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CONTENT

UNIFORM CIVIL CODE – THE NOTION UNMET

*Dr Sheena Shukkur**

> *"We have in this country uniform code of laws covering almost every aspect of human relationship. We have a uniform and complete criminal code operating throughout the country which is contained in the Indian Penal Code and the Criminal Procedure Code. The only province the civil law has not been able to invade so far is the marriage and succession... and it is the intention of those who desire to have Article 35 as a part of Constitution so as to bring about the change."*[1]
>
> *(Dr. B.R. Ambedkar, the Chairman of the drafting committee of the Constitution)*

Though Ambedkar was supported by Gopalaswamy Ayyangar and others but Jawarharlal Nehru intervened in the debate. Nehru said in 1954 in the Parliament, "I do not think at the present time the time is ripe for me to try to push it (Uniform Civil Code) through"[2]

Since the Uniform Civil Code (UCC hereinafter) was a politically sensitive issue, the founding fathers of the Constitution arrived at an honourable compromise by placing it under Article 44 as a directive principle of state policy.

Amongst this debate the uncertainty of its introduction continues. The term civil code is used to cover the entire body of laws governing rights relating to property and otherwise in personal matters like marriage, divorce, maintenance, adoption and inheritance. The demand for a uniform civil code essentially means unifying all these personal laws to have one set of secular laws dealing with these aspects that will apply to all citizens of India irrespective of the community they belong to. Though the exact contours of such a uniform code have not been spelt out, it should

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1 *Pro Vice Chancellor, Mahatma Gandhi University, Kottayam Lok Sabha Secretariat, I-III *Constituent Assembly Debates* 551(23 Nov.1948)

2 Virendra Kumar,*Towards a Uniform Civil Code: Judicial Vicissitudes (from Sarla Mudgal (1995) to Lily Thomas (2000)*42 JILI 315(2000)

presumably incorporate the most modern and progressive aspects of all existing personal laws while discarding those which are retrograde[3].

The preamble of the Constitution declared that India is a "Sovereign, Socialist, Secular Democratic, Republic", which means there is no State religion and that the religion should not interfere with the ordinary life of an individual.

Further the Constitution envisages that it is secular by laying down the Article 44 for all its citizens that "The State shall endeavour to secure for the citizen a Uniform Civil Code throughout the territory of India." However, even after half a century of the framing of the Constitution, the ideal of UCC is yet to be achieved. UCC is required not only to ensure (a) uniformity of laws between communities, but also (b) uniformity of laws within communities ensuring equalities between the rights of men and women.[4]

The controversy between right to religion and provision regarding UCC surfaces in the early days of the working of the constitution. An attempt has been made to discuss here as to how judiciary has worked as a balancing wheel to preserve the rights and promote the idea of UCC.

One among the earlier decisions where the conflict between freedom of religion and the directive towards UCC was discussed is *State of Bombay v.Narasu Appa Mali*[5] In this case the Bombay Prevention of Hindu Bigamous Marriages Act, 1946 was challenged and was held intra vires the Constitution. The Act has imposed several penalties on a Hindu for contracting a bigamous marriage. The validity of the abolition of polygamy in particular communities was challenged and the Former Chief Justice M.C. Chagla of the Bombay High Court observed[6]

> *"One community might be prepared to accept and work for social reform; another may not yet be prepared for it, and Article 14 does not lay down that any legislation that the State may embark upon must necessarily be of an all embracing character. .....From these considerations it follow that there is a discrimination against the Hindu in the applicability of the Hindu Bigamous Marriage Act, the discrimination is not based only upon ground of bigamous marriages is not uniform, the difference and distinction is not arbitrary or capricious, but is based upon reasonable grounds."*

3 Available at http://economictimes.indiatimes.com/cms.dll/html/uncomp/articleshow?msid=98057(visited on 5-11-2013).

4 Flavia Agnes, *Hindu Men Monogamy and Uniform Civil Code* XXX(50) Economic and Political Weekly 32 (1995)

5 *State of Bombay vs Narasu Appa Mali* ,AIR 1952 Bom. 84

6 Id at. 86

It was further observed[7] that the Constitution sets up a secular State, and the Article 44 contains a directive to the State to secure for the citizens a UCC throughout the territory of India, and still the State of Bombay by this legislation has discriminated between Hindu and Muslims on the grounds of religion and has set up a separate code of social reform for Hindu different from that applicable to the Muslims. It is revealed that through this case[8] the High Court favoured the introduction of the UCC and held that the institution of polygamy was not based on necessity.

In 1952, the Madras High Court decided on a similar circumstance when Section 4[9] of the Madras Hindu (Bigamy and Divorce) Act, 1949, was challenged in *Srinvasa Aiyar v. Sarawathi Ammal*.[10] While rejecting all the arguments put forth the Madras High Court through Satyanarayan Rao and Rajgopalan JJ. pointed out that the abolition of polygamy did not interfere with religion because if a man did not have a natural born son, he could adopt one.[11] Relying on the judgment of U.S. Supreme Court[12] it further observed that whilst religious belief was protected by the constitution, religious practices were subject to State regulations. The Court upheld the Madras Hindu (Bigamy and Divorce) Act, 1949 and declared it Constitutional.

In *Ram Prasad v. State of U.P.*,[13] Rule 27 of The Uttar Pradesh Government Servant Conduct Rules, 1946,[14] and also Section 5 (1) of Hindu Marriage Act, 1955 was challenged on the ground that the provisions contained in this section were violative of Article 25 of the Constitution. The fact stated that the petitioner wanted to re-marry for want of a son to perform pious obligations. The petitioner supported his case by citing the essential parts of the Hindu religious books which permitted him to marry a second wife, during the subsistence of the first wife, if his first wife was incapable of bearing a male child. Justice Mehrotra rejected the contention of the petitioner and upheld the validity of Section 5(1) of Hindu Marriage Act, 1955 and Rule 27 of Uttar Pradesh Government Service Conduct Rules 1946. "Hindu religion permitted a second marriage in certain circumstances but it cannot be regarded as

7 Id
8 *State of Bombay vs Narasu Appa Mali* ,AIR 1952 Bom. 84
9 "Notwithstanding any rule of law, custom or usage to the contrary, any marriage solemnized after the commencement of this Act between a man and a woman either of whom has a spouse living at the time of such solemnization shall be void."
10 AIR 1952 Mad. 193
11 *Srinvasa Aiyar v. Sarawathi Ammal,* AIR 1952 Mad. 194
12 *Reynolds v. US* (1870) 98 US 145
13 *Ram Prasad v. State of U.P* ,AIR 1957 All 411
14 Rule 27-provided that "no government servant who has a wife shall contact another marriage without obtaining the permission of the Government, notwithstanding that such subsequent marriage is permissible under the personal law for the time being applicable to him

an integral part of Hindu Religion. The presence of a son may be essential to achieve religious salvation but that does not necessarily mean that in the presence of a wife who has a living female child and there being right to adopt, second marriage is so obligatory as to from a part of the Hindu religion." [15]

The petitioner in another case[16] prayed before the court to pass a decree for the restitution of conjugal rights against his first wife. His main contention was that Muslim Personal Law allows second marriage even while first marriage subsists. He contended that he was, therefore, entitled to the consortium of the respondent under Muslim personal law. The Court through Dhavan J. refused to grant a decree of restitution of conjugal rights, and observed[17]

> *Muslim law as enforced in India has considered polygamy as an institution to be tolerated but not encouraged, and has not conferred upon the husband any fundamental right to compel the first wife to share his consortium with another woman in all circumstances. A Muslim husband has the legal right to take a second wife even while the first marriage subsists, but if he does so and then seeks the assistance of the Civil Court to compel the first wife to live with him against her wishes, in that case the circumstances in which his second marriage took place are relevant and material in deciding whether his conduct in taking a second wife was in itself an act of cruelty to the first.*

Moving ahead the learned Justice observed[18]:

> *"the onus today would be on the husband who takes a second wife to explain his action and prove that his taking a second wife involved no insult or cruelty to the first …….. Under modern condition it would be inequitable for the court to compel her against her wishes to live with such a husband. There are no divergent forms of cruelty such as Muslim cruelty, Hindu cruelty or Christian cruelty but the concept of cruelty is based on universal and humanitarian standards."*

In 1972 the Kerala High Court decided the *Makku Rawther's Children: Assan Rawther and other v. Manahapara Charayil*,[19]. An oral gift was made and the same was challenged on the ground that Section 129 of the transfer of Property which exclude the operation of Registration Act in case of Hiba is violation of Articles 14 and 15 of the Constitution and, therefore, it may be declared void under Article 13

15 *Ram Prasad v. State of U.P* ,AIR 1957 All 411 at 414-15
16 *Itwari v. Asghari*, AIR 1960 All 684
17 Id
18 Id
19 *Makku Rawther's Chidren: Assan Rawther and other v. Manahapara Charayil*, AIR 1972, Ker. 27

of the Constitution. Justice V.R. Krishna Iyer explained the philosophy behind the concept of gift and declared the law regarding registrations of gifts. Justice K. Iyer observed: [20]

> *Whatever might have been the content of the gift in Section 129 of Transfer of property Act, when it was originally enacted its meaning has to be gathered today in the Constitutional perspective of Article 14, 15, 25, and 44.....The application of Muslim Personal Law to gifts does not preclude the application of other law which do not run counter to the rules of Muslim Law..... A Muslim gift may be valid even without a registered deed and may be invalid even with registered deed.... The important thing is that the old laws must be tuned up to the new law of the Constitution and the spirit of the times.... One of the seminal and, may be, radical ideas our founding fathers dearly held was the making of a secular society in India and, surely a sine qua non for such a social structure is that God and Caesar remain each in his domain".*

Thus all kinds of gifts whether it belongs to Hindu or Muslims must comply with the section 17(1), section 49 of the Registration Act, and Section 123 of the Transfer of Property Act. The only exception to this general rule according to this judicial pronouncement is that non-secular gifts can be exempted from registration.

In *A. Yousuf v. Sowramma*,[21] a case on the Muslim law of divorce, Justice Krishna Iyer made a critical examination of the traditional law on the subject. In this case a wife who had deserted her husband without cause was not maintained by her husband for a period of two years and the learned Judge held that under Section 2(1) of the Dissolution of Muslim Marriage Act, 1939 the wife was entitled to sue for dissolution of her marriage on the score that she was not as a fact maintained by her husband for two years even if there was a good cause for husband's failure to maintain her. He held that husband was not bound to maintain a wife who refused herself to him, or was otherwise disobedient, unless the refusal or disobedience was justified by non-payment of prompt dower, or she left the husband's house on account of cruelty. If a wife who deserted her husband without a good cause had no right to be maintained by her husband, the plea of non-maintenance as a ground for dissolution of marriage under Section 2 of the Dissolution of Muslim Marriage Act, 1939 was not available to her. To hold that a wife was entitled to sue for dissolution for her marriage for non-maintenance under the provision of statute when she had no right to be maintained by her husband under Muslim law was not the same thing as

20 Id at 33.
21 AIR 1971 Ker 261

holding that the wife was entitled to obtain divorce as of right and without showing any cause under the tradition Muslim law. The adjudication of wife's claim for Khula as of right under Muslim law, and, therefore, under Section 2(ix) of the Dissolution of Muslim Marriage Act, 1939, far from being supererogatory was directly and appropriately called for in this case. The learned judge did maintain that the statement that the wife could buy a divorce only with the consent of or as delegated by the commentaries on Koranic Texts and Hadith dealing with divorce.

The Hon'ble High Court of Kerala in *Aboobaker Haji v. Mamu Koyaa*.[22] decided on the facts that a young woman who, allegedly under instigation from an orthodox father, asked for divorce from a heterodox husband on the ground that her life with her husband for reasons of neglect and cruelty had become insufferable and therefore she did not want to cohabit with her husband. Krishna Iyer. J. not only decided that a judicial divorce may be granted in India, under Section 2(ii) of Dissolution of Muslim Marriage Act, on the grounds that a husband has neglected or failed to provide maintenance for his wife even in circumstances in which he is under no legal duty to support her. The court held also that a wife is entitled to divorce, under Section 2 (ix) of the Act[23] if her marriage has broken down.

Bhagwan Dutt v. Smt. Kamal Devi,[24] discussed the scope of Section 488 of Criminal Procedure Code 1898[25] and Section 23 of Hindu Adoptions and Maintenance Act, 1956. The earnings and income of wife whether should be taken into consideration while deciding a case of a wife who seeks maintenance from her husband in the court. The Supreme Court through Sarkaria J. observed:[26] "Section 488 is intended to serve a social purpose and to prevent vagrancy and destitution and to find out as to what is required by the wife to maintain a standard of living which is neither luxurious nor penurious, but is modestly consistent with the status of the family. The needs and requirements of the wife for such moderate living can be fairly determined, only if her separate income, also is taken into account together with the earnings of husband and his commitments." Commenting on the relationship between Section 488 and Section 23 he further observed that the former provides a

22 1971 K.L.T. 663

23 Sec 2. Grounds for decree for dissolution of marriage: A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely:....
(ix)on any other ground which is recognised as valid for the dissolution of marriages under Muslim law

24 AIR 1975 SC 83

25 Wifes' right to maintenance from husband (Old CrPC)

26 *Bhagwan Dutt v. Smt. Kamal Devi,* AIR 1975 SC 86

machinery for the summary enforcement of the moral obligation of a man towards his wife and children so that they may not out of sheer destitution became a hazard to the well-being of orderly society. As against the latter, it provides for the fixation of rate of maintenance allowances, for the enforcement the rights of Hindu wives of dependents under their personal law. Thus the scope of two laws is different. Section 488 is applicable to all persons belonging to all religious and has no relationship with the personal laws of the parties.[27] The Supreme Court narrowed the gap between the general law regarding maintenance and the personal law of the Hindus by ignoring the personal law holding that Criminal Procedure Code to be made applicable to all persons irrespective of their religion.

In *Bai Tahira v. Ali Fissalli*,[28] an issue was raised before the Supreme Court that whether the compromise deed executed by the husband and the wife can exclude the operation of Section 125 of Criminal Procedure Code of 1973. The facts of the case were that Bai Tahira had been divorced in 1962 and thereafter the defendant married to a second wife. In the compromise deed a flat and Rs. 5,000 had been adjusted as a mehr money and iddat money. It was also mentioned in the deed that she had no further claim against her husband. But in 1973, the Criminal Procedure Code was amended. Thereafter, Bai Tahira filed an application for maintenance under Section 125 in the trial court and later at Supreme Court Justice Krishna Iyer delivered the judgement on behalf of Tulzapurkr, J. and R.S. Pathak, J. and upheld Bai Tahira's right to ask for maintenance despite the compromise. He opined:[29]

> *"A new statutory right was created as a projection of public policy by the code of 1973, which could not have been in the contemplation of the parties in 1962. No settlement of claims which does not have the special statutory right of the divorce under Section 125 can operate to negate the claim."*
>
> *....."The payment of illusory amounts by way of customary or personal law requirement will be considered in the reduction of maintenance rate but cannot annihilate that rate unless it is reasonable substitute. The legal sanctity of the payment is certified by the fulfilment of the social obligation, not by a ritual exercise rooted in custom. No construction which leads to frustration of the statutory project can secure validation if the court is to pay true homage to constitution."*[30]

27 Id at. *87*
28 AIR 1980 SC 362
29 *Bai Tahira v. Ali Fissalli*, AIR 1980 SC 365
30 Id at 365-66.

> ....."*The whole scheme of Section 173(3)(b) is manifestly to recognize the substitute maintenance arrangement by lump-sum payment organized by the custom of the community or the personal law of the parties… the proposition therefore is that no husband can claim under Section 127 (3) (b) absolute from his obligation under Section 125 towards a divorced wife except on proof of payment of a sum stipulated by customary or personal law whose quantum is more or less sufficient to do duty for maintenance allowance.*" [31]

The court came to the conclusion that the purpose of payment of any kind of maintenance under any customary or personal law must be to obviate destitution of the divorcee and to provide her with wherewithal to maintain herself. Thus the court stressed emphatically that the provision contained in Chapter IX of Criminal Procedure Code read with Part IV of the Indian Constitution and Article 15 (3) which provides for transforming the values with the changing time should be given universal application in India.

In *Fuzlunbi v. Khader Vali*,[32] Fuzlunbi was married to Khader Vali in 1966. Thereafter she was ill-treated by her husband and she filed a petition before the magistrate under Section 125 Cr. P.C. and prayed for maintenance for herself and her son. The Magistrate granted monthly maintenance allowance. To save himself from the liability the husband rendered talaq and tendered the sum of Rs. 500/- by way of mehr and Rs. 750 towards maintenance for the period of Iddat. Thus on the request of respondent the Magistrate cancelled the orders of maintenance on the ground of divorce and payment of mehr and iddat. The appellant filed a revision petition in the High Court and later at Supreme Court. Justice Krishna Iyer delivered the judgment[33]

> "*Whatever the facts of a particular case, the code, by enacting section 125-127, charges the court with humane obligation of enforcing maintenance or its just equivalent to ill-used wives and cast away ex-wives, only if the woman has received voluntarily a sum at the time of divorce sufficient to keep her going according to the circumstances of the parties.*"

He further observed:[34]

> "*Neither personal law nor other salvationary plea will hold against the policy of public law pervading Section 127 (3) (b) as much as it does Section 125. So a fathering is no substitute for a fortune nor naive consent equivalent to intelligent acceptance. The amount earlier awarded is the minimum.*"

31 Id at p.366
32 AIR 1980 SC 1730
33 *Fuzlunbi v. Khader Vali* , AIR 1980 SC 1736
34 Id at. 1736-37

The Supreme Court concluded that there is no conflict between the provisions regarding mehar and iddat of Muslim law and provisions under Cr.P.C. regarding maintenance. The Muslim husband is under obligation to maintain his wife even after divorce if she is unable to maintain herself and, therefore, the criminal law provisions have overriding effect over the personal law of any religious community.

In *Ms. Zohra Khatoon vs Mohd. Ibrahim*,[35] earlier the High Court of Allahabad cancelled the orders of maintenance allowance passed by the magistrate on the ground that when the divorce proceeds are initiated by the wife under the dissolution of Muslim Marriage Act, 1939, then wife cannot claim maintenance from her husband, neither under the Muslim law nor Criminal Procedure Code. Justice Fazal Ali in a majority judgement delivered stated that:[36]

> "*The view taken by the High Court is erroneous and is based on a wrong interpretation of Cl. (1)(b) of the Explanation to Section 125(1) of the Criminal Procedure Code …. Under Cl. (b) the wife continues to be a wife within the meaning of the provisions of the code even though she has been divorced by her husband or has otherwise obtained a divorce and has not remarried.*"

Thus the Supreme Court ignored the orthodox practices under Muslim law.

In *Shahulameedu v. Subaida Beevi*,[37] Krishna Iyer, J. while upholding the rights of a Muslim wife to cohabit with her husband who had taken a second wife yet held her entitled to claim maintenance under section 488 of the (old) Criminal Procedure Code. He observed that, the view Muslim husband enjoyed an arbitrary, unilateral power to inflict divorce did not accord with Islamic injunctions. He went on to plead for monogamy among the Muslims. He referred to the Koran which promoted monogamy upon Muslims and departure thereof was only an exception. It was also pointed out that a number of Muslim countries[38] have prohibited polygamy. He further observed that a keen perception of the new frontiers of Indian law hinted at Article 44 of the Constitution was now necessary on the part of Parliament and the Judicature.

The Supreme Court for the first time directed the Parliament to frame a Uniform Civil Code in the year 1985 in the case of *Mohammad Ahmed Khan v Shah Bano*

35 AIR 1981 SC 1243
36 *Mst. Zohra Khatoon v. Mohd. Ibrahim* , AIR 1981 SC 1243 .
37 (1970) KLT 4
38 Like Syria Tunisia, Morocco, Pakistan, Iran and Islamic Republic of the erstwhile Soviet Union.

Begum[39], popularly known as the *Shah Bano* case. In this case, a Muslim woman claimed maintenance from her husband under Section 125 of the Code of Criminal Procedure after she was given talaq (divorce) from him. The Supreme Court held that the Muslim woman have a right to get maintenance from her husband under Section 125 CrPC. The Court also held that Article 44 of the Constitution has remained a dead letter. The then Chief Justice of India Y. V. Chandrachud observed that,

> *"A common civil code will help the cause of national integration by removing disparate loyalties to law which have conflicting ideologies"*[40]

After this decision, nationwide discussions, meetings, and agitation were held. The then Rajiv Gandhi led Government overturned the *Shah Bano* case decision by way of Muslim Women (Protection of Rights on Divorce) Act, 1986 which limited the right of a Muslim woman for maintenance under Section 125 of CrPC. The explanation given for implementing this Act was that the Supreme Court had merely made an observation for enacting the UCC; not binding on the government or the Parliament and that there should be no interference with the personal laws unless the demand comes from within.

In *Mary Roy v. State of Kerala*[41], the question argued before the Supreme Court was that certain provisions of the Travancore Christian Succession Act, 1916, were unconstitutional under Art. 14[42]. Under these provisions, on the death of an intestate, his widow was entitled to have only a life interest terminable at her death or remarriage and also for his daughter. It was also argued that the Travancore Act had been superseded by the Indian Succession Act, 1925. The Supreme Court avoided examining the question whether gender inequality in matters of succession and inheritance violated Art.14, but, nevertheless, ruled that the Travancore Act had been superseded by the Indian Succession Act. Mary Roy[43] has been characterized as an important decision in the direction of ensuring gender equality in the matter of succession.

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39 AIR 1985SC955

40 Id

41 *Mary Roy v State of Kerala* ,AIR 1986SC1011

42 Article 14 - Equality before law: The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

43 Flavia Agnes, *Hindu Men Monogamy and Uniform Civil Code*

Further, the Supreme Court has issued a directive to the Union of India in *Sarla Mudgal v Union of India*[44] to endeavour framing a Uniform Civil Code and report the steps taken to it by August, 1996.

However in *Lily Thomas*[45] case, the Supreme Court expressed that the directives as detailed in Part IV of the Constitution are not enforceable in courts as they do not create any justiciable rights in favour of any person. The Supreme Court has no power to give directions for enforcement of the Directive Principles. Therefore to dispel all apprehensions, it is reiterated that the Supreme Court had not issued any directions for the codification of a Uniform Civil Code.

The Supreme Court's latest reminder to the government of its Constitutional obligations to enact a UCC came in July 2003, when a Christian priest approached the Court challenging the Constitutional validity of Section 118 of the Indian Succession Act. The priest from Kerala, John Vallamattom filed a writ petition in the year 1997 stating the Section 118 of the said Act was discriminatory against the Christians as it imposes unreasonable restrictions on their donation of property for religious or charitable purpose by will. The bench comprising of Chief justice of India V.N. Khare, Justice S.B. Sinha and Justice A.R. Lakshmanan struck down the Section declaring it to be unconstitutional. Chief justice Khare stated that,

> *"We would like to State that Article 44 provides that the State shall endeavour to secure for all citizens a uniform civil code throughout the territory of India. It is a matter of great regrets that Article 44 of the Constitution has been given effect to. Parliament is still to step in for framing a common civil code in the country. A common civil code will help the cause of national integration by removing the contradictions based on ideologies"*[46]

Thus, as seen above, the apex court has on several instances directed the government to realize the Directive Principle enshrined in our Constitution and the urgency to do so.

Justice Jeevan Reddy in *S.R. Bommai v. Union of India*[47] observed that

> *"religion is the matter of individual faith and cannot be mixed with secular activities, Secular activities can be regulated by the State by enacting a law".*

44 *Sarla Mudgal (Smt.), President, Kalyani and Others vs Union of India and Others* ,AIR 1995 SC 1531
45 AIR 2000 SC 1650
46 *John Vallamattom v. Union of India*, (2003) 6 SCC 611
47 AIR 1994 SC 1918

Article 44 is based on the concept that the UCC will not and shall not result in interference of one's religious beliefs relating, mainly to maintenance, succession and inheritance. This means that under the UCC a Hindu will not be compelled to perform a nikah or a Muslim be forced to carry out saptapadi. But in matters of inheritance, right to property, maintenance and succession, there will be a uniform law. The whole debate can be summed up by the judgment given by Justice R.M. Sahai. He said:

> *"Ours is a secular democratic republic. Freedom of religion is the core of our culture. Even the slightest of deviation shakes the social fibre. But religious practices, violative of human rights and dignity and sacerdotal suffocation of essentially civil and material freedom are not autonomy but oppression. Therefore, a unified code is imperative, both for protection of the oppressed and for promotion of national unity and solidarity."*

All the above decisions tend to uphold the general law in accordance with the Constitution of India, without harming the spirit of the personal laws in practice. Hence it is not forcing the UCC on an unwilling population, who are not ready to adopt secular laws separated from religious customs, which is required; nor is it good to force the custom of a community upon others.

