats from unarmed women or weak persons to an armed, strong man.Thus, the evaluation of the reasonable apprehension requires the exercise of definite, yet quick prudence on the part of the accused. In *Mukhtiar Singh v. State of Punjab*[48] the Punjab High Court asserted that reasonable apprehension depended upon the state of a person's mind and also the situation in which he had been placed at the relevant time.

Thus, the right of self-defence is not based on the honesty or good faith of the victim of an attack, but on the fact of reasonable grounds for his fear of death or bodily harm i.e. the fear of a reasonable man in those circumstances. There is however, no standard of such reasonable man. There is no test of the belief of a reasonable man whether an attack on him is with or without felonious intent. He alone knows what he really believed. Others can only judge him on the basis of what was apparent to an ordinary man at that time. Some courts in the USA charge the jury to "put yourself in the place of the defendant, would you have done as he did, would you as judicious men believe what he believed and acted on it as he did". The rule is that in determining whether an accused charged with having caused death or grievous hurt, was in danger of death or great bodily injury so as to make his act justifiable on the ground of self-defence the Court must view the circumstances from the accused's standpoint at the time they reasonably appeared to him.

8.4. ***Real and Immediate Threat***

For the purpose of there being a reasonable apprehension, the threat must be real and immediate. Only if it is so is the accused entitled to exercise the right to private defence.

47 *Ramzani v. State*, AIR 1925 All. 319.
48 1975 Cri. L.J. 132.

The Lahore High Court, in *Bishan Singh v. Emperor*[49] ruled that it is the accused's apprehension of immediate threat which is important and not the injuries suffered by him. The test of immediate threat is belief in imminence of danger and is based on some reasonable ground. Justification for culpable homicide in self-defence exists when there is imminence of danger, the apprehension of danger is immediate and only against actual assailants and not against possible assailants in the future.

In *Mohd. Rafi v. State*[50] the Court ruled that when persons engaged in a lawful act saw the aggressors moving towards them in a menacing attitude they need not wait till the latter actually commence the fight. The Court added that they can themselves go ahead, meet and attack them as the arrival of the aggressors meant a distinct threat of attack, causing reasonable apprehension to the body.

In Canada the courts have adopted a somewhat similar approach in emphasising the importance of real and immediate threat for the apprehension of danger to person or property. In *R. v. Dioron*[51] where an awkward and intoxicated person was pursued by a man holding a bottle and who had previously beaten him up, the pursued shot at him. Here the accused (the man who was pursued) was having reasonable and probable grounds for belief that the pursuer intended to strike him and had ability to do so.

Thus, it can be seen from the above decisions that for there to be a justified exercise of the right to private defence, the threat to body/property must not only be real, but it also must be immediate, needing the exercise of the right as a result of its immediacy.

8.5. ***Temperament of the Assailant***

The temperament of the assailant is one of the prime considerations of reasonable apprehension. It should be judged from all the surrounding circumstances, such as the reputation of the deceased for a violent, dangerous or turbulent disposition and the existence of tension of feeling and initial malice at the time of occurrence. In *Kanbi Chhagan v. State*[52] the deceased was a man of violent and irresistible temper. He had served a sentence for murdering his father. When he threatened the accused on his release from jail claiming a share in the father's property at once. He was in an excited state and threatened dire consequences. The Court held that there was reasonable apprehension on the part of the accused for picking up a shovel and hitting the deceased with it.

In *Karamat Husain v. Emperor*[53] the deceased was a brute and a

49 AIR 1929 Lah. 443.
50 AIR 1947 Lah. 375.
51 Canadian case c.f. *supra*. n. 11, p. 171.
52 AIR 1954 Sau. 34.
53 AIR 1938 Lah. 269.

dangerous man who had been suspected of murders. He was a village bully who had threatened everyone. He beat his wife, the sister of the accused, who rushed to him (the accused) for protection. She was followed by her husband who insisted on beating her. The accused then seized a hatchet and hit the deceased on the head and killed him. On these facts the Lahore High Court held that there was reasonable apprehension in the mind of the accused for himself and his sister.

Thus, it is evident, after a perusal of judicial trends that the temperament of the aggressor is of vital importance in determining whether there had been exercise of the right to self-defence based on a reasonable apprehension.

9. The Judicial tests of Apprehension

Generally there are two types of tests that the courts take into consideration when going into the reasonableness of the apprehension in the exercise of the right i.e. the objective and subjective tests. However, in recent times there has also emerged a third, combining the two, called the expanded objective test.

9.1. Objective Test

This test contemplates the response the response of the ordinary, standard and average person placed in the same circumstances as the accused. The application of such a test means that whenever an ordinary reasonable person believes that the conduct of another appears to be the conduct of an aggressor and that the aggression is imminent, the accused can use any reasonable amount of force, as such an ordinary reasonable man would use in the circumstances, until the aggression is reasonably believed to have ended or the danger is no longer present. In other words, the situation is assessed objectively in order to give benefit of private defence to the accused.

Though this test does not take into account any of the subjective or psychological conditions of the mind of the defendant, it accepts all physical, material and surrounding circumstances to be those of the standard person. The mental state contemplated in this test is that of the standard person as it would function in the mind of the accused and under the same physical conditions.

9.2. Subjective Test

This is the traditional test of the American courts. The subjective test examines the mental state of the accused, his or her own beliefs and feelings caused by the sway of the events, without regard to any standard of reasonable conduct. In other words, the circumstances under which the accused acted in the exercise of the right to private defence are ascertained subjectively. It means the psychological feelings of the accused in the particular situation are given due weight in the test.

Reasonableness of apprehension is attributed to the individualistic

attitude of the accused in the circumstances of the case, which sometimes, may lead to injustice. Subjective assessment of the situation always pays dividends to the defender. That is why the courts are not in favour of this test. However,,,,,,, it cannot be denied that what was passing in the mind of the accused (and thus the true mental state at the time) in the face of the aggression could be best known only by him.

9.3. Expanded Objective Test

This is the offspring of the two above tests. It is also sometimes called the combination test or a hybrid test. In this test, the inquiry is based on the individual as a person and is, therefore subjective, but the test goes on further to determine whether or not the individual accused acted as a reasonable person. The test requires that the accused's belief, as to the various elements of the right, appears reasonable to him or her. It is assumed that he or she is reasonable. The accused is thus judged by his or her own standards of reasonableness.

This test has often been criticised as inaccurate and misleading. It attempts to look at the psychological and individual state of mind of the defendant and then determine its reasonableness according to the standards of reasonableness of that same individual. In the balancing process of social interest versus social harm, this test contemplates the inclusion in such balancing of subjectivity which leads to greater individualised justice versus objectivity which by virtue of its generalisation and standardisation gives more stability to the law but less personalised justice.

It is submitted that this new hybrid rule seems to combine the advantages of the two prior tests and must get its fair trial in the courts, this approach being personalised and better suited to meeting the ends of justice.

9.4. The Retreat Rule

One of the much debated issues in connection with the right to private defence is whether a person, in the light of aggression and consequent danger to body/property, has a duty first to investigate the practicable possibility of retreating from the scene and avoiding the conflict rather than actively defending himself using his designated right of self-defence.

The retreat rule had application in England in all cases of self-defence. However, it is evident from English law that this rule will not apply where attack is made with intent to murder. This has been summarised in Halsbury's Laws of England which reads, "A person lawfully defending himself or his habitation is not bound to retreat or to give way to the aggressor before killing him; he is even entitled to follow him and to endeavour to capture him; but if the aggressor is captured or is retreating without offering resistance and is than killed, the person killing him is guilty of murder.

Another important issue with regard to the retreat rule has been discussed in *Julien's case*[54]. The main issue was whether a person who has been forewarned of an attack ought to leave the place where he is. The court held that there is no duty to retreat until the parties are atleast within sight of each other and the threat to the person relying on self-defence is so imminent that he was able to demonstrate that he did not mean to fight.Ordinarily the retreat rule forbade the use of deadly force by one to whom an avenue for safe retreat was open. However, the modern trend is that a person who is attacked is entitled to stand his ground and repel force by force.

In America, however, the matter has frequently considered, and in several justifications it has been held that if one who, being without fault, is murderously assailed may stand his ground and justifiably kill his assailant. On the other hand, in several jurisdictions it is held that if the necessity of killing may be safely avoided by retreating, the party assailed must retreat rather than kill.[55]

Today, the continental law is generally favourable to the right to stand one's ground. The two reasons given for this are that a man cannot be constrained to take the risk even of a retreat that *seems* safe and secondly, he cannot be obliged to yield is honour and dignity by retreat.[56] This view has been reaffirmed repeatedly in India in cases such as *Mohd. Khan v. State of M.P*.[57] which held that the law does not require a law-abiding citizen to behave like a coward, further holding that there is nothing more degrading to the human spirit than to run away in face of danger.

10. When Right of Private Defence exceeding to Causing Death?

The effect of exceeding the right of private defence can be divided into two categories, homicidal and non-homicidal. These fall under three categories. First, the cases in which the accused *bona fide* for the purpose of self-defence uses force but on account of error of judgement or due to loss of self-control in the heat of the moment or suddenness of the affair causes more harm than is necessary. Second, those cases where unnecessary harm or injury is inflicted after the apprehension of danger has ceased to exist. The third kind covers those cases in which the conduct of the accused and the circumstances of the case reveal that the accused intended to cause more than necessary harm from the very beginning. In the last class of cases, the question of mitigation in view of the *mala fides* on the part of the wrong-doer cannot as a rule be said to arise. In such cases the right of self-defence is only a cloak for unjustifiable acts. In the second class of cases whether or not the question of mitigation arises, depends upon the presence

54 [1969] 2 All E.R. 856.
55 Joseph Beale, "Retreat from a murderous assault", *Harv. L. Rev*., Vol. 16, (1902), p. 573.
56 *Supra.*, n. 11, p. 189.
57 1972 Cri.L.J. 661 at 665.

or absence of *mala fides*. The Canadian case of *R. v. Fraser*[58] illustrates the reasoning behind this position of reducing excessive self-defence to manslaughter and not punishing for murder, holding that this defence (self-defence) reduces the degree of liability not because of lack of intent because an intent to kill or injure, where force is permissible, is less morally culpable than the intent to kill or injure recklessly under other circumstances. Where the act is done in a spirit of revenge, reprisal or retaliation, or is by its very nature extremely reckless or cruel it is hardly distinguishable from the acts falling in the third category and there is no occasion for the courts to exercise leniency in such matters.

The rationale for a middle ground between murder and successful exercise of the right of self-defence is:-

- some cases fall short of moral culpability normally associated with murder
- "honest belief" on the part of the accused that he is using reasonable force is inconsistent with the mens rea required to establish murder.[59]

The second exception to Sec. 300, IPC, states that if the accused, in good faith, exceeds the right to private defence provided to him in law, so long as there is absence of any sort of premeditation as to the commission of the act and also no intention to do more harm than is necessary for the purpose of the protection of the person or property in question, such accused cannot be held guilty of murder but only culpable homicide not amounting to murder.

The rationale behind this exception being made to murder is that such acts falling under this provision are very closely linked with the law of private defence which is rightfully used. The main reason for separating the two degrees of culpability of homicide in regard of acts exceeding the right of private defence in good faith is that the law itself invites acts that are on the verge of the crime of voluntary culpable homicide by providing the specific right of private defence of person and property.[60] The fact that the same or very similar act will get a total reprieve under Sec. 96, IPC, reduces the culpability of all acts done in good faith exceeding the right of private defence and resulting in death.

The right to private defence as a general exception is contained in Ss. 96-106, IPC. Under these sections, the right to private defence extends to the voluntary causing of death to the wrongdoer if the offence or attempt to commit the offence is of a certain description enumerated therein. One of the requirements, however, is the existence of reasonable apprehension of the consequences of the offence. Reasonable apprehension would mean that any honest mistake as to

58 (1980), 55 C.C.C.(2d) 503 c.f. 23 *Crim. L.Q*. 329.
59 *Palmer v. The Queen*, [1971] 1 All E.R. 1077 (PC).
60 Draft Penal Code, note M, pp. 146-7, c.f. K.D. Gaur, *Criminal Law Cases and Materials* (2nd ed.) (Bombay, 1985), p. 434.

circumstances, or as to amount of force required for the exercise of the right would have to be reasonable failing which it would amount to exceeding this right and therefore an exception to murder, not a general exception.Even Sec. 79, IPC has been interpreted as requiring a reasonable mistake, or atleast due care, inspite of which a mistake is caused.[61] The exception to Sec. 300 also requires 'good faith' i.e. due care as defined in Sec. 52.

The accused may make different types of mistakes. First, he may be mistaken as to the actual situation. For example, he may think himself threatened by the deceased when, in fact, the deceased in merely joking. Second, he may correctly understand the situation before him but makes a mistake as to the quantum of force required to defend himself in the circumstances. Third, the accused may be mistaken both as to the actual situation and as to the measure the supposed situation requires to be taken.

An unreasonable apprehension therefore, would not be covered by the general exception, and in order to fall within Exception 2 to Sec. 300, due care is a requisite. This exception to murder, therefore, covers the situation of an unreasonable apprehension in good faith.

In contrast to this, British law[62] allows for an unreasonable mistake to also fall within the right of private defence holding that the accused is entitles to be tried on his actual beliefs and not on the probable beliefs of a reasonable man in his position.

Common law generally demands reasonableness to be an essential characteristic of a mistake as a defence. The right to private defence however, has been specifically excluded from this trend in recent times as elucidated in the above-cited cases. Indian law, on the other hand, under Sec. 79, IPC may allow for an unreasonable mistake, but for private defence reasonableness has been made a requisite. Considering that the right to private defence is a general exception because of a person's honest belief that he has a right to defend his person and property, when there exists an honest but unreasonable belief as to circumstances, his actions in those circumstances (as he believed them to be) should also be made a general exception. This debate is based on the clash between the subjective and objective tests of reasonableness.

The basic and essential characteristics of this exception are that although the person is not expected to weigh, in golden scales, the amount of force to keep within the right,[63] there should not be blatant excursion of the right. If there is such excursion, it would amount to the exceeding of the right to private defence

61 *Keso Sahu v. Saligram*, 1977 Cri.LJ 1725, elucidates this proposition.

62 *Williams*, [1987] All E.R. 411, *Jackson*, [1984] Crim. L.R. 674, *Fisher*, [1987] Crim. L.R. 334 (CA), *Bedford v. R*., [1988] A.C. 130, c.f. Michael Jefferson, *Criminal Law*, (London, 1992), p. 207.

63 *Yogendra Morarji v. State of Gujarat*, AIR 1980 SC 660.

and would therefore not be a general exception. Again, however, the accused must not be the aggressor or inflict injuries on the deceased maliciously or vindictively and not in self-defence.[64] Therefore, Exception 2 to Sec. 300 covers a situation between a legal and justifiable right to private defence based on honest and reasonable apprehension and blatant abuse of this right in order to intentionally inflict harm on the other party. The exception envisages a person labouring under an honest but unreasonable belief exercising so much force as is unnecessary under the circumstances but doing so 'in good faith' and without an intention to cause unnecessary harm. This mental state is illustrated in the case of *Vidhya Singh v. State of Madhya Pradesh*[65] where the Supreme Court held that when the appellant was encircled and assaulted, he in the heat of the moment, fearing that he will be dealt with severely, went on attacking those who encircled him and therefore, conviction under Sec. 304 was justified.

Considerable advantage has been taken of the vagueness of the term 'exceeding' in the exception. No quantum as to the amount of excess force used has been laid down. Consequently, the courts have adopted a lenient position in this regard. Examples of this are in cases like *Tara Chand v. State of Haryana*[66] where even though the injuries inflicted on the deceased could not be justified on grounds of defence of property, (even after the deceased fell, he was injured in a vindictive and revengeful spirit) yet, it was held that the right to private defence had been exceeded and Sec. 304 applied.

Similarly, in *Nanhu Khan v. State of Bihar*[67], where serious injuries inflicted on the deceased were not necessary for protecting property from him and the indiscriminate attack was continued even after the deceased fell down while the accused received only minor injuries, it was once again held that conviction would only be under Sec. 304 and not Sec. 302. Again, in *Ghansham Dass v. State (Delhi Admin.)*,[68] the deceased had committed criminal trespass, but he was not armed and no possible apprehension of death or grievous hurt to the accused could have arisen. It was held that by using a dangerous weapon, the right to private defence of property had been exceeded. The accused was hence held guilty under Sec. 304.

However, it is submitted that these cases do not take into account the specific inclusion of the phrase 'without any intention of doing more harm than is necessary.' A more apt decision can be found in the case of *Ladha Gova v. State*[69] where, when the accused on seeing the deceased stealing his sugarcane fetched an axe and gave a blow on the head of the deceased who immediately fell

64 *Mohd. M.S. Hameed v. State of Kerala*, AIR 1980 SC 108.
65 AIR 1971 SC 1857.
66 AIR 1971 SC 1891.
67 AIR 1971 SC 2143.
68 AIR 1979 SC 44.
69 AIR 1951 Sau 1.

unconscious and was completely at the mercy of the accused, it was held that after the deceased had fallen down it could not be said that the right of private defence still continued and extended to inflicting two more fatal blows to the deceased so sever and brutal as to lead to the inference that the accused had the intention to cause the deceased's death. This decision can also be justified on the ground that the mental element in the right to private defence or even to the exception does not extend to such levels.

Thus, it is submitted that there is required a rethinking along new lines, possibly the expanded objective test for ascertaining the liability under excessive exercise of the right to self-defence. The foremost consideration however, should be that this right should not be misused as a tool for premeditated murder with a sense of revenge. The sanctity of the right must be protected and the jurisprudence behind its existence has to be appreciated to apply its true content satisfactorily.

11. When Right of Private Defence Does Not Arise?

11.1. Sudden Fight

Decided cases show that the right the right of private defence is not maintainable to either party in a sudden fight as it is difficult to ascertain the aggressor in such a situation. In *Paras Ram v. Rex*[70] there was a sudden quarrel with regard to the ownership of cattle. The Allahabad high Court held that it was not a case of two persons having come predetermined to fight and measure strength, but was a case in which there was bickering over cattle through an exchange of abuses. This conferred no right on the deceased to attempt to strike the accused in the first instance, but yet it was difficult to ascertain who was the aggressor in this case and it was held that the accused could not avail of the defence of self-defence.

11.2. Free Fight

In re Erasi Subba Reddi[71] it was held that where there is a spontaneous fight between two parties, each individual is responsible, for the injuries he causes himself and for the probable consequences of the pursuit by his party of their common object. He cannot plead that because he might at any moment be struck by some member of the other party his own blows were given in self-defence.

However, in *Jumman v. State of Punjab*[72] the Supreme Court held that where a mutual conflict develops and there is no reliable evidence as to how it started and as to who was the aggressor it will be correct to assume private defence for both sides. This brings up the interesting issue of whether the statutory framework present in India enables two people in conflict with one another to

70 *Paras Ram v. Rex*, AIR 1949 All. 274.
71 AIR 1943 Mad. 492.
72 AIR 1957 SC 469.

concurrently exercise the right to private defence as against each other. In this case the vital aspect of one of them having to be the aggressor seems to be missing.

11.3. Aggressor initiator of the attack

The aggressor cannot claim the right of private defence. In *Kishan v. The State*[73] the appellant and his co-accused were the aggressors. The deceased inflicted blows on the co-accused in exercise of the right of private defence. The appellant and his associate being the aggressors could not take benefit of the right of private defence.

The question of who was the aggressor becomes important in cases where the plea of self-defence is raised. The Supreme Court re-affirmed the law in[74] that a person who is an aggressor and who seeks as attack on himself by his own aggressive act cannot rely upon the right of self-defence, if in the course of the transaction, he deliberately kills another whom he had attacked earlier. Thus, in deciding the question of sanctity of bodily interest the courts are inclined to favour the ones who are victims of the initial aggression.

This decision brings out a paradox. It results in the situation where the accused, although the aggressor cannot exercise the right of self-defence if the victim of his primary attack exceeds his right to private defence. It is an important question which has not been addressed whether the excessive self-defence can be taken as a freest aggression which causes a reasonable apprehension in the primary aggressor of danger to his life by virtue of the misuse of the right. It is submitted that although the accused has brought the decision onto himself there should be no condonation for wilful and careless exercise of the right to self-defence, often intentionally over-stepping the legal boundaries of the right. However, on the other hand the decision of the Supreme Court in *State of U.P. v. Ram Swarup*[75] is also most reasonable. It held that the aggressor can avail of the right only in most exceptional circumstances, and that he should first have made all efforts to escape from the situation already created by him, thereby in a way negativing aggression.

11.4. Acts of Private Defence

The right of private defence is not available against the act of private defence. The Supreme Court in *Munney Khan v. State of M.P.*[76] stated that the right of self-defence is available against an offence, and therefore, where an act is done in exercise of the right of self-defence, such act cannot give rise to any right of self-defence in favour of the aggressor in return. This decision has been laid the groundwork for a number of successive cases reaffirming this view.

73 AIR 1974 SC 244.
74 1983 All. C.R.R. 355 (SC).
75 AIR 1974 SC 1570.
76 AIR 1971 SC 1491.

In this regard, the above mentioned debate over the right of self-defence of the initial aggressor against the excessive self-defence of his victim is reopened. It cannot be disputed that an excessive exercise of the right of self-defence is an offence under the law. Hence it must be the right of the accused to immediately defend his self in the face of such offence. However, holding this view would lead to a number of practical difficulties as the reasonableness of the first defence must be ascertainable objectively by the aggressor, and secondly the law is not to encourage the commission of offences and does not seek to give such an offender any additional rights.

11.5. When the Assailant runs away

The Courts have almost unanimously held that the right ends when the assailant starts running away. The Supreme Court held in *Jai Dev v. State of Punjab*[77] that once the aggressor runs away there was no danger either to property or the body of the accused an longer and that the right could not be exercised.

In *State of M.P. v. Saligram*[78] it was held that where the deceased was trying to run away from the scene of the occurrence and the accused prevented him from doing so, the assault on the deceased was unjustified.

Thus, this principle tries to reaffirm that private defence is a limited right meant to be used sparingly, only when the danger to body or property exists and not after its termination.

11.6. Against an Unarmed or Unoffending Person

The right of private defence does not exist in the situations where the individual is unarmed and unoffending including the intervener. Under such a circumstance, there would be no apprehension of danger from such a person and as such there is no justification for exercising the right of defence under such a circumstance.

In *Mukhtiar Singh* v. *State* [79] it was held that self-defence as a justification does not extend to the causing of harm to an unarmed and unoffending intervener. Many cases[80] have held that when a person has fallen down on the ground, his weapon already having been wrested from him, no case for exercising the right of private defence lay.

However, in *Baburao Vithal Survade v. State of Gujarat*[81] it was held that there is nothing in the law of private defence to suggest that the right of private

77 AIR 1963 SC 612.
78 1971 Jab. L.J. 292.
79 1971 Cri. L.J. 1049.
80 *Ramesh v. State*, AIR 1969 Tripura 53; *Gurbachan Singh v. State of Haryana*, AIR 1974 SC 496; *Hari Meghji v. State of Gujarat*, AIR 1983 SC 488.
81 1972 Cr. L.J. 1574.

defence of body cannot be claimed against an assailant who is not armed with some sort of weapon. Thus, under exceptional circumstances the right of private defence may be available even against unarmed persons.

Thus, as society has progressed, the right of self-defence has needed streamlining and constraint by use of these restrictions to become a universal and well-defined right

12. Conclusion

The right of private defence is basic to any society. It is now well established as a justification for otherwise criminal conduct. Even the UN has recognised its importance as a universal human right. It is however as sensitive an area as it is important.

The right of self-defence has not been treated with due precision. In the case of self-defence pardons must not become automatic because it will lead to an absurd interpretation of law and will abet and encourage homicide. The act done in self-defence should be shown to be defensive and not offensive and there must be no flavour of revenge or retaliation in it, the act being of a purely instinctive nature. The statutory provisions seem to be most suited to the Indian circumstances and are clearly drafted. Nonetheless, this statutory right is given life by the interpretation it receives. It is only through a comprehensive understanding of the jurisprudence behind the general exceptions as justifications and the concept of self-defence in particular that a dynamic and meaningful interpretation will arise. As Professor Glanville Williams suggests, the force used in self-defence should be termed as "protective force". Such force may be used to ward off unlawful detention and to escape from such detention.[82]

With a changing society there always arises a need to adapt and modify the law to the circumstances.

One of the innovative new approaches is of Richard Mahoney who believes that the important stets of self-defence merits more seriousness. He believes that the defence is so basic to the element of an crime that the concept of presumption of innocence must prevail and the burden of proof should be shifted to the prosecution who would be required to prove beyond reasonable doubt that the accused committed murder that *was not undertaken in self-defence*.[83] This approach is able to strengthen the respect and sanctity that criminal law gives to the concept of sef-defence.

The Model Penal Code of USA[84] suggests a new approach. If an accused

82 Glanville Williams, *Text Book of Criminal Law* (London, 1978) p. 449.
83 Richard Mahoney, " The Presumption of Innocence- A New Era", Canadian Bar Review, Vol. 67, (1988), p.1.
84 *The Model Penal Code* (USA, 1962), p. 952.

acts under a mistaken belief that the action was justified in self-defence or defence of others but was negligent or reckless in forming this conclusion, the accused is liable for any applicable crimes for which negligence and recklessness is sufficient for liability. This introduces a new form of culpability which could well be recognised in India to constrain the reckless, yet not malicious exercise of private defence.

One other issue that needs further discussion with regard to excessive self-defence is the *'Black or White but no Shades of Grey'* approach taken in *Palmer v. The Queen*.[85] Therein, it was held that in any given case an accused may either succeed or fail on the defence, there being no middle-ground type of verdict. This is a most interesting approach which has not really got sufficient recognition. This is propounded by those who believe that the concept of excessive self-defence should be done away with. The defence being in the form of a right, it may either be exercised successfully or not.

Parliament has always been receptive to change. It has even recognised the liberal scope of self-defence, wherein the right covers defence of all persons irrespective of their relationship. It includes anyone under a person's immediate protection. It has restricted the right where necessary and expanded it where possible. As long as the legislator is able to judge the pulse and needs of the society he seeks to protect, and remain dynamic in his approach, the law will always be in touch with the people and lives will be in safe hands. A fair trial could be given to the Expanded Objective Test, in place of the Objective or "reasonable man" test, as it seems more just and keeps well within the framework of the jurisprudence behind the general defences.

85 [1971] 1 All E.R. 1077 (PC).

Rule of Reason under Competition Law in India

Nandini Harsh[1]

Since the inception of Commission Act 2002, various judicial interpretation of the anti-trust act has resulted into division of lawful and unlawful conduct under competitive agreements. The conduct of the business firms or companies in the market which were not presumptively unlawful was evaluated under the rule of reason to determine whether the conduct at issue should be condemned or not. Rule of reason is applied to determine the restrictive business practice.

The objective of the competition policy in India is to create an active competitive environment and to keep a check on the anti competitive agreements. The rule of reason has been applied to Indian anti thrust agreement to determine whether it deter competition and cause adverse appreciable effect in the relevant market. This rule is a legal device which can effectively distinguish arrangements among the enterprises or person or companies that detriment the competition and causes anti thrust harm. It is a legal means applied by the competitive enforcement agencies or courts to determine the benefitting characteristics of restrictive business practises against its negative or harmful characteristics in order to reach to decision that practise should be prohibited or not.

Some market restrictions which initially give rise to competition issues may on further assessment found to have valid efficiency enhancing benefits.

1. Problem to be investigated

The present study intends to accentuate that rule of reason is a legal approach to evaluate the conduct of person in restrictive business practise against its anti competitive effects. It deals with meaning, historical perspective and rule of reason applicable to U.S.A and U.K.

Objectives:

To examine the Rule of Reason under competition law in order to understand its applicability on the anti competitive agreements in India.

Research Question:

- What is rule of reason and how it is applied to Indian competition law?
- How rule of reason evolved in competition law?
- How rule of reason is applied under foreign laws?