Article 44 lays down a principle of uniformity which is fundamental in the governance of the country, but is not judicially enforceable. There are many significant directives enshrined in the Part IV of the Constitution which require urgent implementation like living wages, farmers land ownership and the like which are more fundamental in the governance of the country. We need to prioritize.

We need to bring reform in each of personal laws and equip them to make them relevant in the prevailing socio-economic and political trends for the changing time. Instead of an external enforcement for the reforms let these changes emerge from and through internal reforms. The preservation of social fabric and constitutional mandate and democratic values are thus satisfied.

PUBLIC OPINION AND SENTENCING

Dr. John P C*

The fundamental laws[1] governing fixation of criminal responsibility and sentencing envisage both to be done by the judiciary. The Indian Evidence Act, 1872 declares in many words the power of the Court to take decisions as to the proof of things in the criminal justice system[2].

In fact there have been no guidelines for the Judges to appreciate facts nor had there been any guidelines for sentencing. This situation was eloquently projected by late Justice Krishna Iyer who lamented nearly half a century ago in *Balakrishnan* v. *State of Kerala*[3], thus;

> *Every criminal proceeding should be dichotomised into two stages, the pre-conviction and post-conviction phases. What is relevant in fixing the sentence may be irrelevant and even objectionably in the fixing of the guilt and all that is relevant at the conviction stage, pooled and presented to the Court, may be altogether inadequate for the sentencing process. That is why Judges, when they sentence offenders have too little knowledge of the real circumstances of the offender and of the factors which caused him to do what he did, the motivation for the crime and of the curative prescription that would protect the community and salvage the individual. If the discretion given to the Judge in the matter of personalising punishment is to be effectively exercised, additional fact finding processes have to be resorted to by the Judge either in the shape of a judicial hearing before sentencing for which there is no express provision in our code, or through the instrumentality of the Public Prosecutor and counsel for the defence who may be in a position to lay before the Court, after the prisoner's guilt has been fixed, such reliable information as would enable the Court to adjust and adapt its sentence to the needs of the case. The criminal law of India being largely offence oriented and very*

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1 * Associate Professor, Govt. Law College, Thiruvananthapuram, Kerala.
Indian Penal Code and Criminal Procedure Code.

2 Section 165 of the Evidence Act lays down that the Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form at any time, of any witness, or of the parties about any fact relevant or irrelevant…

3 1970 KLT 34

> *inadequately offender oriented, there is really no statutory procedure for the post conviction fact finding programme unlike in many other systems of penal law. I have sought the help of counsel for materials relevant in this regard"*[4].

He hit the nail on the head itself when he pinpointed the plight of the Judge in sentencing. He observed:

Another handicap for the Judge confronted by a sentencing situation is the total absence of directive principles to regulate the exercise of his discretion in individualising the punishment. Generally the sentence under the IPC is one of relative indeterminateness with a high fixed maximum and with absolutely no statutory guidelines for the magistrate except such as he may glean from judicial decisions which themselves may be too variable to serve as precise leading strings. The IPC over 100 years old and the Cr.PC, around 70 years old are hardly conscious of the remarkable strides made in modern penology and do not articulate the current sentencing policy which jurists advocate, Judges apply and the statutes of other countries have codified. It may be appropriate to observe that the art of punitive treatment is still the Cinderella of Indian Criminal Law. All that I can do in this case is to accommodate within the limits of the existing law what I consider to be the legitimate purpose and processes of penal treatment. An unguided missile, euphemistically described as a judicial punishment, may well be a social hazard.

> *Sentencing is a means to an end, psycho physical panacea to cure the culprit of socially dangerous behaviour. Penal strategy must, therefore, strike a sober balance between sentimental softness towards the criminal, masquerading as progressive sociology and the terror cum torment oriented handling of the criminal, which is actually, in many cases, the sublimated expression of judicial severity although ostensibly imposed as a deterrent to serve society from further crimes. Social defence through reformation of the criminal, a task to perform which psychology and sociology are auxiliary tools is what strikes me as the primary object of punishment. In a sense the triune purpose of penal treatment will take in social defence, redemption of the convict and the satisfaction of the victim and the community that justice has been done in this case"*[5].

The purpose of quoting Justice Krishna Iyer was not only to show that this has been the case for the last century but also to highlight the fact that no other Judge with the honourable exception of Justice Bhagawati and Justice Iyer has cared to look at the inadequacy of the criminal justice system. If judgments are any guide, most of

4 Id.at.35
5 Id. at 35-36.

the judges even now grope in darkness to grasp the sentencing policy of the criminal statutes.

Constitutionalisation of the Sentencing Process

Generally speaking criminal statutes do not reflect sentencing policy nor do they provide for any guidelines for sentencing. Justice Iyer and Bhagawati invoke the philosophy of the Constitution and insisted that sentencing should be done in the light of the constitutional philosophy. The search for the constitutional philosophy helped them to ascertain the purpose of sentencing and the knowledge in criminology helped to formulate guidelines.

Constitutionalisation of the sentencing process gives enough freedom to the activist Judges to explore the sentencing practices in the light of the penological theories. In *Mohammad Giasuddin* v. *State of Andhra Pradesh*[6] Justice Iyer had gone to the extent of suggesting the introduction of transcendental meditation as a treatment to the prisoners.

Statutory Developments

In 1973 Criminal Procedure was amended and provisions like 235 (2), 248(2), 255(2), 360 and 361[7] came to be incorporated. For the first time the court was authorised to have pre-sentence hearing under Ss.235, 248 and 255. Section 235(2) stipulates:

> *If the accused is convicted, the Judge shall, unless he proceeds with the provisions of 360, hear the accused on the question of sentence, and then pass sentence on him according to law.*

So, after the accused is found guilty, the court should think of invoking Sec. 360. The court is bound to hear the accused, more precisely the convicted person, on the question of sentence. It is in fact a separate trial giving the person a right of pre-sentence hearing[8]. In *Santa Singh* v. *State of* Punjab[9] Bhagawati, J. Observed that, "hearing contemplated by section 235(2) is not merely confined to hearing oral

6 (1977) 3 SCC 287

7 Section 360 enables the Court to avoid punishment and release the offender on good conduct under certain conditions spelt out in the section. Section 361 requires that whenever the court deal with an accused person under section 360 or under the provisions of Probation of Offenders Act, 1958 or a youthful offender for the treatment, training or rehabilitation, if the court decides otherwise and to pass any sentence on the person shall record special reasons for not invoking section 360 Cr.P.C.

8 *Bachan Singh* v. *State of Punjab*, (1980) 2 SCC (Cri) 580, 635.

9 1976 (4) SCC 190

submissions, but it is also intended to give an opportunity to the prosecution and the accused to place before the court facts and material relating to various factors bearing on the question of sentence and if they are contested by either side, then to produce evidence for the purpose of establishing the same"[10]. The object of this provision is to acquaint the court with the social and personal data of the offender to enable the court to decide as to the proper sentence or the method of dealing with the offender after his conviction[11]. Hence, "hearing" is not a mere formality. A sentencing decision taken without following the requirements of S.235 (2) is violative of the rules of natural justice[12].

Reports about the convict from Probationary Officers could also be adduced under this section. A perusal of *Tarlok Singh* v. *State*[13], might help one to understand the relevance of this provision for finding a punishment to suit the personality of the offender. Section 248[14] and 255[15] have similar impact on sentencing.

The Purpose of Punishment

Aim of criminal law is to establish sound foundation for a tolerable and durable social order[16]. That is why the society defined certain acts as criminal and prescribed penalty for doing anything which is declared as crime. The awarding of penalty is nothing but the community condemnation of the commission of the crime. It is the expression of community's disapproval, or contempt for the convict which alone characterises physical hardship as punishments[17]. Hence, punishment is a judgment which remembers the criminal that what he did was wrong. Hence, punishment is a judgment which reminds the criminal that what he did was wrong. The aim of punishment is not to prevent crime but to bring people to see and to understand the wrongness of his conduct[18].

Lord Denning appearing before the Royal Commission on 'Capital Punishment' expressed that, punishment is the way in which society expresses its denunciation of

10 Id.at 196
11 Chandrasekharan Pillai K N, ed., *Criminal Procedure* at 501 (Eastern Book Company 2006).
12 *Allaudin Mian* v. *State of Bihar,* (1989) 3 SCC 5.
13 (1977) 3 SCC 218.
14 Section 248 deals with procedure after conclusion of trial of a warrant case by Magistrate.
15 Section 255 deals with procedure after finding acquittal or conviction of a suspect in a trail of summons case by magistrate.
16 Henry M. Hart, *The Aims of Criminal Law*, 23 Law and Contemporary Problems 401,402(1993)
17 Gardner, *Bailey* v. *Richardson and the Constitution of the United States*, 33 B.U.L.Rev. 176 (1953): 193 quoted in *Id.*
18 R.A.Duff, *Trials and Punishment,* 233, 236 (Cambridge University Press 1986).

wrong doing and in order to maintain respect for law, it is essential that punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of the citizens. For them it is a mistake to consider the object of punishment as being deterrent or reformative or preventive and nothing else. The truth is that some crimes are so outrageous that society insists on adequate punishment because wrong doer deserves it, irrespective of whether it is deterrent or not[19]. So, punishment must be severe enough to act as a deterrent but not too severe to be brutal. Similarly punishments should be moderate enough to be human but cannot be too moderate to be ineffective[20].

In *Flemming* v. *Nester*[21], the question before the US Supreme Court was whether the State inflicted deprivation amounts to punishment. Nester, who migrated to US from Bulgaria in 1913, became eligible for old-age benefits under the Social Security Act. In 1956 he was deported on the ground that he was a member of the Bulgarian Communist Party from 1933 to 1939, in accordance with the Immigration and Nationality act[22]. He was informed that his insurance benefits would cease. He approached the District Court which decided the case in his favour. Court stated that:

> *Termination of benefits amounts to punishing him without a judicial trial ,that it constitutes the imposition of punishment by legislative act rendering Sec.202 a bill of attainder: and that the punishment exacted is imposed for past conduct not unlawful when engaged in, thereby violating the constitutional prohibition on ex post facto laws.*[23]

The District Court found that deprivation of such benefits amounted to punishment. Government appealed to the Supreme Court, where the court found that Nester was not punished. Court observed that the Congress is powerful to take such decisions which are regulatory in character and not punishment. Mere denial of non-contractual benefits is completely outside the scope of criminal law and lacks reprobative symbolism essential to punishment[24]. But, Justice Brennen in his dissenting judgment argued that it is impossible to think of any purpose the provision

19 Government of India, *Committee On Reforms Of Criminal Justice System* $14.1 at 169 (Ministry of Home Affairs 2003)
20 Id. at para14.2
21 80 S.Ct. 1367 (1960)
22 Section 202 states that an alien individual who is deported after September 1, 1954 on certain grounds including past membership in communist party need not be given any old-age, survivor, and disability insurance benefits.
23 80 S. Ct. 1367 at 1374
24 Id. at. 1376

in question could possibly serve except to 'strike' at aliens deported for conduct displeasing to the law makers[25]. Justice Brennen was right in saying that the Congressional reprobation has a 'punitive intent'.

Punishment is a suffering for the wrong committed, awarded by an authority, whatever form it be. If the punitive element is there it is punishment. In *Alister Anthony Pareira* v. *State of Maharashtra*[26], the Indian Supreme Court observed:

> *One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. …what sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances27.*

In *State of Madhya Pradesh* v. *Bablu Natt*[28] Supreme Court observed that the principle governing imposition of punishment would depend upon the facts and circumstances of each case. An offence which affects the morale of the society should be severely dealt with[29]. These observations of the apex court show that the punishment must be deterrent and preventive rather than rehabilitative. More over it must reflect the attitude of the society towards the crime and criminal. In *State of Karnataka* v. *Krishnappa,*[30] Court narrated the importance of sentencing, thus:

> *Protection of society and deterring the criminal is the avowed object of law and that is required to be achieved by imposing an appropriate sentence. The sentencing Courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. Courts must hear the loud cry for justice by the society in cases of heinous crime of rape on innocent helpless girls of tender years, as in this case, and respond by imposition of proper sentence. Public abhorrence of the crime needs reflection through imposition of appropriate sentence by the Court. There are no extenuating or mitigating circumstances available on the record which may justify imposition of any sentence less than the prescribed minimum to the respondent. To show mercy in the case of such a heinous crime would be travesty of justice and the plea for leniency is wholly misplaced.*[31]

25 Id.at. 1387
26 AIR 2013 SC 3802
27 Id. at para 70.
28 (2009)2 SCC 272
29 Id *at* 276
30 2000 (4) SCC 75
31 Id. at para 16

If the judgment is not reasoned, properly reflecting the collective conscience, one may wonder as to how to reflect public opinion on sentencing. It is indeed necessary that proper sentencing should have three objectives; the offender's treatment, alleviating the victim's feelings and the consideration of community's feelings. The punishment awarded in a case may thus impact on the society's attitude towards the crime. Society's views would perhaps be equated with public opinion. Though it may have thus impact it is not necessary that it should have any role in determining the quantum of sentencing. However, if the Court does not regard a crime as serious one demanding a higher punishment public opinion about sentencing may shake the public faith in the efficacy of the legal system. There could be the other result as well. If the society feels the need for proper control over certain attitude and makes its laws stringent enough to prevent them, the Court may strictly enforce it. But if it results in misuse it may have rebuff.

Sentencing Policy in India

Not much theoretical exposition is given by the Courts even where they avoid capital punishment. Sometimes, the Courts smacks lack of its knowledge in penology. For example, one may try to understand the meaning of the following statement in Sandesh32:

> "*The doctrine of rehabilitation and doctrine of prudence are the other two guiding principles for proper exercise of judicial discretion*".

One may hope that the Court will explain it one day.

Sometimes the Court describes proportionality as an aim of punishment. These are layman's perception about punishment. One has to learn the theories of punishment and try to apply them to the fact situation in each case. This process of applying the theories may help the Court to evolve new theories understandable to the public. It is not understood why the Courts resort to mechanical listing of the circumstances instead of discussing the issues legally and scientifically. The latter is intellectually challenging and rewarding.

Unscientific approach in sentencing can result in unconvincing judgments. If the judgments do not serve the purpose of sending out a message, it cannot be called a satisfactory judgment. It will neither logical nor will instil confidence among the

32 *Sandesh* v. *State of Maharashtra*, (2013) 2 SCC 479 at $22

general public. In this context the position of Judge and his decision as spelt out by the Supreme Court in OMA v. State of Tamil Nadu33 might be of interest. While criticising the District Judge for being influenced by the fact that the accused belongs to a faraway place from Tamil Nadu for awarding capital punishment observed:

> *A Judge has no weapon or sword. A Judge's greatest strength is the trust and confidence of the people, whom he serves. We may point out that clear reasoning and analysis are the basic requirements in a judicial decision. Judicial decision is being perceived by the parties and by the society in general as being the result of a correct application of the legal rules, proper evaluation of facts based on settled judicial precedents and a Judge shall not do anything which will undermine the faith of the people.34*

The import of the Court's observation is the requirement of the Court's judgment being convincing to the public. There is no attempt on the part of the Courts to live up to this expectation. Deepak Misra, J. also, in the same case, remembers the judiciary the role of the judge thus:

> *He must constantly keep in mind that every citizen of this country is entitled to a fair trial and further if a conviction is recorded it has to be based on the guided parameters of law. And, more importantly, when sentence is imposed it has to be based on sound legal principles, regard being had to the command of the statute, nature of the offence, collective cry and anguish of the victims, and, above all, the 'collective conscience' and doctrine of proportionality. Neither his vanity nor his pride of learning in other fields should influence his decision or imposition of sentence. He must practice the conscience of intellectual honesty and deal with the matter with all the experience and humility at his command. He should remind himself that some learning does not educate a man and definitely not a judge. The learning has to be applied with conviction which is based on proper rationale and without forgetting that human nature has imperfect expression when founded bereft of legal principles. He should not usher in his individual satisfaction but adjudge on objective parameters failing which the whole exercise is likely to be named "monstrous legalism".* [35]

In fact there are instances where the Judges have unknowingly added inconsistency in drawing conclusions from facts. For example, one may look at the conclusions drawn by Justice Sathasivam and Khalifulla in Mohinder Singh v. State of Punjab,36

33 (2013) 3 SCC 440
34 Id. para20 at 450.
35 Id. at para 54.
36 (2013) 3 SCC 294

about the accused's approach towards his second daughter. Justice Sathasivam finds his not attacking her as a ground favourable to him; Khalifulla found that she saved herself and that he did not spare her. Justice Sathasivam observes:

> *One significant factor in this case, which we should not lose sight of is that he did not harm his other daughter, namely, shalu (PW2) even though he had a good chance for the same. Further, it was highlighted that he was a poor man and unable to earn his livelihood since he was driven out of his house by his deceased wife. It is also his claim that if he was allowed to live in the house, he could easily meet both his ends and means, as the money which he was spending by paying rent would have been saved. It is his further grievance that his deceased wife was adamant that he should live outside and should not lead a happy married life and that was the reason that their relationship were strained. This also shows that the accused was feeling frustrated because of the attitude of his wife and children. Moreover, the probability of the offender's rehabilitation and reformation is not foreclosed in this case.*[37]

It is interesting to note that the court is canvassing for a person who not only brutally killed his wife and daughter, but also raped the daughter earlier in the presence of her mother, and was punished by the court. Court found a mitigating circumstance that he avoided another rape on her second daughter. By giving flimsy arguments in this case, once again the judiciary in India proves that Justice Deepak Misra is right in pointing such judgments are "monstrous legalism".

Kalifulla, J's judgment in the same case is more confusing. He adds:

> *When the father himself happens to be the assailant in the commission of such beastly crime, one can visualize the pathetic situation in which the girl would have been placed and that too when such a shameless act was committed in the presence of her own mother. When the daughter and the mother were able to get their grievances redressed by getting the appellant convicted for the said offence of rape one would have in the normal course expected the appellant to have displayed a conduct of remorse. Unfortunately, the subsequent conduct of the appellant when he was on parole disclosed that he approached the victims in a far more vengeful manner by assaulting the hapless victims which resulted in filing of an FIR once in the year 2005 and subsequently when he was on parole in the year 2006. The monstrous mindset of the appellant appears to have not subsided by mere assault on the victims who ultimately displayed his extreme inhuman behaviour by eliminating his daughter and wife in such a gruesome manner in which he committed the murder by inflicting the injuries on the vital parts of the body of the deceased and that too with all vengeance at his command in order to ensure that*

37 Id.para 28 at 304

> *they met with instantaneous death. The nature of injuries as described in the post-mortem report speaks for itself as to the vengeance with which the appellant attacked the hapless victims. He was not even prepared to spare his younger daughter (viz) PW-2 who, however, escaped the wrath of the appellant by bolting herself inside a room after she witnessed the grotesque manner in which the appellant took away the life of his wife and daughter.*[38]

The narration shows that the Judge digested the case in its fullest extent and very much aware of the serious nature of the ghastly murder and the motive for it. Even then without giving any reason he said that the case still does not fall within the category of 'rarest of rare', though it calls for a stringent punishment. Common man cannot understand such decision, which warrants sentencing guidelines rather than to allow the judge to use his little wisdom.

In *Sandesh*, 39 though the murder and rape was considered by the court as grave, giving the offender benefit of mitigation mainly on three grounds, viz., the tender age of the accused, lack of intent on his part to commit murder and the smell of alcohol. It is not known how these three grounds mitigate the gravity of the murder of a lady and the rape of another pregnant lady. In many cases tender age of the culprit accepted as a mitigating circumstance and saved them from gallows. It is actually an encouragement for the young culprits.40 Court found that the accused have no intention to kill anybody and if he had any intention to kill he need not inflict twenty one injuries and one fatal blow on vital part is necessary.41 A strange finding, which shows that the number of injuries is more, there is chance for amnesty. Here, the court failed in appreciating the fact that before leaving the scene the accused gave a fatal blow with a *kukri* on the neck of the deceased to ensure her death. Alas! no intention. Smell of alcohol is another mitigating factor. Everybody knows voluntary intoxication is no defence. Such "Judge centric" interpretations only reveal the non appreciation of facts by the Judge and not the intention of the legislature or the public opinion.

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38 Id. at. 309.

39 *Sandesh* v. *State of Maharashtra,* (2013) 2 SCC 479.

40 See also cases in which capital punishment is commuted to one of life imprisonment on the ground of tender age of the culprit. See, *Bantu Alias Naresh Giri* v. *State of MP,* (2001) 9 SCC 615; *Amrit Singh* v. *State of Punjab,* AIR 2007 SC 132; *Rameshbhai Chndubhai Rathod* v. *State of Gujarat*, (2011) 2 SCC 764; *Surendra Pal Shivbalak* v. *State of Gujarat,* (2005)3 SCC 127; *Amit* v. *State of Maharashtra,* (2003) 8 SCC 93; *Rahul* v. *State of Maharashtra*, (2005) 10 SCC 322; *Santosh Kumar Singh* v. *State*, (2010) 9 SCC 747.

41 *Sandesh* v. *State of Maharashtra*, (2013) 2 SCC 479 at 487 per Swatanter Kumar, J.

In *Shankar Kisanrao Khade* v. *State of Maharashtra*,42 court formulated three tests, 'crime test', 'criminal test' and 'rarest of rare test'. This seems to be a realistic view. Though the accused in this case failed in all these tests, unfortunately, he won the battle. The court expressed the view that courts are awarding capital punishment since the situation demands and due to constitutional compulsion, reflected by the will of the people and not the will of the judge.43 Hence, when go through the judgment, one could understand that the Judge failed in observing constitutional compulsions and protecting the will of the people.

In *Sangeetha and another* v. *State of Haryana*,[44] Madan B. Lokur, J. rightly pointed out that in the sentencing process, both the crime and the criminal are equally important. We have unfortunately not taken the sentencing process as seriously as it should be with the result that in capital offences, it has become judge centric sentencing rather than the principled sentencing. There was lack of appreciation of facts. This may not convince the commoner.

In many cases Supreme Court commuted death sentences to life imprisonment on the ground that there are chances of reformation of accused[45]. Decisions like *Mohammad Chaman* v. *State (NCT) of Delhi,*[46] *Mohinder*[47] *and Sandesh*[48] raises the question how the court can judge the chances for reformation of accused. The wide discretion given to the court, usually, opens the sentencing process to abuse and allows personal prejudices of the judges to influence decisions[49]. In this context it is

42 (2013) 5 SCC 546

43 Id,para 52 at.576

44 (2013) 2 SCC 452

45 See for example, *Anshad* v. *State of Karnataka,* 1994 SCC (4) 381, *Rama Subramanian* v. *State of Kerala,* AIR 2006 SC 639

46 2001 (2) SCC 28. This was a case of murder and rape of a one and half year girl child.

47 *Mohinder Singh* v. *State of Punjab,* (2013) 3 SCC 294. In this case the accused was first convicted for committing rape on his daughter and in the second case convicted for murder of his wife and daughter.

48 *Sandesh* v. *State of Maharashtra*, (2013) 2 SCC 479 . It is a case of murder of an old lady and rape of another pregnant lady.