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2. Historical Perspective of Rule of Reason

The American Sherman Act 1890 has been taken as the evolving point for the modern competition law. The Act was enacted as a protest against companies which exploited their monopolies to take advantage of the peasants and other traders. Many trusts also dominated the industries which worked on their own skills and strategies to use unfair, exploitative and oppressive means to suppress the competitors and push them out of the competition in the relevant market[2]. Section 1 of the Sherman Act provides that 'every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade….is hereby declared to be illegal'. Whereas section 2 of the Act mentions that any individual who monopolises or makes any attempt to monopolise through combination or conspiring with other person then he is liable to punishment[3].

However the Sherman Act 1890 does not pronounce any new standard of law, but make available old and established principles of the common law to the competition market. It also did not in clear terms, define or identify the conduct relating to competition as detrimental in nature. Senator Sherman approved that interpreting in legal language the conduct or behaviour of lawful and unlawful combinations was complicated, and must be left for the interpretation of the courts[4]. Thus the Sherman Act provides discretion which is to be exercised by the court in anti thrust agreement. But this discretion should be exercised subject to the provision of the Act.

In *Standard Oil Co. of New Jersey v United States*[5], the US Supreme Court developed this canon and applied it in the interpretation of the Sherman Act. It was held that only combinations and contracts unreasonably restraining trade are subject to actions under the anti thrust laws. Possession of monopoly power is not in itself illegal. It was further held that

"When…the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several states, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by congress."

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2 Richard Whish and Brenda Sufrin , Article 85 and The Rule of Reason, Competition Law, The International Library Of Essays In Law And Legal Theory.

3 Section 2 lay down"every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce . . . shall be deemed guilty.

4 *United States* v. *U.S. Gypsum Co*., 438 U.S. 422, 438 (1978). the Sherman Act does not establish which conduct should be criminally or civilly convicted; it is left to the discretion of the judge. Over many years, the Congress enhanced the maximum fines and term of imprisonment for Sherman Act violators.

5 221 U.S 1 (1911)

For nearly a decade, then, courts have explicitly held that the Sherman Act restricts only unreasonable restraints, which judges have interpreted in the context of effect of economy. In modern parlance, courts are applying this "Rule of Reason" while considering whether a contract "harness" competition or, instead, "destroys" it, by creating or exercising market control. Some agreements are so clearly damaging that the courts criticize it with little analysis, considering it "unreasonable per se." Most agreements bear such criticism, and undergo more cautious inspection, which courts call "the Rule of Reason." Courts, scholars and the enforcement agencies have given a three step test to govern analysis under Rule of Reason.

1) A plaintiff must establish a prima facie case by indicating that the restraint exhibit physical anticompetitive harm, which generally consists of actual adverse appreciable effects on the competition such as increased price or reduced output.
2) The defendants must establish that their agreement exhibits pro competitive benefits which overshadow the harm implied in plaintiff's prima facie case.
3) Even though the defendants can make such a presentation, the plaintiff can still accomplish by proving that the defendants can achieve the same benefits by way of a less restrictive trade practises. This three step test helps courts distinguish those agreements that "harm" or "destroy" competition, by creating or exercising market power, from those that encourage it.

3. Rule of Reason in India under Competition Act, 2002

Section 3 (1) of the Competition Act 2002 provides for the anti competitive agreements[6].

This section can be divided into three components

a) The agreements should affect competition within India.

b) The affect should be appreciable, that is, not minimal
c) It should either actually affect or expected to affect competition.

The affect on the competition should be the result of the agreement between enterprise or association of enterprise or person or association of person. The consequential effect may be unintentional. Here damage to competition is by virtue of agreement which include any understanding or formal arrangement. The

6 S.3(1) "No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India."
S.3(2) All such agreements entered into in contravention of the aforesaid prohibition shall be void.

expression agreement has been defined in S. 2 (b) of the Act[7]. It implies that the said agreement not to be in formal document to be entered between the parties. Such agreement can be inferred from the intent, behaviour and objectives of the parties. If the parties make an agreement which has adverse appreciable effect on the competitive markets then direct evidence of such agreement may not be found and it is to be proved by the facts and circumstances of the case.

Agreements are considered to be illegal when it imposes unreasonable restriction on the competition which is tested by rule of reason. It is also required that the parties to the agreement are engaged in the manufacture of similar products and are rival companies. It is not possible to provide an exhaustive list of agreements that attracts the attention of such provision and rule of reason needs to be applied to individual case. An illustrative list would include:

a) Agreement which fixes purchase or selling price
b) Agreement which limits quantities, markets, technical development or investment
c) Agreement dealing which territories to be served and source of supply
d) Agreement providing dissimilar treatment of equivalent transaction with their trading parties that place them at disadvantage.

These observations were made by the Raghvana Committee relating to the anti competitive agreement. Sec. 3 of the Act divides the anti competitive agreement into 2 types, that is, vertical[8] and horizontal[9] agreements.

3.1. ***Horizontal Agreement: S.3 (3)***

Horizontal agreements are agreement entered into between companies or firms which are at the same level of competition[10]. Generally, the rule of reason

7 "Agreement" includes any arrangement or understanding or action in concert-
(i) whether or not, such arrangement, understanding or action is formal or in writing; or
(ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings;

8 Sub-section (4) of section 3 deals with "Vertical Agreements".

9 Sub-section (3) of section 3 deals with "Horizontal Agreements".

10 S.3(3) lays down any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which—
(a) directly or indirectly determines purchase or sale prices;
(b) limits or controls production, supply, markets, technical development, investment or provision of services;
(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;
(d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition.

do not applies to the horizontal agreements as these agreements are presumed to have adverse appreciable effect on the competition. Where it is proved that particular agreement is covered under S.3 (3) of the Competition Act 2002 then it is per se illegal. Horizontal agreements are those agreements which are between enterprises at the same level of the production chain. For example, agreement between two rivals is a horizontal agreement. Therefore, the agreements which is between rivals for fixing prices of products or for restricting production of goods or for sharing markets, there is a presumption in the Act that such agreements cause appreciable adverse effects on competition. Cartel is the most pernicious horizontal agreement that adversely affect the competition[11].

3.2. ***Vertical Agreements: S.3 (4)***

Vertical agreements[12]are those agreements which are not between rivals and at the different level of competition. These agreements will be in contravention of s.3 (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India. Vertical agreements are those between undertakings operating at different levels of the production chain. For example, an agreement between the manufacturer and a distributor is a vertical agreement. The presumptive rule does not apply to vertical agreements. The

11 Competition Commission of India available at www.cci.gov.in.

12 S. 3(4) agreements entered into between companies or firms which are at the different level of competition in the any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including

a) tie in arrangement
b) exclusive supply agreement
c) exclusive distribution agreement
d) refusal to deal
e) resale price maintenance

shall be an agreement in contravention of sub-section (1) if such agreement causes or likely to cause an adverse appreciable effect on competition in India.

Explanation of section 3(4): for the purpose of this section

(a) Tie-in arrangement:

These are agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods.

(b) Exclusive supply agreement:

It is an agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person.

(c) Exclusive distribution agreement:

These agreement limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods.

(d) Refusal to deal:

These agreement restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought.

(e) Resale price maintenance:

These agreements sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

question whether the vertical agreement is causing appreciable adverse effect on competition is to be determined by rule of reason, which essentially means that the positive as well as the negative impact of such agreement on competition will have to be taken into consideration before reaching to any end[13]. Under the rule of reason, vertical agreements are generally treated more compassionately than horizontal agreements. This is because vertical agreements can often perform pro-competitive functions. Such agreements are usually considered anti-competitive if one or more of the firms that are party to the agreement have dominant market power, as it is considered abuse of dominant position.

3.3. ***Inquiry into Agreement: S.19 (3)***

A collective reading of section 3(1) and section 19(3)[14] of the Act show that the expression appreciable adverse effect on competition used in section 3 (1) has not been defined in the Competition Act 2002. However, s.19 (3) of the Act states that while determining appreciable adverse effect on competition under section 3 of the Act, the Commission shall into consideration all or any of the factors mentioned in s. 19(3). Thus, in assessing whether an agreement has an appreciable adverse effect on competition, both the harmful and beneficial effects are to be pointed out.

4. Rule of Reason under Foreign Law

4.1. **American *Competition***

Under U.S competition, 3 general principles of analysis have been developed to determine competitive reasonableness:

a) Certain conduct that are clearly anti competitive which are per se unreasonable. Here it is required to prove that only conduct occurred and not its competitive unreasonableness and accused are excluded from justifying the restraint as reasonable[15].
b) The contract, combinations or conspiracies in restraint of trade that are not per se illegal are considered under rule of reason.

13 Competition Commission of India available at www.cci.gov.in last visited the site on 25.5. 2015.

14 S.19(3) lays down the Commission shall while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard, to all or any of the following factors, namely:-
(a) Creation of barriers to new entrants in the market;
(b) Driving existing competitors out of the market:
(c) Foreclosure of competition by hindering entry into the market
(d) Accrual of benefits to consumers
(e) Improvements in production or distribution of goods or provision of services: or
(f) Promotion of technical, scientific and economic development by means of production or distribution of goods and provision of services.

15 In re Cardizem CD Antitrust Litigation, 332 F. 3d 896, 907, 2003 FED App. 0195p (6th Cir. 2003) (rejecting defense argument of pro competition and lack of anti competition of per se illegal horizontal agreements between companies).

The rule of reason inspects and balances various factors relating to competition in taking account whether particular business practise have pernicious effect on competition.

c) There is also third approach which draws heavily from both approaches mentioned above, that is, per se and rule of reason. Finder of fact must fulfil initial requirement but still defendant has a chance of defending its action by providing competitive justification[16].

The third categories have not been easy to define by the courts. Due to this, some practises which has been analysed under one approach have been later brought under different approach. In *United States v. Arnold, Schwinn & Co*.[17], the Supreme Court held that vertical restrictions laid by manufacturers on geographical territories were per se illegal. Whereas the court reversed this decision in *Continental T.V Inc. v GTE Sylvania Inc*[18], vertical non price restrictions imposed by manufacturers on its distributors are to be examined under rule of reason.

4.1.1. ***Test of Rule of Reason***

Before establishing the unreasonableness of the conduct, the plaintiff must prove that the alleged conduct have harmful effects on the competition in the relevant market[19]. The rule of reason inquiry starts with the recognition of relevant market which means the product or services with which or geographical area within which, the defendant competes with other and alleged restraint is felt. Plaintiff must prove that defendant hold adequate market power to actually threaten competition. Market power is the ability to control prices or exclude competition.

The true test is whether the restraint applied regulates and encourage competition or whether the restraint suppress or wipe out competition. If plaintiff discharges this obligation then defendant can justify its behaviour as it is pro competitive which outweighs its harmful effect on competition.

In *State Oil Co. v Khan*[20], the court prescribes rule of reason as "most antitrust claims are analysed under rule of reason, according to which the finder of fact must decide whether the questioned practise imposes an unreasonable restrain on competition, taking into account a variety of factors, including specific

16 Susser v Carvel Corp 381 U.S 125 (1965) (tying restrictions was held to be pro competitive).
17 388 U.S 365 (1967).
18 433 U.S 36 (1977).
19 Copperweld Corp. v Independence Tube Corp., 467 U.S 752, 768 (1984) (court held rule of reason involves an inquiry into the market power and structure intended to access combined actual effect).
20 522 U.S 3 (1997).

information about relevant business, its condition before and after the restraint was imposed, and restraint's history, nature and effect".

The U.S Department of Justice and Federal Trade Commission Antitrust Guidelines for Collaborations among Competitors (April 2000) provides that if participants of economic activities made an agreement which is reasonably related to combination and its pro competitive advantages, the agency examines the agreement under rule of reason though it is of type that might be considered per se illegal.

4.1.2. ***Quick Look: New Version of Rule of Reason***

A budding notion in recent years has been abbreviated version of the rule of reason which is known as quick look. The court had traced the development of quick look to *National Collegiate Athletic Association v Board of Regents of University of Oklahoma*[21] and *Federal Trade Commission v Indiana Federation of Dentist*[22]. Each of these cases which have shaped the foundation of 'quick look' under rule of reason, the court held that even an observer having simple understanding of economics could reach to conclusion that arrangement in question have anti competitive effects on markets and consumers.

The court adopts quick look approach when there is greater probability of ascertainment of anti competitive effects. It is an intermediary benchmark. It applies where per se condemnation is inappropriate, but where no complex analysis is required to demonstrate the anti competitive features of an innate restraint[23]. However this approach is exception and not the mean.

4.2. ***U.K. Competition***

In United Kingdom, there are two arrangement of competition law which is based on domestic law, that is, Competition Act, 1998 and European Community law. The test of rule of reason is applied to chapter1 & 2 of the Act. Chapter 1 consist of 4 elements[24]

- an agreement, decision or concerted practice,
- between undertakings,
- which may affect trade within U.K,
- which has its object or effect, prevention, restriction and distortion of competition.

Where the agreement or concerted action affects trade between members

21 468 U.S 85 (1984).
22 476 U.S 447 (1986).
23 United States v Brown University, 5 F.3d 658, 669, 85 Ed. Law Rep. 1027 (3d Cir. 1993).
24 Chapter 1 of the Competition Act 1998 prohibits any agreement and concerted practise which has the object or effect of preventing, restricting or distorting competition unless an exemption from prohibition applies.

States of European Union (EU), it is also prohibited by the Art.101 of the Treaty on the Functioning of the European Union (TFEU). Here the prohibition covers not only formal written agreement but also gentlemen's agreement and other kind of informal arrangements or understanding in oral or writing intended to be legally enforceable or not. The expression undertaking is interpreted to include any natural or legal person engaged in economic activity irrespective of its legal status and means of financing. The prohibition of the agreement is based after the careful scrutiny of each individual case depending on the facts and the circumstances. The following are the some agreements which are considered as to breach the prohibition of Chapter 1:

a) price fixing
b) collusive tendering
c) resale price maintenance
d) market sharing anti competitive trade rules and recommendation
e) rules of sporting bodies governing entry criteria

The agreement which have adverse appreciable effect on competition is prohibited and in determining appreciable effects, the Office of Fair Trading will consider approaches set out in Notice on Agreements of Minor Importance[25]. The notice mentioned that an agreement between competing undertakings will not have an appreciable effect on competition if their combined share of relevant market does not exceed 10%. The relevant threshold for agreement between non competing undertakings is 15%. The Act also prescribes certain exception of the chapter 1 such as

a) merger and concentrations
b) competition scrutiny under other enactments
c) general exclusions such as avoidance of conflict with international obligation, public policy, compliance with legal requirement etc.

Before 2004, the Act requires the parties to notify their agreements for guidance on compatibility with chapter 1 prohibition. But U.K government abolished the system of notification, now, where the agreements falls within chapter 1 prohibition but satisfies the exemption criteria, is not prohibited. It has been done to reflect the changes introduced at the EU level.

While the chapter 1 deals with anti competitive agreements between enterprises, Chapter 2 prohibitions targets anti competitive conduct by undertaking exercising significant market power. The chapter 2 restriction is based on Art. 102 TFEU and prohibits

25 Commission Notice on Agreements of Minor Importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis) (Oj C368, 22.12.01, p.12).

- abusive conduct
- by one or more undertakings which hold dominant position in the market
- which may affect trade within U.K

The expression 'abusive conduct' implies practise by dominant companies which permit it to enhance or exploit it market power to the disadvantage of competition or consumers. The following conduct has been considered to be abusive:

a) refusal to supply
b) the conclusion of exclusive purchasing, supply or distribution agreements so as to create barrier to entry
c) tying or leveraging so as to extend position of dominance from one market to another
d) pricing with exclusionary effects
e) applying discriminatory standards

The exceptions applying to chapter1 also applies to chapter 2 of the Act.

5. Conclusion

As Indian competition is newly developed with the enactment of Competition Act, 2002, it has borrowed heavily from the U.S competition which also include rule of reason. Rule of reason has been established as a legal approach to counter anti competitive agreement which hamper competition. Though the principle of "rule of reason" is not expressly mentioned in the Act but it is implicit in it. Rule of reason is a powerful tool of investigation in the hands of competition enforcement authorities. This tool is to be applied to anti-trust laws to make the smooth and better functioning of competition.

Under U.S competition law, though Sherman Act is taken as starting point of competition but it was further strengthen by the Clayton Act, 1914. It should be recommended that India should explore the option of incorporating the abbreviated rule of reason to Indian competition. A new approach of rule of reason has been developed in the U.S competition which is called quick look. It applies in cases where per se condemnation is improper, but where no intricate analysis is required to demonstrate the anticompetitive nature of an inherent restraint. Under Indian Competition law, in evaluation of the anti competitive agreements, the rule of reason does not provide any threshold limit and all vertical agreement are tested on the basis of adverse effect. This creates an unnecessary burden on competition authority.

Entire Nation in Pollution Grip: A Threat to Humanity

Shalini Nagpal[1]

"The rights of every man are diminished when the rights of one man are threatened."

John F. Kennedy

Human Rights are moral principles that describe certain standards of human behavior, and are regularly protected as legal rights in national and international law. They are commonly understood as inalienable fundamental rights to which a person is inherently entitled simply because she or he is a human being, and which are inherent in all human beings regardless of their nation, location, language, religion, ethnic origin or any other status. They should not be taken away except as a result of due process based on specific circumstances and require freedom from unlawful imprisonment, torture, and Execution.[2]

Now, the question arises whether these rights can be infringed by the people themselves. The answer is yes, by way of polluting the environment. If we see the society we find that nature has been venerated by ancient Hindus, Greeks, and other religions around the world. They worshipped all forms of nature believing that it emanated the spirit of God. Hinduism declared in its dictum that "The Earth is our mother and we are all her children". Islamic law regards man as having inherited "all the resources of life and nature" and having certain religious duties to God in using them.[3]

The problem of environmental pollution is not new in its origin. It is as old as the emergence of Homo Sapiens on the planet and it was realized in the times of Plato 2500 years ago.[4] However, different dimension of the problem of environmental protection and its management have taken a serious turn in the present era. Today, society's interaction with nature is so extensive that environmental question has assumed proportions affecting all humanity. Industrialization, Urbanization, poverty, the research for new sources of energy and raw materials are some of the factors which have contributed to environmental

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2 Human Rights in India-Wikipedia, The free encyclopedia en.wikipedia.org/wiki/Human Rights in India.

3 *See Islamic Principles for the Conservation of the Natural Environment,* 13-14 (IUCN and Saudi Arabia, 1983)

4 Hambro,E. "*The Human Environment- Stockholm and After*", Year Book of World Affairs, 20(1974).

deterioration the world over.[5] Human discovered coal, petroleum and also the methods to utilize them. This development made a historical change in pace of development of mankind, which has already been started with industrial Revolution. Discovery of petroleum led to industrialization of major parts of the world. In present time, man has invented new technologies of exploitation of resources. Every household is possessing at least one auto vehicle. There is prevalence of skyscrapers, concrete roads, etc. Humans are using synthetic fabric, leather shoes, mobile phones, laptops and many other gadgets. They have also changed their food habits. They need power supply full day. As a result of these emerging demands, there was accordingly growth of supply factories. Industries were deployed in random, haphazard and unplanned manner without taking care of environment which is the main reserve for all demands. The industries started polluting environment severely. They release poisonous gases into atmosphere, polluted water into rivers and other discarded material over the grounds which resulted into air pollution, water pollution, and soil pollution and overall environmental degradation.

1. Effect of Environmental Pollution on Human Health

The environment affects our health in a variety of ways either directly by exposing people to harmful agents, or indirectly, by disrupting life-sustaining ecosystems. Climate change is also posing risks to human health and well-being and thus is emerging as a serious concern worldwide. Contaminated waters of the Krishna River in Bhagpat district of western Utter Pradesh barely 55 km from the nation's capital may be responsible for cancer, bone deformity and paralysis among residents of several villages along with banks.[6]

2. International Conventions on Environment

Various conventions and protocols at international level have been enacted to check environmental degradation. Brudtland Report, United Nations framework Convention on Climate Change, Montreal Protocol, Cartagena Protocol, Nagoya Protocol and Kyoto Protocol are few of them. These conventions try to assign specified weight to environment while doing developmental activities. Developed countries also have come forward to promote environment friendly technologies. USA and china have pledged to reduce the corbon-di-oxide gas emission. However, it is not a responsibility of a particular nation or group of nations to protect environment alone, rather it is duty of all global citizens to work for healthy environment.

5 *Sh. Sachidanand Pandey* v. *State of West Bangal*, A.I.R 1987 S.C.1109.

6 "Polluted rivers cause havoc in western U.P villages", The Hindu, Monday, November 3, 2014

3. Legislations for Prevention of Environmental Pollution

There are many legislations on the subject but more relevant enactments for our purpose are: The Water (Prevention and Control of Pollution) Act, 1974; The Water (Prevention and Control of Pollution) Act, 1977; The Air (Prevention and Control of Pollution) Act, 1981; The Environment (Protection) Act, 1986; The Public Liability Insurance Act, 1991; The National Environment Tribunal Act, 1995; The Environment Protection Rules, 1986; The National Environment Appellate Authority Act, 1997; The Wildlife (Protection) Act, 1972; The Forest (Conservation) Act, 1980. India has recently introduced Swachh Bharat Abhiyan, Ganga Action Plan. It has also constituted Central Pollution Control and State Pollution Control Boards for policy enforcement. India has also formulated The National action Plan on Climate Change (NAPCC) under which it is promoting green energy and conservation of natural resources. Government of India has already enacted the Prohibition of Employment as Manual Scavengers and Their rehabilitation Act, 2013 to ban manual scavenging inside the country.

4. Statutory Remedies

There are various statutory provisions in India which plays a very important role in preventing and controlling all kinds of pollution. These can be discussed as follows:

4.1 Law of Crimes and Environmental Protection

Indian Penal Code 1860 makes various acts affecting environment as offences, Chapter XIV of the Indian Penal Code containing section 268 to 294A deals with the offences affecting the public health, safety, convenience, decency and morals.

Section 269 to 271 makes a negligent act likely to spread infection of disease dangerous to life punishable. The punishment provided for this act is imprisonment up to six months or with fine or both. Section 272 to 276 deal with the adulteration of food, drinks and drugs. Section 277 can be used to prevent the water pollution in certain cases. Under section 426,430,431,432 of IPC general pollution caused by mischief can be controlled as the same is punishable.

Similarly, The provisions of Criminal procedure Code, 1973 (Cr.P.C) can also be invoked to prevent the pollution of almost all kinds. Chapter X Pert B is containing sections 133 to 143 and Part C having section 144, can provide most effective and speedy remedy for preventing and controlling public nuisance causing air, water and noise pollution.

4.2 Civil Procedure Code and Public Nuisance

Section 91 of the code of civil procedure provides the right of action in case of public nuisance. It provides that in case of public nuisance or other

wrongful act affecting or likely to affect the public, a suit for declaration and injunction or for such relief as may be appropriate in the circumstances of the case may be instituted –By the Advocate General or with the leave of the court by two or more persons, even though no special damage has been caused to such persons by reason of such public nuisance or other wrongful act.

5. Constitutional provisions

5.1 Preamble

The preamble of the Constitution of India provides that our country is based on Socialistic pattern of society where the state pays more attention to the social problems than on any individual problems. The basic aim of socialism is to provide decent standard of life to all which can be possible only in a pollution free environment.

5.2 Fundamental Right

According to Article 21 of the constitution, "no person shall be deprived of his life or personal liberty except according to procedure established by law". Art. 21 guarantees a fundamental right to life –a life of dignity to be lived in a proper environment, free of danger of disease and infection. The right to live in a healthy environment as part of Art. 21 of the Constitution.[7]

5.3 Directive Principle of State Policy

According to Article 48-A "the State shall Endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country".

5.4 Fundamental Duties

The Constitution (forty second) amendment Act, 1976, added a new Part IV-dealing with Fundamental Duties in the constitution of India. Article 51A (g) specifically deals with the fundamental duty with respect to environment. It provides "it shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wild life and to have compassion for living creatures".

6. The Contribution of the Supreme Court of India

The right to life has been used in a diversified manner in India. It includes the right to survive as a species, quality of life, the right to live with dignity and the right to livelihood. However, it is a negative right, and not a positive, Article 21 of the Indian Constitution states: 'No person shall be deprived of his life or personal liberty except according to procedures established by law'. The Supreme Court expanded this negative right in two ways. *Firstly*, any law affecting personal

7 *Rural Litigation and Entitlement Kendra* v. *State of U.P.*, AIR 1988 SC 2187 (Popularly known as Dehradun Quarrying Case).

liberty should be reasonable, fair and just. *Secondly*, the Court recognized several unarticulated liberties that were implied by Article 21. It is by this second method that the Supreme Court interpreted the right to life and personal liberty to include the right to the environment.

Rural Litigation and Entitlement Kendra v. *State of U.P.*[8] was one of the earliest cases where the Supreme Court dealt with issues relating to environment and ecological balance. The concept of the right to life under the Indian Constitution was further elaborated on in *Francis Coralie Mullin* v. *Union Territory of Delhi*[9] where the Supreme Court set out a list of positive obligations on the State, as part of its duty correlative to the right to life. The importance of this case lies in the willingness on the part of the Court to be assertive in adopting an expanded understanding of human rights. The link between environmental quality and the right to life was further addressed by a constitution bench of the Supreme Court in the *Charan Lal Sahu case*.[10] The Supreme Court has used the right to life as a basis for emphasizing the need to take drastic steps to combat air and water pollution.[11] It has directed the closure or relocation of industries and ordered that evacuated land be used for the needs of the community.[12]

Another expansion of the right to life is the right to livelihood (article 41), which is a directive principle of state policy. This extension can check government actions in relation to an environmental impact that has threatened to dislocate the poor and disrupt their lifestyles. A strong connection between the right to livelihood and the right to life in the context of environmental rights has thus been established over the years. Especially in the context of the rights of indigenous people being evicted by development projects, the Court has been guided by the positive obligations contained in article 48A and 51A(g), and has ordered adequate compensation and rehabilitation of the evictees.[13]

7. Hindrances in the implementation on Environmental Law

7.1 Environmental Offences are not taken seriously by the people. People while committing environmental crimes don't even know that they are committing crime .There is need of spreading proper awareness regarding environmental laws .Some people who though are aware of these laws , don't take it seriously because state doesn't takes serious action against regarding environmental offences. There should be strict implementation of these laws so that those offences should not be committed again.

8 AIR 1985 SC 652.
9 AIR 1981 SC 746.
10 *Charan Lal Sahu* v. *Union of India* AIR 1990 SC 1480.
11 *V. Mathur* v. *Union of India*, (1996) 1 SCC 119.
12 *M.C. Mehta* v. *Union of India*, (1996) 4 SCC 351.
13 Human Rights and the environment, Y.K Sabharwal, Chief Justice of India.

7.2 Our Judicial System suffers great demerit of delay in decision making process. It takes years and years to solve cases because of this. This should be taken into account while handling environmental cases ,that damage caused to environment is irreplaceable and a resource once lost once lost cannot be taken back .Keeping this thing in mind environmental cases should be solved in a speedy manner.

7.3 There are many rules and regulations for the protection of Environmental. Though it is estimated that there are more than 200 legislations in India dealing directly or indirectly with environmental problems but the situation remains then and there, and rather worsening day by day. The reason may be many but one among them is ignorance of law in particular.

Though judiciary had tried to play a role of public interest Litigation But as mentioned above the judiciary faces many difficulties in solving cases enviro-legal issues, so in order to solve all the issues related environment there should be a separate forum which may encompass in it all the issues related to environment .Courts should be easily accessible, well equipped with scientific knowledge ,well aware of the environmental jurisprudence and efficient enough to punish the polluters in a way that in future not even an attempt to pollute or degrade the environment be made.