49 For example, *Mohd. Chaman*, 2001 (2) SCC 28 (rape and murder of one and half year girl child); *Mohinder*(2013) 3 SCC 294 (Murder of wife and daughter); *Sandesh* (2013) 2 SCC 479 (Murder of an old lady and rape and brutal assault of five month pregnant lady); *Kumudi Lal v. State of U.P.* (1994) 4 SCC 108(rape and murder of 14 year girl); *Raju v. State of Haryana*, (2001) 9 SCC 50(rape and murder of 11 year old girl); *Amrit Singh v. State of Punjab*, AIR 2007 SC 132 (rape and murder of 8 year old girl); *Rameshbhai Chandubhai Rathod v. The State of Gujarat,* (2011) 2 SCC 764 (rape and murder of 8 year old girl) are given amnesty from gallows while *Laxman Naik v. State of Orissa,* (1994) 3 SCC 381 (rape and murder of seven year old girl); *Dhananjoy Chatterjee v. State of West Bengal,* (1994) 2 SCC 220 (rape and murder of 18 year old girl); *Kamta Tiwari v. State of M.P.* (1996) 6 SCC 250 (rape and murder of 7 year old girl); *Molai and another v. State of M.P.* (1999) 9 SCC 581(Rape and murder of 16 year old girl); *Bantu v. State of Uttar Pradesh*, (2008) 11 SCC 113 (Rape and murder of 5 year old girl); *Shivaji @ Dadya Shankar Alhat v. The State of Maharashtra*, (2008) 15 SCC 269 (rape and murder of nine years) are awarded capital punishment.

worth to quote paragraphs 6 to 10 of the observations of the Supreme Court in State of *M.P.* v. *Saleem alias Chamaru & Another*[50]. Court observed, thus:

> 6. Undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed, etc. . . .
>
> 7. After giving due consideration to the facts and circumstances of each case, for deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed are to be delicately balanced on the basis of really relevant circumstances in a dispassionate manner by the court. Such act of balancing is indeed a difficult task. It has been very aptly indicated in Dennis Councle McGautha v. State of California (402 US 183) that no formula of a foolproof nature is possible that would provide a reasonable criterion in determining a just and appropriate punishment in the infinite variety of circumstances that may affect the gravity of the crime. In the absence of any foolproof formula which may provide any basis for reasonable criteria to correctly assess various circumstances germane to the consideration of gravity of crime, the discretionary judgment in the facts of each case, is the only way in which such judgment may be equitably distinguished.
>
> 8. The object should be to protect society and to deter the criminal in achieving the avowed object of law by imposing appropriate sentence. It is expected that the courts would operate the sentencing system so as to impose such sentence which reflects the conscience of the society and the sentencing process has to be stern where it should be.
>
> 9. Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime e.g. where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order and public interest, cannot be lost sight of and per se require

50 (2005 (5) SCC 554).

> exemplary treatment. Any liberal attitude by imposing meagre sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result wise counterproductive in the long run and against societal interest which needs to be cared for and strengthened by a string of deterrence inbuilt in the sentencing system.
>
> 10. The court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal".

Public Opinion in Sentencing

Justice O'Conner of the US Supreme Court in Planned Parenthood v. Casey51, observed:

> The courts power lies in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the judiciary as fit to determine what the nation's law means and to declare what it demands[52].

So, making legally principled decisions acceptable to public is the cynosure for the legitimacy of the judiciary. We, the people of India consider our judiciary as a more legitimate institution than the other branches of the government. This legitimacy and the authority of the judiciary depend on the sustained public confidence. People will support the judiciary if the court decisions are less divergent from the public opinion. So, public opinion is ultimately the source of court's power. If the trust and confidence of the people is lost court cannot expect to function for long as an effective resolver of disputes, a respected issuer of punishments, or a valued deliberative body[53]. This is true with regard to both trial as well as appellate courts.

51 505 US 833(1991)
52 Id.at 865.
53 David B. Rottman and Alan J. Tomkins, *Public Trust and Confidence in the Courts: What Public Opinion Surveys Mean to Judges*, 36 The Journal of the American Judges Association 24(1999)

How do judges decide the outcome of a case? The studies reveal that the judges will be influenced by many factors: legal and non-legal. Whatever be the influencing factor the court has to maintain its neutrality, otherwise the people won't accept the outcome from the courts. Using precedent in its fullest extent will help the court in projecting itself as neutral and that their decisions are in accordance with the rule of law.

In *Swamy Shraddananda @ Murali Manohar Mishra* v. *State of Karnataka,*[54] Court observed:

That is not the end of the matter. Coupled with the deficiency of the Criminal Justice System is the lack of consistency in the sentencing process even by this Court. It is noted above that Bachan Singh laid down the principle of the rarest of rare cases. Machhi Singh, for practical application crystallised the principle into five definite categories of cases of murder and in doing so also considerably enlarged the scope for imposing death penalty. But the unfortunate reality is that in later decisions neither the rarest of rare cases principle nor the Machhi Singh categories were followed uniformly and consistently55.

As the court suggested, their decision in *Shraddananda* discusses complete lack of uniformity and consistency in sentencing offenders who are a menace to the society. In order to conceal the lack of courage to send an offender to the gallows, several flimsy grounds are advanced by the courts, which do not reflect the will of the people. *Mohammed Chaman* v. *State (NCT of Delhi)*[56], is a good example which shows how far the judiciary is from the expectations of common man. In this case, one and half year old girl was raped by the accused and consequently she died due to the injuries sustained. While commuting capital punishment awarded to one of life imprisonment court observed:

> *The crime committed is undoubtedly serious and heinous and the conduct of the appellant is reprehensible. It reveals a dirty and a perverted mind of a human being who has no control on his carnal desires….we are not persuaded to accept that the case can be called one of the 'rarest of rare cases' deserving death penalty. We find it difficult to hold that the appellant is such a dangerous person that to spare his life will endanger the community. It is our considered view that the case is one which a humanist approach should be taken in the matter of awarding punishment*[57].

54 2008 (13) SCC 767
55 Id.at para 31.
56 2001 (2) SCC 28.
57 Id. at 40

The judge while writing a judgment should not get swayed by irrelevant considerations, that in one sense justifying the offence. It is impossible to have uniformity of sentencing but at least the court should aim at uniformity of approach. In India we are lacking this coordination. Malimath committee[58] in its report stated, thus:

> *The Judge has wide discretion in awarding the sentence within the statutory limits [in India]. There is now no guidance to the Judge in regard to selecting the most appropriate sentence, given the circumstances of the case. Therefore each Judge exercises discretion accordingly to his own judgment. There is therefore no uniformity. Some Judges are lenient and some Judges are harsh. Exercise of unguided discretion is not good even if it is the Judge that excercise the discretion. In some countries guidance regarding sentencing option(s) is given in the penal code and sentencing guideline laws. There is need for such law in our country to minimise uncertainty to the matter of awarding sentence[59].*

In *Soman* v. *State of Kerala*,[60] court observed, thus:

> *Giving punishment to the wrongdoer is at the heart of the criminal justice delivery, but in our country it is the weakest part of the administration of criminal justice. There are no legislative or judicially laid down guidelines to assist the trial court in meting out the just punishment to the accused facing trial before it after he is held guilty of the charges.[61]*

Conclusion

Public opinion is always in favour of tough or punitive sentencing. Arguing for considering public opinion does not mean that in all cases the court should award punitive sentences irrespective of the mitigating factors. As Lord Taylor C.J., suggests whether it is the kind of offence which would make right-thinking members of the public, knowing all the facts, feel that justice had not been done by the passing of any sentence other than a custodial one[62]. Hence, public opinion is the opinion of right thinking and well informed public. No commoner can digest most of the decisions of our courts like *Mohinder Singh, Sandesh, Swami Shraddhanand and Mod.Chaman* etc.

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58 Government Of India, Committee On Reforms Of Criminal Justice System Report 170 (Ministry Of Home Affairs 2003)

59 Id.para 14.4 at.170.

60 (2013)11 SCC 382. at para 12

61 Id. at para 12

62 *Cox* (1993) 14 Cr.App.R.(S) 479, at 481, adopting the words of Lawton L.J. in *Bradbourn* (1985) 7 Cr.App.R.(S) 180.

Media has a great role in ventilating the public opinion. But, today, media quite often plays to the galleries and their reporting is no guide to sentencing. Sometimes media reporting may adversely affect correct sentencing in as much as the media may not appreciate the aspects of crimes which the legal system has necessarily to consider in determining the guilt. The new categories of offences like road rage, criminal driving of the vehicles endangering ordinary public, etc. might receive maximum media attention. If such offenders are not adequately punished the media may come up with adverse reporting causing irreparable damage to the image of the criminal justice system. The system should therefore have proper machinery to take care of cushioning the adverse impact. A vigilant branch of academics could perhaps monitor the decisions with critique so that all other branches of the Criminal Justice System could undertake review, revisions and reforms promptly.

DECRIMINALIZATION OF ATTEMPTED SUICIDE – A CRITIQUE

*Dr. Binu N**

Introduction

The global statistics in the year 2006 revealed that, amongst one million persons committed suicide, more than one lakh persons were in India; indicating an increase of 3.7 per cent over the 2005 figure.[1] The number of suicides in the country during the decade (1996-2006) has recorded an increase of 33.9 per cent;[2] and youngsters were found to be the prime groups taking recourse to the path of suicides.[3] A similar trend was visible in the last decade as well: the national figures in 2012 and 2014 were 1,34,799[4] and 1, 31,666 persons,[5] respectively.

Throughout the history of mankind, suicide has been condemned. Since the middle Ages, society has used first the canonic law; and later, the criminal law to combat suicide. However, following the French Revolution of 1789, penalties for attempted suicide were abolished in European countries. In England, the Suicide

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Accidental Deaths and Suicides in India in 2006 (National Crime Records Bureau 2007)The overall male: female ratio of suicide victims for the year 2006 was 64:38;however, the proportion of boys: girls suicide victims (up to 14 years of age) was 48:52, i.e., almost equal number of young girls have committed suicide as their male counterparts. *Id*

2 From 88,241 in 1996 to 1, 18,112 in 2006. Id

3 Around 35.7 per cent were youth in the age group of 15-29 years and 34.5 per cent were middle-aged persons in the age group of 30-44. Senior citizens have accounted for 7.7 per cent of the total victims. *Ibid*.

4 *Accidental Deaths & Suicides Report* . (National Crime Records Bureau 2013) The number of suicides during the decade (2002-2012) has recorded an increase of 22.7% (1, 35,445 in 2012 from 1, 10,417 in 2002). Attempted suicide is at least 20 times more common than the completed suicide, *Suicide Prevention*. (World Health Organization 2012). Of all those who engage in non-fatal suicidal behaviours, one- third repeat the behavior within a year and nearly 10% eventually commit suicide. Pirkis J,Beautrais A, Durkee T, *Suicide Attempts in New Zealand and Australia*; in *Suicidology and Suicide Prevention: A Global Perspective* 127–31 (Oxford University Press 2009), Silverman M *Suicide Attempts in North America".in Suicidology and Suicide Prevention: A Global Perspectiv*117–21 (Oxford University Press 2009)

5 *Accidental Deaths & Suicides in India* vii (National Crime Records Bureau 2014)

Act, 1961 abrogated the law laying down attempt to commit suicide, an offence.[6] However, In India, both abetment of suicide and attempt to commit suicide continue to be offences.[7]

Nevertheless, in the recent times, the Indian courts have taken a lenient approach towards suicide attempters: over the past decade, not even a single judgment regards suicide as a crime. Moreover, the Supreme Court in a landmark judgment in 2011,[8] while issuing guidelines relating to *euthanasia*, had recommended the Parliament to consider decriminalizing attempt to suicide.

Eventually, it was included in the recently drafted Mental Health Care Bill, 2013 which has been introduced in the Rajya Sabha, and is still pending. The present Article is an attempt to analyze the Indian legal provisions relating to suicide attempts in the light of the Constitutional provisions and judicial decisions; and to review the Indian and international legal perspectives of attempted suicide so as to highlight the socio-psycho-legal implications of decriminalization of attempted suicide.

Attempted suicide as an offence: International Scenario

'Suicide attempt' can be defined as a 'non-fatal self-directed potentially injurious behaviour with intent to die.'[9] In ancient Athens, a person who had died by suicide was denied the honours of a normal burial: he would be buried alone, on the outskirts of the city, without a headstone or marker.[10] A criminal ordinance issued by Louis XIV in 1670 was far more severe in its punishment: the dead person's body was drawn through the streets, face down, and then hung or thrown on a garbage heap. Additionally, his property was confiscated.[11] However, in 1823, the Burial of Suicide Act abolished the legal requirements of burying such persons at crossroads.[12]

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6 Although suicide is no longer an offence in itself, any person who aids, abets, counsels or procures the suicide of another or an attempt by another to commit suicide, is guilty of an offence and liable on conviction on indictment to imprisonment for a term which may extend to 14 years. See, Section 2 dealing with criminal liability for complicity in another's suicide.

7 Sections 306 and 309, Indian Penal Code, 1860, respectively.

8 *Aruna Rama Chandra Shanbaug v. Union of India* ,(2011) 4 SCC 454. For a discussion on the issue of physician- assisted suicide, see , *Euthanasia and Public Policy*, 7(4) Cambridge Quarterly of Healthcare Ethics 209 -216 (1998); *Symposium on Physician-Assisted Suicide, Ethics* 109(3) International Journal of Social, Political and Legal Philosophy 497-518 (1999); Gerald Dworkin et al., *Euthanasia and Physician-Assisted Suicide: For and Against* (1998); Maria T.CeloCruz, *Aid-in-Dying: Should We Decriminalize Physician-Assisted Suicide and Physician-Committed Euthanasia?* 18 Am. J. L. & Med. 369-94 (1992).

9 Etienne G. Krug, Linda L. Dahlberg, James A. Mercy, Anthony B. Zwi and Rafael Lozano (eds.),*World Report on Violence and Health* 185 (World Health Organization 2002).

10 Plato, *Laws* (Book IX).

11 Durkheim, Émile, *Suicide* 327 (The Free Press 1997).

12 Williams G. L. *The Sanctity of Life and the Criminal Law*. (Faber and Faber 1958)

By 1879, the English law had begun to distinguish between suicide and homicide, though suicide resulted in forfeiture of estate. Also, the deceased were permitted daylight burial in 1882. In many jurisdictions, it is a crime to assist others, directly or indirectly, in taking their own lives. In some jurisdictions, it is also illegal to encourage them to do so. Sometimes an exception applies for physician-assisted suicide (PAS), under strict conditions.

Since the 13th century,[13] English law perceived suicide as an immoral, criminal offence against God and also against the Crown.[14]As said earlier, suicide ceased to be an offence only by 1961.With respect to civil law, the simple act of suicide is lawful but the consequences of committing suicide might turn an individual event into an unlawful act: in *Reeves v Commissioners of Police of the Metropolis,* [15] a man in police custody who hanged himself was held to be equally liable with the police (a cell door defect enabled the hanging) for the loss suffered by his widow.

Suicide directly involving only the deceased person is not by itself a crime under Scots law. However, attempting suicide might be a breach of the peace if it is not done as a private act; this is routinely reported in the case of persons threatening suicide in areas frequented by the public. The Suicide Act, 1961 applies only to England and Wales. Under Scots law, a person who assists a suicide might be charged with murder, culpable homicide, or no offence depending upon the facts of each case. Despite not being a criminal offence, consequential liability upon the person attempting suicide (or if successful, his/her estate) might arise under civil law where e.g. it parallels the civil liabilities recognised in the *Reeves case.*

In the Australian state of Victoria, while suicide itself is no longer a crime, a survivor of a suicide pact can be charged with manslaughter. Also, it is a crime to counsel, incite, or aid and abet another in attempting to suicide; and the law explicitly allows any person to use "such force as may reasonably be necessary" to prevent another from dying by suicide.[16] In Ireland, attempted suicide is not a crime and, self-harm is not generally seen as a form of attempted suicide. It was decriminalised in 1993.[17]

13 Holt, Gerry, *When Suicide was Illegal* available at *Bbc.co.uk*. (visited on 12-03-2016)

14 SM Canick, *Constitutional Aspects of Physician-Assisted Suicide After Lee* v. *Oregon,*23 Am. JL & Med 69-96(1997).

15 [2000] 1 AC 360.

16 Available online at *https://en.wikipedia.org/wiki/Suicide_legislation#Australia_.28Victoria.29* (visited onSeptember 15, 2016)

17 Criminal Law (Suicide) Act, 1993. *Irishstatutebook*.ie.1993-06-09.

Under the Penal Code of Malaysia,[18] whoever attempts to commit suicide, and does any act towards the commission of such offence, shall be punished with imprisonment for a term which may extend to one year or with fine or with both. In the Netherlands, being present and giving moral support during someone's suicide is not a crime. However, it is a crime to participate in the preparation for or execution of a suicide, including supplying lethal means or instruction in their use. Physician-assisted suicide may be an exception.[19]

New Zealand currently has no law against suicide in itself, as a personal and unassisted act. However, there are legislative sanctions against 'assisting or abetting' suicides.[20] In Norway, attempted suicide is not illegal.[21] In Romania, encouraging or facilitating the suicide of another person is a criminal offence and is punishable by up to 7, 10 or 20 years in prison, depending on the circumstances of the case.[22] In Russia, a person whose mental disorder "poses a direct danger to oneself" can be put into a psychiatric hospital. Inciting someone to suicide by threats, cruel treatment, or systematic humiliation is punishable by up to 5 years in prison.[23]

In Singapore, a person who attempts to commit suicide can be imprisoned for up to one year.[24] South African courts, including the Appellate Division, have ruled that suicide and attempted suicide are not crimes under the Roman-Dutch law, or that if they ever were crimes, they have been abrogated by disuse. Attempted suicide was from 1886 to 1968 a crime in the Transkei under the Transkeian Territories Penal Code.[25]

North Korea also criminalizes suicide with a peculiar deterrent, where the family and relatives of the suicide victim might be penalized as a form of collective punishment for the act of suicide.[26]

In United States, historically, various States listed suicide as a felony, but these policies were sparsely enforced. In the late 1960s, eighteen States had no laws against suicide.[27] By the late 1980s, thirty of the fifty States had no laws against suicide or

18 Act 574, Penal Code
19 *https://en.wikipedia.org/wiki/Suicide_legislation.* (visited on June 10, 2016)
20 Section 179, Crimes Act, 1961.
21 *Justis-ogpolilitidepartmentatet*: *Ot.prp.nr.22* (2008-2009).
22 Penal Code of Romania, Article 191.
23 Article 110 of the Criminal Code of the Russian Federation.
24 Singapore Penal Code, Section 309.
25 Milton, John. *South African Criminal Law and Procedure: Common-law Crimes* 353 -354 (Juta ,3rd edn 1996)
26 Jiang G, Cheng Q, *Suicide Attempts in Asia*, in Wasserman C, ed, *Oxford Textbook of Suicidology and Suicide Prevention: A Global Perspective* 109- 112 (Oxford University Press 2009).
27 Litman, Robert E, *Medico-Legal Aspects of Suicide* ,6Washburn395 (1966–1967).

suicide attempts but every State had laws declaring it to be a felony to aid, advice or encourage another person to commit suicide.[28]

The law in this regard was codified in Canada through the Criminal Code of 1892. However, suicide was removed from the Code in 1972 based on the argument that a legal deterrence was unnecessary.[29]In some States, suicide is still considered an unwritten "common law crime," as stated in Blackstone's Commentaries.[30] As a common law crime, suicide can bar recovery for the late suicidal person's family in a lawsuit unless the suicidal person can be proven to have been "of unsound mind." That is, the suicide must be proven to have been an involuntary act of the victim in order for the family to be awarded monetary damages by the court. This can occur when the family of the deceased sues the caregiver (perhaps a jail or hospital) for negligence in failing to provide appropriate care.[31]

Philosophical Basis

Historically, much of the legal stance against suicide originated when St. Augustine declared suicide to be a sin (354-430 CE).The influence of religious institutions was instrumental in shaping the criminalization of suicidal attempts. However, after the French Revolution, the attitude towards suicide and attempted suicide gradually changed: most of the developed countries have repealed criminalization of attempted suicide, but some countries including India, continue to treat suicidal attempt as a criminal offence.

The issue with regard to de-criminalization of attempted suicide has been riddled with controversies. It has its share of opponents and supporters.[32] The opponents assert that no human being has the right to take his life. On the surface the debate appears to be simple and straightforward. It involves two fundamental questions focusing on the power of society versus the rights of individuals. The issues involved deep down are as complicated as they are morally divisive, intellectually contentious, and emotionally wrenching.

28 ES. Shneidman, "Approaches and Commonalities of Suicide", *Suicide and its Prevention*. 24(1989) Available online at *https://books.google.com/books .* (visited on October 13, 2016)

29 CanLII -2012 *BCSC* 886.

30 So held by the Virginia Supreme Court in *Wackwitz v. Roy*, 418 S.E.2d 861 (Va. 1992).

31 See, *On Sound and Unsound Mind: The Role of Suicide in Tort and Insurance Litigations* 33Journal of the American Academy of Psychiatry and the Law 176-182 (2005).

32 Keating Heather, *Compassionate Killings* 75(5) M.L.R 697-721(2012).

Apropos "right to life," Uhlman writes, the issues are: what is the value of human life? When does life cease, and what are our obligations when it does? By what moral license may a human being claim the right to end his own life? Should the law guide or follow behaviours in this area, and who should decide, courts or legislatures?[33] On a similar point, "to think about these matters is to confront some of the central questions of human condition: belief in God and immortality of the soul, the nature of moral and legal obligation, and the origin of one's duties to neighbour and self, to name only a few."'[34] To these questions no agreement is in sight.

Religious people refer to the sanctity of life. God gives people life; so only God has the right to take it away. Roman Catholic Church regards suicide as morally wrong.[35] Muslims also regard human life, sacred because it is given by *Allah*. Sikhs have high respect for life – a 'gift of God.' Buddhism considers suicide a dishonorable act. Buddhism places great stress on no harm (*Ahimsa)* and on avoiding the ending of life. The way life ends has a profound impact on the way the new life will begin as death is a transition and the deceased person will be reborn to a new life whose quality will be dictated by his *karma.* There is a Jaina ethic of voluntary death through fasting (*Prayopavesha*) which is an acceptable way for a Hindu to end his life in certain circumstances. It is different from suicide. *Prayopavesha* is only for people who are fulfilled, who have no desire or ambition left and no responsibilities remaining in their life. It is non violent and uses natural means unlike the suddenness of suicide.[36]

The concept of decriminalization of attempted suicide is based on the philosophy of humanism and comparison. It recognizes the autonomy of the individual, freedom of choice to live or die with dignity. It is a very sensitive issue that polarized the world; and one of the most perplexing issues which the world faces today.[37]

Differences arise in the question of what constitute an offence. Basically, a certain type of conduct is regarded as offence, because the conduct is supposed to cause harm to others.[38] Moreover, it has been argued that irrespective of harm caused to others by one's actions, there exists the element of "public morality", which holds the

33 Michael M. Uhlman, *Western Thought on Suicide: From Plato to Kant* in Michael M. Uhlmaned. *Last Right: Assisted Suicide And Euthanasia Debated* 11-44 (1998); see also *Kam C. Wong, Whose Life Is It Anyway?* 5 Cardozo Pub. Law, Policy & Ethics J 234-308 (2006).

34 Id at 11.

35 Pope John Paul, The *Gospel Of Life* 133 (Random House 1995).

36 Conditions laid down for *Prayopavesha* are: (a) Inability to perform normal bodily purification (b) Death appears imminent or the life's pleasures are nil (c) Decision is publically declared (d) The action must be done under Community regulation.

37 Peter Singer, *Rethinking Life and Death,* 22 (Oxford University Press 1995).

38 John.S. Mill propounds the idea of "harm condition" in which he talks about "the only rationale for which power can be rightly exercised over any member of civilized society against his will, is to prevent harm to others. His only good, either physical or moral, is not sufficient. JS Mill, *On Liberty* 72 (1869).

fabric of the society together. This means that individual autonomy should be coupled with public morality and the responsibility of an individual to the society. When criminal law chooses a particular conduct for punishment and distinguishes it from another conduct, it must take into account the magnitude of the harm likely to be caused.[39]

In modern times, some people accept death with a sense of realism, viewing death as inevitable but not to be hastened.[40] These people embrace death as the ultimate reprieve after a long, arduous journey. Still others look to death as an honour, an event to anticipate and work toward. These people achieve their identity through death, such as a mother who risks her life to save her child. In ancient times, suicide was widely and openly practiced. Hindu wives voluntarily sacrificed themselves at the funeral pyre of their dead husbands;[41] and in China and Japan, people commit suicide in lieu of being disgraced.[42]

In Western civilizations, especially within the philosophical community, self-destruction was acceptable, though not venerated.[43] For example, Plato made provisions for suicide under the following circumstances:

1. where one's mind is morally corrupted and one's character can therefore not be salvaged;
2. where the self-killing is done by judicial order, as in the case of Socrates;
3. where the self-killing is compelled by extreme and unavoidable personal misfortune; and

39 Patric Develin, *The Enforcement of Morals* 103 (Oxford University Press 1965).

40 This is the Taoist view. Under Taoist beliefs, living and dying--just as *yin* and *yan* implies each other. People do not, and should not, live forever. Too much of living cheapens life. Thus it was said: "The people make light of dying because of the greatness of their labours in seeking for the means of living." Lao Tze, Tao Te Ching, *The Texts of Taoism, Sacred Books of the East* 39 (Jame Legge trans, 1962), Available online at http://oaks.nvg.org/yslra2.html (visited August 23,2016)

41 Robert L. Hardgrave, Jr., *The Representation of Sati: Four Eighteenth Century Etchings by Balthazard Solvuns,* 117 Bengal Past and Present 57, 57-80 (1964).