8. High level Committee Report on Environmental Law

On August 29, 2014 the Ministry of Environment, Forests & Climate Change (MOEF & CC) of the Government of India set up a High Level Committee headed by former Union Cabinet Secretary TSR Subramanian, IAS (retd). This committee was given a comprehensive mandate: To review all laws and judgments pertaining to environment, wildlife and forest protection, and also those relating to pollution control, and then produce a report with specific recommendations for reforms in law and governance which was to be completed within two months.

The deadline for completion of the Committee's tasks was extended by a month, and the final report was submitted by the Committee to Prakash Javadekar, Union Minister of State for Environment, Forests and Climate Change with Independent Charge on November 18, 2014. The report was not made public at that time. However, it was leaked, and it soon became available on various websites of media and environmental and social action groups.

The six laws which have been reviewed include the Environment (Protection) Act (EPA) 1986, the Forest (Conservation) Act (FCA) 1980, the Wild Life (Protection) Act (WLPA) 1972, The Water (Prevention and Control of Pollution) Act 1974, The Air (Prevention and Control of Pollution) Act 1981 and the Indian Forest Act 1927.

According to the Executive Summary of the HLC's report, the committee has drafted their recommendations based on seven key principles. These include [14]-

i. It proposed new Environment Loss Management Act (ELMA).
ii. It recommended full-time expert bodies, National Environment Management Authority (NEMA) and State Environment Management Authority (SEMA), to be constituted at the Central and state levels respectively.
iii. A fast track procedure for linear projects (roads, railways and transmission lines), power and mining projects and for the projects of national importance has been prescribed in the new mechanism.
iv. The committee has suggested amendments to almost all green laws, including those relating to environment, forest, wildlife and coastal zone clearances.
v. An Environment Reconstruction Fund is proposed to be established for accumulation of this cost and other penalties recovered from projects.
vi. It also recommended that an environmental reconstruction cost should be assessed for each project on the basis of the damage caused by it to the environment
vii. The committee has not suggested any major changes in the forest laws but has recommended revision of the compensatory afforestation policy.
viii. The committee has also recommended reducing power of National Green Tribunal (NGT). It suggests district-level courts to decide on infringement of environmental laws.

A preliminary analysis of the summary's contents and emerging news reports indicate that the committee has recommended substantial changes in the legal framework for environment regulation, the setting up of new specialized institutions, a new comprehensive law for environment management with an appellate mechanism on approvals and non-compliance, and the creation of a cadre of experts called the All India Environment Services.

Conclusion

There is an urgent need to formulate laws keeping in mind the fact that those who pollute or destroy the natural environment are not just committing a crime against nature, but are violating human rights as well. The advancement of the relationship between human rights and the environment would enable the incorporation of human rights priciples within an environmental scope,

14 "Subramanian Committee on Review of Environmental Laws submitted report to the Union Government".05-Dec -2014, http://www.jagranjosh.com.

such as anti-discrimination standards, the need for social participation and the protection of vulnerable groups. At the same time, the human rights system would be stregthened by the incorporation of environmental concerns, enabling the expansion of the scope of human rights protection and generation of concrete solutions for cases of abuses. Of course, one of the most important consequences, is to provide victims of environmental degradation the possibility to access to justice. Media and Civil Socities like NGOs can play an important role in achieving the aim of recently organised programme Clean India. They could spread awareness at a mass scale and could also help in sensitizing the issue over people of this country. They can be an active agent of vigiliance by raising any discrepancies in execution of this mission.

Atmosphere and environment are known as global commons. They belong to entire global community and so cannot be divided according to the national or political boundaries. They need united efforts to resolve the problems of global warming, ozone layer depletion etc. Those countries who are contributing more to the environmental degradation have to make greater efforts and exercise greater abnegation in their consumption patterns to reduce the pace of environmental degradation.

Judicial Appointments through Collegium or National Judicial Appointment Commissions a Study – in the Indian Perspective

Anjay Sharma[1]

"The role of the courts as resolver of disputes, interpreter of the law and efender of the Constitution requires that they be completely separate in authority and function from all other participants in the justice system."[2]

- Brian Dickson
Chief Justice, Supreme Court of Canada

To maintain the rule of law, judiciary plays the fundamental role of interpreting and applying the law and adjudicating upon controversies between one citizen and another and between a citizen and the state. In a country with a federal written constitution, courts have the additional function of safeguarding the supremacy of the Constitution by interpreting and applying its provisions, keeping all authorities within the constitutional framework and to settle on conflicts between the Centre and the States. In India, in addition to the above, the judiciary also has the significant function of protecting and enforcing the FRs of the people guaranteed to them by the Constitution.

In the context of governance, the rule of law has a useful application within the main branches of government. However, in order to secure the rule of law, stability and fairness is required among the ruling executive that respects the judiciary and it involves several concepts rooted in democracy, one of which is the independence of judiciaries.

Independent judiciaries are characterized by the following: (1) judges are free to make impartial decisions without outside political interference; (2) a judiciary acts as a check upon the executive and the legislature; and (3) judges are not arbitrarily removed or threatened[3]. The integrity of a court therefore depends upon the degree of insulation from external political actors, and their decisions would be honoured even if they involve the executive or legislative bodies. Judicial independence allows judges to make decisions that may be contrary to the interests of other branches of government. In this sense, the courts are seen to be guardians of the constitution, and thereby serve to protect civil

1 Assistant Professor in Lovely Professional University.

2 Chief Justice Brian Dickson, Supreme Court of Canada (1984-1990) *The Queen v. Beauregard*, [1986] 2 S.C.R. 56 at para. 30.

3 http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx accessed on 01-13-2015, see also www.**un**.org/rights/dpi1837e.htm.

liberties of citizens. An independent judiciary could give a voice to citizens who are traditionally ignored or left out of the political process. For minority groups, this is particularly relevant when the ruling government representing the majority ignores their rights, or fails to apply constitutional protections for them. Judicial independence is absolute necessity for maintaining rule of law and fair judicial administration in the country. Independent judiciary plays an important role in controlling the arbitrary act administration. If judiciary is under the control of the executive, it cannot punish the executive, in case violates the law.

The judges should be impartial as well as independent. There is difference between these two terms. "Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case"[4] while independent "connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees."[5] It includes independence of judges from the other branches of government or politicians; independence from political ideology or public pressure and independence of the individual judge from superiors in the judicial hierarchy, so that a judge can decide each case on his or her own best view of what the law requires. In India independence of judiciary held to be a basic structure in 1973, in the celebrated case of *Kesavananda Bharati* v. *State of Kerala*[6], In this regard, it may be mentioned that *independence of judiciary* has been held to be a basic feature of the Constitution in many cases[7].

1. Appointment in Judiciary

Different countries use different systems of judicial appointments. Appointment through political institutions; appointment through the judiciary itself; appointment through a judicial council which may include non-judge members; selection through electoral system. In most of the countries, appointment of judges is either by election or nomination. The former process can be totally ruled out considering the level of literacy in our country and the unfortunate fact that dirty politics infuse in every election. In the latter category, the most impressive is the process for appointment in Missouri, U.S.A., which

4 www.ohchr.org/Documents/Publications/training9chapter4en.pdf accessed on 26-01-2015

5 https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/108/index.do accessed on 01-10-2015 *Valente v. R.14*, Justice Le Dain,

6 Kesavananda Bharati v. State of Kerala. AIR 19731461

7 *Shri Kumar Padma Prasad v. Union of India and others*, AIR 1992 SC 1213 (para 37); *Supreme Court Advocates-on-Record Association and another v. Union of India*, AIR 1994 SC 268; *Registrar (Admn.), High Court of Orissa, Cuttack v. Sisir Kanta Satapathy (dead) by LRs*., AIR 1999 SC 3265; *All India Judges' Assn. (III) v. Union of India,* (2002) 4 SCC 247 at p. 268 : AIR 2002 SC 1752; *Jasbir Singh v. State of Punjab*, (2006) 8 SCC 294 at p. 301.

is described as the Missouri Plan[8], wherein a Missouri Appellate Commission consisting of the Chief Justice of the Supreme Court, three lawyers elected by the State Bar one from each of the three courts of Appeal and three citizens, who are not members of the Bar, appointed by the Governor from each of the three appellate districts, select the appointees[9]. There is a wide range of different models for political appointment mechanisms. Appointments to constitutional or supreme courts typically involve either a "representative" mechanism or a "cooperative" model. Other systems allow a single institution, either parliament or executive, to make appointments. In a representative system is one in which each of several political institutions will select a certain percentage of the court.[10] In a cooperative system[11], two or more institutions must cooperate to appoint members of the court. Supreme or Constitutional Court Justices in the, nominated by the president and approved by a house of the legislature by a majority vote. The cooperative system, however, risks deadlock, since appointment requires the agreement of different institutions to go forward. It is possible that in circumstances of political conflict, appointments would not be made at all, and vacancies would persist. In some systems, a single political institution dominates[12]. In USA on other hand the president appoints the Court judges with the consent of the Senate. In the judicial system of Japan, the post war constitution guarantees that "all judges shall be independent in the exercise of their conscience and shall be bound only by this constitution and the Laws[13]" In Australia and Canada, judicial appointments of the superior courts are made by the executive after wide consultation, including with the judiciary. There is therefore no basis for the theory that the judiciary must always have a controlling voice in judicial appointments to secure judicial independence[14]. Appointment of judges in England- in Great Britain Judges are appointed by the Crown, which prior to 2005 meant the executive which means by the executive without any restriction. The power of the Executive was curtailed in March 2005, by the Constitutional Reform Act, 2005 which established a Judicial Appointment Commission for England and Wales and a Judicial Appointment and Conduct Ombudsman. The U.K. Judicial Appointments Commission, a body, consists of 15 members: two from the legal profession, five judges, one tribunal member, one lay justice (magistrate), and six lay people including the There is no predominance of judges in the U.K. Commission. In South Africa Judicial Service Commission plays an important role in the appointment of judges and also

8 http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1836&context=law_journal_law_policy accessed on 01-10-2015

9 http://en.wikipedia.org/wiki/Missouri_Plan accessed on 13-01-15

10 Italy and in South Korea, the constitutional court is formed by 1/3 of the members being appointed by the president, 1/3 by the legislature, and 1/3 by the Supreme Court.

11 US, Brazil and Russia

12 The German Constitutional Court is effectively appointed by the parliament.

13 Article 76 of the Constitution of Japan.

14 http://www.thehindu.com/opinion/op-ed/dont-close-the-door-on-national-judicial-appointments-commission-as-yet/article6350842.ece accessed on 20-1-2015.

advises the country's national government on any matters relating to the judiciary and the administration of justice. It is a body established in the Constitution of South Africa "to advise the national government on any matter relating to the judiciary or the administration of justice" and for which separate legislation has been enacted.

2. Independence of Judiciary—Global Chanllenge

The United Nations has highlighted essential importance of an independent judiciary by its adoption of the *Basic Principles on the Independence of the Judiciary* at its Seventh Congress in 1985.[15] As a consequence of the adoption of the *Basic Principles* by the UN General Assembly, each member state is expected to guarantee the independence of its judiciary in its constitution or the laws of the country.[16] *The Universal Declaration of Human Rights*[17] enshrines the principles of: (1) equality before the law, (2) the presumption of innocence, and (3) *the right to a fair and public hearing by a competent, independent and impartial tribunal established by law.* The recitals of the *Basic Principles on the Independence of the Judiciary*[18] observe there is frequently a gap between the vision underlining these principles and their actual implementation. The Economic and Social Council of the UN adopted in 1989 the *Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary.*[19] These *Procedures* also encourage various United Nations institutions to assist Member States, at the invitation of their governments, in reviewing and strengthening judicial independence. The history of judicial administration in India can start with the High Courts Act, 1860[20] whereby High Courts were set up in each province and a further appeal from these courts was to the Privy Council in England and Federal Court at New Delhi[21]. 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. After implementation of the constitution the Supreme Court of India was formed and is now the highest court of appeal in India Under the Government of India Act, 1919 and the subsequent Government

15 See *Basic Principles on the Independence of the Judiciary, Art. 1.*
16 General Assembly resolution 40/146, 1985.
17 Adopted by the United Nations in December, 1948. Article 10 reads: "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." See also article 14(1) of the *International Covenant on Civil and Political Rights (ICCPR),* UN General Assembly Resolution.
18 Endorsed by the General Assembly in its resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.
19 Economic and Social Council resolution 1989/60.
20 www.law.cam.ac.uk/faculty-resources/10000862.doc accessed on 30-01-1-2015.
21 Section 200 of the Government of India Act, 1935.

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. After extensive debate, the Constituent Assembly ensured that no appointment could be made without consulting the Chief Justice of India. Subsequent decisions have ensured that the Supreme Court is virtually the final decision maker in the appointment process.

3. Position in India

In India, the Judges of Supreme Court and High Courts is appointed by the President after "consultation" with the Supreme Court and this has led the judiciary to be largely self-appointing in practice. Articles 124 and 217 of the Constitution of India deal with the appointment of Supreme Court and High Court Judges respectively. Although the provisions are theoretically simple and clear, their practical implementation has been highly controversial. There has been an unfortunate power struggle on the question of supremacy or primacy in the matter of appointment of such Judges. The members of the Constituent Assembly who drafted the Constitution of India would have scarcely imagined that these simple provisions would have led to so much of acrimony and debate. "Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years. Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted[22] and every judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor or the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court. [23] We adopted the middle course.

3.1 Appointment of Judges of High Courts and Supreme Court

Art. 124(2) and Art. 217(1) of the Constitution provide that the power of appointment vests in the President, in consultation with the Chief Justice of India for Supreme Court appointments, and in consultation with the Governor of the concerned state The history of judicial appointments in India has swung from executive primacy before 1993 and thereafter to absolute judicial primacy with minimal executive role. The appointments procedures were products of vigorous debate in the Constituent Assembly. This would ensure that judges, in Nehru's words, would be "*people who can stand up against the executive government and whoever may come in their way"*.[24] The Chief Justice of India was entrusted with this constitutional role since he could provide the necessary

22 Article 124(2)of the Constitution.
23 Article 217 of the Constitution.
24 CAD vol VIII, 246-247 (24th May 1949).

apolitical antidote to politically motivated selections by the executive, if they were mooted. In the Constituent Assembly, judicial independence was seen as a necessary requirement for the judiciary to adjudicate impartially, insulated from political interferences and A careful inter-institutional equilibrium in the process of judicial appointments was envisaged .Despite the need to prevent the recurrence of such politicisation that would adversely affect the impartiality of the judiciary, if not the perception thereof, the Assembly invested the power of appointment focally with the President, who would act on the aid and advice of the Council of Ministers, who were political persons. The Law Minister, Mohan Kumaramangalam, during the Prime Ministership of Indira Gandhi 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.[25] Fearing that this determination was a superficial guise for creating a judiciary 'made to measure' [26] the Supreme Court responded, though too late, at a time when its public image was at its nadir.[27] Through two landmark decisions the Court clarified the nature of the consultation process for appointment of judges under Art. 217(1)[28] and transfers under Art. 222[29] and held judicial independence to be part of the basic structure of the Constitution.

In first judge's case[30], controversies concerning the appointment of judges came for determination in this case. The relevant Article for appointment of a Supreme Court Judge is Sub-clause (2) of Article 124. While the relevant Article for the appointment of a High Court judge Article 217 (1). In the Seven Judge Bench of the Supreme Court,[31] held that the consultation with each of the three constitutional functionaries, the Chief Justice of the High Court, the Governor of the State and the Chief Justice of India means a full and effective consultation, which has the same meaning as under Article 222(1) namely obtaining opinion after due deliberation, placing full and identical facts and material before the person being consulted. The President could override the opinion given by the functionaries. The action of President means acting through the Council of Ministers. No primacy could be given on the opinion of Chief Justice of India. The action of the President can only be challenged on grounds of

25 Mohan Kumaramangalam, Judicial Appointments: *An Analysis of the Recent Controversy over the Appointment of the Chief Justice of India* (Oxford & IBH Pub Co, New Delhi 1973) 83.

26 Nani Palkhivala, *Our Constitution: Defaced and Defiled* (MacMillan, New Delhi 1974) 93.

27 This was primarily owing to its perceived capitulation before the government during the Emergency in the infamous Habeas Corpus case holding that Art. 21 was the 'sole repository' of the right to life and the government, by law, could validly suspend the same. *A.D.M. Jabalpur v. Shivkant Shukla*, (1976) 2 SCC 521.

28 *S. P. Gupta v Union of India*, AIR 1982 SC 149.

29 *Union of India v Sankalchand Sheth (1977) 4 SCC 193.*

30 *S.P. Gupta* v. *Union Of India*, AIR 1982 SC 149.

31 A.C. Gupta, D.A. Desai, E.S. Venkataramiah, P.N. Bhagawati,R.S. Pathak,Syed M. Fazal AliandV.D. Tulzapurkar.

mala fide or on the grounds of extraneous considerations. The word 'consultation' does not mean concurrence. The expression 'concurrence' was explicitly rejected by the Constituent Assembly. This made the appointment of judges transparent in the sense that the Executive is responsible to the Legislature, and through the Legislature it was accountable to the people. "This is, of course, not an ideal system of appointment of Judges, but the reason why the power of appointment of Judges is left to the Executive appears to be that the Executive is responsible to the Legislature and through the Legislature; it is accountable to the people who are consumers of justice. The power of appointment of Judges is not entrusted to the Chief Justice of India or to the Chief Justice of a High Court because they do not have any accountability to the people and even if any wrong or improper appointment is made, they are not liable to account to anyone for such appointment. The appointment of a Judge of a High Court or the Supreme Court does not depend merely upon the professional or functional suitability of the person concerned in terms of experience or knowledge of law though this requirement is certainly important and vital and ignoring it might result in impairment of the efficiency of administration of justice, but also on several other considerations such as honesty, integrity and general pattern of behaviour which would ensure dispassionate and objective adjudication with an open mind, free and fearless approach to matters in issue, social acceptability of the person concerned to the high Judicial office in terms of current norms and ethos of the society, commitment to democracy and the rule of law, faith in the constitutional objectives indicating his approach towards the Preamble and the Directive Principles of State Policy, sympathy or absence thereof with the constitutional goals and the needs of an activist judicial system. These various considerations, apart from professional and functional suitability, have to be taken into account while appointing a Judge of a High Court or the Supreme Court and it is presumably on this account that the power of appointment is entrusted to the Executive. But, as pointed out above, there is a fetter placed upon the power of appointment by the requirement of consultation with the Chief Justice of the High Court, the Governor of the State and the Chief Justice of India in case of appointment of a High Court Judge and with the Chief Justice of India in case of appointment of a Supreme Court Judge."[32] This judgment giving supremacy to the executive.

The judgement of Second Judges Case was confusing on some points, and it is very difficult to interpret clear propositions. The President of India referred nine questions for consideration by the Supreme Court[33]. These questions related to three aspects:- Consultation between the Chief Justice of India and his brothers judges in the matter of appointments of Supreme Court and High Court Judges and transfer of the latter; judicial review of transfers of Judges; and the relevance of seniority in making appointments to the Supreme Court The principles

32 *First Judges Case*, Bhagawati J observed at para 29
33 The Second Judges Case In Re the Presidential reference made on 23rd July, 1998

laid down by the Supreme Court can be summarised as follows:- Consultation with the Chief Justice of India does not mean consultation only with the Chief Justice. It requires consultation with a plurality of judges. The Chief Justice of India has to form a collegium of four senior most puisne judges of the Supreme Court. This is necessary for appointments for judges of the Supreme Court or to transfer a High Court Chief Justice or a High Court judge. For appointment of the High Court judges, the Chief Justice has to consult two senior most judges of the Supreme Court. This collegium can also take into account the views of a Supreme Court judge from the particular High Court to which appointments are to be made. Until 1998, the collegium consisted of the Chief Justice of India and two senior-most judges. Thereafter, it was changed to the Chief Justice and four Judges of the Supreme Court. The opinion of the collegium will have primacy in the matter of appointments. It is open to the Executive to inform the collegium of its objections. However, if the Chief Justice and his companion judges are still of the view that there is no reason to withdraw their recommendation, then that appointment should be made as a matter of healthy convention. However, even if two judges have serious reservations about a particular appointment, then it should not be made. The Chief Justice can also consult other judges of the Supreme Court, judges of the High Court or even the Members of the Bar with regard to a particular appointment. The views of the members of the collegium should be made in writing and should be forwarded to Government of India along with recommendations of the Chief Justice. However, when the Chief Justice consults other Supreme Court Judges or members of the Bar these views should be summarized in a memorandum and forwarded to the Government of India. If some members of the collegium have retired before a particular appointment is made and the Government of India has sent back adverse comments, then the Chief Justice has to constitute a new collegium by adding the requisite new judges to form the collegium. In such an event, there has to be unanimity in the appointment that is to be made. The Chief Justice may, in his discretion, inform the person of the objections raised by the Government of India. The collegium can call for the reply of the prospective appointee and take into account his explanation before either withdrawing the nomination or confirming it. Merit is the predominant consideration for appointment to the Supreme Court but seniority should be kept in mind. The Supreme Court has held that seniority can be overlooked in cases of outstanding merit. The collegium for approving the appointments of High Court judges is the Chief Justice and two senior-most puisne judges of the Supreme Court. The Chief Justice should take into account the views of the Supreme Court Judges who are likely to be conversant or familiar with the affairs of the concerned High Court. They must also take into account the opinion of the Chief Justice of the particular High Court; this is entitled to the greatest weight. The idea of 'collegium' was also born in this case. In the Judges' Transfer case, Bhagwati J. Had observed—"There must be collegium to make recommendations to the President, in regard to the appointment of a Supreme Court or a High Court

Judge. The recommending authority should be broader based and there should be consultation with wider interests. If the collegium is composed of persons who are expected to have knowledge of the persons who may be fit for appointment on the bench and have qualities required for appointment and this last requirement is absolutely essential--- it would go a long way towards securing the right kind of judges, who would be truly independent and who would invest the judicial process with significance and meaning for the deprived and exploited sections of our society"[34]. As regards the argument that the executive should have primacy since it is accountable to the people than the judiciary which is not Verma J (as he then was) opined: "The majority view in S.P. Gupta to the effect that an executive should have primacy, since it is accountable to the people while the judiciary has no such accountability, is an easily exploded myth, a bubble which punishes on a mere touch. Accountability of the executive to the people in the matter of appointments of superior Judges has been assumed, and it does not have any real basis. There is no occasion to discuss the merits of any individual appointment in the legislature on account of the restriction imposed by Articles 121[35] and 211[36] of the Constitution.---- Thus, in actual practice, the real accountability in the matter of appointments of superior Judges is of the Chief Justice of India and the Chief Justices of the High Courts, and not of the executive which has always held out, as it did even at the hearing before us that, except for rare instances, the executive is guided in the matter of appointments by the opinion of the Chief Justice of India."[37]

3.2 Working of Collegium

The Collegium comprising of Chief Justice of India and four senior most judges of the Supreme Court has to be formed to give advice to the President. The main purpose of the collegium is to ensure that the best available talent to be appointed as judge in the Higher Judiciary. The Chief Justice of India and the senior most puisne Judges, due to their long tenures on the Supreme Court, are best fitted to achieve this purpose. 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 for special leave to appeal and appeals. Even where the person under consideration is a member of the Bar, he would have frequently appeared before them. The collegium must consider the following factors in recommending the judges for the appointment: Merit should be the predominant consideration. On what basis the merit will be judged? Earlier judgments given by the judge, respect he commands in the legal fraternity, his legal qualifications, and any such considerations. Not only that, Cogent and good reasons should

34 S.*P. Gupta v. UOI*,AIR 1982 SC 149.
35 Restriction on discussion in parliament.
36 Restriction on discussion in the state legislatures.
37 *Supreme Court Advocates-on-Record Association* v. *Union of India* AIR 1994 SC 268 at para 44

be recorded for recommending a person of outstanding merit regardless of his seniority. For recommending one of several persons of more or less equal degree of merit, the factor of the High Courts not represented on the Supreme Court, may be considered and any such factors may deem necessary. The Supreme Court then prepares its recommendations, everything in writing, stating all the factors cogently and with significant reasoning. If two or more members of the collegium disagree with the names recommended, then Chief Justice of India should not persist with the recommendation. If the collegium agrees to the names, the recommendation is sent to the executive. Constitutionally, Supreme Court's recommendation is not binding on executive, so the executive may refuse to accept the candidates recommended by Supreme Court for the appointment. But government must provide genuine reason for its refusal. In case government accepts Supreme Court's recommendations, matter ends there, the judges will be appointed as recommended. If the government refuses to appoint the person recommended by Supreme Court, the materials and information conveyed by executive must be placed before the original collegium or the reconstituted one. If the collegium accepts the opinion of executive, then CJI, in his discretion, informs the person earlier recommended for his non appointment. The names recommended by executive will then be final for appointment. In case collegium refuses to reconsider the request and unanimously reiterate that the appointment of recommended candidates must be made, then, executive has no choice but to appoint them. In Justice Verma's view, the author of the leading opinion in the Second Judges case the current problem is not one which arises from the enormous authority given to the Supreme Court collegium by the Second Judges ruling. It is rather from the application of that judgment and dissemination of the wrong impression that once the collegium makes its recommendation, it was absolutely binding on the executive, even if the collegium's recommendation was not unanimous. Justice Verma went on to say: "….the opinion of the executive is weightier in the area of antecedents and personal character and conduct of the candidate; the power of non-appointment on this ground is expressly with the executive, notwithstanding the recommendation of the CJI; and that doubtful antecedents etc., are alone sufficient for non-appointment by the executive. The decision also holds that the opinion of the judicial collegium, if not unanimous, does not bind the executive to make the appointment."[38] Referring to the lack of credibility in the in house process of appointment, former Supreme Court Judge V.R.Krishna Iyer opined: "It has often been dilatory, arbitrary and smeared by favourites. The Nine Judges Bench, in a mighty seizure of power, wrested authority to appoint…judges from the top executive to themselves by a stroke of adjudicatory self-enthronement."[39] A judiciary which has total control over its own composition would have a club like outlook. The judges who do not agree to

38 Second Judges Case *(1993) 4 SCC 441 : AIR 1994 SC 268*

39 http://www.lawteacher.net/free-law-essays/judicial-law/judiciary-of-hope-and-aspirations.php accessed on 10-02-2015

the views of the Collegium may not be considered for appointment. Consequently very meritorious is overlooked. Consequently the collegium has overlooking the several talented junior judges in the High Courts or members of the bar. With the Collegium's deliberations cloaked in secrecy. There is delay in appointment if there is disagreement among members of the collegium between the executive. But this period is almost always rushed through, with little public transparency over the written opinions of the members of the collegium. The Second Judges Case makes these opinions non-justifiable but non-disclosable to the public. Further, judicial review too is limited to the ground of non-consultation with constitutional functionaries as held by the Supreme Court in the case of *Shanti Bhushan v. Union of India.*[40] At any given time there are vacancies the Supreme Court, in twenty-four High Courts and the transfer of a number of judges to be made. These administrative tasks detract the judges of the collegium from their principal judicial work of hearing and deciding cases. The collegium neither has a secretariat to shoulder this burden nor an intelligence bureau to make appropriate inquiries of the competence, character and integrity of a proposed appointee.