42 In the world of the warrior, seppuku was a deed of bravery that was admirable in a *samurai* who knew he was defeated, disgraced, or mortally wounded." Stephen Turnbull, *Samurai: The World of the Warrior* (2005),*See also* Vivien W. Ng, *Ideology and Sexuality: Rape Laws in Qing China*, 46 J. Asian Stud. 57, 60 (1987) (Females who were raped in imperial China were expected to kill themselves for losing her virtue). See also *Confucianization of the Law: A Study of Speech Crime Prosecution in China*, 11Murdoch U. Elec. J. L. 11 (2004) (In Imperial China, senior officials were not sentenced to death but allowed to take their own lives if punishment is required. This was aimed at preserving their self-respect and individual dignity).

43 Robert Young, *Voluntary Euthanasia*, in Edward N. Zalta ed. Stanford Encyclopaedia of Philosophy (Summer 2005) available on line at http://plato.stanford.edu/entries/euthanasia-voluntary. (visited on August 10,2016)

4. where the self-killing results from shame at having participated in grossly unjust actions.[44]

The Epicurean philosophers who were preoccupied with sensitivity and emotion, equated happiness with being free from pain."'[45] Thus, Cicero observed: a strong and lofty spirit is entirely free from anxiety and sorrow. It makes light of death . . . It is schooled to encounter pain by recollecting that pains of great severity are ended by death... (pain) lie within our own control: we can bear them if they are tolerable, or if they are not, we may serenely quit life's theatre, when the play has ceased to please us.[46]

The Stoics were even more insistent that people live by their own decree. The Stoics asserted that virtue alone is good, vice alone evil, and that all else is absolutely indifferent. Poverty, sickness, pain, and death, are not evils. Riches, health, pleasure, and life, are not goods. A person may commit suicide, for in destroying his life he destroys nothing of value. [47]

Thus, Seneca openly advocated suicide: "If one death is accompanied by torture, and the other is simple and easy, why not snatch the latter? Just as I shall select the ship when I am about to go on a voyage so I shall choose my death when I am about to depart from life."[48]To him, quality of life is much more important the quantity of life. For mere living is not a good, but living well. Accordingly, the wise man will live as long as he ought, not as long as he can. It is not a question of dying earlier or later, but of dying well or ill. And dying well means escape from the danger of living ill. [49]

Indian Statutory Regime

Most countries across the world no longer criminalize the suicidal attempts; however India has continued to hold it as a punishable offence. The recently drafted Mental Health Care Bill, 2013, introduced to the Rajya Sabha makes an attempt to rectify it; but is still under consideration. Till date, suicide continues to be a criminal offence.

The relevant provisions[50] of the Indian Penal Code, 1860 dealing with suicide are extracted hereunder:

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44 Id.

45 Jan Edward Garrett, *Is the Sage Free from Pain?* 6 Volga J. Phil. & Soc. Scis. (1999).

46 Michael Russo, ed. *Cicero's Torquatus' Defense of Epicurean Ethics, De Finibus* (1914).

47 *Internet Encyclopedia of Philosophy*, *Stoicism,* available online at http://www.utm.edu/research/iep/s/stoicism.htm (visited onOctober 18,2016)

48 Seneca, *Ad Lucilium Epistulae Morales*. (Richard M. Gummere trans., William Heinemann, 1918) (availible on line at at *http://www.molloy.edu/academic/philosophy/sophia/Seneca/epistles/ep70.htm* (visited on June 10,2016)

49 Steven Neeley's *The Constitutional Rights to Suicide*.(Peer Lang 1994)

50 Section 498 - A, IPC also touches the aspect in relation to cruelty by husband or in -laws. However, this provision is outside the scope of the present study.

Abetment of Suicide

If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.[51]

Attempt to Commit Suicide

Whoever attempts to commit suicide and does any act towards the commission of such offence shall be punished with simple imprisonment for a term which may extend to one year or with fine, or with both[52].

Suicide has not been defined anywhere in the Code. Briefly defined, 'suicide' is the "human act of self-inflicted, self-intentioned cessation"[53] or "the initiation of an act leading to one's own death"; synonymous with "destruction of the self by the self or the intentional destruction of one's self."[54]

Suicide as such is no crime under the Code. The Code is attracted only when a person is unsuccessful in committing the suicide. If the person succeeds, there is no offender who could be brought within the purview of law. The provision is based on the principle that the lives of men are not only valuable to them but also to the State which protects them.

Judicial Review *vis-a vis* Section 309 IPC

The Delhi High Court, for the first time, in *Sanjay Kumar Bhatia's* case[55] was seized with the question as to whether the investigation of the case under Section 309 of the Indian Penal Code, 1860 should be allowed to continue beyond the period fixed by Section 468, Code of Criminal Procedure, 1973. Albeit, the impugned provision was not struck down by the court yet Justice Sachar's observation is pertinent to note: "It is ironic that Section 309 IPC still continues to be in our penal code … strange paradox that in the age of votaries of euthanasia, suicide should be

51 Sec. 306, Indian Penal Code, 1860.

52 Sec. 309,id

53 *Encyclopaedia Britannica* 383 (1973).

54 Jack D Douglas, *The Social Meaning of Suicide* 398 (Princeton Univ. Press 1967), Suicide(*felo de se*) needs to be distinguished from *euthanasia* or mercy-killing. Suicide by its very nature is an act of self -killing or self-destruction, an act of terminating one's own life sans the aid or assistance of any other human agency. Euthanasia, on the other hand, involves the intervention of other human agency to end the life. Euthanasia is nothing but homicide, and unless specifically accepted it is an offence. A priori, an attempt at mercy-killing is not an attempt to suicide.

55 *State v. Sanjay Kumar Bhatia* ,(1985) Cri.LJ 931.

criminally punishable. Instead of the society hanging its head in shame, that there should be such social strains that a young man, the hope of tomorrow should be driven to suicide compounds its inadequacy by treating the boy as a criminal…The continuance of S.309 IPC is an anachronism unworthy of a human society like ours."[56]

In answering the question regarding the expanding horizons of "right to life", the apex court of India has held that the term "life" under Article 21 of the Indian Constitution does not connote mere animal existence on continued drudgery through life.[57] It has been interpreted to include within its ambit, some finer graces of human civilizations which make life worth living; which in the expanded form would mean the tradition, culture and heritage" of the concerned person.[58] Further, physical and mental health has been treated as an integral part of right to life, because without good health, the civil and political rights assured by the Constitution cannot be enjoyed.

The question whether the right to die is included in Article 21 of the Indian Constitution[59] came for consideration for the first time before the Bombay High Court in *State of Maharashtra v. Maruti Sripati Dubal*.[60] The Bombay High Court observed that 'right to life' includes the 'right to die' also.[61] It was held that every individual should have the freedom to dispose of his life as and when he desires.[62]

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56 Id at 940. See also, D. Sura Reddy , *Right to Die – A Note on the Supreme Court's Verdict* 1 SCJ 30- 33 (1995).

57 *Consumer Education and Research Centre v. Union of India* (1995) 3 SCC 42.

58 *Board of Trustees of the Port of Bombay v. Dileep kumar* ,(1983) 1 SCC 124.

59 For a discussion on 'constitutional morality,' see Latika Vaishist, Re-*thinking Criminalizable Harm In India: Constitutional Morality as a Restraint on Criminalization*,55 JILI 73-93 (2013).

60 1987 (1) Bom CR 499 (Out of frustration, a police constable tried to set himself fire).

61 Id at para 10.

62 Id at para. 18 . For a collection of leading and defining articles on the subject of "right to die," see Melvin I. Urofsky & Philip E. Urofsky, *The Right to Die: V1 Definitions and Moral Perspectives: Death, Euthanasia, Suicide, and Living Wills, V2 Who Decides? Issues and Case Studies*,(Routledge,1st ed 1996)**;** Luke Gormally ed. *Euthanasia, Clinical Practice and the Law* (1994); For constitutional and legal issues on the "right to die" see S. Steven Neeley, *The Constitutional Right to Suicide*(1994); John I. Fleming, *Death, Dying,and Euthanasia: Australia Versus the Northern Territory*, 15 Issues L. & Med. 291 (2000),Richard C. Parks, *A Right to Die with Dignity: Using International Perspectives to Formulate a Workable U.S. Policy*, 8 Tul. J. Int'l & Comp. L 447 (2000); Walter Wright, *Historical Analogies, Slippery Slopes, and the Question of Euthanasia*, 28 J.L. Med. & Ethics 176 (2000); Carol Levine & Connie Zuckerman, *Hands On/Hands Off. Why Health Care Professionals Depend on Families but Keep Them at Arm's Length*, 28 J.L. Med. & Ethics 5 (2000); Ben A. Rich, *A Prescription for the Pain: The Emerging Standard of Care for Pain Management*, 26 Wm. Mitchell L. Rev. 1 (2000); Melvin I. Urofsky, *Justifying Assisted Suicide: Comments on the Ongoing Debate*, 14 Notre Dame J. L. Ethics & Pub. Pol'y 893 (2000); Margaret M. Funk, *Notes & Comments: A Tale Of Two Statutes: Development of Euthanasia Legislation In Australia's Northern Territory and the State of Oregon*, 14 Temp. Int'l & Comp. L.J. 149 (2000); Subhash Chandra Singh, *Euthanasia : Contemporary Debates 1* SCJ 25- 31 (2005);Helga Kuhse,*The Sanctity of Life Doctrine in Medicine : A Critique*, 11 (Oxford University Press, 1987),Dr. Shubangi Deshmane, Debate on Euthanasia *AIR* Jnl.82- 83(2011).

The Constitutional validity of Section 309 of the Indian Penal Code, which makes attempted suicide, an offence was challenged in this case. It was held that the provision is arbitrary, *ultra vires* the Constitution, violative of Articles 14 and 21 and hence void.[63]

In this case, the judges observed that, "it is an incident of abnormality or of an extraordinary situation or of an uncommon trait of personality. Abnormality and un commonality are not unnatural merely because they are exceptional. Mental diseases and imbalances, unbearable physical ailments, affliction by socially dreaded diseases, decrepit physical condition disabling the person from taking normal care of his body and performing the normal chores, the loss of all senses or of desire for the pleasures of any of the senses, extremely cruel or unbearable conditions of life making it painful to live, a sense of shame or disgrace or a need to defend one's honor or a sheer loss of interest in life or disenchantment with it, or a sense of fulfillment of the purpose for which one was born with nothing more left to do or to be achieved and a genuine urge to quit the world at the proper moment are among the various circumstances in which suicide is committed or attempted. The reaction of the community to all the situations is not uniform and varies from condemnation to acclamation depending upon the situation. Nor all communities further react or have reacted in the same way at all times. The moral and sociological practices influenced in no small measure by the organized religions, have determined the varied responses of the different societies at different times and of the same society at different times."[64]

On the other hand, the Andhra Pradesh High Court in *Chenna Jagadeeswar v. State of AP*[65] held that the right to die is not a fundamental right within the meaning of Article 21; and hence Section 309 IPC is not unconstitutional.

The opposing views of the different High Courts were placed to rest by a Division Bench of the Supreme Court, in *P. Rathinam v. Union of India.*[66] The apex court, agreeing with the view expressed in *Maruti*, upheld the contention that Section 309, IPC violates Article 21, and is hence void.

B L Hansaria J. further observed that "the right to life which Article 21 speaks of can be said to bring in its trail, right not to live a forceful life,"[67] and though "the

63 Id at para. 21 .
64 Id at para. 12.
65 (1988) CRLJ 549.
66 (1994) 3 S C C 394.
67 Id at 410.

negative aspect may not be inferable on the analogy of the rights conferred by different clauses of Article 19, one may refuse to live, if his life is not according to the person concerned worth living of, if the richness and fullness of life were not to demand living further. One may rightly think that having achieved all worldly pleasure or happiness, he has something to achieve beyond this life. This desire for communion with God may very rightly lead even a healthy mind to think that he would forgo his right to live and would rather choose not to live. In any case, a person cannot be forced to enjoy right to life to his detriment, disadvantage of disliking."[68]

However, the court rejected the plea that *euthanasia* (mercy killing) should be permitted by law. The judges said that they would not decide this point as firstly, it is beyond the scope of the present petition; and secondly, also because in *euthanasia* a third person is either actively or passively involved about whom it may be said that he aids or abets the killing of another person. There is a distinction between an attempt of a person to take his life and action of some others to bring to an end the life of a third person. Such a distinction can be made on principle and is conceptually permissible.[69]

This decision has been subjected to various criticisms: this judgment may have come as a hope of liberation to some who are in a very depressed and irreversible state of mind or body, without fear of any punishment should their attempt fail; but what about its effect on the young immature minds which tend to act or react in desperate haste. In most of the dowry deaths accused takes the plea that the deceased has committed suicide which it is generally otherwise. How such cases could be tackled in view of this judgment? Again suicide owing to frustration involving failure in examinations or failure to get a job or even a good job or promotions in service would raise many social problems. Is individual capable of taking a decision to end his life in such conditions? Does he not owe a responsibility towards the society to overcome these human frailties and live for it?[70]

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68 Id.

69 Id. at 428. For a detailed discussion on e*uthanasia*, See, *Aruna Rama Chandra Shanbaug v. Union of India* (2011) 4 SCC 454.

70 It will be advantageous to quote the following paragraphs from Ratanlal & Dhirajlal's *Law of Crimes*: "Right to live: General – Every civilized legal system recognizes right to life. We are having a written Constitution. There are certain basic rights which have been treated as fundamental by the founding fathers of the Constitution. Article 21 is one of them. It declares that no person shall be deprived of his life or personal liberty except according to procedure established by law. Section 309 of the Indian Penal Code makes an attempt to commit suicide an offence punishable with imprisonment up to one year or with fine or with both. Thus, right to life is also considered to be a duty to live. Ordinarily, therefore, an individual has no right to end his life. He has to perform his duties towards himself and towards the society at large." 1825-1827 (26th edn. 2007).

Two years later in *Gian Kaur v. State of Punjab,*[71] a five judge Constitution bench of the Supreme Court overruled *Rathinam* and held that right to life does not include the right to die or the right to be killed; and 'right to die is inherently inconsistent with the right to life as is death with life.'[72]

J .S Verma J. observed:

> *Any aspect of life which makes it dignified may be read into Article 21 of the Constitution but not that which extinguishes it and is therefore inconsistent with the continued existence of the life resulting in effacing the right itself.*[73]

The court declared that the right to life including the right to live with human dignity would bring the existence of such a right up to the end of natural life. The apex Court set aside the judgment of the Bombay High Court in *Maruti* and the decision of the Supreme Court in *Rathinam;* and upheld the judgment of the Andhra Pradesh High Court in *Chenna Jagadeeswar* holding that Sec. 309 IPC was not violative of Articles 14 and 21 of the Constitution.

In C. A. Thomas Master v. Union of India, [74] the petitioner was a retired teacher of 80 years who wanted to voluntarily put an end to his life after having had a successful, contented and happy life. He stated that his mission in life had ended; and argued that voluntary termination of one's life was not equivalent to committing suicide. The Kerala High Court held that no distinction can be made between suicide as ordinarily understood and the right to voluntarily put an end to one's life. Voluntary termination of one's life for whatever reason would amount to suicide within the meaning of Sections 306 and 309, I.P.C. No distinction can be made between suicide committed by a person who is either frustrated or defeated in life and that by a person like the petitioner. The question as to whether suicide was committed impulsively or whether it was committed after prolonged deliberation is wholly irrelevant.

However, after a decade, in *Aruna Shanbaug*[75] involving *euthanasia*, the apex Court observed that, although section 309, Indian Penal Code has been held to be constitutionally valid in *Gian Kaur* case, yet time has come that it should be deleted by Parliament as it has become anachronistic; and that a person attempts suicide in a depression, and

71 (1996) 2 SCC 648.
72 Id at 660.
73 Id
74 *(2000)Cr.LJ 3729.*
75 *Aruna Rama Chandra Shanbaug v. Union of India* ,(2011) 4 SCC 454.

hence he needs help, rather than punishment. Finally, the court recommend to Parliament to consider the feasibility of deleting section 309 from the Penal Code.[76]

Way back in 1994, in *Rathinam*[77] also, it was observed:

> *"On the basis of what has been held and noted above, we state that section 309 of the Penal Code deserves to be effaced from the statute book to humanize our penal laws. It is a cruel and irrational provision, and it may result in punishing a person again (doubly) who has suffered agony and would be undergoing ignominy because of his failure to commit suicide. Then an act of suicide cannot be said to be against religion, morality or public policy, and an act of attempted suicide has no baneful effect on society. Further, suicide or attempt to commit it causes no harm to others, because of which State's interference with the personal liberty of the persons concerned is not called for.[78] We, therefore, hold that section 309 violates Article 21, and so, it is void. May it be said that the view taken by us would advance not only the cause of humanization, which is a need of the day, but of globalization also, as by effacing section 309, we would be attuning this part of our criminal law to the global wavelength."*[79]

The World Health Organization also expressed the view that punishing with imprisonment a behaviour consequent to either a mental disorder or a social difficulty gives completely a wrong message to the population, and that the WHO encourages efforts for the prevention of suicide.[80] The International Association for Suicide Prevention has also expressed the view that attempted suicide should be decriminalized and that suicidal individuals need to be helped and imprisonment only makes their problems worse[81]. The said Association on September 10 every year sponsors 'World Suicide Prevention Day' as a part of its efforts to achieve effective suicide prevention.[82]

While some suicides are eulogized, others are condemned. That is why perhaps wisely no attempt has been made by the legislature to define either. The want of a plausible definition itself makes the provisions of section 309 arbitrary and violative of Article 14.[83] There are different mental, physical and social causes which may lead

76 Id at para. 103. *In State v. Sanjaya Kumar Bhatia*, the Division Bench of Delhi High Court while acquitting a young boy who attempted to commit suicide by consuming 'Tik Twenty' strongly advocated for deletion of section 309, I.P.C. from the statue book.

77 (1994) 3 S C C 394.

78 Id at 429 (Para 109).

79 Id at para. 110.

80 National Crime Records Bureau, *Suicide Prevention, Accidental Deaths and Suicides in India – 2006* (Ministry of Home Affairs 2007).

81 *World Medical Association Policy*, (WMA General Assembly 2002).

82 Id

83 Article 14 of Indian Constitution incorporates the doctrine against arbitrariness.

different individuals to attempt to commit suicide, there being nothing in common between them. Section 309 makes no distinction between them and treats them alike, making the provisions thereof arbitrary. The Bombay High Court in *Maruti*[84] observed that if the purpose of the punishment for attempted suicide is to prevent the prospective suicides by deterrence, the same is not achieved by punishing those who have made the attempts, as no deterrence is going to hold back those who want to die for a social or political cause or to leave the world either because of the loss of interest in life or for self-deliverance. The provisions of section 309 are unreasonable and arbitrary on this account also. As is rightly said, arbitrariness and equality are enemies of each other. The blanket prohibition on the right to die on pain of penalty, it was pointed out, is not reasonable.[85]

The High Court also observed that there is nothing unnatural about the desire to die and hence the right to die. The means adopted for ending one's life may be unnatural varying from starvation to strangulation. But, the desire which leads one to resort to the means is not unnatural. Suicide or an attempt to commit suicide is not a feature of a normal life. It is an incident of abnormality or of an extraordinary situation or of an uncommon trait of personality. Abnormality and un-commonality are not unnatural merely because they are exceptional. The High Court further observed that the right to die or to end one's life is not something new or unknown to civilization.[86]

The High Court quoted the eminent French sociologist, Emile Durkheim's threefold classification of suicides made on the basis of the disturbance in the relationship between society and the individual:

I. *Egoistic suicide* which results when abnormal individualism weakens Society's control over him; the individual in such cases lacks concern for the community with which he is inadequately involved;

II. *Altruistic suicide* which is due to an excessive sense of duty to community; and

III. *Anomic suicide* which is due to society's failure to control and regulate the behaviour of individuals.[87]

This classification is not regarded as adequate by many, but it gives the broad causative factors of suicide. It is estimated that about one third of the people who kill

84 1987 (1) Bom CR 499.
85 *Humanization and Decriminalization of Attempt to Suicide* (Law Commission of India,October 2008).
86 1987 (1) Bom CR 499.
87 Emile Durkheim, *Suicide* 105-201 (Routledge & Kegan Paul Ltd 2002).

themselves have been found to have been suffering from mental illness. The Court observed that such cases require psychiatric treatment; and not confinement in prison cells where their condition is bound to worsen leading to further mental derangement. For others who make the suicide attempt on account of acute physical ailments, incurable diseases, torture or decrepit physical state induced by old age or disablement need nursing homes; and not prisons.

As seen earlier, in *Rathinam,*[88] a Division Bench of the Supreme Court also recognised the right not to live a forced life. Quoting from a lecture of Professor, Alan A Stone, the Court noted that right to die inevitably leads to the right to commit suicide.[89] However, the Court disagreed with the view in *Maruti* that in the absence of plausible definition of suicide, Section 309 is violative of Article 14. The Supreme Court observed that irrespective of the differences as to what constitutes suicide, suicide is capable of a broad definition and that there is no doubt that it is intentional taking of one's life, as stated in *Encyclopaedia of Crime and Justice*.[90]

For the contention that section 309 arbitrarily treats all attempts to commit suicide by the same measure without regard to the circumstances in which attempts are made, the Court held that this also cannot make the said provision as violative of Article 14, inasmuch as the nature, gravity and extent of attempt may be taken care of by tailoring the sentence appropriately; in certain cases, even Probation of Offenders Act,1958 can be pressed into service, whose provision[91] enables the court to ensure that no stigma or disqualification is attached to such a person. [92] The Supreme Court observed that suicide, the intentional taking of one's life has probably been a part of human behaviour since pre-history. Suicide knows no barrier of race, religion, caste, age or sex. There is secularization of suicide.[93]

The Supreme Court further observed that suicide is a psychiatric problem and not a manifestation of criminal instinct. What is needed to take care of suicide-prone persons are soft words and wise counselling (of a psychiatrist), and not stony dealing by a jailor following harsh treatment meted out by a heartless prosecutor.[94]

88 1987 (1) Bom CR 499.
89 Id. at 410. See also Alan A. Stone, *The Right to Die: New Problems for Law and Medicine and Psychiatry* 37 Emory Law Journal 627-643 (1988).
90 1987 (1) Bom CR 499 at 418.
91 Section 12, Probation of Offenders Act, 1958.
92 1987 (1) Bom CR 499 at 405.
93 Id at 418. See also, Donna T. Andrew, *The Secularization of Suicide in England* 1660-1800 Past & Present 158-165 (Oxford University Press 1988).
94 Id at 420.

It is significant to note that the Supreme Court in *Gian Kaur*[95] focused only on the constitutionality of section 309, IPC; and the Court did not go into the wisdom of retaining or continuing the said provision in the statute.

Conclusion

Life is a stage with one entrance but many exits; and suicide is one of such exits. The fact being so, should attempted suicide be punishable? Looking at the offence of attempted suicide, an English writer observed: "It seems a monstrous procedure to inflict further suffering on even a single individual who has already found life so unbearable, his chances of happiness so slender, that he has been willing to face pain and death in order to cease living. That those for whom life is altogether bitter should be subjected to further bitterness and degradation seems perverse legislation.[96]"

Acting on the view that such persons deserve the active sympathy of society and not condemnation or punishment, the British Parliament enacted legislation[97], whereby attempt to commit suicide ceased to be an offence. The Law Commission of India in its Forty Second Report had examined whether attempt to commit suicide be retained as a penal offence. The Commission referred to the *Dharma Sastras* which legitimized the practice of taking one's life in certain situations and also referred to the provisions of Suicide Act, 1961 in Britain.