3.3 National Judicial Services Commission Report

In 1987, the setting up of a National Judicial Services Commission (NJSC) was recommended by the Law Commission in its 121st Law Commission Report. It prescribed that the Commission must be a body of experts drawn from various interest groups. After the *first judges case*[41] the executive came to use overriding powers in the matters of selection and appointment of judges. The commission was unhappy with the situation prevailing at the time. Criticising the system prevailing in 1987 the Law Commission observes: "the present model confers overriding powers[42] Acting on these widely held fears and perceived executive overreach in appointments, the Supreme Court in The Second Judges' Case' substantially overruled the First Judges' Case[43] and fundamentally altered the nature of the appointments process. In doing so, it expounded its conception of judicial independence, that the judiciary itself, without executive interference was best placed to determine its own composition and thereby secure its independence. Dr. Ambedkar turned down the idea of judges appointing the judges because this would overtake the power of the president. The vesting of the appointment power in the President, in consultation with the Chief Justice of India, would mean that an inter-institutional equilibrium was established in the process, wrought by the interplay of the executive and judiciary balancing each other in the process of appointment. This equilibrium, it was believed, would not only ensure an independent judiciary but also one which was selected through an accountable process, checked by the executive. According to Verma J., to correct the existing

40 (2009) 1 SCC 657.
41 AIR1982 SC 149
42 http://lawcommissionofindia.nic.in/101-169/report121.pdf accessed on 15-10-2014
43 AIR 1982 SC 149

lacunae and fulfil the constitutional purpose of ensuring judicial independence in the appointments process, primacy would be accorded to the view of the Chief Justice of India, who would be in the best position to assess the merit of a candidate. According such primacy would also obviate any political influence which may arise otherwise. Which system is better? In India the state should take necessary steps to separate judiciary from the executive[44] i.e. independence of judiciary should be maintained. The doctrine of separation of powers is not accepted fully in the constitution of India and one may agree with the observation of Mukherjee, J "The Indian constitution has not indeed recognize the doctrine of separation of powering its absolute rigidity but the functions of the different parts or branches of the government have been sufficiently differentiated and consequently it can very well be said that our constitution does not contemplate assumption, by one organ or part of the state, of functions that essentially belong to another"[45].

From the above case laws right from Ram Jawaya[46] to *I.R. Coelho vs. State of Tamil Nadu*[47] in there has been a wide change of opinion as in the beginning the court was of the opinion that as such there is no doctrine of separation of power in the constitution of India but then as the passage of time the opinion of the Supreme Court has also changed and now it do includes the above said Doctrine as the basic feature of the constitution. Montesquieu's influential perceptive of separation of powers as essential for preservation of liberty, an understanding widely employed by the Indian Supreme Court in separation of powers questions, will be used as a basis.[48] According to Montesquieu, if legislative, executive and judicial powers are exercised by a single person, there is no liberty.[49] For Montesquieu, if the judge and executor were the same, 'the judge could have the force of an oppressor...and it can destroy each citizen by using its particular wills.'[50] Hence he envisaged a limited separation, which albeit not divesting the fundamental executive nature of judicial power, would ensure that it was not exercised by the same body of persons as those who were responsible for executing laws so that no person shall be a judge in his own case. The executive power of the Union has been vested in the President.[51] The legislative and judicial powers have not expressly vested in the legislature and the Judiciary. Parliament i.e., central legislature consists of two houses and president[52]. Theory of separation of powers

44 *Article 50* of the Constitution of India
45 *Ram Jawaya v state of Punjab* AIR 1955 SC 549
46 Supra
47 AIR 2007 SC 8617
48 *Kesavananda Bharati v State of Kerala,* (1974) 4 SCC 1461) at 1873 (Per M.H. Beg J.); IR Coelho v State of Tamil Nadu, (2007) 2 SCC 1.
49 Montesquieu, *The Spirit of Laws* (Anne Cohler, Basia Miller and Harold Stone (eds), CUP, Cambridge 1989) 157
50 *Ibid* 51
51 Article 53 the Constitution of India.
52 Article 79 of the Constitution of India

breaks down here because the executive head is a part of the legislature. There is a Supreme Court of India but unlike the United States, judicial power of the Union has not been vested in the Judiciary. Although the executive power is vested in the President, the real powers reside somewhere else[53]. Parliament unanimously has passed the National Judicial Appointments Commission Act, 2014 (NJAC Act), and the Constitution (99th Amendment) Act, to give constitutional status to the National Judicial Appointments Commission (JAC) to appoint judges to the Supreme Court and High Courts. This is the consensus of public opinion in the country: that the judicially created collegium system of appointing judges requires replacement by a new system of appointment. The NJAC comprises of six-members which include chief justice of India as chairman, union law minister, two senior-most Supreme Court judges and two eminent persons. The two eminent persons will be selected by a collegiums comprising of prime minister, chief justice of India and leader of the opposition or the leader of the single largest party in the Lok Sabha. Besides, one eminent person should belong to the SC, ST, women or minority community, preferably by rotation and will have tenure of three years. The NJAC will recommend to the President for the appointment and transfer of judges of higher judiciary, viz., Supreme Court and High Courts. It will also make recommendations for the appointment of Chief Justice of India and Chief Justices of High Courts. The 99th Constitutional Amendment Act amended Article 124 (2) of the Constitution that provides for the appointment of the judges of higher judiciary and inserts Article 124A, Article 124B and Article 124C providing for composition and function of the NJAC.

3.4 National Judicial Appointments Commission Act, 2014

It gives NJAC a Constitutional status for appointment of judges to the Supreme Court and the High Courts. It also gives the executive an equal role in the appointment of judges to the highest judiciary, as a constitutional body. It specifies amendments to Articles 124 (2) and 217 (1) that deals with the appointment of judges in the Supreme Court and the High Courts, respectively. National Judicial Appointments Commission Act, 2014 lays down the procedure to be followed by the proposed six-member body for appointment and transfer of judges of higher judiciary. Now the judges in the Supreme Court and the High Courts will be appointed by the President in consultation with the NJAC. Once the NJAC is in place then Union government has to intimate NJAC within 30 day about the vacancies in the Supreme Court and the High Courts. Vacancies to come up within the next six months should also be intimated to the commission in advance. With passing of the 99th Constitutional (Amendment) Act, 2014, and to the National Judicial Appointments Commission Act, the collegium system of appointments, now 21 years in the making, is sought to be replaced by the newly created National Judicial Appointments Commission (hereinafter

53 *Article 74, of the Constitution of the India*

called as 'NJAC'). The NJAC Act, 2014 is passed in pursuance of the newly inserted Article 124A and 124B which establishes and gives to the National Judicial Appointments Commission constitutional status, while at the same time describing its composition, functions and powers. Under the NJAC Act, the procedure to be followed for appointments to the High Court as well as the Supreme Court is clearly spelt out. Most importantly, in furtherance of the newly inserted Article 124C, the NJAC Act, vests both the Central Government as well as the Commission itself, with rule making power to further define the manner in which appointments are to be made. The rule making power of the Central Government is rooted in Section 11, which provides for the power to fix the remuneration and other service conditions for the members of the NJAC. Section 11(2)(c), in the nature of a residuary clause, considerably expands this rule making power by stating "*any other matter which is to be, or may be, prescribed, in respect of which provision is to be made by the rules*." On the other hand, the rule making power of the NJAC itself is embedded in Section 12, and empowers the Commission to prescribe regulations for the criteria to be considered for judicial appointments, the criteria for consulting members of the bar for such appointments. An immediate concern, given the wide and overlapping rule making power of the Commission and the Central Government, is a potential for conflicting rules, and an uncertainty as to which set of regulations would prevail, if such a conflict were ever to arise. This fear is not entirely unfounded, since the Law Ministry is actively involved in the functioning of the Commission. The Law Minister himself is a member of the NJAC, and the Ministry is tasked with promptly forwarding details as to prospective judicial vacancies, to ensure timely appointments. Considering this intimate interface between the Law Ministry and the NJAC, it would be natural to foresee a situation in which the Law Ministry seeks to regulate the functioning of the NJAC, which may potentially over lap, and worse still, conflict the rules of the Commission. More troubling however is Section 13 of the NJAC Act, which subjects the rules, made in furtherance of this act (both by the Central Government as well as the NJAC) to alteration by both houses of parliament. Sub-ordinate legislation drafted by the executive is not subject to a uniform standard of review by Parliament, and may vary depending on the terms of the statute vesting such power. The ability of parliament to alter, in any manner, howsoever insignificant, the regulations of the commission, seriously impedes the ability of the NJAC to determine for itself, the relevant criteria to be considered for the manner and method for judicial appointments. This is not to suggest that the regulations of the NJAC would be subject to no safeguards whatsoever. Under Article 145 and 229, rules drafted by judicial organs continue to be subject to judicial review, and may be struck down if repugnant to any constitutional provision. The rules of the NJAC, should therefore be treated of such a like nature, and should be made subject only to judicial review. Section 13 of the NJAC Act, should then alert us to the indirect, yet significant manner in which the government may continue to retain unjustified supervisory powers

over the Commission. If the rationale for the creation of the NJAC is that judicial appointments must be reclaimed from the exclusive domain the judiciary, then surely, it must also be insulated from governmental interference in the finer points of its functioning and parameters of deliberation. Importantly then, is the need to debate the constitutionality of the NJAC, not merely in broad claims of judicial independence, but in the more minute details of how such functionaries are to operate and whether the intended constitutional space for such a Commission to operate in, is encumbered by unwarranted government presence. The three judicial members of the commission will not have a predominant vote in the selection of a judge. The provision in the NJAC Act which states that the JAC cannot recommend a person for appointment as a judge if any two members of the commission do not agree for such a recommendation. It is suggested that this provision takes away the power of the three ex-officio judges of the Supreme Court to recommend a judge, and gives a veto to two non-judicial members. The judicial members may themselves be the opposing two members of the recommendation made by others, which would allow the views of the judicial members to prevail. It empowers Parliament to enact a law regarding composition, function and procedure of the NJAC. The appointment of judges by the Supreme Court through collegium has no foundation in our constitution. It comes in existence in second Judges case[54] and Apex Court diluted the primacy of the CJI, and gave the power of appointment to a collegium of the CJI and four senior-most colleagues[55].

4. Conclusion

The collegium system over the years has come under severe criticism on account of opaqueness in appointment and transfer of judges of higher judiciary. Besides, the growing corruption and nepotism within the judiciary calls for transparency. The recent revelation by Justice (retd) Markandey Katju and Justice Dinakaran case is a pointer towards reforming the judiciary. Besides, it is criticised that collegiums system does not provide an adequate tenure for the chief justices of the High Courts, the consultation process is secretive and unknown to the judiciary and the public, and meritorious candidates from the bar and high courts are denied an opportunity to serve on the bench for undisclosed reasons. The failure of the collegium system may be traced to several factors. Firstly, there is no machinery or method for searching suitable persons. Secondly, there exists no objective standard for selecting candidates. Thirdly, the collegium has no way of acquainting itself lacs of advocates practising in different High Courts. The result is that the collegium recommends the children and near relatives of the judges, relatives of the judges and the relatives of politicians, Persons belonging to the caste of the judges ,Lawyers who have been able to befriend the judges.

54 *(1993) 4 SCC 441 : AIR 1994 SC 268*
55 *(1998) 7 SCC 739 : AIR 1999 SC 1*

Lawyers who had worked as juniors to the judges. The legal fraternity argues that NJAC is a strategy to bring the judiciary within the ambit of executive in the garb of reforming collegiums system. There are several problems in the collegium system[56]: First, its members keep out permanently or delay the appointment of high court colleagues with whom they did not share a good rapport when they served in the same court. Second, indirect SC appointments to HC benches: unless a high court chief justice agrees, his own elevation to the apex court was in jeopardy. Third, there is a inclination to elevate only those HC judges who are very active on the seminar circuit or were able to host the best functions and look after visiting SC judges efficiently during legal aid, mediation and Lok Adalat initiatives. Fourth, there is an in-built bias in favour of the four chartered high courts: Delhi, Bombay, Calcutta and Madras. Fifth, the dominance of the '*you appoint mine else or I will delay or block yours'* syndrome.

The background in which the collegium system came. At that time there was this talk about judges being committed to the philosophy of the ruling party, three Supreme Court judges were superseded. First Judges' Case, 1981: 'executive' has primacy, Second Judges' Case, 1983: 'CJI' has primacy, Third Judges' Case, 1998: 'designed collegium system'. The Judges of High Courts and Supreme Court are better aware of the performance of the lawyers and lower judiciary. They are better aware of the performance of the lawyers to recommend the name for higher judiciary. Sole criteria are the only performance of the person to be taken into the consideration. There is minimal delay in the selection process. The basic purpose was to ensure that we do not have what we called *sarkari judges*. We have judges who have ability, integrity and also independence. Independence to resist influence of pressure from any sort, not necessarily executive, government and the other sources. Judges are the best judge because they know the judgments of the judges and their work, but the flaw is you cannot exclude the executive altogether. Judiciary must have an edge, not an exclusive one, but it must accommodate other entries and other voices in the appointment. The Chief Justice of India (retd), R.M. Lodha reiterated that no effort to harm the judiciary's independence will succeed as its independence is "non-negotiable"[57]. Judicial independence is essential for maintaining public confidence that there is an institution which would come to their "aid and rescue in case of any wrong committed by the executive or anyone"[58]. He stated, "If there is any amount of corruption in judiciary one thing that will happen is it would shield impurity. That is the worst form of ailment in a thriving democracy and to each one of you who are sitting here I request you don't do anything that directly or indirectly brings

56 http://www.hindustantimes.com/comment/analysis/haste-can-only-lead-to-waste/article1 1255442.aspx#sthash.br9rP574.dpuf Accessed on23 September,2014

57 http://www.livelaw.in/judiciary-inherent-strength-attack-independence-will-succeed-cji/ accessed on 14th Sep2104

58 www.newindianexpress.com/nation/ accessed on 01-Jan-2015,Seminar on 'Rule of Law Convention -2014'.

corruption to judiciary. Because corruption is not something which can happen by one hand. There are people who play all sorts of trick".”[59] The independent and transparent judiciary is the sine qua non of a healthy democracy. JL Gupta Former Chief Justice of Kerala High Court “The government is the single largest litigant in the country, so how can they have anything to do with the selection of the people who will deal with their cases?”[60] Even if the collegiums' method for the appointment of judges has no foundation in the constitution, it could have been excused had the system worked satisfactorily but unfortunately, it has not. The system lacks the transparency and is secretive. The public is not aware of the selection of a judge until his name is forwarded to the Government by the collegium. There have been instances of judges being selected or not selected due to favouritism or prejudice of members of the collegium. Selection on competitive merit of the appointees is discarded and judges are generally appointed to the SC on their seniority in ranking in HC. Justice J.S. Verma, principal author of the 2nd Judges judgment, later admitted that the collegiums system had failed. The functioning has come in, not only from outsider but also from personalities who have 'insiders' in the functioning of the Supreme Court[61]. Should the earlier system of the Executive appointing judges after consultation be restored? To introduce a JAC in India is fundamental change in the constitution. Such a change requires careful consideration and evaluation of the system. Remedy must not be become worse than malady. The stability and prosperity of the society could be created only by guaranteeing the independence of the judiciary to guard and enforce those fundamental rights under the rule of law. Politics in every sphere is the bane of the present day Indian Life. Let judiciary remain free from this malady. The mere fact that the judge is appointed by the executive and can be removed by the legislature should not lead to the conclusion that the judge is related to other organs of government, capable of being influenced and threatened by them and hence not independent. Such measures may, on the contrary, be necessary to create an inter-institutional equilibrium and promote accountability in the particular system. When executive is the largest litigant, executive should not be allowed free hand in the appointment of the judges.Before killing a system try to find out the faults and correct it. One-third of new MPs face criminal charges, according to the Association for Democratic Reforms, which analysed the election affidavits filed before the Election Commission[62]. According to the Association for Democratic Reforms (ADR), which analysed the election affidavits filed before the Election Commission, 34 per cent of the new MPs face criminal charges. Role of the National Democratic Alliance government in the appointment

59 http://www.livelaw.in/judiciary-inherent-strength-attack-independence-will-succeed-cji/ accessed on 14th Sep 2014

60 Hindustan Times, Jalandhar. Auguast 13,2014.

61 http://www.frontline.in/static/html/fl2520/stories/20081010252003500.htm accessed on 01-10-2015 . /An interview by V. Venkatesan of *Frontline* dated 10.10.08.

62 http://www.thehindu.com/news/national/16th-lok-sabha-will-be-richest-have-most-mps-with-criminal-charges/article6022513.ece accessed on 20Aug,2014

of *amicus cure* Subramianium appointment as a judge is also questionable.[63] Noted jurist Fali S Nariman slammed the two legislations that seek to overturn the present collegium system of appointment of judges, saying they hit at the root of judicial independence and may be struck down by the Supreme Court[64]. We need to discuss openly and freely, the best method of appointing the best judges, for nothing less than the precious constitutional rights of our countrymen are at stake. How is it that for every other walk of life, Apex court believes that the cardinal principle of governance of civilized society based on rule of law, has to be transparency, but when it comes to judicial appointments, the rule suddenly vanishes into thin air. The real debate should not be about who appoints but about how appointment should be done? It gives enough space for political interference in the judicial appointment, which is against the basic feature of separation of power. There may be delay in the appointment tampering with reports those prospective candidates not having good rapports with political parties. The democracy leaves sufficient scope for different opinions and beliefs, sometimes there arise two almost equal forceful opinions, contradicting and conflicting with each other, holding out little chance of compromise. At this time, judiciary being regarded and respected as independent and impartial, the judicial verdict is generally adopted by all and the crises are resolved. The needs of the hour are restraint and conformity to the letter and spirit of the constitution both by all organs of the government. A free judiciary can only exist in a political system in which democratic principles are truly believed in and acted upon by all alike. In return, the judiciary in a democracy should have the courage to protect its independence and deliver impartial judgments free of fear of repercussions on career and prospects. Is it not against constitution? How can Executive decide the Judges in the Constitutional Courts? Is it against the principles of separation of powers? Is it not against the basic structure theory regarding independence of judiciary? The Constitution is a living law to keep a check on all three organs of the government. If Judiciary has empowered itself in the appointment of judges, for better delivery of Justice, this power must be subject to even a greater scrutiny and restraint. So that the legitimacy of institutions in a democracy and certainty of law can be maintained. The argument that the independence of the judiciary is jeopardised by the creation of a JAC is superficial. Even prior to the collegium system, judges of the Supreme Court, including some outstanding judges, were appointed by the President after consultation with the Chief Justice of India and other judges of the Court. The JAC will become functional only after a long time. A permanent secretariat to back up the functioning of the JAC has to be created.

63 Subramanium, who served as the Solicitor General during the previous UPA regime, was recommended by the collegium for elevation to the apex court bench along with some other names. But the government rejected his name "Subramanian was assisting the Supreme Court as amicus curaie in Sohrabuddin Sheikh fake encounter case in which BJP leader Amit Shah came under scrutiny.

64 http://articles.economictimes.indiatimes.com/2014-08-14/news/52807837_1_ accessed on 30-09-2014

Regulations have to be formulated for its functioning, particularly for the criteria of suitability for judicial appointments. There are many shortcomings in the JAC as formulated in the statute, but much will depend on how it will function in practice. The collegium system was allowed to function for over 20 years before its unsatisfactory working was acknowledged, even by judges. There should be a right balance between the executive and judiciary in the appointment of judges and a more participatory[65] mode which would ensure effective participation of both the executive and the judiciary. The composition of JAC is reflective of both executive and judiciary[66]. The Law Minister is capable of reflecting the view of the Executive as it is after all the Ministry of Law which forwards the recommendation to the Cabinet and to the President. Attorney General will be able to reflect the views of the Bar and considering his years of practice in the Supreme Court he is better equipped to know what kind of quality is required for a Supreme Court judge. Instead of condemning the JAC straightaway on its interference in judicial independence, and on the speculation of judicial members of the commission being side-tracked and outvoted by two non-judicial members, why can't the commission be allowed to function for sometime so it can reveal its merits? Whatever may be the composition of the NJAC. It is important to strike a balance between judicial independence and judicial accountability. The real issue is not who (judiciary or executive) appoints the judges but the manner they are appointed. Unless the entire process is transparent, the quality of appointment would not improve. In no democratic country the appointment of judges has been left exclusively to the judiciary. The denial of judicial review a basic feature highlights the secrecy in such appointments. It was with a view to ensure that the best products become the judges. But history has another story to tell. It is not necessary that the best products are ensured if judges appoint them. Transparency in public bodies is need of the hour and appointment of judges, who act as guardians of our Constitution should be transparent. After all Judges and their appointments should be like Caesar's wife- above all suspicion. *Judicial independence does not just happen all by itself. It is tremendously hard to create, and easier than most people imagine to destroy."*[67] The Judiciary was to be the arm of the social revolution, upholding the quality that Indians had longed for in colonial days but had not gained.... The courts were also idealised because, as guardians of the Constitution, they would be the expression of new law created by Indians for Indians[68]. So that we can say that "justice must not only be done, but also must be seen to be done." There are enough countries in Asia where constitutionalism did not flourish and the experience of these countries should be taken as a warning. The constitutional validity of the Constitution 99th (Amendment) Act, 2014, and to the National Judicial Appointments Commission

65 The National Commission to Review the Working of the Constitution'.
66 *Report of Law Commission of India ,* 1987.
67 Justice Sandra Day O'Connor The National Voter February 2008.
68 G. Austin, The Indian Constitution, A Corner Stone of a Nation,164 (1966).

Act, 2014, in the Supreme on the ground that independence of judiciary is a basic feature of the Constitution that cannot be violated by passing the aforesaid Acts. "Whatever the system, it is the honesty of purpose of the persons who are in charge of working that system that matters. Honest errors everyone makes. But then if something stares you in the eye, and then you do it, it weakens the system. And, therefore, I am for transparency."[6968] There is no basis for the theory that the judiciary must always have a controlling influence in judicial appointments.

69 http://www.frontline.in/static/html/fl2520/stories/20081010252003500.htm/ 'Honesty matters' V. VENKATESAN Interview with Justice J.S. Verma, former Chief Justice of India.

Impact of Nuclear Non-proliferation Treaty on India

Dr. Jaswant Saini[1]

Varun Kumar[2]

The global nuclear non-proliferation regime is facing some serious challenges. But we need to put these current challenges in perspective. Though the challenges facing the non-proliferation regime today might seem as if they are unprecedented, we must also not forget that from its inception, the regime has faced such challenges. Indeed, historically, the existence of such challenges has provided the impetus to strengthen and tighten the regime. India's first nuclear test in 1974 led to establishment of the Nuclear Suppliers Group (NSG); revelations about Iraq's success in hiding its nuclear weapons program led to the Additional Protocol; North Korea's withdrawal from the nuclear Non- Proliferation Treaty (NPT) led to proposals to eliminate the right to withdrawal clause in the Treaty, though this particular proposal has not yet been accepted.

Nevertheless, the non-proliferation regime does face a crisis today. For the first time, a non-nuclear member state, North Korea, has withdrawn from the Treaty and gone nuclear, and another non-nuclear member state, Iran, is threatening to do the same. Such non-compliance with the basic purpose of the treaty can lead other NPT non-nuclear weapon states (NNWS) to also seek their own nuclear weapons, thus unravelling the treaty. The NSG waiver granted to India for international nuclear commerce despite India building a nuclear arsenal and not being a signatory to the NPT is also seen as a challenge to the non-proliferation regime.[3] Meanwhile, little progress has been made on nuclear disarmament, a key objective of the NPT, another issue that agitates NNWS. But the most important challenge that the non-proliferation regime faces is the breakdown in the consensus about non-proliferation.

The global nuclear non-proliferation regime was established and strengthened in the first several decades after the NPT came into force in 1970 because the major powers, the key actors in international regime creation, management and sustenance, broadly agreed on the need for the regime and its key objectives and provisions.

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3 On the implications of the nuclear deal for the nuclear non-proliferation regime, see T.V. Paul, "The US-India Nuclear Accord: Implications for the non-proliferation regime," International Journal (Autumn 2007) pp. 845-861.

Over the last decade, that consensus has broken down. Washington's policies have been an important factor in this decline, but other major powers have not helped much either because they have allowed differences with the US on other political issues to spill over into non-proliferation issues. This has given violators and non-complying members space to exploit and weaken the regime. Hopefully, the next US administration will recognize the need for global consensus and work towards it. Equally hopefully, other powers will recognize that they would ultimately lose if the regime completely collapses and thus act in concert with the US to shore up the regime.

India is severely constrained from doing much to help the regime. India, not being a member of the NPT, has been outside the non-proliferation regime, and indeed a target of the regime. With the NSG waiver and the additional IAEA safeguards in place, India is now moving towards a modus vivendi with the regime. And India has strong interest in preventing further nuclear proliferation. The challenge that India and the non-proliferation regime face is in finding a way for India to support and strengthen the regime even while staying outside many of the formal institutions of the regime.

1. India's Nuclear Policy

Though India conducted a nuclear test in 1974, the Indian nuclear weapons program was more or less shut down for the next decade and half.[4] Though some developmental work continued at a low level, the decision to build nuclear weapons was taken only around 1988-1989. The Indian decision to go nuclear appears to have been taken reluctantly: Indian intelligence had been warning for about a decade that Pakistan was making steady progress on its nuclear weapons program, and both the international community in general, and the non-proliferation regime more specifically seemed unable or unwilling to stop Pakistan's nuclear pursuit. In addition, there were clear indications that China was aiding Pakistan's efforts. India's efforts at nuclear disarmament made no headway either, with the Rajiv Gandhi Action Plan receiving little support from the powers that mattered. These conditions appear to have left Indian decision makers believing that they had little choice but to restart the Indian nuclear program.

The Indian decision to conduct a second series of tests in 1998 and declare itself openly a nuclear weapon state is more complex. As the non-proliferation order tightened, with the NPT being extended indefinitely and the CTBT (Comprehensive Test Ban Treaty) threatening to eliminate an Indian nuclear option, various Indian governments sought to slip the noose by conducting nuclear tests.

4 The best history of the Indian nuclear program is George Perkovich, India's Nuclear Bomb: The Impact on Global Proliferation (New Delhi: Oxford University Press, 1999). See also, Raj Chengappa, Weapons of Peace: The Secret Story of India's Quest to be a Nuclear Power (New Delhi: Harper Collins, 2000)

Such efforts were thwarted either due to internal political problems or because preparations for nuclear tests were discovered. India's 1998 tests were thus a response to fears that India would be permanently consigned to a position of nuclear inferiority, especially vis-à-vis China. In the decade since the 1998 nuclear tests, India's weapons program has made slow but steady progress. India's size and conventional military capability are sufficient to handle most threats that it faces, which also reduces the pressure to deploy nuclear weapons in more adventurous roles.[5] Early fears about a nuclear arms race between India and Pakistan and China now appear to have been exaggerated. India has shown little concern with the state of the nuclear balance between itself and its two nuclear neighbours, concentrating instead on building up a relatively small but capable nuclear arsenal. India's doctrine of no first use and a credible minimum force structure represents a prudent investment, in line with India's general view that nuclear weapons are political instruments with little value other than as a deterrent for other nuclear forces. It must be noted, however, that India's nuclear forces are currently not capable enough to deter China because India does not have a missile with sufficient range to target all regions of China. Therefore India's nuclear force, especially its missile force, should be expected to grow slowly both in qualitative and quantitative terms over the next decade.

2. The US-India Nuclear Deal

The US-India nuclear deal was essential to India because India's traditional approach towards nuclear cooperation had reached a dead-end. Traditionally, India sought international nuclear cooperation, even while maintaining a nuclear weapons program, by agreeing to partial safeguards on nuclear imports. This strategy allowed India to supplement its domestic nuclear power capability with international cooperation, as long as there were willing international partners. However, when the rules of international nuclear commerce changed from partial safeguards (safeguards only on the specific imported item) to full-scope safeguards (safeguards on the entire nuclear program as a condition for any nuclear commerce), India was faced with the choice of either giving up its nuclear weapons program, or giving up on international nuclear commerce. Not surprisingly, India chose the latter. What the US-India nuclear deal does is give India the option yet again to both keep its nuclear weapons program while also preserving its access to international nuclear commerce. The issue had become even more vital for India because India's explosive economic growth has put much greater strains on its electricity generation capacity, leading to peak power shortages of as much as 11 percent. Now that the nuclear deal is complete, and India has the necessary waiver from the NSG that permits other nuclear powers such as France and Russia to supply India with civilian nuclear technology,

5 Rajesh Rajagopalan, "India: The Logic of Assured Retaliation," in Muthiah Alagappa, The Long Shadow: Nuclear Weapons and Security in 21st Century Asia (Stanford: Stanford University Press, 2008)

India is expected to significantly enhance its civilian nuclear power sector with international cooperation. The nuclear deal is unlikely to have major impact on India's nuclear weapons program. In the last two decades, ever since India went nuclear in the late 1980s, India has only built a few dozen nuclear warheads. Most estimates suggest that India has enough fissile material for about 65-110 warheads, with some estimates suggesting even lower numbers. If we assume a median of 85 warheads, it would suggest that India has only built, on average, about four warheads a year. This suggests that India feels no great pressure to rapidly increase its arsenal. The suggestion, by some arms control experts, that access to foreign nuclear fuel will free India's domestic fuel resources for weapons does not hold much water because India has much larger stockpiles of fuel (about one ton) that it could have converted for weapons if it had wanted to do so.[6] In other words, the small size of the Indian nuclear force is the consequence of deliberate choice rather than because of any fissile material shortage.

3. India's Non-proliferation and Arms Control Policies

Over the last several decades, India has emphasized nuclear disarmament rather than nuclear non-proliferation. New Delhi's position on the spread of nuclear weapons was a complex one. On the one hand, India always saw such spread of nuclear weapons as a danger. Its decision not to sign the NPT despite taking part in the negotiations was a difficult one, reached after New Delhi concluded that signing the treaty would adversely affect Indian security especially because neither Washington nor Moscow appeared willing to provide any form of extended deterrence cover for India's security. In other words, India never accepted the idea that nuclear proliferation was legitimate, unlike, for example, China in the 1950s and 1960s.[7] Therefore, though New Delhi refused to sign the NPT, it also refused to help other states such as Libya with nuclear technology.

New Delhi was also quite meticulous about ensuring that its nuclear weapons technology did not reach other non-nuclear weapon states. Though there have been some concerns raised that India might have illegally acquired some technologies and materials, and that it may have been careless in ensuring the security of some of its nuclear technology, the Indian record in protecting its technology from leaking is far better than that of most other Nuclear powers[8] . In the process, New Delhi built up a reputation as a 'responsible nuclear power' that became an unexpected bonus in dealing with the international community,

6 For a detailed analysis, see Ashley J. Tellis, Atoms for War? U.S.-Indian Civilian Nuclear Cooperation and India's Nuclear Arsenal (Washington D.C.: Carnegie Endowment for International Peace, 2006).

7 See Mingquan Zhu, "The Evolution of China's Nuclear Non-proliferation Policy," The Non-proliferation Review (winter 1997), pp. 40-48.

8 On these concerns, see David Albright and Susan Basu, "Neither a Determined Proliferator nor a Responsible Nuclear State: India's Record Needs Scrutiny," ISIS Issue Brief, April 5, 2006 available at http://isis-online.org/publications/southasia/indiacritique.pdf.

especially as India sought a waiver from NSG guidelines. India squared this circle of both opposing the NPT and opposing nuclear proliferation by taking the position that though each country should be free to decide on how to meet its security needs, states that did sign the NPT had an obligation to live up to their commitments. Thus, on both North Korea and Iran, India's position has been to argue that because these countries voluntarily accepted the NPT, they have an obligation to live up to their treaty commitments. India's response to the threat of nuclear proliferation was to take an active part in nuclear disarmament diplomacy, seeing the elimination of nuclear weapons as both a way of dealing with the threat of proliferation as also a way of avoiding the unpleasant decision about building its own nuclear weapons. India also was at the forefront in pressing that all commitments in the NPT be honoured, including the Article 6 obligation towards nuclear disarmament, rather than focusing only on the spread of nuclear weapons to non-nuclear states. Thus, a favourite Indian argument about nuclear proliferation was to point out that what mattered was not just horizontal proliferation (or the expansion of the nuclear weapons club) but also vertical proliferation (the expansion of the arsenals of the existing members of the club).

Nevertheless, as the global nuclear non-proliferation regime comes under increasing threat due to non-compliance or even outright violations by countries such as Iran and North Korea, India will have to increasingly face up to the needs of fashioning a more appropriate approach to the non-proliferation regime. In addition to focusing on nuclear disarmament and non-compliance by NWS (Nuclear Weapon States), India will also have to come up with meaningful and effective ways of dealing with non-compliance by NNWS (Non-Nuclear Weapon States), something that India had previously ignored. One of the disadvantages that India faces in making this policy transition is that India is not a member of the NPT and it is unlikely to become one unless India's de facto NWS status is accepted as de jure status by the NPT members. This is unlikely. But the alternative – India living up its nuclear weapons and joining the treaty as a NNWS – is equally unlikely. In essence, then, India's relationship with the treaty in unlikely to undergo any formal changes though India can be expected to play a more active diplomatic role in trying to keep the NPT system together. As stated earlier, India is likely to continue stressing nuclear disarmament as a way of resolving the problems of Nuclear proliferation. Though India's disarmament drive is sometimes seen a cynical ploy to divert attention from its unwillingness to accede to the NPT, a good number among India's political and administrative elite appear sincerely committed to the goal of a nuclear-weapon free world. This may very well be because no serious cost-benefit analysis has been undertaken within the government of the implications of nuclear disarmament on India's security interest. If so, it would not be the first time: India originally supported both the NPT and the CTBT without realizing the full import of these treaties on India's security. India would eventually refuse to accede to either treaty.

Nevertheless, India does strongly support a Nuclear Weapons Convention with the objective of eventual comprehensive nuclear disarmament. Even after openly declaring itself as a nuclear weapon state, India has reiterated its commitment to comprehensive nuclear disarmament.

4. Conclusion

If efforts at comprehensive global nuclear disarmament are to succeed, arms control and disarmament institutions need to be strengthened. This is easier said than done. It would be difficult even to agree on the principles for such institutions. The Conference on Disarmament (CD) and its predecessor entities were clearly the key forum for global non-proliferation negotiations and were responsible for the most successful global arms control measures, including the NPT. But, unfortunately, the CD has been deadlocked for more than a decade now, with member states unable even to agree on a work agenda. The CD's consensus rule is generally blamed for this deadlock, but it is unlikely that this rule will be or can be changed.

This deadlock has serious consequences: negotiations on the Fissile Material Cut-Off Treaty (FMCT), the key next step in global nuclear arms control, has been held up. The FMCT negotiations are likely to be challenging, given the disagreements among some key parties on important issues such as whether the treaty should have verification elements (the US has opposed verification measures, while most others want it), and whether existing fissile material stocks should be counted in the treaty (some states including Pakistan want existing stocks included, while many states including the NWS only want to cut-off future production). But until serious negotiations start, it is unlikely that the disagreements on these issues can be resolved, which will delay the treaty and quite possibly, suggest the need to move the treaty to some other forum.

Indeed, there are now more calls for moving critical arms control treaties away from the CD altogether because of the inability of the CD to get anything done. [9] Two key arms control measures, the Ottawa Treaty banning land mines, and the Convention on Cluster Munitions have been negotiated outside the CD. If the CD continues to be unable even to decide on what their annual agenda should be, frustration with the CD process can only increase. On the other hand, despite the problems with the CD, it remains the indispensable forum for nuclear arms control negotiations. Neither the Land Mines treaty nor the Convention on Cluster Munitions are appropriate examples because neither of these initiatives include the key nuclear weapon powers.

Such a non-CD model might be useful when like-minded countries come together, leaving out states that are likely to present serious obstacles. But clearly

9 On why such sentiments may be misplaced, see David Atwood, Why the Conference on Disarmament Still Matters: What NGOs Need to Do.

such a model will not work in dealing with nuclear arms control and disarmament. The primary obstacle in nuclear arms control talks are the nine nuclear weapon states and their touchiness on issues they consider vital to their national security. Moving to an ad hoc body outside the CD will be of little help.

Sedition Laws in India

Nirmal Rallan[1]

The law of sedition i.e. Section 124-A of Indian Penal Code is criticised as archaic, abusive and a hallmark of dictatorship not democracy. It is alleged that it is against the freedom of speech and expression guaranteed to all citizens under Article 19(1) of the Constitution of India and is used by governments to suppress dissent against it. Many people have objected to the continuance of this law in independent India. It is argued that this law is not in the interests of a healthy democracy as it gags all fair criticism of the government. Post Aseem Trivedi and Binayak Sen's case, sedition law has been severely criticized on the ground that it allows for government's crackdown on voices of dissent. Several journalists and human rights activists have advocated the repeal of this law due to fear of its misuse by those in power. Is abolition of the law the only solution? Is the Indian democracy ready for the abolition of this law? Is the right to freedom of speech and expression and absolute right? Let us take a look.

1. Principle behind Sedition Law

Section 124-A is based on the principle that every State, whatever its form of Government, has to be armed with the power to punish those who by their conduct jeopardize the safety and stability of the State, or disseminate such feelings of disloyalty as have the tendency to lead to the disruption of the State or to public disorder. The very existence of the State will be in jeopardy if the Government established by law is subverted. Hence the continued existence of the Government established by law is an essential condition for the stability of the State. That is why 'sedition', as an offence in section 124-A, has been placed under Chapter VI relating to offences against the State.[2]

The Section 124-A explains the acts which amount to offence thereunder. Accordingly, the words, written or spoken, or by signs or visible representation which bring or attempt to bring into hatred or contempt, or excite or attempt to excite disaffection towards the Government established by law in India are punishable under the Section. The correct assessment of the offence is that it is an offence short of treason but more serious that the ordinary breach of peace or conduct tending thereto.[3] Sedition is a common law indictable misdemeanor and embraces everything whether by word, deed or writing which is calculated

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1 LLB, LLM (DU), UGC-NET , University of Delhi, Delhi.

2 K. D. Gaur, *The Indian Penal Code*, fourth edition (2012), Universal Law Publishing Co., p.227.

3 H. P. Gupta & P. K. Sarkar, Law relating to Press and Sedition in India, 1st edition (2002), OrientPublishing Company, 9, Lowther Road, Darbhanga Colony, Allahabad – 211 002 at p.141.

to disturb the tranquility of the State and lead ignorant persons to endeavour to subvert the Government.[4]

There are several case laws indicating the guiding principles so as to govern the judges in deciding when an intention to excite ill-will and hostility is seditious and when it is not. Fitzerland J, in R. v. *Sullivan*[5] which was later followed and approvingly quoted in *R.* v. *Burns and Others*[6] observed: "Sedition in itself is a comprehensive term and it embraces all those practices 'whether by word, deed or writing which are calculated to disturb the tranquility of the State, and lead ignorant persons to endeavour to subvert the Government and the laws of the Empire. The objects of sedition generally are to induce discontent and insurrection, and stir up opposition to the Government…and the very tendency of sedition is to incite the people to insurrection or rebellion."

Similarly Coleridge J in *R.* v. *Alfred*[7] said that the "word 'sedition' in its ordinary natural signification denotes a tumult, an insurrection, popular commotion or an uproar; it implies violence or lawlessness in some form". Accordingly, it came to be established that in order to apply sedition law to a given case or situation, the acts done must not only bring the government into hatred or contempt or disaffection but should generate or tend to generate or excite the feelings to a degree likely to lead to tumult or public disorder. Thus, public disorder is the essence of sedition.

However a strict and narrow interpretation of the law was given by Strachey J. in *Q. E*. v. *Balgangadhar Tilak*[8] where it was observed that "the amount or intensity of the disaffection is absolutely immaterial…if a man excites or attempts to excite feelings of disaffection, great or small, he is guilty under this section. The offence consists in exciting or attempting to excite in others bad feelings towards the Government. It is not the exciting or attempting mutiny or rebellion, or any sort of actual disturbance, great or small. Whether any disturbance or outbreak was caused by these articles is absolutely immaterial. If the accused intended by the articles to excite rebellion or disturbance, his act would doubtless fall within the other sections of the Penal Code. But even if he neither excited nor intended to excite any rebellion or outbreak or forcible resistance to the authority of the Government, still if he tried to excite feelings of enmity to the Government, that is sufficient to make him guilty under the section."[9] In *Nazir Khan* v. *State of Delhi*[10], the Supreme Court explained the meaning of

4 *Id.* at p.142.
5 11 Cox. C.C. 44.
6 16 Cox. C.C.355, 361.
7 22 Cox C.C.1,3.
8 K. N. Chandrasekhran Pillai, Shabisten Aquil, *Essays on the Indian Penal Code,* (2005), Indian Law Institute, Bhagwan Dass Road, New Delhi, p.283.
9 I.L.R. (1897) 22 Bom.112.
10 *Id*. at p.134, 135.

sedition. It was stated that, "Sedition is a crime against society nearly allied to that of treason, and it frequently precedes treason by a short interval. Sedition in itself is a comprehensive term, and it embraces all those practices 'whether by word, deed or writing which are calculated to disturb the tranquility of the State, and lead ignorant persons to endeavour to subvert the Government and the laws of the country..."[11]

2. Justification for 'Sedition Law' in the post-Constitution period

Fair criticism, debates and discussions on political matters cannot be termed as sedititious. The test is the manner in which it is made. Sincere and honest discussion on issues is legally permitted. The law only interferes when the discussion crosses the limits of fair criticism. Incitement to disorder and violence is the essence of the crime. Everyone may lawfully criticize or censure the conduct of the Government provided that he does so without malignity and inciting or attempting to incite violence and disorder. In fact, it is entirely a question of degree to distinguish reasonable criticism from seditious utterances. Everyone is presumed to intend the natural consequences of his acts. If, therefore, the language of the accused had a direct tendency to cause unlawful disturbances and to lead to a breach of the peace, he must be presumed to have intended what it was likely to produce.[12] Provocative words intending to stir up rebellion or violence cannot claim the protection of constitutional freedom.

Freedom of speech and expression is a fundamental right under Article 19 of the Constitution. Therefore, it is generally argued that sedition law has no place in Indian democracy as it curbs freedom to express views and discourages criticism of government. But like any other right, freedom of speech and expression is not an absolute right. Like every other right this right also comes with a duty. Freedom of speech comes with a duty to use it in a responsible way and not to abuse it in any manner irresponsibly. The dimension of freedom of speech as a right is not rigid but a variable one depending upon time, place and circumstances. The content of the right depends, amongst others, upon the following factors.[13]

1. the political situation of the times,
2. the economic prosperity of the society,
3. the audience to which the speech is addressed or amongst whom the writing is circulated,
4. extent of toleration developed by the people, and
5. the police force available to the State.

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11 (2003) 8 SCC 461.

12 *Supra* note 2 at p. 142. Also see Stephen's Digest of the Criminal Law (9th edition) 93, R v. Burns (1886) 16 Cox CC 355 at 359, 360, per Cave J. and R v. Sullivan, R v. Pigoti (1868) II Cox CC 44.

13 S. R. Komawar, "Sedition Law in India – An Overview", The Criminal Law Journal, (2012), at p. 3

In the enlightened and contended times, there might arise no occasion for enforcement of these laws. Even when the laws are there, and prosecutions at times become necessary, much harm might not be done even if the courts acquit the accused because the courts generally pronounce their verdicts long after the time when the provocative atmosphere in which the words were spoken or published and which apparently justified prosecution, existed. But if the period is not propitious, and if the times are such that systematic attempt is made to violate any of the laws, prosecution and punishment for violation will scarcely be effective.[14]

In the current scenario terrorists and separatist forces operating in India and from outside are bent on attacking the unity and integrity of India in all possible ways. These forces, through their poisonous words and ideas create rift between the different sections and religions in the Indian society. A majority of our population is uneducated and ignorant and is likely to fall prey to the dangerous plans of these separatist forces. Hence, India in the present times cannot take the risk of abolition of sedition laws. Sedition law is meant to maintain discipline and order in society especially in turbulent times. In India, the situation could become dangerous to peace and public tranquility if people are allowed to say whatever they want to under the excuse of freedom of speech. Security of State, public order and national integration should be the should not be sacrificed at any cost. Before we go for abolition of sedition law let us wait till our population reaches such a level of maturity as exists in developed countries of the World.

It would not be a wise move to grant unrestricted freedom to those who misuse this freedom to put an end to it by availing of that freedom. Waiting for an overt act towards the commission of the actual crime cannot be justified. Repealing the sedition law in the present circumstance may not be appropriate and advisable. The countries who have abolished such laws do not face such internal problems and threats to public tranquility as is there in our country. The situation in India is very complicated due to wide range of cultural and regional disparities among the population. Due to caste factions and religious diversity in our society, it is not impossible to provoke people and create disorder. Therefore there is a need to keep a check on those trouble-shooters who want to misguide the masses and create threat to the security of the State.

It is also the prime concern of every State to restrain spreading of rumors about itself as these could have serious repercussions on the on peace and security of State. Continuance of sedition law in democratic India is necessary for the preservation of law and order. The security of the State, which depends upon the maintenance of law and order, is the very basic consideration upon which legislation, with a view to punishing offences against the State is undertaken. At the same time, such a legislation has to protect and guarantee the freedom of

14 *Supra* note 7 at p.2.

speech and expression which is the sine qua non of every democratic form of Government. Properly construed this section strikes the correct balance between the individual fundamental rights and the interest of public order.[15]

In *Niharendu Majumdar* v. *K.E.,* Gwyer, CJ explained the need for the law of sedition in the following words:[16]

The first and most fundamental duty of every government is the preservation of order, since order is the condition precedent to all civilization and the advance of human happiness. The duty has no doubt been sometimes performed in such a way as to make the remedy worse than the disease; but it does not cease to be a matter of obligation because some on whom the duty rests have performed it ill. It is to this aspect of the function of Government that in our opinion the offence of sedition stands related. It is the answer of the State to those who, for the purpose of attacking or subverting it, seek to disturb the tranquility, to create public disturbance and to promote disorder, or who incite others to do so. Words, deeds, or writings constitute sedition, if they have this intention or this tendency, and it is easy to see why they may also constitute sedition, if they seek, as the phrase is, to bring Government into contempt. This is not made an offence in order to minister to the wounded vanity of Governments, but because where Government and the law cease to be obeyed because no respect is felt any longer for them, only anarchy can follow.

3. Judicial Pronouncement

Kedarnath Singh v. *State of Bihar*[17] is a leading case on the issue of constitutionality of section 124-A IPC. The Supreme Court of India gave its decision in favour of the constitutionality of section 124-A wherein it was held that any law which is enacted in the interest of public order may be saved from the vice of constitutional invalidity. The Supreme Court accepted that section 124-A is capable of two interpretations, the one given by Strachey J in *Tilak* case and the other given by the Federal Court in *Niharendu* case. The Court said that either view can be taken and can be supported on good reasons. In its view, the Judicial Committee has given a literal construction to the section divorced from all the antecedent background in which the law of sedition has grown in England, while the Federal Court had taken into consideration the developments in the English law in this respect. It was explained that according to the meaning given by the Judicial Committee, the section will be much beyond the permissible limits of restrictions which the State is empowered to impose under Article 19(2) of the Constitution.

15 *Supra* note 2 at p.158.
16 1942 F.C.R. 38
17 AIR 1962 SC 955.

On the other hand, the Supreme Court observed, if the meaning given to the section by the Federal Court is adopted, the section will be in accordance with the position under the English law and is also in consonance with the intention of the legislators when they enacted Act XXVII of 1870. Such construction will be in accordance also with the Constitution. Applying the Golden rule of interpretation the Supreme Court held that the section 124-A is constitutional. It was explained that the gist of the offence is incitement to disorder or tendency or likelihood of public disorder or the reasonable apprehension thereof. For the determination of criminality, the Court in each case has to determine whether the words in question have "the pernicious tendency" and the utterer has the "intention of creating public disorder or disturbance of law and order." Then only the utterance attracts penal provision. It implies that when a person incites people to violence by words spoken or written, he looses the constitutional protection of freedom of speech. Freedom is different from license.[18]

Thus the Supreme Court by narrow interpretation of the section, held that it was within the permissible limit of restrictions on the freedom of speech in the interests of public order.

Sinha, C.J., speaking through the court observed that:[19]

> "The provisions of the section read as a whole, alongwith the explanations, make it reasonably clear that the section aims at rendering penal, only such activities as would be intended, or have a tendency, to create disorder or disturbance, of public peace by resort to violence. The explanations appended to the main body of the section make it clear that a criticism of public measures or comment on government action, however strongly worded, would be within reasonable limits and would be consistent with the fundamental right of freedom of speech and expression. It is only when the words, written or spoken, etc. which have the pernicious tendency or intention of creating public disorder or disturbance of law and order that the law steps in to prevent such activities in the interest of public order. So construed, the section strikes the correct balance between the individual fundamental rights and the interest of public order.

The Court further stated that the right guaranteed under Article 19(1) (a) is subject to such reasonable restrictions as would come within the purview of clause (2) of Article 19 which comprises (a) security of the State, (b) friendly relations with foreign States, (c) public order, (d) decency or morality etc. With reference to the constitutionality of section 124-A of the Indian Penal Code, as to how far they are consistent with the requirements of clause (2) of Article

18 *Supra* note 1 at p.51.
19 *Supra* note 31 at p..233.

19 with particular reference to security of the State and public order, the section, it must be noted, penalizes any spoken or written words or signs or visible representations, etc. which have the effect of bringing, or which attempt to bring into hatred or contempt or excite or attempt to excite disaffection towards 'the Government established by law'.[20] It was also observed in this case that the "Government established by law" is the visible symbol of the State.

The very existence of the State will be in jeopardy if the Government established by law is subverted. Hence the continued existence of the Government established by law is an essential condition of the stability of the State. Any written or spoken words, etc., which have implicit in them the idea of subverting Government by violent means, which are compendiously included in the term 'revolution', have been made penal by the section in question. But the section has taken care to indicate clearly that strong words used to express disapprobation of the measures of Government with a view to their improvement or alteration by lawful means would not come within the section.[21]

The Court went on to say :[22]

> *".... the freedom has to be guarded against becoming a licence for vilification and condemnation of the Government established by law, in words which incite violence or have the tendency to create public disorder. A citizen has a right to say or write whatever he likes about the Government, or its measures, by way of criticism or comment, so long as he does not incite people to violence against the Government established by law or with the intention of creating public disorder. The Court, has, therefore, the duty cast upon it of drawing a clear line of demarcation between the ambit of a citizen's fundamental right guaranteed under Art. 19(1)(a) of the Constitution and the power of the legislature to impose reasonable restrictions on that guaranteed right in the interest of, inter alia, security of the State and public order."*

4. Conclusion

The law of sedition introduced by the British in India in 1870 in the colonial era, as section 124-A was seen as a draconian law. The law was meant to control the agitations by the freedom fighters and to curb the freedom of speech and expression. Section 124-A of the Indian Penal Code punishes any person who by words, spoken or written, attempts to bring into hatred or contempt, or excites disaffection towards the Government established by law. In the pre-independence period in India, this Section was given a wide interpretation making it draconian. Exciting or attempting to incite bad feelings towards the government was held

20 *Id.*
21 *Supra* note 6 at p.25-26.
22 *Supra* note 6 at p.27.

punishable under this legal provision even if it did not result in public disorder. The wide interpretations made a person guilty under the law for actions or words even when no actual disaffection towards the Government was caused. In the post-Constitution period, it is not possible to uphold such a broad interpretation of section 124-A due to the fundamental freedom of speech and expression protected under Article 19(2).

This freedom entails the right to express one's convictions and opinions freely by words, writings, pictures, or in any other manner. This freedom also allows freedom of Press which is essential for the proper functioning of the democratic process. It is said that this freedom of speech and expression is the mother of all liberties.[2322] Free discussions of various issues of public importance is the foremost requirement in a healthy democracy thus enabling the formation of public opinion on social, political and economic matters. Any restriction imposed upon the freedom of speech and expression is prima facie unconstitutional, unless it can be shown to fall within the grounds under the limitation clause (2) of Article 19. This clause authorizes the State to impose restrictions upon the freedom of speech only on certain specified grounds viz. sovereignty and integrity of India, security of State, friendly relations with foreign States, public order, decency, morality, contempt of court, defamation and incitement to offence. All these restrictions are perceived to be in the national interest or in the interest of society.

No doubt freedom of speech and expression is vital to the functioning of a democracy but it is also equally true that unrestricted freedom leads to anarchy and disorder. Like any other freedom, this freedom cannot be absolute but a qualified one subject to reasonable restrictions as provided under Article 19(2) of the Constitution. Any restriction on the exercise of freedom of speech and expression exceeding the limits of Article 19(2) cannot be held to be valid. This freedom of speech and expression also entails a duty on the citizens to act in a responsible and disciplined manner. No one has a right to violate the Constitution or promote disorder or violence or cause a threat to public peace and order. In any case, individual interests cannot have precedence over social and national interests. A citizen's views on political issues need to be expressed in a reasonable manner and within the lawful and reasonable limits. Criticism of Government's actions and policies must not be done in a malignant manner or with corrupt or malicious motives. Criticising a change in policy or raising objections against Governmental actions is the right of every citizen in a democracy. But such criticism and protests can be allowed only so long as it is done in a peaceful manner without disturbing the law and order in a State.

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23 M. P. Jain, *Indian Constitutional Law*, 5th edition (2009), Lexisnexis Butterworths Wadhwa Nagpur, 14th floor, Building No. 10, Tower-B, DLF Cyber City, Phase II, Gurgaon – 122002, Haryana, p.986.

Post *Kedar Nath* decision, the sedition law has not remained draconian. In the present times, peaceful protests, meetings, public discussions and processions are held lawful which would have been held seditious under the British rule. Any expression of anger or discontent towards the Government needs to be done within the reasonable limits of law without disturbing peace and ensuring the dignity of our revered national symbols and Constitution. No Government can risk public tranquility at the cost of unrestricted freedom to its citizens. Separatist forces and anarchists need to be dealt with a strong hand in the best interests of the nation.

Abolition of the sedition law in the present turbulent times may not be a good move. Only a disciplined and non-violent society can progress in today's competitive world. There is a need for positive attitude on the part of citizens as well as the Government towards resolving the various issues of public importance. Indecent cartoons, undignified attitude and inciting the ignorant masses to ask for a separate State would lead to our downfall as a Nation. This will also make us weak internally making us vulnerable to outside attack and a subject of ridicule in a globalised world. Political dissent needs to be expressed in a dignified and disciplined manner at an appropriate forum.

On its part the Government should make efforts to resolve sensitive issues without any delay. No compromises should be allowed at the cost of 'security and integrity of India'. People who give irresponsible statements and threaten the security and integrity of India for their vote bank politics or other evil designs need to be dealt with a strong hand. State cannot remain a mute spectator and wait till any overt act is done by mischief-makers to disturb peace and harmony in the society. So for now sedition law is well balanced for the functioning of a healthy democracy in India.

Role of BCI in Reforming Legal Education in India -Issues and Challenges

Dr. Praveen Kumar[1]

The decline in the standards of legal education in the country has been engaging the attention of concerned authorities especially the Bar Council of India. The Bar Council of India has felt urgent necessity to improve the standards of legal education. The Bar Council has thus got a powerful influence in its hands to influence the quality, content and standards of legal education in the country. The Bar Council can play a very vital role in the process of progressive development of Indian legal education. The Bar council exercises its influence on legal education from a vocational point of view because only such law degrees as are recognized by the Bar Council shall be a sufficient qualification for admission to the profession. The Bar council can lay down standards which a law degree must fulfil before it can be recognized by it for enrolment into the legal profession.

1. Establishment of National Law Schools in India

The concept of a National institution to act as a trendsetter and a testing ground for bold experiments in legal education came up before the Bar Council of India in the context of the Councils statutory responsibility for maintaining standards in professional legal education. The NLSIU Act, 1986 of the Karnataka legislature, Bar Council of India has decided to start National Law School at Bangalore with a view to improving the quality of legal education in the country and to establish the bench mark institution like IITs and IIMs.