Jahagirdar J. once remarked: "A man commits suicide for various reasons and in diverse circumstances. The aim, in all cases, is to get deliverance from the several real or imaginary misfortunes to which that person is subjected. If he is successful in his attempt, it is regarded as deliverance; if unsuccessful it is regarded as an offence. Survival is an offence. It is impossible to find any rational justification for inflicting a punishment upon a person who has made an attempt to escape punishment which he thinks society is inflicting upon him. Is survival itself not sufficient punishment? … Over a long period, fortunately, the attitude towards suicide and attempted suicide has changed and most civilised countries have done away with the concept of attempted suicide as an offence.[98]

95 (1996) 2 SCC 648.
96 *The New Encyclopaedia Britannica*, 359 (Micropaedia, 15th ed 1987).
97 The Suicide Act 1961(UK)
98 Attempt at Suicide – A Crime or a Cry *Humanization and Decriminalization of Attempt to Suicide* (Law Commission of India) (Report no. 210).

'Suicide', said Goethe 'is an incident in human life which, however much disputed and discussed, demands sympathy of every man and in every age must be dealt with anew'.[99]

In many countries, including the whole of Europe, North America, much of South America and Asia, including neighbouring Sri Lanka, attempted suicide is not a criminal offence any more. Many who resort to suicide and who manage to survive do not seek medical help for fear of being arrested and penalized.[100] Suicide is a "cry for help". People who attempt suicide need extensive and sometimes long-term psycho-social support.[101] The panacea for them certainly cannot be imprisonment.

Only a handful of countries in the world, like Pakistan, Bangladesh, Malaysia, Singapore and India have persisted with this law. The apprehension that the repeal of the law would cause an increase in suicides is belied by the fact that Sri Lanka repealed the law four years ago and the suicide rate is showing a trend in reduction. In the opinion of the SNEHA,[102] the persistence of Indian law leads to following difficulties:

1. Emergency treatment for those who have attempted suicide is not readily accessible as they are referred by local hospitals and doctors to tertiary centres as it is termed as 'medico-legal' case. The time lost in the golden hour will save many lives.

2. Those who attempt suicide are already distressed and in psychological pain and for them to face the ignominy of police interrogation causes increased distress, shame, guilt and further suicide attempt.

3. At the time of family turmoil dealing with police procedure adds to the woes of the family.

4. It also leads to a gross under-reporting of attempted suicide and the magnitude of the problem is not unknown. Unless one is aware of the nature of extent of the problem effective intervention is not possible.

5. As many attempted suicides are categorized in the guise of accidental poisoning etc., emotional and mental health support is not available to those who have attempted as they are unable to access the services.

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99 *Halsbury's Laws of England*, 106 (4th ed. 2000)

100 Richard Miniter , *The Dutch Way Of Death Opinion Journal From Wall Street (*April 28 2001)

101 Henry Beecher, *The New Definition of Death*" 5 International Journal of Clinical Pharmacology 120-121(1971).

102 SNEHA, A Suicide Prevention Organization, Chennai, India, that offers support for the depressed,desperate and the suicidal; available on line at www.thealternative.in,www.snehaindia.org. (visited October 18,2016)

In many countries attempt to commit suicide is regarded merely as a manifestation of the diseased condition of the mind deserving treatment and care rather than visiting the person concerned with punishment.[103] In India, debates relating to decriminalization of attempted suicide became a live issue in 1994 following the judgment of Supreme Court in *Rathnam;*[104] in 2011, following *Aruna Shan Baug* [105] dealing with *euthanasia*; and recently in 2014 against the backdrop of the Mental Health Care Bill, 2013.

The Mental Health Care Bill, 2013 which decriminalizes an attempt to suicide, was introduced in the Rajya Sabha on August 19, 2013 and is pending in the Parliament. The key provisions of the bill relating to suicide are:

- The person who attempts to commit suicide shall ordinarily be presumed, unless proved otherwise, to have mental illness at the time of attempting suicide and shall not be liable to punishment.[106]
- The appropriate Government shall have a duty to provide care, treatment and rehabilitation to a person, having mental illness and who attempted to commit suicide, to reduce the risk of recurrence of attempt to commit suicide.[107]
- When any person with mental illness or who may have a mental illness appears or is brought before a Magistrate, the Magistrate may, order in writing that the person is conveyed to a public mental health establishment for assessment and treatment; or to authorise the admission of the person with mental illness in a mental health establishment for such period not exceeding ten days to enable the medical officer or psychiatrist in charge of the mental health establishment to carry out an assessment of the person and to plan for necessary treatment, if any.[108]

This is really a positive step and if implemented in its true spirit will reduce the risk of recurrence of attempt to suicide. It will encourage those in need

103 Stephen Potts, *Looking For the Exit Door* 25 *Houston L.R*, 504 [1988].
104 1987 (1) Bom CR 499.
105 *Aruna Rama Chandra Shanbaug v. Union of India* (2011) 4 SCC 454.For a critical evaluation of the decision, see D. Radhika Yadav, Whose Life is it Anyway? (An Ethico-legal Analysis of Euthanasia 2 SCJ 17-25 (2015).
106 Section 124(1).
107 Section 124(2).
108 Section 111.

of counselling and related support to access these without fear or shame. It will also remove the stigma associated with suicide.[109]

Anticipated Consequences of Decriminalisation

The prosecution and the imposition of custodial and financial penalties on those convicted of suicidal behaviours constitute an affront to human dignity. In a large majority, the suicidal behaviour is typically a symptom of psychiatric illness, indicating that the person requires assistance; not punishment.

As many 93% of suicide attempters were found to be psychiatrically ill at the time of commission of the act. Penal sanctions will only serve to exacerbate suicidal persons' risk for depression, anxiety, and repetitive suicidal behaviour.[110]

Further, suicidal behaviour is a result of a host of factors beyond a person's control, such as endogenous biological causes, socio-economic causes such as poverty, frustration in love, setbacks in finances, family or other such reasons. Technically, it may not be considered as an offence against the State. On the contrary, the State itself may be indirectly responsible for the plight of the victim who is left with no other alternative, except but to end his life.[111]

In Indian context, the cases admitted after attempted suicide should have a 'medico-legal' stamp on the case record which is confidential and kept in safe custody. The Medical Superintendent of the hospital is required to inform the police for the necessary proceedings and action. The police usually visit the hospital and collects information about the circumstances of the suicide attempt from the person/family. There are often unnecessary delays or even refusals from hospitals, fear of punitive action and added trauma and stigma of having to deal with police and courts. With

109 However, the Bill states that the person may be exempt from 'punishment'; and not from 'prosecution.' The police can take such a person in custody and produce before a magistrate since the presumption is that, such person has a mental illness. Magistrate has powers to ensure that such person is conveyed to a public mental health establishment for assessment/treatment for up to ten days. Therefore, the persons who attempt suicide may continue to hesitate in seeking medical treatment after a suicidal attempt, because of perceived fear of possible institutionalization against their own will. Other issues related to possible misuse of above provision may arise e.g. in case of victims of attempted suicide in the background of domestic violence. See, Vasundhara Rani, *Decriminalising Section 309 of IPC is a Boon or Bane?* 2 SCJ 25-29 (2015).

110 Jiang G, Cheng Q, *Suicide Attempts in Asia*. in: Wasserman C, ed *Oxford Textbook of Suicidology and Suicide Prevention: A Global Perspective* 109–12 (Oxford University Press 2009).

111 Government of India, *Humanization and Decriminalization of Attempt to Suicide* (Report No. 210) (2008)

decriminalization, the patients and their families will be in a better position to openly seek mental health care after the attempt.

From a societal perspective, decriminalization is a more sensitive and humane way of dealing with the problem compared to prosecution. Additionally, it will also help in improving the reporting and generation of better epidemiological data on suicidality. The criminalization of suicidal acts causes the problem of suicide to go underground, making it difficult for suicidal persons to receive necessary assistance.[112]

Arguments against Decriminalization

- **An unhealthy approach** - Most people who opt to die are somehow begging for help in order to solve the problems of life. The depressive situations occasioned by frustration, losses, shame, fear etc. are not enough to warrant ones to commit suicide. After all there are societal approved means of coping with human problems not suicide.[113]
- **Degradation of human worth-** Kant[114] and Mappes[115] argue on the immoral nature of suicide, also that it degrades human worth. Granted that man is an image of God, he occupies a very special place in creation and to commit suicide reduces his nature below the level of animal nature hence man should abhor suicide.
- **Violation of the law of self-preservation-** This argument proceeds from man's natural instinct of self-preservation so; killing oneself is a direct negation of this natural law of self. Hence, suicide is always contrary to the natural law and to charity whereby every man should love himself.[116]
- **Destruction of 'morality'-** Kant observes that suicide destroys the basis of morality. He adds, when the subject of morality in one's person is destroyed, it means that morality itself is rooted out of existence.[117]

112 Sareen H, Trivedi JK, *Legal Implication of Suicide Problems Specific to South Asia* .12 Delhi Psychiatry J. 121–5 (2009).

113 J. N. Ogar and A. M. Ogaboh, *Suicide: Its Moral, Legal and Sociological Analyses* 2 Journal of Arts Science & Commerce 94-102, 99 (2011).

114 See, Immanuel Kant, *The Doctrine of Virtue, Part II of the Metaphysics of Morals* (New York: Happier and Row Publishers 1964).

115 Mappes, A. & Zembaty, J. *Biomedical Ethics* (New York: McGraw Hill Books 1986).

116 Beauchamp, T, *Philosophical Ethics: An Introduction to Moral Philosophy* (McGraw Hill Book Company 1982).

117 Immanuel Kant, *The Doctrine of Virtue, Part II of the Metaphysics of Morals* 85 (Happier and Row Publishers 1964).

- **Violation of God's supremacy**- This argument proceeds from the fact that God is the creator and Lord of life. Man is placed on Earth under certain conditions and for specific purposes. The act of suicide therefore opposes the very purpose of the creator. To St. Augustine and others, God prohibits suicide and that we are under obligation to obey a divine command.[118]
- **Against 'utilitarianism'**- The theory of Utilitarianism given by Bentham based on 'pleasure and pain' concept also make 'suicide an evil' because the pleasure is obtained only by one person who commits suicide to escape from the life full of sufferings but the pain is caused to many members of society who all are dependent on the person who has committed suicide.[119]

Neither academicians nor jurists have consensus as to what constitutes suicide, much less attempted suicide. However, majority of them put forth propositions: *mens rea*, without which no offence can be sustained, is not clearly discernible in such acts; temporary insanity is the ultimate reason of such acts which is a valid defence even in homicides; and individuals driven to suicide require psychiatric care not the prison cells.[120] The presence of Section 309 of the Penal Code is thus not only irrational and obnoxious; but also harmful to the members of a society for whose benefit it is supposed to be on the statute book.

It cannot be deterrent because a man commits the act for reasons beyond his control; it cannot be reformative because a sick man is thrown among the felons. The punitive theory is wholly irrelevant because the person attempting suicide does no wrong to others. In sum, the attempt to commit suicide cannot and should not be regarded as an offence. It is not committed by a person who wants to hurt anyone; it is not resorted to by one with criminal intention. Suicide and attempted suicide are difficult to define. An act which cannot be defined precisely cannot be punished. By branding such people as 'criminals,' treatment is rendered difficult. Punishment for attempted suicide is unsupportable by any recognized theory of punishment. What

118 Id. at 91,140.

119 Jeremy Bentham, *The Principles of Morals and Legislation* (Prometheus Books&Publishers 1789).

120 For a detailed discussion See, Kessler RC, Borges G, Walters EE, *Prevalence of and Risk Factors for Lifetime Suicide Attempts*617–26 (National Comorbidity Survey,Arch Gen Psychiatry 1999); Chang B, Gitlin D, Patel R, *The Depressed Patient and Suicidal Patient in the Emergency Department: Evidence-based Management and Treatment Strategies* 13 Emerg Med Pract 1–23 (2011); Bertolote JM, Fleischmann A, De Leo D, Wasserman D, Psychiatric *Diagnoses and Suicide: Revisiting the Evidence* 25Crisis 147–55 (2004); Yadwad BS, Gouda HS, *Is Attempted Suicide an Offence"* 27 J Indian "Acad Forens Med.*108*–11 (2005); Latha KS, Geetha.N, *Criminalizing Suicide Attempts: Can it be a Deterrent?* 44 Med Sci Law.343–47 (2004); Kahn DL, Lester D, *Efforts to Decriminalize Suicide in Ghana, India and Singapore* 4 Suicidol Online 96–104 (2013).

the 'abolitionists' of Section 309 are asking for is a fair treatment for those unfortunate, hapless people who fail in their attempts to commit suicide. The deletion of Section 309 is not an invitation or encouragement to attempt to commit suicide. Do not punish the helpless; help the helpless.

With a shift in official position from 'legal' to a 'medical' model of attempted suicide, an important challenge from a policy perspective will be to provide an access to mental health care for all those with attempted suicide. Patients presenting with an attempted suicide should be advised for a psychiatric consultation in all cases. In this context, there is a tremendous need to allocate the necessary resources for strengthening the primary mental health care services in all districts of the country.

There is a need to further increase the emphasis on the public health approach to suicide prevention e.g. increased awareness generation, restrictions on access to commonly used lethal methods of suicides like insecticides; and control over facilitating factors such as alcohol. There is a need to develop an effective framework integrating the mental health with social welfare, education and other related sectors.

To conclude, the recent steps to achieve decriminalization of suicide in India are commendable. Decriminalization will reduce the trauma and potential prosecution in the aftermath of a suicidal attempt. However, there is a need to improve the mental health coverage and provide a framework to deliver essential mental health services to all those who attempt suicide.

GENOME RESEARCH – *MYRIAD* DECISION RENDERS PATENT PARADOX MORE COMPLEX

Dr. E.R. Jayaram*

Intellectual property rights have always been the most powerful tool to spur innovation. However the genomic science has always been a tough terrain for intellectual property rights to handle. As basic research on genome has a totally different nature when compared to other categories of biotechnology researches like biomedical research, diagnostic research, pharmaceutical sector etc. This becomes highly relevant in a world where right to health has emerged as one of the most important rights that are available to mankind. The recognition of right to health as a fundamental part of our human rights holds much relevance when innovation and IPR comes in conflict with access to affordable health care. The recent trends intellectual property rights to bring genome data under the preview of IP right triggered many controversies specifically when cases like *Myriad*[1] caught the attention of the world.

The right to health and access to health care is not a new concept. Right to health is one of the most important rights that are available to mankind and must be recognized over and above other property right. All human rights are interdependent, and right to health is no exception. Internationally, right to health was first articulated in 1946 during the constitution of the World Health Organization (WHO), whose preamble defines health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity".[2] The 1948 Universal Declaration of Human Rights also mentioned health as part of the right to an adequate standard of living.[3]

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1 *Ass'n for Molecular Pathology v. Myriad Genetics, Inc*., 133 S. Ct. 2107 (2013).
The preamble further states that "the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race,religion, political belief, economic or social condition."

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3 [3] Art. 25. 1) everyone has the right to a standard of living adequate for the health andwell-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lackof livelihood in circumstances beyond his control."(2) Motherhood and childhood are entitled to

The right to health was again recognized as a human right in the 1966 International Covenant on Economic, Social and Cultural Rights "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[4] Since then, other international human rights treaties have recognized or referred to the right to health or to elements of it, such as the right to medical care. For the Committee on Economic, Social and Cultural Rights (CESCR), the main body at the international level monitoring the realization of the right to health,is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity.[5]Among the international instruments that include the right to health, the International Convention on the Elimination of All Forms of Racial Discrimination states that: "…States Parties undertake… to guarantee the right of everyone… to public health, medical care, social security and social services".[6]

To achieve highest available standard of health care and medical services it is pertinent that, research and innovations must be given optimum importance .Both the right of any individual to enjoy the material and moral benefits as a creator of intellectual property, and the right of all human beings to a standard of living that affords adequate health and medical care, as are set forth in the United Nations Universal Declaration of Human Rights are not contradictory but should be seen as complimentary because the former rights afford the enjoyment of the latter rights through progress and innovation in science.[7]

As we have seen above, public health principles, in the context of access to medicines, are supported by a range of national and international legal and policy instruments, including the Constitution of the World Health Organization (WHO).[8] From a human rights perspective, implementation of intellectual property rules should be governed by those principles which support public health goals and access to medicines.

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special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection."

4 Art 12(1)

5 Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000), par. 1.

6 Article 5 (e) (iv)

7 Article 25 and 27

8 Some other international instruments guaranteeing the right include The 1966 International Covenant on Economic, Social and Cultural Rights, Art 12;The 1979 Convention on the Elimination ofAll Forms of Discrimination against Women: Arts. 11 (1) (f), 12 and 14 (2) (b); The 1989 Convention on the Rights of the Child: art. 24; The 1990 International Convention on the Protection of the Rights of All Migrant Workers and members of Their Families: arts. 28, 43 (e) and 45 (c);The 2006 Convention on the Rights of Persons with Disabilities: art. 25.

Intellectual property rights and health sector

The intellectual property law is a powerful tool for protecting the scientific innovations. The patent is the commonly used intellectual property right to protect biotechnology innovation, which confers a monopoly right to the inventor to exploit the invention for a limited period of time. The concept of patent system stimulates technical progress in four ways; first, it encourages research and invention; second, it induces the inventor to disclose his discoveries instead of keeping them a trade secret; third, it offers a reward for the expenses on developing inventions to the stage at which they are commercially practicable and fourth, it provides an inducement to invest capital in new lines of research. Unless the research results are protected, it might not be profitable if many competing producers embark on them simultaneously.[9]A robust patent system providing for adequate patent protection is an indispensable incentive to creative and inventive work and is crucial to establishing and maintaining an attractive commercial environment. An adequate patent system, effectively administered, ultimately stimulates domestic innovation, fosters new industries, and creates jobs. It helps attract foreign investment. An adequate patent system can also help countries develop and strengthen their own research infrastructures and capacities, seen by the UN and other organizations as a key factor in fighting AIDs in the countries that are hardest hit. In general, adequate intellectual property systems are a key factor in sustained economic development, which ultimately helps break the cycle of poverty and leads to better education, higher living standards, and better healthcare for the people.

An adequate patent system also provides a proper balance between the public interest and the interest of the inventor. For example, it should be able to work effectively and equitably whenever the patent owner abuses the exclusive right, or if specific circumstances require an adjustment to the patent owner's rights. However one may encounter several problems in the traditional patent system while applying it to the area of biotechnology research. Issues like patent proliferation, anticommons, patent thickets and research bottlenecks are some of the contemporary problems faced by biotechnology research sector.

Genome Patents and the Patent Inconsistencies

Traditional patent system offers a positive atmosphere to innovations. It acts as an incentive to innovate by providing a monopoly to the innovator. However the

9 Justice RajagopalaAyyangar's Report on the Revision of the Patents law (1959). The Patents Act 1970 was based on the recommendations made by Ayyangar's report

application of patent to the new areas of research like modern biotechnology has many compatibility issues. Traditionally, biotechnology researchers were opting patent as the common mode of protection to their innovations. Dramatic growth of biotechnology has brought forward many contemporary issues. The heavy patenting rush has caused many issues like patent thickets and anticommon effects. Further the new trend of applying patents on basic research tools and materials like gene and gene fragments has triggered many heated debates. A major section of researchers believe that these new trends may adversely affect the ongoing research by impeding access to basic research materials and tools.

Patent proliferation

The area of scientific research is especially genomic research is witnessing fast growth resulting in patent proliferation. The rush patent every minute changes and findings in the research sector is causing patent proliferation. Further, rush for patent even for slight improvements leads to an overlapping set of patent rights, generally termed as patent proliferation. This situation will cause researchers to seek license from multiple patentees to do further research in the same area. This further leads to many complications as described hereunder.

Patent thickets

One of the seriously debated issues in the field of intellectual property law is regarding the existence of patent thickets and the extent to which any such thicket may be interfering with research. Even though Intellectual Property rights are designed to encourage scientific progress, over-proliferation of patent rights could create bottlenecks that obstruct the flow of research.[10] Scholars have used the term "patent thicket" to describe the problem of multiple overlapping rights that can hamper innovation by creating transaction barriers. Large numbers of rights hamper research and innovation, particularly in the biotechnology field. "The term 'patent thicket' was coined to characterise a technological field where multiple patent rights are owned by multiple actors.[11]

10 Robin Feldman and Kris Nelson, *Open Source, Open Access, and Open Transfer: Market Approaches to Research Bottlenecks*,2, available at http://ssrn.com/abstract=1127571 (visited on 8-11-2010)

11 ; Michael S. Mireles, *An Examination of Patents, Licensing, Research Tools, and the Tragedy of the Anticommons in Biotechnology Innovation*, 38 U. Mich. J.L. Reform 141, 148 (2004)

The tragedy of anticommons

The 'tragedy of the commons' is a metaphor which explains why people overuse shared resources. But the recent proliferation of intellectual property rights in biotechnology research suggests a different tragedy. This phenomenon called 'anticommons' in which people underuse scarce resources because too many owners can block each other.[12] The "Anticommons theory" was developed by Michael A. Heller and adapted in the field of biotechnology by Heller and Eisenberg in their article published in Science in May of 1998.[13] 'Tragedy of anticommon' is the most influential and damaging criticism put forwarded against application of patent system to the field of biotechnology. The proliferations of patents on basic research in genomic science created a situation leading to heavy transaction costs, where the individual researchers have to procure licenses to do further research in a particular area of research.

Patent monopolies stifle upstream research

Another major argument against the patent system is that, it may stifle future innovations. The stronger patent rights will actually impede access to future innovations. Patent confers monopoly leading to rent-seeking which is disadvantageous to the consumers. It also enables the right holder to blocking off competitors with monopoly right. Traditional incentive based approach in intellectual property right makes the biotechnology research sector highly profit oriented. Search for commercial incentives causes significant delays in the publication of research findings. This may also result in stifled collaboration, biotechnology research sector.[14]

Evergreening and continuation practice

"Evergreening" refers to attempts by owners of pharmaceutical product patents to effectively extend the term of their patents by obtaining related patents on modified forms of the same drug, new delivery systems for the drug, new uses of the

12 Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCI. 698 (1998).

13 Id

14 David Blumenthal et al., *Data withholding in Genetics and the Other Life Sciences: Prevalences and Predictors*, 81 ACADE. MED 137- 145 (2006) available at http://journals.lww.com/academicmedicine/Fulltext/2006/02000/Data_Withholding_in_Genetics_and_the_Other_Life.6.aspx.(visited on 29-4-2011)

drug and the like.[15]Evergreening is one of the major problems posed by the patent regime. Drawing the line between legitimate incremental innovation and the improper attempts at evergreening is a broad and difficult problem faced by the patent law.The problem of evergreening is most evident in the biotechnology sector.

Patent toll (tollbooth) and patent trolling

Patent troll and patent toll are entirely different concepts A patent early on in the innovative process can impose a toll on all subsequent innovations that rely on it.[16] Later inventors therefore face higher transaction costs and they must pay licensing fees before they can further refine a technology. These tolls built over a period of time on the path of technology's development, may discourage the later research altogether. Each upstream patent allows its owner to set up another tollbooth on the road to product development, adding to the cost of research and slowing the pace of downstream innovation.[17]

A patent troll is a company that acquires patents of failed companies or independent innovators and uses these patents to threaten suit against alleged infringers, without having the intention of actively using the patent they assert .[18]The patent trolls buy the patents and act as patent locks; they preferably buy patents without the intention of using them. They look out for patent holders that cannot afford to maintain their patent anymore or patentees who fear the risk of litigations because of the fact that the patented technology has grown too high for them.[19]Another group of potential licensors are those who cannot proceed with the research or unable to exploit their patent as they may infringe another overlapping patent .[20]

Submarine patents

The submarine patents are those applied earlier but not known to the public. These patents that surface years after an industry are in operation and as a result the

15 Janice M.Mueller and Donald Chisum, *Enabling Patent Law's Inherent Anticipation Doctrine*,45 Houston Law Review 1106(2008)

16 Carl Shapiro, "*Navigating the Packet Thicket: Cross Licenses, Patent Pools, and Standard Setting*", in Adam Jaffe et al. eds ,*Innovation Policy and The Economy*119 (2001).

17 Id

18 Dietmar Harhoff, *Economic Cost-Benefit Analysis of a Unified and Integrated European Patent Litigation System,* 10(Institute of Innovation Research 2009)

19 Id

20 Sigrid Nicole Muller, *Should Research Tools Be Patentable? Troubles & Chances Of Patenting Research Tools* 38*(*Technology Tilburg University 2008)

companies working in the same area are automatically put in to infringement liability. These patents often remain as pending applications in the Patent and Trademark Office for a very long time. They come to the surface as issued patents after many other companies establish themselves in the area of patented technology. Submarine patent has also been used to describe patents applications that lie dormant for a long period and are asserted when a competitor produces a product or process which infringes the claimed invention. The submarine patents are also a result of international filings of patent applications like Patent Cooperation Treaty (PCT). The PCT patent application allows an inventor to file a patent application in several PCT member countries by making a single application in his home country. This will enable the inventor to seek patent protection in PCT countries by avoiding the need of filing separate applications in each individual country in which protection is sought. The national patent application has the effect of an international patent application in those PCT contracting states which the patentee designates in his application. The granting of a patent remains the responsibility of the national or regional offices.