2. Evaluation of standards by the Bar Council of India

Besides numerous remarkable reforms by the Bar Council, the pace of enhancing the quality of legal education was lowered down by the Bar Council through numerous compromises adopted in the last two decades. These include;

(a) Bar Council has not been able to generate and mobilise funds for supporting improvements in legal education, particularly among institutions located outside metropolitan cities. These institutions are lacking in providing in basic infrastructural needs and academic structure due to lack of fund and other facilities. They do not keep good law library. They could not invite eminent faculties to teach students as the eminent faculties prefer to stay in Metro cities. Moreover, these institutions never follow the BCI guidelines in true sense and still they are running law courses.

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(b) Bar Council has not been able to prevent full-time teachers from practicing law and thereby depriving students of the benefit of services of these teachers. After completion of the course most of the students have to go for the practical training of the law as a legal practitioner. Bar Council has introduced compulsory internships to complete the law course but it is insufficient to inculcate practical skills in the students. Moreover, to know the practical situation of the court room procedures, a person who is expert in that particular field is required and Bar Council has not proposed appointment of certain faculty from practising lawyers in legal educational institutions. Only the practicing lawyer is the best teacher to teach practical aspects of law in the court. Apart from internship and practical work, on the other hand procedural law papers like Criminal Procedure code, Indian Penal Code, Indian Evidence Act cannot be understood except with practical knowledge and practices that are followed in the court. Bar Council provides for restriction on practice by the people working in educational institutions since not implemented effectively. It is high time for the Bar Council to lay down rules for special lectures by experts in the law colleges. Bar Council must put forward and expand the time for internship. It is proposed that final semester must be dedicated for internship and practical work.

(c) In the recent years, a recent development by non-law institutions like Indian Institute of technology (IIT), Kharagpur, one of the premier technology institutions of the nation has come out with new course on law related to Technology and Computers. This innovation of synchronising legal studies with other disciplines must be initiated by other premier institutions like IIT, IISc, ISI and IIMs. These institutions are the best in their respective field of Science and technology, statistics and management. So if they start to use their intellectuals in this field then the development in law will be the astonishing. Like-wise if the other business schools come out with different law courses on the corporate management then it will be beneficial for the corporate law field.

(d) Synchronisation law degree with other degree in other discipline and specialization in law streams is another contemporary concept to develop legal education. Post graduate Diploma in cyber laws, tax laws, matrimonial issues, real estate laws, banking and insurance laws are yet to be introduced in India. The BCI has introduced synchronisation of few streams with law and has initiated for honours degree in law as a progressive step. But so far in practice, few institutions have started offering honours degrees and short term diplomas.

3. Issues and challenges

Legal education needs reforms. But the creation of an elitist in situation for a discipline like law when standards of legal education in general are so poor may have unanticipated and undesirable consequence. Any reform of legal education must be contemplated in the light of Indian conditions. Further, legal education can not be considered in isolation but as part of higher education generally. After Independence, the course the universities offered was a 2 years course after graduation, later made a three years couse. Now a five years integrated course of legal teaching has started. The NLSIU monopoly over what was then hyped as the revolutionary five-year B.A. LL.B. programme, lasted for the next fifteen years. In 1999, there was an explosion of the law school phenomenon, with many other states decided to follow suit. Ten years hence, the prestige of gaining admission to these law schools is comparable to that of any IIT. This concept has been a success and now there are twenty five National Law Universities in total. These institutions have brought legal education at par with other professional courses such as medical and engineering. The schools represents a unique effort in promotion of legal education in India.

The Bar council has started all India bar examination to get enrolled as an Advocate and in legal profession. The aim of the examination is to filter the dedicated and committed aspirants from the rest. It has been a mystery for the researcher that, if this is the prime duty of Bar Council to give certificates to the law graduates then what is the sanctity and integrity of any university to provide a law degree? This examination is a question on the integrity of the examination standards of the universities across the nation.

The Bar Council has used its power and prescribed the subjects of study which a LL.B. course must contain, some of there subjects are elective and some are compulsory. Thus the Bar Council of India is playing a very imperative role in imparting quality legal education. On the other hand, it has been criticised many times, because prescribing a list of subjects is a curtailment of academic freedom. Number of elective courses is very less as compared to compulsory courses. It hinders in developing student's interest in legal education. Law subjects are numerous and concept of specialization has not been favoured by the Bar Council. Introduction of Honours degree in law can be appraised as a pivotal and timely action by the Bar Council to meet the international standards of legal education.

It seems that law institutions owned and regulated by private individuals in the names of trust, companies, societies, affiliated under the Bar Council are not serious about standards of legal education. Moreover, Bar Council has not established any system of grievance redressal for problems encountered by law students. Majority of these institutions must be considered to be outlawed on account of non observance of Bar Council guidelines regarding infrastructure, library and faculty. These institutions do not follow established employment

rules for faculty. There are many instances noticed in news papers that, these institutions charge fine from students on frivolous grounds, for instance, falling short of attendance below 70 percent, which is not compoundable and a clear cut violation of the rule established by the Bar Council for perseverance of standards. Moreover, there are multiple issues regarding, employment rules for faculty, and academic issues of students and there is no grievance redressal mechanism also. Inspection by the Bar Council must be held without prior information to the institution. Inspection with prior intimation is just a mockery of inspection.

4. Conclusion

Law is the cement of society and an essential medium of change. Knowledge of law increases one understands of public affairs. Its study promotes accuracy of the expression, facility in accuracy of the expression, facility in arguments and skill in interpreting the written words, as well as some understanding of social values. The quality of standard of legal education acquired at the law school is reflected through the law school is reflected through the standard of Bar and Bench and consequently affects the legal system. The role of bar council in promoting legal education is worth appreciation and it is due to these efforts which has not shake the faith of people in Judiciary.

To meet the ends, it will be important to devote thought on how to adopt our legal education to modern conditions so that the future generation may fit in the new society that is envisaged. Legal education is an investment, which if wisely made will produce most beneficial results for the society.

Introduction of specialization in law courses with synchronisation with other disciplines has become the demand of present society. Reformation of rural institutions to meet the challenges and implementation of latest policy to enhance the standards of legal education and legal profession thereby is one of the major challenges in front of Bar Council. Inspection procedure by the Bar Council must be made transparent and more accountable. Institutions without basic amenities must be closed down. A proper model for recognition and affiliation of Laws Schools must be adopted and implemented.Academic standard and infrastructural standards must be developed together by institutions in conjunction with growing demands of the society.

The Dilemma of Live-in Relationships in India

Ramesh Kumar[1]

The only form of socially acceptable relationship between a man and a woman in Indian society is that of marriage. Any relationship outside marriage is generally viewed as immoral and illegal. The social and legal security attached to the institution of marriage makes it the most acceptable form of relationship between a man and woman. However with the changing norms of modern society, the western concept of live-in relationships is fast catching up especially in metropolitan cities in India. It is an arrangement where a man and woman cohabit without getting married. Such relationships seem to offer an easy way out in case of break-ups which is not quite possible in case of traditional marriages. However life may not be quite easy after all even in a live-in relationship as it may have its own long-term legal and social repercussions. Also such relationships put the female live-in partner in a vulnerable position with limited legal and social protection for her and her children. In the absence of any specific law on the subject the legal position is still not very certain though the Courts have taken a progressive stand on the issue.

1. Legal Position in India

There seems to be no legal bar as regards live-in relationships. The fundamental right to life and liberty under Article 21 allows every individual to live in the manner they like. Law does not restrict two consenting adults to live together without marriage. In *Lata Singh* v. *State of U.P*[2], the hon'ble Supreme Court observed that a live-in relationship between two consenting adults of heterogenic sex does not amount to any offence (except 'adultry') even though it may be perceived as immoral. The legal position was further clarified in *S. Khushboo* v *Kanniammal & Anr*[3] where the three-judge bench clarified that while it is true that the mainstream view in our society is that sexual contact should take place only between marital partners, there is no statutory offence that takes place when adults willingly engage in sexual relations outside the marital setting, with the exception of 'adultery' as defined under section 497 IPC[4]. In *Patel &*

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2 AIR 2006 SC 2522.

3 Criminal Appeal No. 913 of 2010 [Arising out of SLP (Crl.) No. 4010 of 2008] (2010) 5 SCC 600.

4 Section 497 IPC says "Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor."

others case[5], it was held that live-in relation between two adults without a formal marriage cannot be construed as an offence. The Allahabad High Court in *Payal Sharma* v. *Superintendent, Nari Niketan Kandari Vihar*[6], held that both men and women can live together without getting married.

2. Position of Live-in Partner under the 'Protection of women from Domestic Violence Act, 2005

The changing societal reality of live-in relationships has been partly recognised under the Protection of Women from Domestic Violence Act 2005 (hereinafter called PWDVA). The Act does not cover all live-in relationships. In fact, the Act nowhere uses the term 'live-in relationship'. Instead it uses the terms 'relationships in the nature of marriage'. Only those live-in relationships that are in the 'nature of marriage' are covered under section 2(f) of PWDVA, 2005.[7] It requires continuous cohabitation for a significant period in a 'shared household' and not one-night stands. The expression 'a relationship in the nature of marriage' has not been defined under the Act. The Supreme Court in *D. Velusamy* v *Patchaiammal*[8] observed that Parliament by the aforesaid Act has drawn a distinction between the relationship of marriage and a relationship in the nature of marriage, and has provided that the person who enters into either relationship is entitled to the benefit of the Act. The Court was of the view that 'a relationship in the nature of marriage' must fulfill the following four conditions:

(a) The couple must hold themselves out to society as being akin to spouses.
(b) They must be of legal age to marry.
    (i) They must be otherwise qualified to enter into a legal marriage, including being unmarried.
    (ii) They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time.

In addition, the parties in the relationship must have lived together in a 'shared household' as defined in section 2(s) of the Act. It was clarified in this case that Parliament has used the expression 'relationship in the nature of marriage' and not 'live-in relationship'. Thus the Court has clarified that all live-in relationships would not get the benefit of this Act. Also it is relevant to note that continuous cohabitation raises a presumption of marriage for the purpose of

5 (2006)8 SCC 726.
6 In the High Court of Allahabad, C.M.H.C.W.P. Appeal No. 16876 of 2001.
7 Section 2(f) defines 'domestic relationship' as a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family.
8 Criminal Appeal nos.2028-2029 of 2010 [arising out of SLP(Crl.)Nos.2273-2274/2010].

evidence under section 114 of the Indian Evidence Act in the absence of any other evidence of marriage. Merely spending weekends together or one night stand would not make it a 'domestic relationship' for the purpose of PWDVA.

2.1 Legal rights of the female live-in partner

If a relationship between a man and a woman fulfils the above conditions prescribed by the Supreme Court, the female partner gets the following rights under the provisions of the Domestic Violence Act, 2005 :

- Protection from domestic violence including actual abuse or threat of abuse (physical, sexual, verbal, emotional or economic).
- Secure housing in the 'shared household' whether or not she has any right, title or benefit to the same.
- Right to obtain 'protection orders' against the male partner from the Court.
- Monetary reliefs to be paid by the male partner to enable her to meet medical and other expenses/ losses.
- Payment of maintenance to the women and her children in consistent with the standard of living to which the female partner is accustomed to.
- Custody of children to the female partner and restrain on the male partner from visiting the children if it is harmful for the children.

The Act also provides for appointment of Protection Officers to provide assistance to the woman w.r.t medical examination, legal aid, safe shelter, etc.

2.2 Maintenance Rights of Female Partner under Criminal Procedure Code, 1973 (Cr.P.C.)

In a progressive stand, the Supreme Court in *Abhijit Bhikaseth Auti* v. *State of Maharashtra and Others*[9] observed that it is not necessary for a woman to strictly establish the marriage in order to claim maintenance under section 125 of Cr.P.C. But words and expressions used in section 125 Cr.P.C. gives the right of maintenance only to the legally wedded wife or divorced wife and not to live-in partners. In this regard, the Malimath Committee had also suggested that the word 'wife' under section 125 Cr.P.C. be amended to include a 'woman living with the man like his wife' so that even a woman in a live-in relationship with a man would also be entitled to alimony. The Committee observed that if a man and a woman are living together for a reasonable long period, the man shall be deemed to have married the woman.

9 CrLJ 2009 SC 889.

2.3 Legitimacy and Inheritance Rights of the Child born out of Live-In Relationships

The legitimacy issue of children born out of such relationships is also an important issue. Section 16 of the Hindu Marriage Act (HMA) grants legitimacy to the children of void and voidable marriages. Thus section 16 can be invoked only if a marriage was proved to have taken place in the first instance which later turned out to be void or voidable in case of Hindu couples. But in case of live-in relationships there is no marriage at all. Thus HMA cannot be invoked to grant legitimacy or inheritance rights to the property of parents to the children born out of such relationships between two Hindus. Thus children born out of such relationships are not entitled to become coparceners of Joint Family property though they can claim maintenance as illegitimate children. In *Bharat Matha & others* v. *R. Vijaya Ranganathan & Ors*[10], it was held that children born out of live-in relationships may succeed to the separate property of parents but they cannot claim any right to the ancestral coparcenary property. Hindu Adoptions and Maintenace Act, 1956 can also be invoked to grant maintenance till the child (legitimate or illegitimate) is a minor.

3. Conclusion

Absence of any specific legislation on this subject is a matter of concern. Woman live-in partners do not have the same privilege as a married woman or a divorcee under the Indian law. They and their children continue to be exploited in such relationships. Whatever protection they get under PWDVA is available only if they are able to establish that their relationship was in the 'nature of marriage'. Legal lacunae result in several legal complications and grave injustice to the women partners and their children. There is an urgent need for legal reforms. Suggestion of Malimath Committee needs to be incorporated under the CrPC. Protection given to the 'relationships in the nature of marriage' under the Protection of Women from Domestic Violence Act, 2005 is a welcome initiative. Fake marriages resulting from lack of mandatory ceremonies can now be brought under the legal net to grant relief to the woman and her children. But it seems to be a long way before all women in live-in relationships get legal protection in India. Till then such women are at the mercy of their male partners and will continue to suffer in a man's world.

10 Civil Appeal no. 7108 of 2003.

Anticipatory Bail in India: A Critique of Discretion, Jurisdiction and Implementation

Dr. Anupam Kurlwal[1]

"When the even flow of life becomes turbid, the police can be called upon to inquire into charges arising out of political antagonism. The powerful processes of criminal law can then be perverted for achieving extraneous ends .Attendant upon such investigations, when the police are not free agents within their sphere of duty, is a great amount of inconvenience, harassment and humiliation. That can even take the form of the parading of respectable person in handcuffs, apparently on way to a court of justice. The foul deed is done when an adversary, is exposed to social ridicule and obloquy, no matter when and whether a conviction is secured or is at all possible, It is in order to meet such situations, though not limited to such contingencies, that the power to grant anticipatory bail was introduced in into the code of 1973."

-Supreme Court of India in
Gurbaksh Singh Sibbia Case[2]

1. Introductory Reflections

Under Indian criminal law, Section 438 of the Code of Criminal Procedure, 1973[3] permits a person to seek out a bail before an arrest. This Section provides for a direction from the Court of competent jurisdiction, viz. the High Court or the Court of Session, for grant of bail to a person apprehending arrest in the event of his arrest for accusation of having committed a non-bailable offence.[4] This is popularly known as 'Anticipatory Bail', i.e. bail in anticipation of arrest. It is a matter of common knowledge that this expression is a buzzword which is commonly used in day to day litigation. The author tried hard but failed to relate its origin to any statute. The main provision i.e. Section 438 of Cr.P.C does not mention it. The marginal note to the main provision also does not portray it. The heading of Section 438 is also *Direction for grant of bail to person apprehending*

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2 *Gurbaksh Singh Sibbia* v *State of Punjab* 1980 AIR 1632;1980 SCR (3) 383 at para 397.

3 Chapter XXXIII of the Code of Criminal Procedure, 1973 contains provisions Ss. 436 to 450 as to Bail and Bonds. There is a provision for anticipatory bail in Chapter XXXIII under Section 438 of the Criminal Procedure Code.

4 *Onkar Nath* v. *State of U.P*., 1976 Cri LJ 1142 (All). See also *Chandrashekhara Rao* v. Kamla Kumari, 1995 Cri LJ 3508 (AP).

arrest. However, the phrase 'anticipatory bail' has become a hot cake that the advocates sell suggesting a trance that it is feasible to apply for bail in anticipation of arrest. If truth be told, the expression `anticipatory bail' has not been defined in the Code and is a misnomer inasmuch as, it is not as if bail presently granted in anticipation of arrest.[5]

2. Emergence of the Provision

This is a new provision in the present Code.[6] The earlier Code i.e. the Code of Criminal Procedure, 1898, did not contain any specific provision corresponding to the present Section 438.[7] In the absence of specific provision under the Old Code, there was a difference of opinion among the High Courts of different States on the question as to whether Courts had the inherent power to pass an order of bail in anticipation of arrest, the preponderance of view being that it did not have such power. [8] The Law Commission of India was in favor of such provision. [9] From the Statement of Objects and Reasons for introduction of Section 438 of the Code, it is apparent that the framers of the Code on the basis of recommendation of the Law Commission purported to evolve a device by which a citizen is not forced to face disgrace at the instance of influential persons who try to implicate their rivals in false cases; but the Law Commission, at the same time, had also issued a note of caution that such power should not be exercised in a routine manner.[10] The Law Commission accepted this suggestion in July, 1972 through 48th Report by branding this as a useful addition.[11]

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5 *Balchand Jain* v. *State of M.P*., (1976) 4 SCC 572 at para 55

6 The new provision in Section 438 has been inserted in the Code on the recommendation of the Law Commission in its 41st Report ; September 24, 1969.

7 The suggestion for directing the release of a person on bail prior to his arrest (commonly known as "anticipatory bail") was carefully considered by Law Commission of India in its 41st Report. It observed: "Though there is a conflict of judicial opinion about the power of a Court to grant anticipatory bail, the majority view is that there is no such power under the existing provisions of the Code of 1898."

8 See *Shri Gurbaksh Singh Sibbia and others* v. *State of Punjab* (1980) 2 SCC 565. See also *Savitri Agarwal* v. *State of Maharashtra* (2009) 8 SCC 325.

9 The law commission in its 41st Report (pp. 320-321) considered the need for such a provision and observed: "*The necessity for granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false causes for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. In recent times, with the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases, where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail. We recommend the acceptance of this suggestion.*" (Emphasis Supplied)

10 See *Durga Prasad* v. *State of Bihar*, 1987 Cri. L.J.1200] (H.C. Pat. 1987) esp. at 1203; 1205.

11 In para 31 of its 48th Report (Law Commission of India 48th Report, July 1972'Some question under the Code of Criminal Procedure Bill, 1970') the Law Commission recommended acceptance of the suggestion and made the following comments on the aforesaid clause: "The Bill introduces a provision for the grant of anticipatory bail. This is substantially in accordance with the recommendation made by the previous Commission.

3. Deliberation of Discretion: Appraisal of Section 438

A scrutiny of section 438 brings out the following points: (1) On the application of person who has reason to believe – (i) That he may be arrested, and (ii) That the arrest may be in respect of a non bailable offence, the high court or the court of session may, in its discretion, direct that, the event of arrest, the person shall be release on bail. [12] (2) The court making such a direction may in its discretion , impose, conditions including- (i) A condition that the person shall make himself available for interrogation by a police officer as and when required; (ii) A condition that the person shall not make any inducement, threat promise to any person for dissuading him from disclosing the facts of the case to the court or to the police; (iii) A condition that the person shall not leave India without the previous permission of the court; (iv) Such other condition as may be imposed under section 437(3), as if the bail were granted under that section.[13] If such a person, after getting the direction mention above, is arrested without warrant by an officer in charge of a police station in respect of an offence to which the direction relates, and is prepared to give bail, he shall be released on bail; and if a magistrate taking cognizance of such offence decides to issue a warrant of arrest against that person, he shall issue a bailable warrant in conformity with the direction referred in section 438(1) as mentioned above.[14]

We agree that this would be a useful addition, though we must add that it is in very exceptional cases that such a power should be exercised. We are further of the view that in order to ensure that the provision is not put to abuse at the instance of unscrupulous petitioners, the final order should be made only after notice to the Public Prosecutor. The initial order should only be an interim one. Further, the relevant section should make it clear that the direction can be issued only for reasons to be recorded, and if the court is satisfied that such a direction is necessary in the interests of justice. It will also be convenient to provide that notice of the interim order as well as of the final orders will be given to the Superintendent of Police forthwith"

12 Section 438 (1) of Criminal procedure Act, 1973 provides that "Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia, the following factors, namely (i) the nature and gravity of the accusation; (ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence; (iii) the possibility of the applicant to flee from justice; and (iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested, either reject the application forthwith or issue an interim order for the grant of anticipatory bail; Provided that, where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in-charge of a police station to arrest, without warrant the applicant on the basis of the accusation apprehended in such application."

13 *Criminal Procedure Code, 1973;* Section 438(2). See also *State of Punjab* v. *Raminder Singh*, AIR 2008 SC 609.

14 *Criminal Procedure Code, 1973;* Section 438(3). Section 438 (3) is really what may be termed as "machinery section" for working out an order under section 438(1) by way of an illustration.

Section 438 applies only to non-bailable offence; it is immaterial whether the offence is cognizable or non-cognizable.[15] Anticipatory bail can be granted even after the Criminal Court has taken cognizance, and summons or warrant has been issued by the Court,[16] though in some cases[17] contrary view has been taken. Anticipatory bail can be granted after the issue of process by the trial court. Anticipatory bail can be granted to a person against whom a magistrate in a complaint case has issued a non-bailable warrant.[18] Obviously, there could be no order granting anticipatory bail after the person arrested. It is also not material whether the offence is under Indian Penal Code or any other statute like Customs Act,[19] Prevention of Corruption Act, Prevention of Food Adulteration Act and so on. Anticipatory bail may be granted even for the offences punishable with death or life imprisonment[20] but the discretion under section 438 is not to be exercised with regard to offence punishable with death or imprisonment for life or in serious cases like economic offences involving blatant corruption at the higher rungs of the executive and political power[21] unless the court at the very stage is satisfied that such a charge appears to be false or groundless.[22] The power under section 438 is of extraordinary nature and must be exercised carefully that too in exceptional cases only [23] like the Apex Court has held that such relief should not be granted to an accused of dowry death under section 304-B IPC as a matter of course. [24]

It is noteworthy that this ample discretionary power is a "ponder of prudence" as it has been bestowed on the High Court and Court of Session concurrently in the matter of granting bail, however, this power shouldn't be curtailed by providing some strict rules of general nature because of the simple reason that circumstances of a case differs from the other cases. One situation of a case that may turn out to be sufficient may become insufficient in another case. Moreover, all the factors[25] compiled can never be exhaustive. All said and done, it

15 *Suresh Vasudeo* v. *State*, 1978 Cri LJ 677 (Del.H.C.)

16 *Akhalaq Ahmed F. Patel* v. *State of Maharashtra*, 1998 Cr. LJ 3969 (Bom); *Shikh Khasin Bi* v. *State* AIR 1986 AP 345: 1986 Cr.LJ 1303 (FB)

17 *Ashok Kumar* v. *State of Orissa*, 2000 Cr.LJ 1975 (Or) *Kundal Majumdar* v. *State of Tripura*, 2002 Cr. L. J. 353 (Gau).

18 *Puran Singh* v. *Ajit Singh,* 1985 Cri. LJ 897 (P&H HC)

19 *E. Joseph* v. *Collector of Customs*, 1982 Cri LJ 559 (Mad.)

20 *Gurbaksh Singh Sibbia* v *State Of Punjab*, (1980) 2 SCC 565

21 *Gurbaksh Singh Sibbia* v *State Of Punjab*, (1980) 2 SCC 565

22 *Gurbaksh Raghu Naik* v. *State Of Punjab***,** 1978 Cri. LJ 20 (P&H HC)

23 *Gurbaksh Raghu Naik* v. *State Of Punjab,* 1978 Cri. LJ 20 (P&H HC)

24 *Samunder Singh* v. *State of Rajasthan*, 1987 Cri LJ 705. However Chhattisgarh High Court in *Manoj Agarwal* v. *State of Chhatisgarh*, 2003 (1) ICR 1 (Cri) (Chhattis.) has ruled out that in a fit case where charges are concocted it may be given.

25 The Criminal Law (Amendment) Act 25 of 2005 through Section38 has added four grounds in Section 438(1) which the court must take into account before issuing any order of anticipatory bail. These factors are: (i) nature and gravity of accusation (ii) the antecedents of the applicant including fact as to whether he has previously undergone imprisonment o conviction by a Court in respect of any cognizable offense (iii) the

is quite necessary that this power should be exercised with due care and caution. Most importantly, the power under section 438 is not unguided or uncanalised but all the limitations imposed in the preceding section 437 are implicit[26] and petitioner must make out a special case for the exercise of the power to grant anticipatory bail and circumstances of the case should justify the exercise of this power.[27] Mere possibility of some non-bailable offence will not justify grant of anticipatory bail unless specific accusation based on reasonable ground to apprehend arrest are brought before the court by the requester.[28] Filing of FIR is not a condition precedent.[29] Actually, mere 'fear' is not 'belief' and this remedy can't be used a weapon to guard against a possible arrest in perpetuity and it should remain a shield.[30] It is for the court to see whether a person has "reason to believe" or not and the court will examine the existence of reasonable grounds objectively.[31]

4. Regular Bail and Anticipatory Bail: Distinction

Anticipatory bail does not mean that bail is granted before arrest. It refers to a pre-arrest order passed by a court that articulates that in the event a person is arrested, he is to be granted bail. It is not an order which grants a person bail before he is arrested because bail cannot be effective before a person is arrested. Obviously, there is no question of release on bail unless a person is arrested, and, as a result, it is only on arrest that the order granting anticipatory becomes effective.[32] Then, what is the difference between regular bail and anticipatory bail? The regular bail is granted only after arrest and consequently it becomes effective subsequently whereas the anticipatory bail i.e. order is granted before arrest and consequently it is effective from the moment of arrest.[33]

This provision, nonetheless, makes no difference whether the arrest is apprehended at the hands of the police or at the order of the magistrate. The issuance of the warrant by the magistrate against a person fairly gives rise to such an apprehension and well entitles a person to make a prayer for anticipatory bail[34]. Issuance of summon for appearance also entitles an accused to apply for anticipatory bail.[35] A direction under section 438 is intended to confer conditional

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possibility of the applicant to flee from justice (iv) where the accusation has been made with the object of injuring and humiliating the applicant by having him so arrested. (Effective date yet to be notified)

26 *Gurbaksh Sibbia* v. *State of Punjab*, 1980 AIR 1632, 1980 SCR (3) 383

27 *Gurbaksh Raghu Naik* v. *State Of Punjab,* 1978 Cri. LJ 20 (P&H HC)

28 *Sajjan Kumar* v. *State*, 1993 Cri LJ 1493 (Del.). *Thayyanbadi* v. *S.I. Police, Panoor*, 1985 Cri LJ 1111 (Ker)

29 *Gurbaksh Sibbia* v. *State of Punjab*, 1980 AIR 1632, 1980 SCR (3) 383

30 *Pokar Ram* v. *State of Rajasthan*, 1985 SCR (3) 780 at para 3

31 *Gurbaksh Singh Sibbia* v *State Of Punjab*1980 SCR (3) 383 at para 419.

32 *Balchand Jain v. State of MP,* (1976) 4 SCC 572

33 Sunita Devi v. State of Bihar 2005 SCC (Cri) 435

34 *Puran Singh* v. *Ajit Singh,* 1985 Cri. LJ897 (P&H HC)

35 *P.V. Narasimha Rao* v. *Delhi Admn.* 1997 Cri LJ 961(Del HC)

immunity from the 'touch' or confinement mentioned in Criminal Procedure Code.[36] Where a competent court grants `anticipatory bail', it makes an order that in the event of arrest, a person shall be released on bail.[37]

Thus, the net conclusion that emerges out of this discussion is this: "The anticipatory bail is a pre-arrest process that acts like an insurance policy and gives relief from the arrest for accusation of offence(s) mentioned in the order whereas the regular bail is a simple post-arrest order of bail."