Thus we have discussed some of the major issues related to patents in biotechnology sector directly or indirectly affecting scientific progress .Inspite of these factors, innovations continue to keep pace with the need for better understanding of the unknown giving rise to further controversies in the patent regime on many medical diagnostic methods, personalized medical treatments, and human genes.

The United States is known for taking an unusually expansive approach towards patentable subject matter. Compared with Western Europe, for instance, the US has been far readier to grant patents on business methods, medical diagnostic processes, and human genes. However the magnanimity that it has shown towards grant of patents on business methods, medical diagnostic processes, and human genes may as well be shrinking. This is quite evident from its decision in the Mayo Collaborative Services v. Prometheus Labs., Inc.[21] Decisions such as in Mayo and Myriad[22] can have far reaching consequences in the patent world relating to biotechnology sector. The authors seek to make an appraisal of some of the decisions leading to Mayo and Myriad and also the findings of the court in these two cases.

21 *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 130 S. Ct. 3543 (2010

22 *Lab. Corp. of Am. Holdings v. Metabolite Labs., Inc.,* 548 U.S. 124, 138 (2006).

BIOTECHNOLOGY RESEARCH AND PATENT DILEMMAS

Diamond v. Chakrabarty

The recent court cases on gene and gene fragments in the United States, are showing a mixed trend. The biotechnology patent era was triggered off by *Diamond v. Chakrabarty*.[23]In 1972, respondent Chakrabarty, a microbiologist, filed a patent application, assigned to the General Electric Co. The application asserted 36 claims related to Chakrabarty's invention of "a bacterium from the genus Pseudomonas containing therein at least two stable energy-generating plasmids, each of said plasmids providing a separate hydrocarbon degradative pathway." This human-made, genetically engineered bacterium is capable of breaking down multiple components of crude oil. Because of this property, which is possessed by no naturally occurring bacteria, Chakrabarty's invention is believed to have significant value for the treatment of oil spills.

Chakrabarty's patent claims were of three types: first, process claims for the method of producing the bacteria; second, claims for an inoculum comprised of a carrier material floating on water, such as straw, and the new bacteria; and third, claims to the bacteria themselves. The patent examiner allowed the claims falling into the first two categories, but rejected claims for the bacteria. His decision rested on two grounds: (1) that micro-organisms are "products of nature," and (2) that as living things they are not patentable subject matter under 35 U.S.C. 101.On appeal at the PTO, the Board of Patent Appeals and Interferences affirmed the examiner's rejection. The Court of Customs and Patent Appeals reversed the Board's decision, however, ruling that living organisms are patentable subject matter.[24]

The PTO then filed a petition for writ of certiorari to the Supreme Court .The question before the Court was whether the claimed microorganism constituted a "manufacture" or "composition of matter" within the meaning of the US Patent Act. Reviewing the broad congressional mandate regarding patentable subject matter, the Supreme Court concluded that it did and asserted the principle for which Chakrabarty is best known: that "anything under the sun that is made by man" is eligible for patenting. Though this patent was not the first patent to be issued on a living organism[25], it was only after Chakrabarty, however, that the PTO clarified what had been an inconsistent approach to patenting living organisms. This clarification came

23 447 U.S. 303, 306

24 Application of *Chakrabarty*, 571 F.2d 40 (CCPA 1978), aff'd on reh'g, 596 F.2d 952 (CCPA 1979).

25 The PTO had granted patents on single-cell organisms on several occasionsdating back to 1873, when Louis Pasteur obtained a patent (US Patent No. 141,072)on a purified yeast cell

in Ex Parte Allen[26] , when the Board of Patent Appeals and Interferences reversed the examiner's rejection of claims for genetically engineered oysters as unpatentable because it found "no evidence that the claimed polyploid oysters occur naturally without the intervention of man .Shortly after Ex Parte Allen was decided, the PTO issued a statement on April 7, 1988, announcing that "[t]he Patent and Trademark Office now considers non-naturally occurring non-human multicellular living organisms, including animals, to be patentable subject matter within the scope of 35 U.S.C. 101."[27]Almost exactly one year later, on April 12, 1988, the PTO issued the first patent for a transgenic animal, commonly known as the "Harvard Mouse".[28]

At the time Chakrabarty was decided, biotechnology was a newly developing field. No one could have foreseen in 1980 the phenomenal pace at which new biotechnology advances would develop. Neither could anyone have predicted the exponential growth in the number of patent applications and issued patents on biotechnology-related inventions that would occur over the next 25 years. However, the genomic patents were always placed in very delicate situation. The recent case laws based on the revised utility guidelines show that the patent on gene and gene fragments are ineligible for patent unless they establish the credible and substantial utility criteria. Further, most of the cases failed to establish the patentability criteria based on substantial credible utility and written deception requirement set by the revised guidelines.

ReDane K. Fisher and Raghunath V. Lalgudi

In this case[29]patent for "Nucleic Acid Molecules and Other Molecules Associated with Plants" filed by *Monsanto* scientists, Re Dane K. Fisher and Raghunath V. Lalgudiwas held unpatentable for lack of utility and lack of enablement. The only claim in the application was as follows;[30]

> "A substantially purified nucleic acid molecule that encodes a maize protein or fragment thereof comprises a nucleic acid sequence selected from the group consisting of SEQ ID NO: 1 through SEQ ID NO: 5. "[31]

26 *Ex Parte Allen*, 2 U.S.P.Q.2d 1425, 1427 (Fed. Cir. 1987)
27 US Patent and Trademark Office Notice, "Animals--Patentability," 1077 O.G. 24 (Apr. 21, 1987)
28 US Patent No. 4,736,866
29 *In re Fisher*, 421 F.3d 1365 (Fed.Cir. 2005).
30 Joshua Kim, *Fisher of Genes:Patentatability of ExpressSequenced Tags*,29 Hastings Comm.&Ent.L.J 401,404(2006-2007)
31 *In re Fisher*, 421 F.3d 1365 (Fed.Cir. 2005).

The application also made a general statement that the five claimed ESTs might be used in a variety of ways. The uses described in the patent application were many.[32] The USPTO rejected the claims and refused the application on the grounds that the claimed ESTs had no specific and substantial utility. The ESTs lacked specific utility because they could only be used to locate genes of unknown function, similar to other ESTs. Further the PTO held that the ESTs lacked substantial utility because there was no known real use for the proteins produced as a final product resulting from the ESTs. On an appeal to the USPTO's Board of Patent Appeals, decision of the USPTO was confirmed. *Monsanto* further appealed to the United States Court of Appeals for the Federal Circuit (Federal Circuit), contenting that that the USPTO was applying a higher utility standard than stipulated Under section 101 of the patent Act. The Federal Circuit also affirmed the decision of the Board of appeal. The Federal Circuit concluded that the claimed ESTs acted only as research intermediates which might help scientists in isolating the particular underlying protein-encoding genes. *Monsanto* admitted that the underlying genes had no known functions.[33] Relying on *Brenner's* decision, the Federal Circuit upheld the USPTO's view on the standard of specific and substantial utility and ruled that the research intermediates did not meet specific and substantial utility standard.

Lab. Corp. Of Am. Holdings V. Metabolite Labs.,Inc

Another case that caught the world's attention was the *Lab. Corp. Of Am. Holdings V. Metabolite Labs., Inc*[34] where the Supreme court considered the validity of patent relating to a process for diagnosing deficiencies of two vitamins, namely folate and cobalamin. The process involved a test to measure the level of an amino acid called homocysteine in a body fluid of the patient and then noticing whether its level was elevated above the prescribed norm to affirm a vitamin deficiency. The patent was filed on the method for testing homocysteine levels in body fluids and specifically

32 Id. Serving as a molecular marker for mapping the entire maize genome, which consists of ten chromosomes that collectively encompass roughly 50,000 genes; Measuring the level of mRNA in a tissue sample via microarray technology (method of studying how large numbers of genes interact with each other) to provide information about gene expression; Providing a source for primers for use in the polymerase chain reaction process (PCR) to enable rapid and inexpensive duplication of specific genes; Identifying the presence or absence of a polymorphism; Isolating promoters (the part of a gene that contains the information to turn the gene on or off) via chromosome walking; Controlling protein expression; and Locating the genetic molecules of other plants and organisms."

33 Joshua Kim,*Fisher of Genes*:, p.404.

34 548 U.S. 124, 138 (2006)

sought to protect the scientific connection between homocysteine levels and vitamin deficiency. This case concerned LabCorp's declaratory judgment suit over whether it had breached its licensing agreement with Metabolite rather than addressing patent infringement *per se*.They obtained a patent on their findings and assigned the patent to Competitive Technologies, Inc. (CTI), and its licensee to Metabolite Laboratories.

LabCorp took a license from *Metabolite* agreeing to return 27.5% of the related revenues from the test. One of the termination clauses in their agreement permitted *LabCorp* to terminate the arrangement if a more cost effective commercial alternative was available which did not infringe a valid and enforceable claim of the patent. Until 1998, *LabCorp* used the patented tests and paid royalties. But later it decided to use one of these other procedures made by Abbott Laboratories and it was far superior when compared to *Metabolite*.

The Trial Jury found in favour of metabolite and held that *LabCorp* had willfully infringed Metabolite's patent and awarded damages for patent infringement and breach of contract. On appeal the United States Court of Appeals for the Federal Circuit affirmed the stand of the trial jury. According to *LabCorp,* the process explained in claim 13 was 'invalid for indefiniteness, lack of written description, non-enablement, anticipation and obviousness' and the process explained in claim 13 was only a correlating step which simply related total homocysteine levels with vitamins to detect whether there was any deficiency or not.[35]The Federal Circuit rejected *LabCorp's* arguments and agreed with the District Court. A writ petition was preferred to the Supreme Court which granted certiorari only to resolve the question of whether the patent was valid or not, since it involved detecting a natural correlation between homocysteine and vitamin B12, and the 'laws of nature.[36]It is interesting to note that the dissenting judges expressed their opinion strongly favoring *LabCorp's* contention of the patents as invalid. The Supreme Court was interested in addressing the patentable subject matter issue which was neither raised in the petition, nor considered below. Further it is also interesting to note that *LabCorp* never clearly raised patentable subject matter issue in the suit. The writ of certiorari was dismissed as improvidently granted. However the dissenting opinion to the dismissal directly challenged the standard of patentable subject matter that the Federal Circuit, the court with exclusive jurisdiction over appeals in patent cases, has been applying

35 *Lab. Corp. of Am. Holdings v. Metabolite Labs., Inc.*, 548 U.S. 124, 138 (2006).
36 *LabCorp. v. Metabolite Corp*, 126 S.Ct. 2921 (2006)

for the last decade.[37] The decision of the Federal Circuit was left in place, as if the Supreme Court had never agreed to hear the case at all. Justice Stephen Breyer, joined by Justices Stevens and Souter, dissented from the order. The dissent argued that the Court should have taken the case in order to lend necessary clarity to an important issue in patent law. In the dissenters' view, a natural correlation between two substances in the body is a "natural phenomenon" that cannot be patented.The dissenting Justices noted that an overly expansive breadth of patentable subject matter might actually undermine public health as well as scientific progress.[38]

MYRIAD[39] –whether satisfied the statutory requirements of patentability

The patentability of an isolated gene addressed in *Ass'n For Molecular Pathology V. U.S. Patent & Trademark Office – Product Of Nature* was one of the most high profile cases to invite controversial debates. The U.S. District Court for the Southern District of New York granted a summary judgment to Myriad Genetics, holding that fifteen claims of seven different patents were invalid due to non-patentable subject matter under 35 U.S.C. section 101.The patent in suit involved genes used in diagnosis for assessing susceptibility to breast cancer and likely responsiveness to certain therapeutics. The claims covered (1) isolated DNA containing all or portions of the BRCA1 and BRCA2 gene sequence and (2) methods for 'comparing' or 'analyzing' BRCA1 and BRCA2 gene sequences to identify the presence of mutations correlating with a predisposition to breast or ovarian cancer."[40] Many issues were discussed in the suit including the validity and constitutionality of the patent. The district court identified two different issues. The first consisted of composition claims directed towards isolated DNA coding for the BRCA1, BRCA2 genes. The second comprised method claims directed towards identifying specific mutations in the BRCA genes by analyzing and comparing the sequencing obtained from human samples. The main contention raised in this case was that, the isolated DNA is a product of the nature. 'The product of nature' argument in *Myriad* was centered on a dispute regarding the interpretation and meaning of the terms "DNA" and "isolated DNA." The court

37 *Lab.Corp. of Am.Holdings v. Metabolite Labs., Inc.,* 126 S. Ct. 2921, 2926 (2006)(Breyer, J., dissenting). Id. at 2928 (noting that the Supreme Court has never approved the Federal Circuit test of patentable subject matter that focuses on whether an invention "produces 'a useful, concrete,and tangible result') (*quoting State St. Bank & Trust Co. v. Signature Fin. Group, Inc.*, 149F.3d 1368, 1373 (Fed. Cir. 1998)).

38 Metabolite, 126 S. Ct. at 2927-29 (Breyer, J., dissenting).

39 *Ass'nFor Molecular Pathology v. U.S. Patent & Trademark Office,* 702 F. Supp. 2d., 181

40 *Ass'n for Molecular Pathology v. U.S. Patent & Trademark Office (Myriad)*, 702 F. Supp. 2d., 181 (S.D.N.Y.2010).

examined whether the "isolated DNA" was protected under the United States Patent Act.[41] The court explaining the, DNA held as follows:

> "In the light of DNA's unique qualities as a physical embodiment of information, none of the structural and functional differences cited by Myriad . . . render the claimed DNA 'markedly different.'"

Myriad claimed that the isolated DNA is having different structural and chemical properties as opposed to native DNA. However, the court reasoned that "DNA is not only a chemical compound capable of encoding protein, but it also has the ability to act as the physical information carrier". Although isolated DNA can be identified and manipulated, it may not be designated to function explicitly the same way a patent application claims it does. This shows that an isolated DNA should not be seen as inseparable from the DNA existing in nature for patent eligibility. Another issue before the court regarding the patentability was that whether mere "purification" of a naturally existing compound renders patentability or not. The court made a departure from observation in *Parke-Davis*[42]that 'isolated and purified adrenaline is patentable'. The court in this case made it clear that the products of nature are outside the scope of patentability. The prior framework of patenting a DNA sequence based on mere "isolation" was invalidated in *Myriad* as the Judge clarified that isolation was "simply the application of techniques well known to those skilled in the art."[43]

Judge Robert Sweet concluded that;

> "'DNA's existence in an 'isolated' form alters neither this fundamental quality of DNA as it exists in neither the body nor the information it encodes. Therefore, the patents at issue directed to 'isolated DNA', containing sequences found in nature are unsustainable as a matter of law and are deemed unpatentable subject matter under 35 U.S.C. §101." He added that for an article of manufacture and/or composition of matter to be a patentable subject, it had to be "markedly different" from a product of nature.[44]

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41 35 U.S.C. section 101 reads as:
Whoever invents or discovers any new and useful process,machine, manufacture, or composition of matter, or any new and useful improvementthereof, may obtain a patent therefore, subject to the conditions and requirements ofthis title.

42 *Parke-Davis & Co. v. H.K. MulfordCo.*, 189 F. 95 (S.D.N.Y. 1911)

43 SabyGhoshray, *Interpreting Myriad: Acquiring Patent Law's Meaning Through Contemporary Jurisprudence and Humanistic Viewpoint of Common Heritage of DNA*, 10 J. Marshall Rev. Intell. Prop. L. 508,535 (2011)

44 *Myriad*, 702 F. Supp. 2d at 181(S.D.N.Y. 2010)

Thus the issue of gene patenting became more complicated due to the absence of a clear cut guideline from the court in the matter.

ACLU v. Myriad - Appeal Judgment by federal circuit court

All the controversies came to an end when the judgment appeal was delivered on July 29, 2011. The federal circuit court reversed the decision of the district court in part and affirmed it in part. The appeal court reversed the district court judgment which held that "Myriad's claims to 'isolated' DNA molecules covered patent ineligible products of nature." The appeal court held that the molecules as claimed did not exist in nature. The appeal court also reversed the district court's decision that Myriad's method claim to screening potential cancer therapeutics via changes in cell growth rates was directed to a patent-ineligible scientific principle. However, it affirmed the district court's decision that Myriad's method claims directed to "comparing" or "analyzing" DNA sequences were patent ineligible; such claims included no transformative steps and covered only patent-ineligible abstract, mental steps . Both Plaintiff AUCL and Myriad filed a motion for re hearing before the Federal Circuit and it was denied on 12th September 2011.

Prometheus Laboratories, Inc. V. Mayo Collaborative Services A turning point?

Prometheus was the sole and exclusive licensee of two patents, who claimed methods for determining the optimal dosage of thiopurine drugs used to treat gastrointestinal and non-gastrointestinal autoimmune diseases. The patents claimed methods that seek to optimize therapeutic efficacy while minimizing toxic side effects.[45] The claimed methods typically included two steps: (a) "administering" the drug to a subject, and (b) "determining" the levels of the drug's metabolites. Mayo Collaborative Services and Mayo Clinic Rochester formerly purchased and used Prometheus's test, but in 2004, Mayo announced that it intended to begin using its own test at its clinics and selling to other hospitals. Mayo's test measured the same metabolites as Prometheus's test, but Mayo's test used different levels to determine toxicity of the drug. Prometheus sued Mayo for patent infringement.

In 2007, Mayo filed a motion for summary judgment before the District court contending that the patents in the suit were invalid because the claimed subject matter was unpatentable. The district court found that the claimed invention based on the correlations resulted from a natural body process was a natural phenomenon.

45 *Prometheus Laboratories, Inc. v. Mayo Collaborative Services*, 628 F.3d 1347 (Fed. Cir. 2010)

Hence, the invention was not eligible for patent protection. The court stated that the inventors did not "invent" the claimed correlation; but rather, the inventors merely observed the relationship between these naturally produced metabolites and therapeutic efficacy and toxicity.[46] Prometheus appealed against the District court judgment invalidating the patents. In delivering its judgment in appeal, the Federal Circuit court reversed the order of the District Court and held the claims to be valid. The court applied "definitive test" for determining whether a process was patentable subject matter or not and it applied "the machine-or-transformation" test. Under "the machine-or-transformation" test, a claimed process was patent eligible if (1) it was tied to a particular machine or apparatus or (2) it transformed a particular article into a different state or thing. The court held that "administering" and "determining," steps were transformative and not merely data- gathering steps. The second point of the test narrated correlations between metabolite levels and drug efficacy or toxicity.

Mayo moved a petition for certiorari before the Supreme court.[47] The Supreme Court issued a decision rejecting the 'machine-or-transformation test' as the sole, definitive test for determining the patent eligibility of a process as explained in *Bilski v. Kappos*.[48]. The Court did not, however, reject the machine-or-transformation test, but rather characterized the test as "a useful and important clue, an investigative tool, for determining whether some claimed inventions were a patent eligible processes. The Court then granted Mayo's petition for certiorari and vacated the decision of holding Prometheus's method of treatment claims to cover patentable subject matter under the machine-or-transformation test, and remanded the case for consideration in the light of the Court's decision in *Bilski*. However, on remand, the Federal Circuit again held that Prometheus's asserted method claims were drawn to statutory subject matter. And the court reversed the district court's judgment holding the patent invalid. On 7th March 2011 a petition for a writ of certiorari was filed against the judgement of Federal circuit .On 20 March, the US Supreme Court cut back on the types of inventions that can be patented in America. The court held in *Mayo Collaborative Services v. Prometheus Labs., Inc.* that one cannot patent an invention which merely applies known technology to natural phenomena. Writing for the court, Justice Stephen Breyer stated that this process was unpatentable because it claimed a monopoly on a law of nature – the relationship between the amount of

46 Id
47 *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 130 S. Ct. 3543 (2010).
48 *Bilski v. Kappos*, 130 S. Ct. 3218 at 3226-27 (2010)

thiopurine metabolites in a person and the likelihood that the thiopurine drug dosage is ineffective or harmful. Although some technological measures were needed to ascertain the amount of metabolites in a patient's blood, these measures "were well known" by scientists and did not suffice to make the invention patentable. The ruling is likely to a major impact on the medical and biotech industry. Many methods of medical diagnoses and medical treatment are now unpatentable. Although the court upheld Myriad's patents in July 2011, the Supreme Court ordered the Appellate court to reconsider the case in the light of ruling in March 2012 against the Diagonostic Co. Prometheus Laboratories in San Diego.

Classen Immunotherapies, Inc. V Biogen IDEC.

A very similar case to that of *Prometheus* is *Classen Immunotherapies, Inc. V Biogen Idec.*[49]The case reached the Federal Circuit Court on remand from the Supreme Court. The issue before the court was patentability, regarding Classen's patents in suit. The district court granted a summary judgment that all the claims in the Classen patents were ineligible for patenting because they were directed to the 'abstract idea.' The claimed patent was based on a relation between the infant immunization schedule for infectious diseases and the later occurrence of chronic immune-mediated (non-infectious) disorders. The Federal Circuit concluded that the claimed subject matter, two out of the three Classen patents, was eligible to be considered for patenting, although the claims might not meet the substantive patentability criteria as set forth in sections 102, 103, and 112 of the US Patent Act. The patent explained the method, whereby information on immunization schedules and the occurrence of chronic disease was to be '**screened'** and '**compared',** the lower risk schedule identified, and the vaccine **administered on that schedule**. TheClassen patents were infringed when a health care provider read the relevant literature and selected and used an immunization schedule. The district court stated that the claims described here is little more than the proposed correlation between vaccines and chronic disorders. The court held that the claims were for an abstract idea and therefore not eligible for patenting.

The federal Circuit court affirmed the district court's grant of summary judgment and held that the claims were invalid .This decision was made in the light of In *re Bilski*[50]. However, the appeal to the Supreme Court vacated the original opinion of

49 *ClassenImmuno therapies, Inc. v. BiogenIdec* , 2011 WL 3835409 (Fed. Cir. 2011)
50 *In Re Bilski*, 545 F.3d 943 (Fed. Cir. 2008)

the Federal Circuit Court in the light of the Supreme Court's decision in *Bilski v. Kappos* and remanded back to the Federal Circuit for reconsideration in view of the Supreme Court's instructions on the proper standard to be applied to determine patent-eligibility for method claims.

The Federal Circuit observed that in *Bilski v. Kappos* the Supreme Court encouraged the continuation of the legal and practical distinctions between patent-eligibility and the substantive conditions of patentability. Section 101 mandates patent eligibility; the claimed invention must also satisfy "the conditions and requirements of section 101, whereas, sections 101 and 102 together forms the substantive condition for patentability". The Federal circuit applied these distinctions to the *Classen*patents and concluded that the *Classen* patents were valid .[51] The decision in this case is pointing towards a totally uncertain status where a clear cut characterisation of patent eligibility in biotechnology patents is far from reality.

The Decision Renders the Patent Paradox More Complex

Supreme Court's final decision on Myriad.

This high profile patent litigation, come to an end in June 2013 when the US Supreme Court rendered its decision upholding its views in *Prometheus*[52]. The court held that a naturally occurring DNA segment is a product of nature and not patent eligible merely because it has been isolated, but that cDNA is patent eligible because it is not naturally occurring. The Court therefore, affirmed in part and reversed in part the decision of the United States Court of Appeals for the Federal Circuit. The decision has put the biotechnology research sector in a totally uncertain position.

Conclusion

On a perusal of the cases discussed below we find that the courts have put across various guidelines and yardsticks to capture the essence of patent eligibility and conditions for patentability. Starting with *Diamond v. Chakrabarthy* where the court was magnanimous in throwing open the field for patenting by stating "anything under the sun that is made by man" is eligible for patenting to other cases where the court have often taken varying stands on basis of various principles. Since then we could witness a patenting rush in biotechnology particularly the genomic sector,

51 Id.
52 569 U. S. 3 (2013)

which has emerged as a major cause of concern. The USPTO by its patent examination guidelines issued at regular intervals attempted to address the various issues relating to biotechnology especially the genomic patents. It introduced the concept that the disclosed invention must have some "specific, substantial, and credible utility[53] and relying on the guidelines Federal Circuit court denied the patent in *ReDane K. Fisher and Raghunath V. Lalgudi* for lack of utility. Various other issues relating to genomic patents caught the attention of the world through a dissenting opinion of a judge In *Lab. Corp. Of Am. Holdings V. Metabolite Labs., Inc* who disagreed with the validity of the patent due to indefiniteness, lack of written description, non-enablement, anticipation and obviousness.

The question of validity of patent on isolated gene is still a matter of continuing debate. The recent high profile case of *Myriad* questioned the validity of gene patent once again. The District Court for the Southern District of New York decision in *Myriad,* revisited the "marked different characteristic test" of *Chakrabarty*and observed that isolated and purified genes did not differ significantly from the native DNA, hence not eligible for patent. However the appeal court reversed the district court judgment and held that the molecules as claimed did not exist in nature. Though the there are factual dissimilarities, similar issue on therapeutic research related patent came up for consideration before Supreme court of US later too. The recent case *re Kubin* the application for patent was rejected on the grounds of lack of written description and obviousness. Ultimately in *Prometheus*, the Supreme Court issued a decision rejecting the 'machine-or-transformation test' as the sole, definitive test for determining the patent eligibility of a process as laid down in *Bilski v. Kappos*. The court held that that the relationship between the amount of thiopurine metabolites and the effect of thiopurine was simply a law of nature and therefore non patentable. The case essentially dealt with a therapeutic method and did not address the issue of genome patent squarely. However less than a week after the Supreme Court issued its decision in Mayo, the court vacated the decision of the federal circuit in the gene patent case, *Association for Molecular Pathology v. Myriad Genetics*. The issue of isolated human genes as a patentable subject matter was remanded back to federal circuit "for further consideration in light of Mayo." The Appellate Court held that a naturally occurring DNA segment is a product of nature and not patent eligible merely because it has been isolated, but that cDNA which the order of the naturally occurring nucleotides has been altered is patent eligible

53 Utility Examination Guidelines, **Federal Register** / Vol. 66, No. 4.p. 1092. available at http://www.uspto.gov/web/offices/com/sol/notices/utilexmguide.pdf last accessed on 11-02-2013

because it is not naturally occurring. These continuing litigations are only the bottom line of the curve. The patent scuffle in genomic research sector is getting murkier and the recent decisions indicate that scope of patents in this sector is steeply declining. Analyzing the situation form the socio economic perspective also reveals a rather blurred picture. But for health sector how far it is beneficial is yet to be determined. Because, the pharmaceutical and biotechnology companies doing research in the area of genomics rely heavily on patents to protect their research and development investments, and with the help of patents they will also be able to gain market exclusivity for a limited period time. However the issue of restriction of access to due to patenting of genetic materials have been mitigated by the decision in myriad and proved to be a relief for researchers working in the next level of diagnostic and therapeutic research.

So to conclude we have seen that in the period since the 1980 the Supreme Court decisions have triggered off a debate over the patenting of life, laying down several different guidelines and it has become an unspecified instrumental frame of reference. The area of basic human genome research, and the related diagnostic and therapeutic medical research have posed a significant regulatory challenges for governments. Right from its beginning genomic research gives rise to a variety of ethical, social and economic concerns. Patents though protect the right of investors by providing limited monopoly encourage the investment in research and development in medical research. While the patent on an isolated genome may undermine the right access the human genome for future research in the same field by others. If we accept patenting of genome, it will provide private actors with the ability to prevent individuals from using the sane genome for diagnostic and therapeutic research. This will lead to a situation where the diagnostic and therapeutic research is restricted by rather expensive patent negotiations, making the health care system even more expensive. By highlighting the importance right to affordable health care and access to health care as from the human rights perspective we can conclude that though the patents in human genome is theoretically incompatible with the current laws on patent. From the decisions and case analysis above we find that Judiciary is also not making things easier. There does not seem to be a consistent understanding on the matter relating to gene patenting .One cannot deny the usefulness of gene patenting as it serves a larger purpose in encouraging innovations and inventions in discovering cures and answers to medical ailments which were oblivious to mankind. But for it to be truly beneficial, precise and definite yardsticks, guidelines need to be laid down keeping in mind the impact of such patents on the global healthcare, treatment, and basic genomic research worldwide.

LIABILITY FOR MEDICAL NEGLIGENCE AND THE CHANGING APPROACHES IN LAW

*Dr. A.P. Rajeesh**

Introduction

In the ancient period medical treatment was given a divine position. The doctors were given the status of saints and were considered as representatives of God. Thus, healing decease was treated as something done by the God through human agency. Charakan, Sushruthan, Shukracharyar are all examples of this category of saint doctors. Jesus Christ, Budhan, Sree Narayana Guru were all great healers and thus great doctors too. However, at some point of time the divine role of doctors came to an end and medical treatment turned to be a profession and got all advantages and disadvantages of a profession. The transformation made medical treatment popular but turned to be a profession and led to the application of the concept of professional standard of care in medical treatments and emergence of medical negligence cases.

Compared to the tremendous increase in medical negligence cases in western countries as early as in 1940s and 1950s, the spurt of medical negligence case in India is only after 1980s. However, statistics shows that the present litigations based on medical negligence cases are on a steep escalation in India also. According to Times of India, September 21, 2013, India recorded a whopping 5.2 million injuries each year due to medical errors and other related events. Approximately 3 million years of healthy life are lost in India each year due to these injuries[1]. It was further shown that among these, only less than 1% of cases are brought before court or tribunal for a remedy. Analysis of result shows that 50% of cases brought before the Court / Tribunal were decided against medical practitioners[2]. The finding has turned to be more complex in a detailed study which was conducted by taking a sample of about

1 *B.Sc, LL.M, Ph. D, Assistant Professor, School of Indian Legal Thought, Mahatma Gandhi University, Kottayam, Kerala. Times of India, (Sept. 21, 2013)

2 Cited in Yetukuri Venkiteswara Rao, *Law Relating to Medical Negligence* at XI (Asia Law House, 3d ed 2015)

3500 prescriptions. The study showed that the use of drugs was found unnecessary in 47% of cases, irrational in 19% of cases and hazardous in 11% cases[3].

The studies show that though India was famous for holistic relation between doctor and patient, off late the position has undergone serious change. Like any other field, money making displaced the role of service in medical profession also. The problem in India is aggravated by huge population, want of qualified doctors, privatization of health care field, withdrawal of State from health care sector, pure profit oriented approach of private hospitals and many others. In the present scenario, the empty words of the past divine doctor patient relation has nothing to do with and the matter could be dealt only through law. The article is an attempt to look into the required extent of duty of care on the part of doctors and how far the present law is effective to deal with medical negligence cases.

The origin of duty of care in doctor patient relationship

The duty of care of the doctor to a patient may be contractual or through a general duty of care imposed by law. The contractual duty is subject to the terms of contract and it could be limited or extended through the terms of the contract[4]. However, in the modern scenario the contract which is entered into by the patient with the hospitals will be too vague and limited and it will be very difficult for an ordinary patient to get remedy for breach of contract because of the unilateral terms contained in the agreement in favour of doctors and hospitals.

Thus, the real remedy for the injuries caused by medical negligence is under tort law based on the concept of breach of duty to take care. It seems that *R v Bateman*[5] was the first case in which the extent of duty of care in medical treatment was seriously considered in English law. It is to be taken note in this regard that the matter was decided even before the general duty of care was got precisely formulated in English law in *Donoghue v Stevenson*[6]. In Bateman's case, analyzing the duty of care vested with doctors, the Court observed as follows[7]:-

> *If a person holds himself out as holding special skill and knowledge and is consulted as possessing such skill and knowledge, by or on behalf of a patient, he owes the*

3 Id at X11.

4 However, limiting contractual liability is also subject to law. In English law the situation is governed by Unfair Contract Terms Act 1977. Though there is no such legislation in India, the Indian judiciary has developed the condition that the terms of the contract must be reasonable.

5 (1925) 94 LJ KB 791

6 [1932] AC 502.

7 Id at 794.

> *patient to use due caution in undertaking the treatment. If he accepts the responsibility and undertakes the treatment and the patient submit to his direction and treatment accordingly, he owes a duty to the patient to use diligence, care, knowledge, skill and caution in administering the treatment. No contractual relation is necessary, nor it is necessary that the service be rendered for reward. The law requires a fair and reasonable standard of care and competence. This standard must be reached in all the matters above mentioned.*

Later, the duty of care principle laid down in *Donoghue v Stevenson* got its application in all fields of negligence including professional negligence cases. Thus liability of designers, liability of architect, liability of auditors were all got to be governed by the by the principle laid down in *Donoghue v Stevenson.* However, even when all other professional fields were got governed by *Donoghue* principle, duty of care in medical negligence cases remained as a separate area in professional negligence.

Differential treatment in medical negligence cases

The extent of duty of care and professional negligence in medical treatment was specifically considered in *Hunter v Hanley*[8] , were it was observed that the true test for establishing negligence in diagnosis or treatment on the part of doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of if acting with reasonable care.

Thus the law in this regard is whether the doctor has applied fair and reasonable standard of competence. However, the important question in this regard is how to assess whether the doctor has applied fair and reasonable standard of competence. It is well settled principle of law that reasonableness for breach of duty is to be appreciated in the standpoint of a reasonable man of ordinary prudence[9]. But whether the conduct amounts to the conduct of a reasonable man must be appreciated by the court. Applying this principle in medical negligence cases, the court would appreciate whether the conduct of the defendant doctor amount to the conduct of a reasonable doctor in the field.

The appreciation of breach of duty in medical negligence cases was much thoroughly considered by the House of Lords, in *Bolam v Friern Hospital Management*

8 (1955) SLT 213
9 Id at 216.

Committee[10]. In this case after analyzing the different principles applicable in medical negligence cases, court reached the conclusion that a doctor is not guilty of professional negligence if he acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art. A doctor is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion that takes a contrary view. In this case the pertinent question before the court was, whether selection of the particular type of treatment (Electro – Convulsive therapy) could be treated as reasonable. Answering the question affirmative the Court observed as follows[11]-:

> You have been told by one doctor that he had only seen one acetabular fracture in fifty thousand cases, involving a quarter of a million treatment. It is clear that the particular injury which produced this disastrous result in the plaintiff is one of extreme rarity.

The conclusion reached by the Court poses some difficulties. In cases of breach of duty there are two aspects to be taken into consideration. (1) What would have been the conduct of an ordinary prudent man in the particular context (in this case the conduct of an ordinary prudent doctor). Evidence could be adduced in this regard. Then comes the next question, (2) whether the conduct of the defendant amount to the conduct of an ordinary prudent man in that circumstance (in this case an ordinary doctor in that field). The second is a legal question to be decided by the Court stepping into the shoes of an ordinary prudent doctor in that field. In all other fields of negligence and professional negligence this task is performed by the court. But in this case whether the conduct of the defendant doctor complies with the standard of care of a reasonable doctor in the field happened to be decided by expert doctors in that particular field depending upon whether the defendant doctor has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art.

The irony of the decision was that whether the conduct of the doctor was reasonable was turned to be appreciated by expert doctors contrary to the procedure followed in other fields of negligence / professional negligence where whether the defendant has taken standard of care of an ordinary prudent man in that particular

10 [1957] 2 ALL E R 118. In this case, John Hector Bolam, the plaintiff, claimed damages against Friern Hospital Management Committee, the defendants, in respect of injuries which he sustained while undergoing electro – convulsive therapy on August 23, 1954.

11 Id at 120.

context was decided by court by applying standards formulated by stepping into the shoes of an ordinary prudent man in that field[12].

The differential treatment regarding fixing of standard of care in medical profession started with this case. The justification for this differential approach may be the fear of the court to deal with the complex areas of medical negligence cases or the high reverence to medical profession which led to the observation of the Court, that when you approach this case and consider whether it has been proved against the defendants that negligence was committed, you have to keep in mind the enormous benefits which are conferred on men and women by this form of treatment[13]. However the test was widely accepted and came to be known in medical field as *Bolam Test.* In spite of the patent irrationality in fixing duty of care on medical professionals, it is a surprise to note that *Bolam Test* continued to be unquestioned for around 30 years in assessing standard of care in medical negligence cases and the ratio was followed in some major cases including *Whitehous v Jordan*[14], *Maynard v West Midlands Regional Health Authority*[15], *R v Caldwell*[16], *R v Lawrence*[17].

The deviation from Bolam Test

Finally, the validity of Bolam test was questioned in *Sidaway v Bethlem Royal Hospital Governors*[18]. This was a case in which the plaintiff, who was suffering from persistent pain in her neck and shoulders, was advised by a surgeon employed by the defendant to have an operation on her spinal column to relieve her from the pain. Though the surgeon warned the general consequences of the operation, he did not warn the patient a less than 1% risk of damage of spinal cord. In the course of the operation, the plaintiff suffered injury to her spinal cord which resulted in her being severely disabled. The medical experts deposed that the extent of warning is matter of medical judgment with special importance attached to doctor's assessment of his patient[19]. Thus the contention was that according to practice accepted by a responsible body of medical men skilled in that particular art a 1% risk need not be communicated

12 See Kenneth McK Norrie, *Medical Negligence: who sets the Standard?* 11 Journal of Medical Ethics 135, 136 (1985).
13 Id at 120.
14 [1981] 1 All E R 267.
15 [1985] 1 All E R 635.
16 [1981] 1 All E R 961.
17 [1981] 1 All E R 974.
18 [1985] 1 All E R 643.
19 Id at 648.

to the patient. In other words, the non communication of a 1% risk to a patient is reasonable because it is an accepted practice by a responsible body of medical men skilled in that particular art. This will entail that there is no breach of duty on the part of the defendant doctor as per the existing standards of medical care. If we appreciate the matter in the light of *Bolam Test* the defendant doctor would have been held not liable at this stage itself. However, rejecting the rationale suggested in *Bolam Test*, Court observed as follows[20]:-

> The implications of this view of law are disturbing. It leaves the determination of legal duty to the judgment of doctors. Responsible medical judgment may, indeed, provide the law with an acceptable standard in determining whether a doctor in diagnosis or treatment has complied with his duty. But is it right that medical judgment should determine whether there exist a duty to warn of risk and its scope? It would be a strange conclusion if the courts should be led to conclude that our law, which undoubtedly recognize a right in the patients to decide whether he will accept or reject the treatment proposed, should permit the doctors to determine whether and in what circumstance a duty arises requiring the doctor to warn his patient of the risks inherent in the treatment which he proposes.

Finally disregarding the medical opinion, Court looked into whether the conduct on the part of the doctor viz. not warning the patient about 1% risk was reasonable or not and reached the conclusion that it is reasonable and thus there is no breach of duty. The finding was reached not because the non communication of 1% risk was an accepted practice in medical field but because according to the assessment of the court it is the conduct of a reasonable man (reasonable doctor in this case) in this situation.

The matter was again considered in *Bolitho v City and Hackney Health Authority*[21]. This was a case were the principle of causation was the main issue. Admittedly there was negligence on the part of a doctor in not attending a child aged two years who was died due to respiratory failure and cardiac arrest. It was contended that if the doctor had attended the child and intubated on time, death could have been avoided. Medical experts gave evidence to show that even if the doctor had attended the child, taking into account the condition of the child, the doctor could reasonably decide

20 Id at 649.
21 [1997] 4 All E R771.

not to intubate the child as per the accepted medical practice prevailing at that time and in such case death would have been caused even if the doctor attended the patient. Regarding whether the opinion of responsible / reasonable/ respectable body of medical men is binding on the court in assessing whether the conduct of the defendant doctor was reasonable, the House of Lords observed as follows[22]-:

> In cases of diagnosis and treatment there are cases were despite a body of professional opinion sanctioning the defendants conduct, the defendant can properly be held liable for negligence. In my judgment that is because, in some cases, it cannot be demonstrated to the judges satisfaction that the body of opinion relied on is reasonable or responsible. In vast majority of cases the fact that distinguished experts in the field are of a particular opinion will demonstrate the reasonableness of the option. In particular, where there are questions of the assessment of the relative risks and benefits of adopting a particular medical practice, a reasonable view necessarily presupposes that the relative risks and benefits have been weighed by the experts in forming their opinion. But if, in a rare case, it can be demonstrated that the professional opinion is not capable of withstanding logical analysis, the judge is entitled to hold that the body of opinion is not reasonable or responsible.

Though this case is also a practical application of Sidaway test, and the Court opined that the expert opinion cannot replace the judicial estimation whether the conduct was reasonable or not, the court expressed its unwillingness to meddle with expert's appreciation of practice as the governing guideline to assess whether there is breach of duty or not in normal circumstances.

As an abundant caution the court further observed[23] -:

> I emphasise that, in my view, it will very seldom be right for a judge to reach the conclusion that views genuinely held by a competent medical expert are unreasonable. The assessment of medical risks and benefits is a matter of clinical judgment which a judge would not normally be able to make without expert evidence.

The decision clearly indicates the reluctance of the court to interfere with the expert opinion, though it is possible in appropriate cases. Thus the decision brought the law in somewhat midway between Bolam principle and Sidaway principle.

22 Id at 779.
23 Id.

However, it is not clear why this much sanctity is given to a general practice followed in medical field and what is the hesitation on the part of the court to look into whether the general practice is reasonable or not by applying judicial standards especially in an era when medical profession has turned to be somewhat purely money oriented.

The correct approach in this regard may be the decision of Australian High Court in *Rogers v Whitaker*[24]. In this case after carefully analyzing the extent of duty of care of medical professional and the development of law in other common law countries, the Court categorically observed that the question is not whether the doctor's conduct accords with the practice of a medical profession or some part of it, but whether it conforms to the standard of reasonable care demanded by the law and that is the question for the court to decide and the duty of deciding of it cannot be delegated to any profession or group in the community[25]. The Australian approach is to consider the deposition of experts only as evidence as to whether the conduct of the doctor confirms to reasonable conduct as per law to be assessed by the Court to make the defendant doctor liable or not.

The Indian Approach.

It seems that the complexities in this regard have not taken seriously by the Indian judiciary. In India even though the statistics show a spurt in medical negligence cases recently, the disputes are mainly confined to cases of gross negligence where breach of duty is quite clear like administering medicine without conducting sensitivity test[26], surgery of left leg for problem on right leg, administering treatment on wrong patient[27], leaving surgical apparatus inside body after surgery[28], complaints of mismatched blood transfusion[29] etc. The concept of complex duty of care or whether in administering a treatment the doctor has complied with the care and standard of a reasonable doctor of ordinary prudence in the field were not dealt seriously in India.

It seems that even the *Bolam* test in its true spirit has not applied in India. It is true that in some cases including *Post graduate Institute of Medical Education &*

24 1992 (109) ALR 625.
25 Id at 629.
26 *Spring Meadows Hospital and another v Harjol Ahlu Walia,* AIR 1998 SC 1801.
27 *Indian Medical Association v V.P. Santha*, 1995 (6) SCC 651.
28 *Achut RaoHaribhan Khodwa and others v State of Maharashtra,* (1996) 2 SCC 634.
29 *Post graduate Institute of Medical Education & Research v Jaspal Singh,* (2009 (2) CPJ 92 (SC))

Research v Jaspal Singh[30]*, Mrtin F D'Souza v Mohd. Ishaq*[31],the *Bolam* principle was cited as authority to deal with medical negligence cases in India without applying the principle in the facts of the case. Further, in *Jacob Mathew* v *State of Punjab and another*[32], Supreme Court observed as follows[33] - :

> *The water of Bolam test has ever since flown and passed under several bridges, having been cited and dealt with in several judicial pronouncements, one after the other and has continued to be well received by every shore it has touched as neat, clean and well - condensed one.*

It seems that the perplexity created by the *Bolam Test* though remained for considerable period of time has never received well acceptance and can't be treated as a condensed one. The principle has been partially or fully modified by *Sidaway Test*, *Brolitho Test* and *Roger Test.* The only thing is that the Indian Judiciary failed to properly appreciate the development of law in this regard or to formulate a more acceptable test taking into account the Indian standards to impose duty of care on medical professionals.

A close analysis of medical negligence cases will show that the shore touched by Bolam principle is only the periphery of medical negligence cases in India. Bolam test has got two aspects. (1) Whether the doctor has got required expertise of an ordinary prudent doctor in the field. (2) Whether the treatment administered by the doctor was reasonable. In the second level the question is who will assess whether the treatment provided by the doctor was reasonable, whether medical experts or the court. According to *Bolam Test* the decision rest with the medical expert body and according to *Sidaway Test* the decision rest with the courts. It seems that in this respects neither the Bolam test nor Sideway test was never properly applied in India. For example in *Jacob Mathew* v *State of Punjab and another*[34],where *Bolam Test* was highlighted, the issue was quashing of a criminal proceeding initiated under Sec. 304 A of the I.P.C. for alleged medical negligence which led to death of a patient. The concept of reasonable degree of care, breach of duty and its practical application which arise from civil law more particularly from law of negligence had no practical application in the present case. Similarly in *Post graduate Institute of Medical*

30 (2009 (2) CPJ 92 (SC))
31 Supreme Court of India, Civil Appeal No. 3541 of 2009 decided on 17/02/2009.
32 (2005) 6 SCC 1.
33 Id at. 19.
34 AIR 2005 SC 3180.

Education & Research v Jaspal Singh[35] and *Mrtin F D'Souza v Mohd. Ishaq*[36], though the *Bolam Test* was mentioned, the second aspect of the test which deals with whether the conduct of the defendant was reasonable in the light of general practice followed in medical field had no application.

The reasonableness of treatment of a doctor should be appreciated by the experts in medical field or by the court was specifically considered in *Vinita Ashok v Laxmi Hospitals and Another*[37]. This was a case where a young woman by undergoing medical termination of pregnancy suffered serious injuries by medical negligence which ultimately led to the removal of her uterus. The allegation of the petitioner was that if Ultra sonogram, a test to detect the position of embryo(whether intrauterine or cervical) was conducted before D&C (Dilatation & Curretage), the injuries could have been avoided and uterus could have been saved. There were divergent opinions among experts regarding Ultra sonogram test before conducting D&C. Some experts were of the view that this is highly helpful to detect the position of embryo and to identify whether the pregnancy is intrauterine or cervical. However, there were other expert opinions also to indicate that the test is ineffective and practically impossible in all cases of MTP because the expense will be high. However there was substantial support from medical experts to prove that the procedure adopted by the defendant doctor was reasonable taking into account the general practice prevailing in medical field at that time. If this approach was adopted, this would have been an application of Bolam test. But Court adopted the principle laid down in *Brolitho*, *Sidaway* and *Rogers* and reached the conclusion that whether the conduct of the defendant doctor is reasonable is to be appreciated not by the experts in the field but by the Court taking into account the position of an ordinary prudent doctor in that situation. The Court observed as follows[38]-:

> Thus in large majority of cases, it has been demonstrated that a doctor will be liable for negligence in respect of diagnosis and treatment in spite of a body of professional opinion approving his conduct where it has not been established to the courts satisfaction that such opinion relied on is reasonable or responsible. If it can be demonstrated that the professional opinion is not capable of withstanding the logical analysis, the court would be entitled to hold that the body of opinion is not reasonable or responsible.

35 (2009 (2) CPJ 92 (SC))
36 Supreme Court of India, Civil Appeal No. 3541 of 2009 decided on 17/02/2009
37 Supreme Court of India, Civil Appeal No. 2977 of 1992 decided on 25/09/2001.
38 Id at para. 28.

Subsequently in *Malay Kumar & Dr. Kunal Saha v Dr. Sukumar Mukherjee* [39], it was observed that a court is not bound by evidence of experts which is to a large extent advisory in nature. The court must drive its own conclusions upon considering the evidence which might be adduced by both the sides, cautiously and upon taking into consideration the authorities on the point which he deposes.

But the test applied in these cases has not come down as a principle to assess whether the conduct on the part of the doctor is reasonable or not. In most of the cases where *Bolam Test* was mentioned, the test had no real application and was only to create an impression that *Bolam Test* is the governing test for medical negligence cases in India, disregarding the fact that the test was discarded even in English law where the test was developed much earlier.