5. Jurisdiction

The power to grant anticipatory bail is unusual in nature. Consequently, it should only be exercised in exceptional cases[38] especially where it appears to the court that a person is wrongly implicated or a false case is filed against him or there are reasonable grounds for believing that a person accused of an offence is not likely to escape, or otherwise abuse his liberty while on bail. For this reason, the power is extraordinary in nature and as a result this power is entrusted only to High Court or Court of Session. The rationale behind this entrustment was explained by law commission in its 41st report wherein it observed: **"**We are further of the view that this special power should be conferred only on High Court and the Court of Session, and that the order should take effect at the time of arrest or thereafter. Therefore, this power should be exercised in very exceptional cases." [39] It is normally presumed that the Court of Session would be first approached for the grant of anticipatory bail unless an adequate case for not approaching the said court has been made out. It has also been held that it is not always necessary that the session judge should be approach first.[40] However, the legal position that comes out after studying the decisions of majority of the High Courts (Rajasthan[41], Madhya Pradesh[42], Gujarat[43] and Delhi[44]) is that that, a Court of Session or the High within whose jurisdiction a person apprehends arrest for a non-bailable offence is competent court to grant anticipatory bail.[45] The repercussion of this legal dictum is that a court has no jurisdiction to grant anticipatory bail to the requester against whom a case has been registered in

36 Section 46(1) of the Code of Criminal Procedure which deals with how arrests are to be made, provides that in making the arrest, the police officer or other person making the arrest "shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action". See also *Gurbaksh Singh Sibbia* v *State of Punjab*1980 SCR (3) 383 para 398.

37 *Gurbaksh Singh Sibbia* v *State Of Punjab*1980 SCR (3) 383

38 *Naresh Kumar Yadav* v. *Ravindra Kumar and Others*, AIR 2008 SC 218

39 Law Commission of India 41st Report, September 24, 1969, 'The Code of Criminal Procedure, 1898 Volume I', para 39.9; pp. 320-321

40 *Y.Chandrasekhara Rao* v. *Kamalakumari,* 1993 Cri. LJ 3508 (AP HC)

41 *Jodha Ram* v. *State* 1994 Cr.L.J 1962 (raj)

42 *Pradeep Kumar Soni* v. *State* 1990 Cr.L.J. 2055 (MP)

43 1991 GLH 14

44 1991 Cr.L.J 950 (Del)

45 *Syed Zafrul Husan* v. *State* AIR 1984 Pat 194

another state.[46] The implication of this legal position is that an order under Section 438 will not safeguard an arrest made outside the State unless the offence itself is alleged to have committed within the state.[47] Although, some High Courts have taken a opposite stand holding that if the offense is committed in one state but arrest is anticipated in another State, the High Court in the latter state can entertain application for anticipatory bail.[48]

The author is of the view that this provision provides relief to the requester even if the dealing court does not have jurisdiction in real sense. However, for all practical purposes, the requester should try to find the relief by filing the anticipatory bail application in the court within whose jurisdiction he ordinarily resides. But conceptually speaking, an application under Sec 438 should only be finally decided by the court within whose jurisdiction the alleged offence has been committed. "Anticipatory bail of limited duration" may always be granted with a direction to the petitioner to approach the court concerned.[49] For example, if a person is alleged to have committed an offence in Delhi and he is on the way to Bombay for any work, then he may always approach the Bombay High Court for what lawyers call a "Transit Bail" (Anticipatory bail of limited duration) to get his liberty from arrest and to enable him to approach the concerned authorities. The duration of the order granting anticipatory bail should be limited and the "court granting the order" should not substitute itself for the "original court" which is concerned to deal with the offence. Because it is the "court having real jurisdiction" which has then to judge whether having regard to the evidence placed before it, the accused is allowed to avail bail or not.

6. Concluding Observations

The object of Section 438 of the Code is that a person should not be harassed or humiliated in order to satisfy the grudge or personal vendetta of the complainant.[50] An order of bail can be passed without notice to the Public Prosecutor and Superintendent of Police.[51] But notice should be issued to them forthwith and the question of bail should be re-examined in the light of the respective contentions of the parties.[52] As a matter of profuse caution notice may

46 *Pradeep Kumar Soni* v. *State* 1990 Cr.L.J 2055(MP) *Supra* n.

47 *C.T. Mathew* v. *Govt. of India* 1985 Cr.L.J 1316 (Ker)

48 *N.K Nayar* v. *State* 1985 Cr.L.J. 1887 (Bom)

49 *Dr L.R. Naidu* v. *State*, 1984 Cri LJ 757(Kant.) *; Neela J Shah* v. *State of Gujarat*, 1998 Cri LJ 228 (Guj)

50 *HDFC Bank Ltd.* v. *J.J. Mannan*, AIR 2010 SC 618

51 Criminal Procedure Code, 1973; Section 438 (1A): Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court. (Added by Criminal Law Amendment Act, 2005; Section 38. Date of enforcement yet to be notified.)

52 *Gurbaksh Singh Sibia* v. *State of Punjab*, AIR 1978 P&H 1: 1978 Cr.LJ 20 *Gurbaksh*

be given to the complainant also.[53] On an application for grant of anticipatory bail, the investigating agency sould be given reasonable time to file objections to the application. The court should not ordinarily grant anticipatory bail u/s 438 unless a notice has been issued to the prosecution giving it an OTO-"Opportunity To Oppose" the application. There may be facts and circumstances in a given case that may validate the making of an *ex parte* interim order of anticipatory bail but in such event, a short dated notice should be issued and the final order should be passed only after giving an opportunity to the prosecution to be heard in opposition. The Court should also record reasons for granting the anticipatory bail in writing. [54]

It is humbly sumitted that it not reasonable to make the presence of the applicant[55] seeking anticipatory bail obligatory at the time of final hearing of the application and passing of final order by the Court because in case of rejection there is possibilty of arrest by the police and that will take the right of requester to move to High Court and that would be violation of natural justice. However, the court has every power to make the presence of the requester mandatory suo moto or on an application made to the court by the Public Prosecutor, the Court considers such presence necessary in the interest of justice.

One can observe that neither section 438 nor any other section in the code makes any clear provision as to whether the order granting anticipatory bail can be cancelled even before the regular bail is actually granted. However, it has been held that when section 438 permits the making of an order and the order is made granting anticipatory bail, it is implicit that the court making such an order is entitled upon appropriate consideration to cancel or recall the same.

An order under Section 438 is a device to secure the individual's liberty; it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations likely or unlikely.[56] The grant of bail under Section 438(1) by the High Court or the Court of Session is dependent on the merits of a case and not the order of the magistrate choosing to summon an accused through bailable or non-bailable warrant. [57] It should not be used to cause hurdles in investigation[58]

Singh Sibia v. *State of Punjab*, AIR 1980 SC:1632 (1980) 2SCC 565:1980 Cr.LJ 1125; *State of Assani* v. (*Dn) Bnolen Gogoi*, AIR 1998 SC 143:1999 SCC (Cri) 403

53 *Chandnakant Chandulal Bhansali* v. *Srikant Shrikrishna Johsi*, 1993 (2) Crimes 389 (Bom).

54 *Pokar Ram* v. *State of Rajasthan*, AIR 1985 SC 969; *State of Maharastra* v. *Vishwas,* 1978 Cri LJ 1403 (BombayHC)

55 Criminal Procedure Code, 1973; Section 438 (1B): The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice. (Added by Criminal Law Amendment Act, 2005; Section 38. Date of enforcement yet to be notified.)

56 *Parvinderjit Singh* v. *State (U.T. Chandigarh)*, AIR 2009 SC 502.

57 *Sennasi* v. *State of Tamil Nadu*, (1997) 3 Crimes 112 (Mad.)

58 *State rep by CBI* v. *Anil Sharma*, AIR 1997 SC 3806 at p.3807

or doing tempering with the evidence[59] and it cannot be claimed as a matter of right.[60] It is but a statutory right and not an essential part of Article 21 and so non-applicability of this remedy to special laws like an offence u/s. 18 of S.C./ S.T. (Prevention of Atrocities) Act, 1989 is constitutional and not violative of Articles 14, 19 and 21 of the Constitution[61] as there are possibilities of abuse of this right which then would be against the legislative intent and spirit of the Act. [62] It must be of limited duration as the regular court cannot be bypassed.[63] Once the investigation makes out a case against a person and he is included as an accused in the charge sheet, the accused has to surrender to the custody of the court and pray for regular bail. On the strength of an order granting anticipatory bail, an accused, against whom charge has been framed, cannot avoid appearing before the trial court. A blanket order of anticipatory bail would lead to an absurd situation that charge gets framed against the accused in his absence. This would be violative of provisions of Section 420 of the Criminal Procedure Code[64]on the base of anticipatory bail and one should pray for regular bail in such circumstances.

59 *K.K. Jivah* v. *Union Territory*, AIR 1988 SC 1934; (1998) 4 SCC 80

60 *State of M.P.* v. *Ram Kishna Balothia*, AIR 1995 SC 1198; (1995) 3 SCC 221 at para 8

61 *Jai Singh* v. *Union of India*, 1993 Cri LJ 2705 (Raj.) *State Of M.P. v. Ram Krishna Baldhia*, (1995) 3 SCC 221

62 *Girdhari Lal* v. *State of Rajasthan*, 1996 Cri Lj 1613 (Raj.) *A.K. Chaudhary* v. *State of Gujrat*, 2006 Cri LJ 726 (Guj.) ; *Phulla Das* v. *State of Punjab*, 1998 Cri LJ 157.

63 *SalauddinAbdulsamad Shaikh* v. *The State of Maharashtra*, 1996 AIR 1042; *Sunita Devi* v. *State of Bihar*, 2005 SCC (Cri) 435.

64 *HDFC Bank Ltd.* v. *J.J. Mannan*, AIR 2010 SC 618

Management of Non-performing Assets in India

Dr. Sony Kulshrestha[1]

Banking system plays a dynamic role in the development of its sound economy; in this concern India is not an exception. Bankers are the curators and providers of the liquid capital of the Nation. The foremost function of the banking system is to mobilize the savings of the people by accepting deposits from the public and provide them liquid asset when it requires. Banks always have assets whether it is performing or not performing, means whether it is available in liquidated form or not. If it is not accessible in liquidated form that we call stressed assets. Theextent of the problem of stressed assetsis not taken seriously,only public sector banks are not facing this problem, but the problem of NPA is prevailingin the entire banking industry in India.[2]

The present study is designed to achieve these objectives: (i) to know and study about the stressed assets in Indian Bank (ii) to manage existing NPAs through and (iii) to make appropriate suggestions and point of considerations for Non -Performing Assets.

The major scope of this study covers on the basis: (i) Non -Performing Assetssafeguards (ii) guiding for the government in creating & implementing new strategies to control NPAs, (iii) selecting appropriate techniques suited to manage the NPAs and develop a time bound action plan to arrest the growth of NPAs.[3]

1. Concept of Non -performing Assets (NPA)

There are different kind of assets in the records of banks such as loans & advances, cash in hand, balances with other banks, fixed assets and other assetsand investment etc. The Non- Performing Asset (NPA) concept is restricted toadvances, loans, and investments only. As long as an asset produces the income probable from it and does not reveal any infrequent risk other than normal commercial risk,[4] it is treated as Performing Asset, and when it flops to generate the anticipated income it becomes a "Non -Performing Asset."On the other hand, a loan& advance assets become a Non Performing Asset (NPA) when it ends to produce income, like interest, fees, commission or any other payments for the bank for more than 90 days.[5]

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2 AkhouryRashmi, the NPA overhang-magnitudes, solutions and legal reforms in Banking and Financial Sector Reforms in India, edited by Asha Singh and others p.266, New Delhi, Serials Publications,2010

3 Atul Mohan and KapurPuneet, A practical guide to Non-Performing Bank Advances, p.1, Lucknow, Vinod Law Publications & Agarwal Law Publications, 1996

4 India, Lok Sabha (14th), Estimates Committee (2004-05), Sixth Report, presented on 25.4.2005, pp.11-12, 23-24, New Delhi Lok Sabha Secretariat, April 2005.

5 Two decades of Credit Management in Indian Banks: looking back and moving ahead;

Non-Performing Assets of banks are one of the majorobstacles in the way of socio-economic growth of India. The level of NPAs of the banking system in India is still too high. It affects the financial standing of the banks so that it is a heavy burden to the banks. A vigorous effort has to be made by the banks to strengthen their internal control and risk management systems and to setup early warning signals for timely detection and action. The problem of NPAs is tied up with the issue of legal reforms. This is an area which requires urgent consideration as the present system that substantially delays in arriving at a legal solution of a dispute is simply not tenable. The absence of a quick and efficient system of legal redress constitutes an important 'moral hazard' in the financial sector, as it encourages imprudent borrowers. NPAs can create many challenges. Some of the important challenges are:

1. *Owners do not receive a market return on their capital.* In the worst case, if the bank fails, owners lose their assets. In modern times, this may affect a broad pool of shareholders.
2. *Depositors do not receive a market return on savings.* In the worst case if the bank fails, depositors lose their assets or uninsured balance. Banks also redistribute losses to other borrowers by charging higher interest rates. Lower deposit rates and higher lending rates repress savings and financial markets, which hampers economic growth.
3. *Non-Performing loans epitomize bad investment.* They misallocate credit from good projects, which do not receive funding, to failed projects. Bad investment ends up in misallocation of capital, labour and natural resources. The economy performs below its production potential.
4. *Non-Performing loans may spill over the banking system and contract the money stock, which may lead to economic contraction.* This spillover effect can channelize through illiquidity or bank insolvency: (i) when many borrowers fail to pay interest, banks may experience liquidity shortages. These shortages can jam payments across the country, (ii) Illiquidity constraints bank in paying depositors e.g. cashing their paychecks. Banking panic follows a run on banks by depositors as part of the national money stock become inoperative. The money stock contracts and economic contraction follows, (iii) under capitalized banks exceeds the bank's capital base.[6]

address by Dr. K. C. Chakraborty, Deputy Governor, RBI at BANCON, 18 November 2013.

6 Pandey, Shruti J. and others, Non-Performing Assets of Indian Banks – Phases and Dimensions, Economic and Political Weekly (EPW), Vol.48, No.24, June 15, 2013, p.91 http://www.epw.in/system/files/pdf/2013_48/24/NonPerforming_Assets_of_Indian_Banks.pdf

2. Classification

Banks are required to classify non-performing assets further into the following three categories based on the period for which the asset has remained non-performing and the reliability of the dues:

Sub-standard assets: a substandard asset is one which has been classified as NPA for a period not exceeding 12 months.[7]

1. Doubtful Assets: a doubtful asset is one which has remained NPA for a period exceeding 12 months.
2. Loss assets: where loss has been identified by the bank, internal or external auditor or central bank inspectors. But the amount has not been written off, wholly or partly.

Sub-standard asset is the asset in which bank have to maintain 15% of its reserves.[8]

3. Reasons for Occurrence of NPAs

NPAs result from what are termed "Bad Loans" or defaults. Default, in the financial parlance, is the failure to meet financial obligations, say non-payment of a loan installment. These loans can occur due to the following reasons:

- Usual banking operations /Bad lending practices
- A banking crisis (as happened in South Asia and Japan)
- Overhang component (due to environmental reasons, business cycle, etc.)
- Incremental component (due to internal bank management, like credit policy, terms of credit, etc...)[9]

3.1 Reasons from the Economic Side

- Political: Mindset regarding paradigm, proactive, fiscal responsible, major portion of NPA arise out of lending to priority sector at the dictates of politicians and bureaucrats.
- Economic: Growth, distribution, efficient allocation of resource.
- Social: Acceptability, mobility, education.
- Technological: Lack of adoption of IT makes data processing difficult.
- Legal: loan contracts are not enforceable naturally be a tendency to default.
- Environmental: Liberalization and globalization.

7 India. Ministry of Finance, Economic Survey 2013-14, p.91-92

8 op.cit. Asha Singh, Banking Sector Reforms in India and Challenges Ahead in Banking and Financial Sector Reforms in India, by p.1

9 http://www.epw.in/system/files/pdf/2002_37/22/Some_Issues_of_Growth_and_Profitability_in_Indian_Public_Sector_Banks.pdf

3.2 Reasons from the Industry Side

- Global competition.
- Cyclical downswing.
- Sunset industry – industry growing slowly or declining.
- Frequent changes in regulatory norms.

3.3 Reasons from the Borrower Side

- Misconceived project.
- Poor governance.
- Product failure.
- Bungling management.
- Diversion of fund.
- Dormant capital structure.
- Regulator changes.

3.4 Reasons from the Banking Side

- Parameter set for functioning was deficient.
- Lack of freedom to choose product and pricing.
- Unexposed to international marketing methods and products.
- Wrong lending decision.
- Lack of Resource and poor training.
- Lack of system and procedure.
- Lack of ability to handle assets and liability.
- Lack of mechanism of credit information dissemination.
- Lack of an effective judicial system for recovery from defaulters.
- Collateral based lending to idle assets.
- Fixing of price and quantum of loans.
- Lack of effective IT system and MIS.

3.5 Reasons from the loan structuring side

- High debt equity ratio.
- Timing of raising equity.
- Discrepancy between rate of interest charged and realistic rate of return.
- Inconsistency between revenue generation and the loan repayment schedule.
- Lack of binding penal clause and performance guarantees.
- Rising interest rate.

3.6 Reason from the Security Side

There is a tendency among bank and institution to depend excessively on collateral for advancing loans. It is important to presume that if the borrower default in repaying then the security given will be helpful for recovery of loan. Clearly this logic is unacceptable. Emphasis should be on cash generation and a charge on this should be built into the loan contract through some escrow mechanism.

3.7 Reason from the regulatory side

Frequently regulator changes can turn assets non performing. Accounting reason like reduction in income recognition norms from 180 days to 90 days could be one reason and political related issues could be the other reason.

4. Way out

4.1 Restructuring *of Finance*

Bank has to increases the number of installment by minimizing the quantum of installment in order to recover the loan.

4.2 Industrial Reconstruction Bank of India (IRBI)

IRBI was set up on 20th March 1985, by reconstituting the Industrial reconstruction corporation of India as the principal credit and reconstruction agency for industrial revival and to coordinate similar work of the other institution engaged there in and to assist and promote industrial development and to rehabilitate industrial concern.

4.3 ARCs

ARCs purchase bad or Non-performing loans, either of a company or an entire portfolio, hoping to restructure the loan or sell the assets to make money. Similarly Danaharata was established in Malaysia, Kamco in Korea and PT in Indonesia. Concerns have been raised about their relevance to India. (Viswanathan, 2002)

4.4 LokAdalats

Lender and borrowers were brought face to face to negotiate a settlement.

4.5 Debt Recovery Tribunal

It was set up under the recovery of debts due to banks and Financial Intuitions Act, 1993 with exclusive jurisdiction to try and dispose of matters pertaining to recovery of debts due to bank and financial assets. It has the potential of playing a significant role in NPA realization.

4.6 Corporate Debt Restructuring

Corporate debt restructuring mechanism was introduced as a platform for handling large NPA, with a potential to give long term package of financial and management restructuring. It rephrases the loan servicing obligation of the borrower and some concession in the interest rate.

4.7 SARFAESI Act, 2002

SAREAESI Act, 2002 is the preferred route for finding solution to NPA when compared to the other methods which were discussed above. There was no legal provision for facilitating securitization of financial assets of bank and FIs or power to take possession of securities and sell them. This resulted in slow recovery of defaulting loan and mounting levels of NPA of bank and FIs and a need was felt for keeping pace with changing commercial practice and financial sector reforms. (Toshiki, Kanomori, 2001) Keeping with this an enabling legislative and regulatory frame work was put in place with the enactment of the securitization and Reconstruction of Financial assets and Enforcement of Security interest Act,2002.The primary objective of act is reduction of NPA levels of banks/FIs and unlocking value from distressed assets in the banking and financial system.

4.8 Well Developed Capital Markets

Numerous papers have stressed the criticality of a well-developed capital market in therestructuring process. A capital market brings liquidity and a mechanism for write off of loans.Without this a bank may seek to postpone the NPA problem for fear of capital adequacyproblems and resort to tactics like ever greening. Monitoring by bondholders is better as they have no motive to sustain uneconomic activity. Further, the banks can manage credit risk better as it is easier to sell or securitize loans and negotiate credit derivatives. India debt market is relatively under developed and attention should be focused on building liquidity and volumes. (Toshiki, Kanomori, 2001)

4.9 Contextual Decision Making

Regulations must incorporate a contextual perspective (like temporary cash flow problems) and clients should be handled in a manner which reflects true value of their assets and future potential to pay. The top management should delegate authority and back the decisions of this kind taken by middle level managers.

4.10 Legal Issues

There have been instances of banrks extending credit to doubtful debtors (who willfully default on debt) and getting kickbacks for the same. Ineffective Legal mechanisms and inadequate internal control mechanisms have made this problem grow – quick action has to be taken on both counts so that both the

defaulters and the authorizing officer are punished heavily. Without this, all the mechanisms suggested above may prove to be ineffective.[10]

4.11 Regular Training Program

Executives have to undergo regular training program on credit and NPA management. It is very useful and helpful to the executives for dealing the NPAs properly.

4.12 Recovery Camps

The banks should conduct regular or periodical recovery camps in the bank premises or some other place, such type of recovery camps reduced the levels of NPA in the banks

4.13 Spot Visit

The bank officials should visit to the borrower's business place / borrowers field regularly or periodically. .

4.14 Other Methods

1. Persistent phone calls.
2. Media announcement.

5. Conclusion

Banking industry has undergone a major change after the first phase of economic liberalization; hence the importance credit management has emerged. In recent time banks are very cautious in extending loan, because of mounting NPA. This article highlights the reasons for an assets becoming NPA and remedial measures to be taken. Due to various steps taken by theGovernment of India NPA levels were reduced to considerable level. (Nearly 2.7% of the loanson the balance sheet of bank, from 8.8%) So it is an indication for the bankers with bad loan in their portfolio to take appropriate actions immediately.

The RBI in its Financial Stability Report, December 2013 has indentified five sectors - Infrastructure, Iron and Steel, Textiles, Aviation, and Mining - as the stressed sectors. PSBs have high exposures to the 'industry' sector in general and to such 'stressed' sectors in particular. Increase in NPAs of banks is mainly accounted for by switchover to system-based identification of NPAs by PSBs, slowdown of economic growth, and aggressive lending by banks in the past, especially during good times. As PSBs dominate the Indian Banking Sector and increase in the NPAs of PSBs is matter of concerns, steps are being taken to improve the situation.

Initiatives taken by the government **s**ome recent initiatives taken by the

10 (Muniappan, 2002)

government to address the rising NPAs include:-

- Appointment of nodal officers in banks for recovery at their head offices/zonal offices/for each Debts Recovery Tribunal (DRT).
- Thrust on recovery of loss assets by banks and designating asset reconstruction companies (ARC) resolution agents of banks.
- Directing the state-level bankers' committees to be proactive in resolving issues with the state governments.
- Sanction of fresh loans on the basis of information sharing amongst banks. Conducting sector / activity-wise analysis of NPAs.
- Close watch on NPAs by picking up early warning signals and ensuring timely corrective steps by banks including early detection of sign of distress, amendments in recovery laws, and strengthening of credit appraisal and post credit monitoring.[11]

A strong banking sector is important for a flourishing economy. The failure of the banking system may have an adverse impact on other sectors thus, there is need to ensure that the banking system recognizes financial distress early, takes prompt stepsto resolve it, and ensure fair recovery for lenders and investors so that banking sector start functioning without stress.

11 India. Ministry of Finance, Economic Survey 2013-14, p.91-92

FPI (Foreign Portfolio Investment) and its Regulatory Frame Work in India

Dr. Neeta Tripathi[1]

Capital is a vital ingredient for economic growth, but since most nations cannot meet their total capital requirements from internal resources alone, they turn to foreign investors to supply capital. Foreign direct investment (FDI) and foreign portfolio investment (FPI) are two of the most common routes for overseas investors to invest in an economy. FDI implies investment by foreign investors directly in the productive assets of another nation. FPI means investing by investors in financial assets such as stocks and bonds of entities located in another country. FDI and FPI are similar in some respects but very different in others. As retail investors increasingly invest overseas, they should be clearly aware of the differences between FDI and FPI, since nations with a high level of FPI can encounter heightened market volatility and currency turmoil during times of uncertainty Because capital is always in short supply and is highly mobile, foreign investors have standard criteria when evaluating the desirability of an overseas destination for FDI and FPI, which include:

Economic factors – the strength of the economy, GDP growth trends, infrastructure, inflation, currency risk, foreign exchange controls etc.,Political factors – political stability, government's business philosophy, track record, and so on., Incentives for foreign investors – taxation levels, tax incentives, property rights, etc. Other factors – education and skills of the labor force, business opportunities, local competition etc.

Although FDI and FPI are similar in that they both originate from foreign investors, there are some very fundamental differences between the two. The first difference arises in the degree of control exercised by the foreign investor. FDI investors typically take controlling positions in domestic firms or joint ventures, and are actively involved in their management. FPI investors, on the other hand, are generally passive investors who are not actively involved in the day-to-day operations and strategic plans of domestic companies, even if they have a controlling interest in them.

The second difference is that FDI investors perforce have to take a long-term approach to their investments, since it can take years from the planning stage to project implementation. On the other hand, FPI investors may profess to be in for the long haul but often have a much shorter investment horizon, especially when the local economy encounters some turbulence. FDI and FPI are both im-

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portant sources of funding for most economies. Foreign capital can be used to develop infrastructure, set up manufacturing facilities and service hubs, and invest in other productive assets such as machinery and equipment, which contributes to economic growth and stimulates employment.

However, FDI is obviously the route preferred by most nations for attracting foreign investment, since it is much more stable than FPI and signals long-lasting commitment to an economy. But for an economy that is just opening up, meaningful amounts of FDI may only result once overseas investors have confidence in its long-term prospects and the ability of the local government.

Though FPI is desirable as a source of investment capital, it tends to have a much higher degree of volatility than FPI. In fact, FPI is often referred to as "hot money" because of its tendency to flee at the first signs of trouble in an economy. These massive portfolio flows can exacerbate economic problems during periods of uncertainty.

1. Regulatory Framework

1.1 Application for Grant of Certificate as Foreign Portfolio Investor

No person shall buy, sell or otherwise deal in securities as a foreign portfolio investor unless it has obtained a certificate granted by the designated depository participant on behalf of the Board: Provided that a foreign institutional investor or sub-account may, subject to payment of conversion fees as specified in Part A of the Second Schedule, continue to buy, sell or otherwise deal in securities subject to the provisions of these regulations, till the expiry of its registration as a foreign institutional investor or sub-account, or until he obtains a certificate of registration as foreign portfolio investor, whichever is earlier: Provided further that a qualified foreign investor may continue to buy, sell or otherwise deal in securities subject to the provisions of these regulations, for a period of one year from the date of commencement of these regulations, or until he obtains a certificate of registration as foreign portfolio investor, whichever is earlier. (2) An application for the grant of certificate as foreign portfolio investor shall be made to the designated depository participant in Form A of the First Schedule and shall be accompanied by the fee specified in Part A of the Second Schedule.[2]

1.2 Eligibility Criteria of Foreign Portfolio Investor

The designated depository participant shall not consider an application for grant of certificate of registration as a foreign portfolio investor unless the applicant satisfies the following conditions namely, - (a) the applicant is a person not resident in India; (b) the applicant is resident of a country whose securities

2 Securities And Exchange Board Of India (Foreign Portfolio Investors) Regulations, 2014, Chapter 2, Clause 3

market regulator is a signatory to International Organization of Securities Commission's Multilateral Memorandum of Understanding (Appendix A Signatories) or a signatory to bilateral Memorandum of Understanding with the Board; (c) the applicant being a bank, is a resident of a country whose central bank is a member of Bank for International Settlements; (d) the applicant is not resident in a country identified in the public statement of Financial Action Task Force as: (i) a jurisdiction having a strategic Anti-Money Laundering or Combating the Financing of Terrorism deficiencies to which counter measures apply; or (ii) a jurisdiction that has not made sufficient progress in addressing the deficiencies or has not committed to an action plan developed with the Financial Action Task Force to address the deficiencies; (e) the applicant is not a non-resident Indian; (f) the applicant is legally permitted to invest in securities outside the country of its incorporation or establishment or place of business; (g) the applicant is authorized by its Memorandum of Association and Articles of Association or equivalent document(s) or the agreement to invest on its own behalf or on behalf of its clients; (h) the applicant has sufficient experience, good track record, is professionally competent, financially sound and has a generally good reputation of fairness and integrity; (i) the grant of certificate to the applicant is in the interest of the development of the securities market; (j) the applicant is a fit and proper person based on the criteria specified in Schedule II of the Securities and Exchange Board of India (Intermediaries) Regulations, 2008; and (k) any other criteria specified by the Board from time to time.[3]

1.3 Categories of Foreign Portfolio Investor

An applicant shall seek registration as a foreign portfolio investor in one of the categories mentioned hereunder or any other category as may be specified by the Board from time to time:

(a) "Category I foreign portfolio investor" which shall include Government and Government related investors such as central banks, Governmental agencies, sovereign wealth funds and international or multilateral organizations or agencies;
(b) "Category II foreign portfolio investor" which shall include:
    (i) Appropriately regulated broad based funds such as mutual funds, investment trusts, insurance/reinsurance companies;
    (ii) Appropriately regulated persons such as banks, asset management companies, investment managers/ advisors, portfolio managers;
    (iii) broad based funds that are not appropriately regulated

3 Securities And Exchange Board Of India (Foreign Portfolio Investors) Regulations, 2014, Chapter2, Clause 4

but whose investment manager is appropriately regulated: Provided that the investment manager of such broad based fund is itself registered as Category II foreign portfolio investor: Provided further that the investment manager undertakes that it shall be responsible and liable for all acts of commission and omission of all its underlying broad based funds and other deeds and things done by such broad based funds under these regulations.

(iv) University funds and pension funds; and

(v) University related endowments already registered with the Board as foreign institutional investors or sub-accounts. Explanation 1.- For the purposes of this clause, an applicant seeking registration as a foreign portfolio investor shall be considered to be "appropriately regulated" if it is regulated or supervised by the securities market regulator or the banking regulator of the concerned foreign jurisdiction, in the same capacity in which it proposes to make investments in India. with no investor holding more than forty-nine per cent of the shares or units of the fund: Provided that if the broad based fund has an institutional investor who holds more than forty nine per cent of the shares or units in the fund, then such institutional investor must itself be a broad based fund. B) For the purpose of clause A of this Explanation, for ascertaining the number of investors in a fund, direct investors as well as underlying investors shall be considered. C) For the purpose of clause B of this Explanation, only investors of entities which have been set up for the sole purpose of pooling funds and making investments, shall be considered for the purpose of determining underlying investors. (c) "Category III foreign portfolio investor" which shall include all others not eligible under Category I and II foreign portfolio investors such as endowments, charitable societies, charitable trusts, foundations, corporate bodies, trusts, individuals and family offices.[4]

4 Securities And Exchange Board Of India (Foreign Portfolio Investors) Regulations, 2014, Chapter2, Clause 5

1.4 Furnishing of Information, Clarification and Personal Representation

The Board or the designated depository participant may require the applicant to furnish such further information or clarification as may be considered necessary to grant certificate of registration as a foreign portfolio investor. The applicant or his authorized representative shall, if so required by the Board or designated depository participant, appear before them for personal representation in connection with the grant of a certificate.

1.5 Procedure and Grant of Certificate

(1) The designated depository participant may grant certificate of registration as prescribed in Form B of First Schedule to an applicant if it is satisfied that the applicant is eligible and fulfils the requirements as specified in these regulations.

(2) The designated depository participant shall endeavor to dispose of the application for grant of certificate of registration as soon as possible but not later than thirty days after receipt of application by the designated depository participant or, after the information called for under regulation 6 has been furnished, whichever is later.

(3) Upon grant of certificate of registration to the foreign portfolio investor, the designated depository participant shall forthwith collect the fees, as specified in Part A of the Second Schedule, from foreign portfolio investor on behalf of the Board and shall remit fees to the Board.

(4) If an applicant seeking registration as a foreign portfolio investor has any grievance with respect to its application or if the designated depository participant has any question in respect of interpretation of any provision of this regulation, it may approach the Board for appropriate instructions.[5]

1.6 Application to Conform to the Requirements

An application for grant of certificate of registration to act as a foreign portfolio investor, which is not complete in all respects or is false or misleading in any material particular shall be deemed to be deficient and liable to be rejected by the designated depository participant: Provided that, before rejecting any such application, the applicant shall be given a reasonable opportunity to remove the

5 Securities And Exchange Board Of India (Foreign Portfolio Investors) Regulations, 2014, Chapter2, Clause 7

deficiency, within the time as specified by the designated depository participant.[6]

1.7 Procedure where Certificate is not granted

(1) Where an application for grant of a certificate does not satisfy the requirements specified in these regulations, the designated depository participant may reject the application after giving the applicant a reasonable opportunity of being heard.

(2) The decision to reject the application shall be communicated by the designated depository participant to the applicant in writing stating therein the grounds on which the application has been rejected.

(3) The applicant, who is aggrieved by the decision of the designated depository participant under sub-regulation (1) may, within a period of thirty days from the date of receipt of communication under sub-regulation (2), apply to the Board for reconsideration of the decision of the designated depository participant.

(4) The Board shall, as soon as possible, in the light of the submissions made in the application for reconsideration made under sub-regulation (3) and after giving a reasonable opportunity of being heard, convey its decision in writing to the applicant.[7]

1.8 Suspension, Cancellation or Surrender of Certificate

Subject to compliance with the provisions of the Act, these regulations and the circulars issued there under, the registration granted by the designated depository participant on behalf of the Board under these regulations shall be permanent unless suspended or cancelled by the Board or surrendered by the foreign portfolio investor.

Suspension and cancellation of registration granted by the Board under these regulations shall be dealt with in the manner as provided in Chapter V of the Securities and Exchange Board of India (Intermediaries) Regulations, 2008.

Any foreign portfolio investor desirous of giving up its activity and surrendering the certificate of registration may make a request for such surrender to the designated depository participant who shall accept the surrender of registration after obtaining approval from the Board to do so.

6 Securities And Exchange Board Of India (Foreign Portfolio Investors) Regulations, 2014, Chapter2, Clause 8

7 Securities And Exchange Board Of India (Foreign Portfolio Investors) Regulations, 2014, Chapter2, Clause 9

While accepting the surrender of registration under sub-regulation (3), the designated depository participant may impose such conditions as may be specified by the Board and such person shall comply with such conditions.[8]

2. Conclusion

While FDI and FPI can be sources of much-needed capital for an economy, FPI is much more volatile, and this volatility can aggravate economic problems during uncertain times. Since this volatility can have a significant negative impact on their investment portfolios, retail investors should familiarize themselves with the differences between these two key sources of foreign investment. FPI (Foreign Portfolio Investment) represents passive holdings of securities such as foreign stocks, bonds, or other financial assets, none of which entails active management or control of the securities' issuer by the investor. Unlike FDI, it is very easy to sell off the securities and pull out the foreign portfolio investment. Hence, FPI can be much more volatile than FDI. For a country on the rise, FPI can bring about rapid development, helping an emerging economy move quickly to take advantage of economic opportunity, creating many new jobs and significant wealth. However, when a country's economic situation takes a downturn, sometimes just by failing to meet the expectations of international investors, the large flow of money into a country can turn into a stampede away from it.

8 Securities And Exchange Board Of India (Foreign Portfolio Investors) Regulations, 2014, Chapter2, Clause 10

Pros and Cons of Surrogacy

Anubhav Srivastava[1]

In this project at first I would like to highlight that the concept of Surrogacy is seen as an exceptionally rich area for feminist ethnographic work because of its desperate and profound impacts on two sets of women- surrogate mother and the child's intended mother[2]. So it is important for me to first clear the concept of Surrogacy. I would now respond to the question that, *What does Surrogacy means?* It means that a practice in which a woman agrees to carry a baby to term, for someone else who then keeps the child as her own.

There are two different types of Surrogacy- Traditional Surrogacy and Gestational Surrogacy.In traditional surrogacy, the surrogate is impregnated naturally or artificially, but the resulting child is genetically related to the surrogate whereas in Gestational Surrogacy an embryo is implanted in the Surrogate's womb and no part of the Surrogate's genetic makeup is transferred to the foetus, it is also termed as *renting* or *outsourcing* of womb[3].

Intended parents may seek a surrogacy arrangement when medical issues make pregnancy not possible or make carrying a pregnancy risky or otherwise undesirable, or because the intended parent or parents are male. Monetary compensation may or may not be involved in surrogacy arrangements. If the surrogate receives compensation beyond the reimbursement of medical and other reasonable expenses, the arrangement is called commercial surrogacy; otherwise, it is referred to as altruistic surrogacy. The legality and costs of surrogacy vary widely between jurisdictions, sometimes resulting in interstate or international surrogacy arrangements.

In its purest form, a surrogate mother has no genetic link to the child she bears. An embryo that is the genetic offspring of another couple is implanted in her uterus. The surrogate is a mother only biologically and only for nine months; she gives the child to its genetic parents at birth.

So as per my understanding Surrogacy is a kind of a contract between two parties and after the contract all the respective parties are benefited just like in other contracts. In other contracts also one gets benefit for his/her work and services, so a surrogate mother is also entitled to get proper reward and benefit after the process of surrogacy is over.

Still there are many legal issues and ethical issues that are related to the

1 Student fromNirma University Institute of Law.

2 Allen, Jeffner. 1984. Motherhood: The annihilation of women. In Mothering: Essaysi n feministtheory. Joyce Trebilcot, ed. NJ: Rowman and Allenheld.

3 Ram Purohit, "*What is Surrogacy?",* published on 3/07/2008.

concept of surrogacy which will be tackled in this project. A proper emphasis will be given to the pros and cons of surrogacy. In this project, it will be discussed why there is a need of Surrogacy and few important cases and case study will also be discussed.

Under this heading only a brief introduction is given about the concept of Surrogacy so it becomes easy for the reader to understand the other concept which will be discussed later in a proper manner. To understand the concept of surrogacy one should just develop a rational framework of mind and one should not understand it by getting influenced by culture, norms and practices. Surrogacy is a modern concept which requires a broad mindset to understand its need and importance.

In this paper a proper research is done after analysing the crux of various articles. All the articles clearly show a wide approach to understand the concept of surrogacy in a broader way. In "*Reorienting the Ethics of Trasitional Surrogacy as a Feminist Paradigm"* by Amrita Banerjee, the author first criticize the dominant Western ethical model that is available, then the author builds a feminist pragmatist philosophical approach that the author presents to be better and more rational. The article provides us with notions of 'Individuality', 'Agency' and 'Empowerment'[4]. It is important to reorient the ethics in a way that is radically transformative, but at the same time, it can direct us with full sensitivity.

As per the understanding of different articles one should understand that surrogacy is not equal to prostitution and surrogate mothers are not sex workers. In an article by Falguni Deshpande; " P*ros and pros of Surrogacy"* it is said that even if Surrogacy is condemned ethically and prohibited legally on grounds of exploitation, such practices are likely to continue under cover as long as economic disparities exists.

Legislatures can also play an important role in Surrogacy and in the article "*Surrogate parenting: What should legislatures do?"* by Marsha Gorrison discusses about the important steps of legislature.[5]

In an article by Bree Kessler, it is highlighted that women indulge themselves in Surrogacy because of economic differences. The author take example of the army wives who become surrogate mothers as their husbands are all the time busy in wars and the women have to find a job for economic stability. [6] Thus after reviewing the different articles and books on surrogacy it is clear that there is nothing unethical and immoral in Surrogacy, but the problem is that it is

4 Ali, Lorraine, and Raina Kelley. 2008. "The Curious Lives of Surrogates." Newsweek, April 7, 45-51.

5 Marsha Garrison,Surrogate Parenting: What Should Legislatures Do? Family Law Quarterly,Vol. 22, No. 2, Special Issue On Surrogacy (Summer 1988),pp. 149-172.

6 Bree Kessler, Recruiting Wombs: Surrogates as the New Security Moms,Women's Studies Quarterly, Vol. 37, No. 1/2, Technologies (Spring - Summer, 2009),pp. 167-182.

portrayed in such a manner that makes it appear to be unethical and immoral, thus a broad concept is required to be introduced. Sperm donation is also accepted, which was earlier considered to be immoral and a thing of low dignity.

It is clear that surrogacy is a social taboo that is not accepted in society, but if we study it properly than one would understand that surrogacy is not immoral it is just a simple contract, and there is no reason to draw a parallel between surrogate mothers and sex workers. Every individual has the right to take his or her own decision, so the concept of Individuality also applies to surrogate mothers and thus they should be allowed to take their own decision related to surrogacy.

Later in this project the legal issues and ethical issues will be discussed properly and pros and cons of surrogacy will also be highlighted.

1. Problem faced by Society

The main problem is that the concept of surrogacy is considered to be a social taboo and is not accepted. It is considered to be equal to prostitution as it is seen that the child is sold for money. So it is the main problem, and to tackle this problem a better and broader framework and ideology should be developed. Surrogacy is not an immoral work whereas it helps the childless couple to get a child and provides economic stability to the surrogate mother.

Objectives of the Research Paper are

- To understand the concept of Surrogacy as per a modern and wider approach
- To analyze the pros and cons of Surrogacy
- To study the important cases that highlighted the concept of Surrogacy
- To understand the legal issues related to the concept of Surrogacy
- To understand the ethical issues of Surrogacy

Research Questions

- What does Surrogacy means and what are the types of Surrogacy?
- Why is Surrogacy considered to be unethical?
- What are the Pros and Cons of Surrogacy?
- Does Surrogacy have any positive points?

2. Pros and Cons of Surrogacy

Under this heading I would be discussing few arguments both in favour and against the concept of Surrogacy. This would help to understand the basic understanding of the people about Surrogacy. Under this heading first I would present the arguments that are against the concept of Surrogacy.

2.1. ***Surrogacy is like Prostitution***

A typical objection to surrogacy (particularly that of commercial surrogacy) is comparing the physical aspects of surrogacy to a form of prostitution: In both cases one can view the women as selling physical, intimate, bodily services,selling their bodies and their function for money. People draw a parallel between surrogate mothers and sex workers, as both provide their body in return of money and economic benefits. This is the biggest reason why surrogacy is considered to be unethical and immoral.

2.2. ***Surrogacy is a form of Alienated Labour***

This objection borrows its logic from Hegel's philosophy of alienated labour.So what's the problem with alienated labour? Many people work and are not emotionally attached to the 'product' of their work or the work process for that matter.Well, the difference with surrogacy (or prostitution for that matter) is that we're talking about physical reproductive labour.

Reproduction is something that many people believe belong in the private sphere and should be surrounded with respect and emotional attachment. According to people against surrogacy, women's reproductive capacities should not be used as physical labour and the status of a child should not be relegated to that of a commodity.

2.3. ***Surrogacy turn Babies into Commodities***

During a pregnancy a woman is supposed to bond with her unborn baby. Con speakers claim that surrogacy prevents the mother from forming a natural bond to her baby and therefore forces her to emotionally detach herself from her pregnancy. Normally the child is the end goal in a pregnancy. For the surrogate mother the child becomes the means (as distinct from the goal), for something else, namely money.When the child becomes a means, the child is commoditized, speakers against surrogacy claim.

2.4. ***There are so many Children in need of a Home - Adoption is Better for the World***

Everybody knows that the world is 'overpopulated' and that there are many orphans whose parents have died from decease or because of war. There are also many children who are living in children's homes because their parents couldn't afford to keep them. The argument here is that people have a moral duty to care for the already existing children in need of a loving caring family rather than proceed to make new babies into an already too crowded world.

2.5. ***Surrogacy is for the Wealthy only***

Needless to say that surrogacy can be a very expensive affair and it is therefore not an option for those of few financial means. However, contrary

to myth, many commissioning couples are not rich in the traditional sense but middle class / upper middle class. The surrogate mothers are typically, but not always, in the lower income range and therefore a typical argument is, "The rich are exploiting the poor!"

2.6. ***Exploiting Third World Women as Baby Machines***

Contrary to many Westerns countries, commercial surrogacy is legal in India and many Indian women have chosen to become surrogate mothers for Western couples.

The typical reason for couples choosing Indian surrogate mothers over Western surrogate mothers is that they are cheaper. This was a relatively long list of arguments against surrogacy. Let's now turn our attention to the pro arguments in the discussion of the ethics of surrogacy.

3. Fulfilling the Deep Seated Wish for a Family

Today up to 10% of American women have difficulties getting pregnant. For couples who dream of having their own children, infertility is frustrating and stressful.

Having children and fulfilling the wish for a family with the help of a surrogate mother is therefore a possibility of living out that dream. It provides a family to childless couple who are unable to procreate due to some medical reasons.

3.1. ***Adoption is not that Easy***

Contrary to sensible logic (there are many children in need of a home - so adoption should be easy), being allowed to adopt a child is difficult and takes a long time.The whole paperwork process along with psychological evaluations and waiting list etc. may take many years. In India it is quite visible that all such kind of paperwork is cumbersome and time consuming.

3.2. ***Surrogate Mothers are Conscious of their Choice***

Under normal circumstances surrogate mothers are very conscious of their decision to carry someone else's child. They are well informed and well paid.

Most of these women have a positive experience and feel satisfied in what they perceive as an altruistic gesture (even though they are getting paid). The concept of individuality should also apply to the surrogate mothers, and they should be allowed to make their own decision without creating a fuss about it.

4. Why there is A Need of Surrogacy

4.1. ***Rise in Women Infertility***

Recently there is a rise in women infertility rate. Women's exposure to environmental hazards, contraceptive side effects, sexually transmitted diseases, efforts to delay child bearing, etc. are few of the main causes that results in a low rate of fertility among women. Thus to tackle this scenario there was a need of technical help. Reproductive techniques are used by a larger number of unmarried women, both lesbians and hetrosexuals to become mothers. In the article "*Mothers for others: A race, class and gender analysis of Surrogacy"* by Heather E. Dillaway, the author discusses about the different medical techniques. Assisted Reproductive Technique (ART) is the new Reproductive tech, that allow women to become pregnant and give birth to children that are not technically their own, some mothers are even becoming mothers to others.[7]

In the above mentioned article few more techniques are discussed that are helpful for impregnating. The most common technique is Artificial Insemination which involves impregnating a woman by sperm injections. Another technique, In-VirtoFertilization, that comprises uniting the sperm and egg outside the womb, in a glass: test tube baby. After this lets discuss Surrogacy as apart of a medical technique for impregnating infertile women, it is a form of a third party reproduction in which a woman agrees to maintain pregnancy for other couple, basically for monetary benefits. Two types of Surrogacy: Traditional and Gestational Surrogacy.

4.2. ***Economic Pressure***

In the developing or the third world countriessuffer a large amount of economic pressure as the gap between poor and rich is increasing day by day, making the poor even poorer and rich even richer. Problems like debt traps, unable to make loan payments etc is common, so surrogacy is considered to be a process through which economic support is provided. In an article by Bree Kessler; "*Recruiting wombs: Surrogates as the new Security Moms"* the author discusses about the reason why the army wives tend to end up as surrogate mothers. The basic reason is to supplement the family income.

The above mentioned article mainly focuses that surrogacy helps to build strong economy condition for army wives, as those wives who become surrogates can earn more than their husband's annual base pay, and other options are difficult as military wives have difficulties finding jobs as they are relocated frequently. The point that attracts army wives to be surrogate a mother is that their health insurance. As per my understanding of the article, the author is right

7 Heather E. Dillaway,Mothers For Others: A Race, Class, And Gender Analysis Of Surrogacy,International Journal of Sociology of the Family, Vol. 34, No. 2, Intersectional Analyses of Family for the 21st Century (Autumn 2008), pp. 301-326

in describing the economic needs of army wives which can be easily satisfied through surrogacy and this is a technology to provide life and not to take life.

These are considered to be the two most important reasons why women indulge themselves in the act of Surrogacy, to tackle economic pressure, and to provide a child to infertile couple. Thus the introduction of this technique is considered to be helpful. Surrogacy is considered to be immoral because it appears to be an act of child selling and it also creates health problems due to frequent pregnancy. But the women should be given an opportunity to decide what is right for them and the concept of individuality should also apply on surrogate mothers.

5. CASE STUDY

5.1. Anand (Gujarat)

Anand is a city of about 100,000 people in the western Indian state of Gujarat. A remote and relatively small town by Indian standards, it is anunlikely centre for transnational and national surrogacy. But nearly 30 percent of the Indians residing outside of India emigrated from Gujarat, and non-residentGujaratis returning to India for personal and medical visits have made Gujarat one of the most popular sites of medical tourism in India. The majority of medical tourists are cardiac patients, but an increasing number come for joint replacement, plastic surgery, and recently for in vitro fertilization.[8] International couples hiring Anand surrogates realize substantial cost savings.

A surrogate childbirth in Canada or the United States costs between $30,000 and $70,000; in Anand the whole process can be accomplished for less than $20,000. An added attraction for clients hiring surrogates in Anand is that the clinic runs several hostels, similar to the one above the clinic, where the surrogates can be kept under constant surveillance during their pregnancy. Surrogacy in India is not governed by laws, and fertility clinics, such as the one in Anand, are merely “guided” by guidelines issued by the Indian Council for Medical Research (ICMR) in 2005. The Ministry of Health and Family Welfare, along with the ICMR, recently passed a bill to control and monitor cases of surrogacy in the country.

The new Assisted Reproductive Technology Regulation Bill and Rules, 2008, if passed into law, will be one of the friendliest laws on surrogacy in the world. Unlike in other countries, this proposed law would make surrogacy agreements between the two parties legally enforceable.10 But until a law is passed, the clinics that provide ART facilities can follow their own rules.Anand is the only place where physicians, nurses, and middle women actively recruit women from neighbouring villages.

8 Padma Bhargav, “Gujarat Becomes the Preferred Medical Tourism Destination,” Canada Free Press, 1 Dec. 2006, www.canadafreepress.com/2006/india 120706.htm.

Hope Maternity Clinic, a pseudonym for the clinic, maintains a constant supply of potential surrogates. As the physician UshaKhanderia, the owner of Hope Maternity Clinic and responsible for bringing the surrogates together in Anand, proudly proclaims, "There may be surrogacy clinics all over the state, the country, and the world, but these people do sporadic surrogacy. No one in the world can match our numbers, 55 surrogates successfully pregnant at the same time." Between 2004 and 2008, Khanderia "matched" seventy surrogates with couples from India and the United States, East Asia, South Africa, and Europe. ope Maternity Clinic sits next to a large garbage dump on a crowded market street that has sprouted numerous sonography centers, ultra sound clinics, medical stores, and hospitals. The clinic offers infertility and ARTs such as in vitro fertilization, intrauterine insemination, embryo freezing, endoscopie surgeries, and sonography. The main clinic consists of a big waiting room, an inner room with one iron bed for women who need to rest after getting their injections, and a third room hidden behind curtains where women recover from embryo transfers or from the effects of anesthesia used during egg donation.

The two upper floors house the surrogacy hostel. Here women stay for varying lengths of time, some in late stages of pregnancy;others recover from injections, and some keeping their pregnancies a secret from their neighbours and community.

This study clearly shows that Surrogacy is prevalent in India, because the above case study mentioned in an article by Amrita Pande clearly shows that in Anand, surrogacy takes place at a large rate. In her case study she personally took interviews of few surrogates who were present in The Hope Maternity Clinic.[9]

*5.2. **New York***

In an article by Heather E.Dillaway, the author highlights the scenario of New York, it shows that 125 women at the Infertility centre of New York, 89% of Surrogate mothers stated that they would not agree to act as a surrogate mother unless they are paid a substantial fee. Thus it is clear that it brings economic stability and the money that the surrogate mother receives is a substantial factor in their decision to become surrogate mothers.

Thus in this chapter of the project a detailed analysis is done on the pros and cons of surrogacy are discussed. It is considered that surrogacy is not an immoral act, and to ask for money and reward in return is not a bad or unethical work. Just like in sperm donation, a male gets reward and monetary benefits in return, similarly a surrogate mother is also entitled to get monetary benefit in return. Women get themselves involved in the process of surrogacy because of

9 Amrita Pande, At Least I Am Not Sleeping with Anyone": Resisting the Stigma of Commercial Surrogacy in India" Feminist Studies, Vol. 36, No. 2, Re-Inventing Mothers (Summer 2010), pp. 292-312

economic pressure and low rates of fertility. Surrogacy helps a woman to get a relief from economic pressure, as monetary benefit is given in return, and it helps the childless couple to get a child. Surrogacy is a technique of providing life and not for taking life. The two case studies presented over here clearly show that this technique of impregnating is also practiced in India and it is nowhere a bad thing to ask for money in return.

The concept of surrogacy was highlighted because of an important case that seeked the attention of many towards this direction. The case was of *Baby M Case.* In an important article by Rashid Wahad, he portrays the concept of surrogacy taking the example of Baby M case, and highlights the important points of surrogacy. A non-feminist approach was adopted by him, and he highlighted the concept from the point of view of the female who is unable to bear a child. He showed that how it is important that through the use of a medical technique, an infertile mother can get a baby, and in return the other party can get money in return.

6. Conclusion

At the end of this project I would like to conclude by saying that surrogacy should not be considered as an immoral and unethical work. There is no proper reason why the act of surrogacy should be avoided. One should not draw a parallel between prostitution and Surrogacy, one should not also consider surrogate mothers as sex workers. There is a huge difference between surrogacy and prostitution, which should be understood properly by the public.

Surrogate mothers are not forced to bear child for someone else, but infact they are well informed and well paid. Most of these women have a positive experience and feel satisfied in what they perceive as an altruistic gesture (even though they are getting paid). The concept of individuality should also apply to the surrogate mothers, and they should be allowed to make their own decision without creating a fuss about it. As mentioned above that the act of Surrogacy provides economic relief and a chance to infertile women to have a child. Problems like debt traps, unable to make loan payments etc is common, so surrogacy is considered to be a process through which economic support is provided. Recently there is a rise in women infertility rate. Women's exposure to environmental hazards, contraceptive side effects, sexually transmitted diseases, efforts to delay child bearing, etc. are few of the main causes that results in a low rate of fertility among women. Thus to tackle this scenario there was a need of technical help. These are few important reasons that makes surrogacy an important decision.

As mentioned above few case studies are provided that clearly shows the increasing trend and importance of surrogacy. After the case study of Anand, GUJARAT, it is clear that with a passage of time surrogacy is increasing in India and is accepted. Today up to 10% of American women have difficulties getting

pregnant. For couples who dream of having their own children, infertility is frustrating and stressful.Having children and fulfilling the wish for a family with the help of a surrogate mother is therefore a possibility of living out that dream. It provides a family to childless couple who are unable to procreate due to some medical reasons. % of Surrogate mothers stated that they would not agree to act as a surrogate mother unless they are paid a substantial fee. Thus it is clear that it brings economic stability and the money that the surrogate mother receives is a substantial factor in their decision to become surrogate mothers.

Thus as per my understand surrogacy is not a problematic thing, and this concept should be understood by an open mindset. It is considered to be a social taboo, but such an image should be altered. It does not wave the rights of women, but it provides help to the parties. As per my opinion surrogacy is not unethical, as it is not a child selling thing. A proper surrogate contract is formed to protect the interests of both parties and thus there is no kind of pressure, and it becomes a contract and expecting money at the accomplishment of the contract is not a bad thing.

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- **Main Text** – Times New Roman, font size 10, 1.15 spacing, justified, with a margin left 1.5 inch and right 1.0 inch, top 1.0 inch and bottom 1.0 inch.
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