If we compare the *Bolam Test* and *Sidaway Test*, under the *Bolam Test*, the doctor can escape from liability if he successfully prove that he acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art[40]. In *Sidaway Test* it is for the court to decide whether the treatment was reasonable on the standpoint of an ordinary prudent doctor irrespective of the fact that the defendant doctor has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art. In the second test also though the court may take into consideration the expert evidence, it is not conclusive to identify whether the doctor has taken the standard of care of a reasonable doctor. But in the first test it is for the medical expert to decide whether the treatment could be considered as reasonable based on the general medical practice prevailing at that time. This leads to a situation that in *Bolam Test*, a question of law which is to be decided by the court turn to be decided by expert doctors. In that way *Bolam Test* is more doctor friendly and that may be the reason for continuation of *Bolam Test* in India, though it was discarded from English law around thirty years back.

It seems that majority of the present medical negligence cases are now brought before the consumer forums. Unfortunately the forum is not adept to deal with the complex issues of duty to take care, breach of duty, *Bolam Test* and *Sidaway Test*

39 2009 (3) CPJ 17 (SC)

40 Regarding the wider application of Sidaway test, it was opined that the Bolam test would appear to have crossed the boundaries of diagnosis and treatment, as well as the limits of medicine, thereby enlarging the role of the doctor to that of a moral arbiter, Ash Samanta & Jo Samanta, *Legal Standards of Care*, 3 Clinical Medicine 443, 444 (2003).

properly. It is doubtful whether even the lower courts in India are adequately equipped to deal with the complex medical negligence problems.

It is to be taken note in this regard that even in cases were medical negligence is proved, the amount of damages awarded is too meager. *Post graduate Institute of Medical Education & Research v Jaspal Singh*[41], is a typical example in this regard. In this case for mismatching blood transfusion which led to the death of a patient, the quantum of compensation awarded by the Consumer Dispute Redressal Forum was just two lakh rupees. The petitioners were dragged up to Supreme Court, and Supreme Court also upheld the two lakh rupees compensation awarded by the Consumer Dispute Redressal Forum. The pathetic plight in this regard is how many poor patients who were victims of medical negligence could fight up to Supreme Court against the affluent and rich hospitals and doctors for getting this petty amount even in cases were medical negligence is proved ?

We have to accept the reality of changing dimensions of medical treatment and the changing approach to medical profession from service to profit oriented business in India. When in all other fields of professional negligence the duty of care is getting expanded we cannot treat medical negligence as an isolate compartment. It is true that in medical field it is difficult to establish professional negligence compared to other professional fields. But that shall not lead to a situation where the victim has no remedy and it is necessary to develop a proper mechanism in India to deal with medical negligence.

Conclusion

Taking into account the pathetic plight of patients who are victims of medical negligence in India, a better option is to constitute special tribunals to deal with medical negligence cases. The Medical Negligence Tribunal could be set up in each state or for a cluster of states. As the tribunal is solely dealing with medical negligence cases, the tribunal will become adept in matters relating to medical negligence and the present situation of confusing the court by using medical terms and explaining medical practices could be avoided and patients who become victims of medical negligence could be well protected.

Further insurance in medical treatment must be made more common and workable. Law may be framed to constitute a fund like Medical Insurance Fund as

41 (2009 (2) CPJ 92 (SC)

part of health insurance by collecting money from doctors and patients and a portion must be contributed by the state also. Compensation awarded by the tribunal for medical negligence must be paid from this fund. In appropriate cases taking into account the gravity of negligence on the part of the doctors, compensation could be realized from doctors fully, partially or more than the compensation awarded as penalty which will go to the fund. This will make the doctors more cautious and careful in medical treatment and the victims will be get properly redressed.

THE DIFFERENTLY ABLED AND THE CRIMINAL LAW: THE QUENCH FOR EQUALITY

Sunil Kumar Cyriac[*]

Introduction

Ability is considered by many people as, a special gift from the God almighty and disability is usually considered as its absence. There are people who believe that disability is also a gift in another form by the god almighty. "Disability is an umbrella term, covering impairments, activity limitations, and participation restrictions. Impairment is a problem in body function or structure; an activity limitation is a difficulty encountered by an individual in executing a task or action; while a participation restriction is a problem experienced by an individual in involvement in life situations. Disability is thus not just a health problem. It is a complex phenomenon, reflecting the interaction between features of a person's body and features of the society in which he or she lives"[1]. The Persons With Disabilities (Equal Opportunities, Protection of rights and Full Participation Act), 1995 gives an inclusive definition to disability by listing Blindness, Low vision, Leprosy-cured, Hearing impairment, Loco motor disability, Mental retardation, and Mental illness as disabilities. The Rights of Persons with Disabilities Act 2016 provides four categories of disabled persons including, person with disability[2] person with benchmark disability[3] person with disability

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Definition by WHO www.who.int/topics/disabilities/en/ last visited on 17-2-2015

2 Sec 2 (s) 'person with disability' means a person with long term physical, mental, intellectual or sensory impairment which, in interaction with various barriers, may hinder his full and effective participation in society on an equal basis with others;

3 Sec 2 (r) "person with benchmark disability" means a person with not less than forty per cent. of a specified disability where specified disability has not been defined in measurable terms and includes a person with disability where specified disability has been defined in measurable terms, as certified by the certifying authority;;

having high support needs[4] and specified disability[5]. According to the United Nations Convention on the Rights of Persons with Disabilities, Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.[6] Disability in any form is capable of producing sufferings of various kinds and magnitudes. There are reasons to believe that survival of the fittest is the dogma advocated not only by the capitalists but also by the general public administered vigourously against the differently abled.

Equality Vs. disability

Weakness in any form is always exploited and the weaker sections are abused in varying degrees and forms and are manipulated to satisfy the luxurious extraveganzas of the strong. Prior to the twentieth century, social attitudes reflected the view that persons with disabilities are unhealthy, defective and deviant. For centuries, society as a whole treated these people as objects of fear and pity. Many were abused, neglected, and murdered either by family members or at the hands of institution workers. The prevailing attitude was that such individuals were incapable of participating in or contributing to society and that they must rely on welfare or charitable organizations.

Since the disabled persons are extremely vulnerable, they were subjected to abuses of various kinds. Abuse includes physical and sexual abuse, psychological harm, financial abuse and neglect/abandonment whether physical or emotional. Abuse is defined as: any act, or failure to act, which results in a significant breach of a vulnerable person's human rights, civil liberties, bodily integrity, dignity or general well-being, whether intended or inadvertent, including sexual relationships or financial transactions to which the person has not or cannot validly consent, or which are deliberately exploitative[7]. The Rights of Persons with Disabilities Act 2016 contains provision for preventing abuse towards the disabled[8].

4 Sec 2 (t) "person with disability having high support needs" means a person with benchmark disability certified under clause (a) of sub-section (2) of section 58 who needs high support;

5 (zc) "specified disability" means the disabilities as specified in the Schedule;

6 Article 1, United Nations Convention on the Rights of Persons with Disabilities

7 Prof. Hilary Brown, *Safeguarding adults and children with disabilities against abuse* 9 Report submitted to Council Of Europe, Council Of Europe Publishing, available at http://www.coe.int (visited on 16/01/2017)

8 Sec.7 (1) reads-: The appropriate Government shall take measures to protect persons with disabilities

Everyone is entitled to have the right of equality before law and equal protection of law. The protection of law is provided to its citizens by every state and for that purpose the state is enacting civil and criminal laws and enforce the same independantly and impartially. But even today the protection from criminal law remains to be unattainable to the disabled. India, being a signatory to the UN Convention on the Rights of Persons with Disabilities, it is obligatory for our legal system to ensure the human rights and fundamental freedoms of persons with disability including mentally ill persons and persons with mental disabilities. It should also be ensured that these rights are enjoyed on equal basis with others and to ensure that they get equal recognition before the law and equal protection of the law. The Convention further requires to ensure effective access to justice for persons with disabilities on an equal basis with others.

Criminal law and the disabled

People who suffer from disability, particularly intellectual disability and who are involved with the criminal justice system are one of the most vulnerable and disadvantaged groups in our society. Their involvement with the criminal justice

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from all forms of abuse, violence and exploitation, and to prevent the same, shall— (a) take cognizance of incidents of abuse, violence and exploitation and provide legal remedies available against such incidents; (b) take steps for avoiding such incidents and prescribe the procedure for its reporting; (c) take steps to rescue, protect and rehabilitate victims of such incidents; and**.** (d) create awareness and make available information among the public.

(2) Any person or registered organisation who or which has reason to believe that an act of abuse, violence or exploitation has been, or is being, or is likely to be committed against any person with disability, may give information about it to the Executive Magistrate within the local limits of whose jurisdiction such incidents occur. (3) The Executive Magistrate on receipt of such information, shall take immediate steps to stop or prevent its occurrence, as the case may be, or pass such order as he deems fit for the protection of such person with disability including an order— (a) to rescue the victim of such act, authorising the police or any organisation working for persons with disabilities to provide for the safe custody or rehabilitation of such person, or both, as the case may be; (b) for providing protective custody to the person with disability, if such person so desires; (c) to provide maintenance to such person with disability

(4) Any police officer who receives a complaint or otherwise comes to know of abuse, violence or exploitation towards any person with disability shall inform the aggrieved person of— (a) his or her right to apply for protection under sub-section (2) and the particulars of the Executive Magistrate having jurisdiction to provide assistance; (b) the particulars of the nearest organisation or institution working for the rehabilitation of persons with disabilities; (c) the right to free legal aid; and (d) the right to file a complaint under the provisions of this Act or any other law dealing with such offence: Provided that nothing in this section shall be construed in any manner as to relieve the police officer from his duty to proceed in accordance with law upon receipt of information as to the commission of a cognizable offence.

(5) If the Executive Magistrate finds that the alleged act or behaviour constitutes an offence under the Indian Penal Code, or under any other law for the time being in force, he may forward the complaint to that effect to the Judicial or Metropolitan Magistrate, as the case may be, having jurisdiction in the matter.

system may be as a victim, a witness or as an offender. Since the disabled becomes the easy prey for the perpetrators of crime, such crime against them makes the victims vulnerable emotionally, psychologically, legally, socially and financially. Irrespective of their disability they were treated in the same way like that of every other person in India till 2013. The new criminal law ammendment Act 2013 brought a few changes in this regard. The new ammendment which is also known as the Nirbhaya Act was brought in the circumstances of Delhi Gang rape case and its main focus is on the sexual offences. One of the important changes brought by the amendment Act was that of section 160 of Cr.P.C where by the disabled person need not go to the police station to give evidence regarding the offence in question[9]. But this benefit to the disabled person can can be availed ony for the examination of persons acquinted with facts and circumstances of the case under section 160 of the code and not even to lodge an F.I.R. if the offence alleged is not under section 354, 354A-354D, 376, 376A-376E or 509 of the Indian Penal Code.[10] In such cases (if the offence alleged is not under section 354, 354A-354D, 376, 376A-376E or 509 of the Indian Penal Code) the disabled person is treated in the same footing as that of an ordinary individual. What is to be noted at this juncture is that these benefits are available only for giving statements before the police and usually such statements have no evidenciary value at all when taken up to the courts, except in the case of an FIR. During trial the real evidence has to be given before a court where no benefits what so ever are available to the disabled, and he has to personally go to the court and to give evidence but can take the assistance of an interpreter or a special educator in recording the statement[11]. Further the new amendment makes additional burden to the disabled person that the statement under section 164 (5)of the Cr.P.C are to be recorded by a magistrate for certain offences and then the disabled person has to be brought before a magistrate

9 In section 160 of the Code of Criminal Procedure, in sub-section (I), in the proviso, for the words "under the age of fifteen years or woman", the words "under the age of fifteen years or above the age of sixty-five years or a woman or a mentally or physically disabled person" shall be substituted.

10 Clause (a) of the second proviso to Section 154, Cr.P.C provides that where an offence under Section 354, 354A-354D, 376, 376A-376E or 509 of the Indian Penal Code, 1860 is alleged to have been committed or attempted and the victim is temporarily or permanently mentally or physically disabled person, then such information shall be recorded by a police officer, at the residence of the person seeking to report such offence or at a convenient place of such person's choice, in the presence of an interpreter or special educator, as the case may be.

11 section 119 of the Evidence Act A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court, evidence so given shall be deemed to be oral evidence:
Provided that if the witness is unable to communicate verbally, the Court shall take the assistance of an interpreter or a special educator in recording the statement, and such statement shall be video graphed

for recording the same[12].

Another situation where a disabled person used to come into contact with the criminal justice system is when he is called as a witness in any case. In that situation also he has to personally attend the court for giving evidence. Usually the witness is likely to wait for hours for giving evidence. It is to be noted that proper sitting or waiting arrangements are not provided in our courts for the witnesses. The reason why the Indian courts insist for the personnel presence of a witness in a criminal proceeding is that the accused has a right that all the evidences against him have to be taken in his presence[13]. Provisions are available in our Criminal Procedure Code to the effect that if any of the witnesses is not capable of appearing before the court for giving evidence, then his personal appearance will be dispensed with by the court and the court may order for issuing a commission for the examination of such a person[14]. In *State of Maharashtra v. Dr. Praful B. Desai* [15]the Supreme Court of India ruled that Video conferencing is an advancement in science and technology which permits one to see, hear and talk with someone far away, with the same facility and ease as if he is present before you i.e. in your presence. In fact he/she is present before you on a screen. Except for touching, one can see, hear and observe as if the party is in the same room. In video conferencing both parties are in presence of each other.

12 In section 164 of the Code of Criminal Procedure, after sub-section (5), the following sub-section shall be inserted, namely:—
"(5A) (a) In cases punishable under section 354, section 354A, section 354(B), section 354C, section 354(B), sub-section (I) or sub-section (2) of section 376, section 376 A, section 376(B), section 376C, section 376(B), section 376E or section 509 of the Indian Penal Code, the Judicial Magistrate shall record the statement of the person against whom such offence has been Committed in the manner prescribed in sub-section (5), as soon as the commission of the offence is brought to the notice of the police:
Provided that if the person making the statement is temporarily or permanently mentally or physically disabled, the Magistrate shall take the assistance of an interpreter or a special educator in recording the statement:
Provided further that if the person making the statement is temporarily or permanently mentally or physically disabled, the statement made by the person, with the assistance of an interpreter or a special educator, shall be video graphed.

13 Sec. 273 of Cr.P.C provides that evidence to be taken in presence of accused. Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader

14 Sec. 284 (1) of Cr.P.C. reads-: Whenever, in the course of any inquiry, trial or other proceeding under this Code, it appears to a Court or Magistrate that the examination of a witness is necessary for the ends of justice, and that the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable, the Court or Magistrate may dispense with such attendance and may issue a commission for the examination of the witness in accordance with the provisions of this Chapter:lays down the following situations when attendance of witness may be dispensed with and commission issued.

15 (2003) 4 SCC 601

The witness can be confronted with documents or other material or statement in the same manner as if he/she was in Court. All these objects would be fully met when evidence is recorded by video conferencing. Neither The Persons With Disabilities (Equal Opportunities, Protection of rights and Full Participation Act) 1995 nor The Rights of Persons with Disabilities Act 2016 provides for any such provision for recording the evidence by video recording for helping the disabled in this behalf.

The third situation where a disabled person used to come into contact with the criminal justice system is when they are accused of and subsequently punished for some crime. People who have disability particularly, intellectual disability, and who are involved with the criminal justice system are by far one of the most vulnerable and disadvantaged groups in our society. People who have an intellectual disability have specific vulnerabilities when they have contact with the criminal justice system, from the time of apprehension to incarceration. They are more susceptible to suggestibility and false incrimination and if imprisoned, more likely to be physically, emotionally and financially abused. Studies have found that offenders who have an intellectual disability are more likely to be uneducated, unemployed, poor, members of an indigenous minority, have suffered from childhood neglect or abuse, have deficits in social and communication skills, and suffer from behavioral and/or psychiatric disorders.

The influence of defective intelligence in the causation of delinquency has not been accurately determined. Behaviour is the result of innate tendancies and environmental influences in the feebleminded individual as in the case of normal individual. The environment in which many of the defective delinquent live make it difficult for individuals of even higher mental levels to make succusful adjustments. The unstable, neurotic, poorly balanced weak-willed individual with marked character defects and personality handicaps, but often with good intelligence is the nost difficult problem we have to meet in handling criminals.

Despite individual differences, some characteristics inherent in people of low intellect make them vulnerable in the criminal justice system. They are more likely to be apprehended than criminals of normal intelligence. With their first encounter with police they are likely to communicate and behave in ways that increase the chance of arrest and punishment regardless of guilt, innocence or mitigating circumstances

Many individuals with developmental delay have learned that it is best to conceal their disability in order to gain social acceptance. They have learned to live a life of

denial. Although such behavior might be considered adaptive as it often works to one's advantage in the community, it can result in serious consequences when generalized to the criminal justice system. The American law, particularly after the Miranda verdict, gives various protections to the person with developmental disability in the event of his arrest. In any arrest of a person with a developmental disability, his guardian or other personal representative should contact a lawyer immediately. Instructions should be given to the client not to talk with the police until his lawyer is present. If a parent or guardian cannot afford a lawyer, the public defender's office in the county where he resides or where the offense took place may be able to represent the suspect. Before the public defender's office represents the suspect, they must be assured that the suspect cannot afford a private attorney.

Several other practical concerns for individuals with disabilities are present when arrested. First, a person with a disability may not recognize a police officer. Second, he may not understand what is being said by the police, and more importantly, not understand his constitutional rights; and third, he may not know what to do after being arrested and detained. The management of people with developmental disabilities in the criminal justice system is a difficult area for several reasons. Firstly, there is no standard terminology, and no set of agreed upon definitions that are used to categorize who have developmental disabilities. The labels like 'intellectually deficient' encompass a very broad range of functional abilities, while there are no clear means of measuring 'intellectual deficiency' and 'development disability.' Secondly, those working within the criminal justice system face significant difficulties with the identification, proper assessment, and effective treatment of developmentally disabled offenders.

Studies shows that developmentally disabled men were five times more likely to commit a violent offence than men with no disorder or disability, and developmentally disabled women were 25 times more likely to commit a violent offence than women with no disorder or disability[16]. This study also found that people with developmental disabilities have an increased risk for offending generally. Developmentally disabled men were three times more likely than non-developmentally disabled men, and developmentally disabled women were four times more likely than non-developmentally disabled women to commit an offence.

16 Sheilagh Hodgins, *Mental Disorder, Intellectual Deficiency, and Crime: Evidence From a Birth Cohort* 482(1992) available at http://www.researchgate.net/publication/271291717 (visited on 12/10/2016)

Simpson & Hogg[17] provide a review of the literature on the predisposing factors of criminality amongst the developmentally disabled. Amongst other things, these researchers found that gender, age, and socio-economic class were significant factors associated with criminality. They also found that the likelihood of offending increased when the developmental disability was in the borderline range, and also when there was a history of offending and/or behavioural problems. It has also been found that police reacted more strongly when crimes were committed by developmentally disabled males rather than by developmentally disabled females.

The issue of the competence and the fitness of developmentally disabled defendants arise at several stages of the criminal justice and legal processes. These stages include participation in a defense, the ability to provide a valid confession, the ability to waive rights and the ability to stand trial. Unfortunately the criminal law of our country does not recognize developmental disability or intellectual disability as a defense or as a mitigating factor. The only available defense is insanity which is based on a century old Mc Naughten principles. Therefore persons with developmental disability or intellectual disability are treated like any other ordinary person and their rights are not properly protected in our country.

It is generally agreed that developmentally disabled persons are over-represented in the criminal justice system. This over-representation may be due to the differential treatment of developmentally disabled defendants, documented in the literature, at various stages of the criminal justice process, including contact with the police, contact with lawyers, during the legal process in courts, and the prison experience.

The inadequacy of treatment programs for developmentally disabled defendants is one of the major challenges faced by the criminal justice system today. While certain treatment approaches have been found to be more effective for certain types of offences, program inadequacy is linked to the difficulties in identification and classification, as well as the lack of inter-agency collaboration. Article 15 of United Nations Convention on the Rights of Persons with Disabilities provides for freedom from torture or cruel, inhuman or degrading treatment or punishment[18]. A similar

17 Simpson & Hogg Patterns, *Offending among people with intellectual disability: a systematic review*, 45 Journal of Intellectual Disability Research 384, 386 (2001).

18 Article 15
Freedom from torture or cruel, inhuman or degrading treatment or punishment
1. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation.
2. States Parties shall take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment.

provision can be seen in the Rights of Persons with Disabilities bill 2014 also[19]. But are we able to provide such rights to the disabled offenders? It is the duty of our criminal justice system to ensure that persons with disabilities charged with or convicted of a criminal offence are not discriminated against in the criminal justice system.

If in any case a disabled person has to suffer imprisonment such an imprisonment will be another additional suffering for them. Imprisonment represents a disproportionately harsh punishment for offenders with disabilities, often worsening their situation and placing a significant burden on the prison system's resources. Due to their vulnerable physical condition, prisoners with disabilities are easy targets for abuse and violence from other prisoners and prison staff. Prisoners with disabilities encounter difficulties in accessing services, complying with rules and participating in prison activities that do not take account of their special needs. At this juncture, it is appropriate to quote the example of Laxmi. *Laxmi, aged 44 has been a prisoner at a Haryana jail, for the past five years. None of her family members visited her since she was convicted and sentenced to life imprisonment. She occupies, what is considered to be, the 'best' spot in the convicted prisoners barrack. Her bed is located beside a window, close to the washrooms. Although Laxmi is completely unaware of why she gets to hold this sought after 'spot,' the truth is far from pleasant. All the other inmates cannot bear sleeping close to Laxmi because the thin cotton bedding she lays on all day perennially stinks of urine and sweat. Since her childhood, Laxmi suffers from severe physical and mental disabilities. She cannot communicate coherently and needs assistance to eat, get dressed, bathe and use the bathroom. She has been provided no specific medical care or assistance from the jail authorities and she is completely at the mercy of her barrack mates who voluntarily take turns in assisting Laxmi throughout the week.* [20]

The prisons are usually a closed and restricted environment, where there is lack of proper prisoner differentiation and supervision, and overcrowding may lead to violence and therefore the difficulties people with disabilities face in society are magnified in prisons. In many countries of the world prisoners are accommodated in overcrowded, poorly ventilated and unsanitary prisons, in an atmosphere that is charged with the perceived or real risk of violence and abuse. Such conditions induce stress, depression and anxiety, which may develop into more serious mental disabilities, if appropriate action is not taken. Prisoners with mental health care

19 See Sec. 5 of Rights of Persons with Disabilities Bill 2014

20 Nitika Nagar, 2/6/2014, alexis.co.in/preshti/prison-diaries-the-rights-of-prisoners-with-disabilities, (visited on 21stNov,2016).

needs comprise a particularly vulnerable group in prisons and have a complex set of needs relating to the protection of their human rights, including provision for appropriate mental health care. They are ill-equipped to survive in the often brutal and brutalizing environment of prisons, and their condition most often deteriorates in the absence of adequate health care and appropriate psychosocial support. Sometimes prisoners with mental disabilities will be housed separately, in extremely inferior conditions with even more restricted access to food, hygiene and health facilities. In some countries prisoners with mental disabilities will be physically restrained, commonly by chains, on a constant basis.

Prisoners with intellectual disabilities are likely to be in need of special health care services, such as behavioural therapy, speech therapy, occupational therapy and physio therapy. Non availability of timely treatment and continuous care further aggravates the situation. The family in many instances is unwilling to house or care for such persons and there is no place in the community for their rehabilitation. For patients with mental health care needs on medication, a break in treatment may have extremely adverse affects, leading to the rapid deterioration of mental well-being. If at all any prisoner is to be transferred from any prison such transfers to other prisons should be accompanied by full medical records and referral letters explaining the current health problems and individual treatment plan.

Studies have shown that people with intellectual disabilities face a higher prevalence of psychosocial or psychiatric disabilities than the general population.[21] People in society have some misconceptions and fears about mentally defective offenders and therefore other prisoners are often unwilling to associate with prisoners with mental disabilities. This can lead to the isolation of such prisoners, leading to the further deterioration of their mental health and further stigmatization. Prisoners with mental disabilities are vulnerable to abuse, sexual assault and violence by other prisoners. Mentally defective offenders are used as a tool by the nefarious offenders for various offences. They have difficulty in understanding the prison code, may be intimidated by staff into acting as informers or forced by other prisoners into performing acts that are harmful to them or that get them into trouble. Both male and female prisoners with mental disabilities often become victims of rape in the prison setting. Some may demonstrate disruptive behaviour, aggression and violence. Others will simply refuse to follow routine orders, for no apparent reason. Disciplinary

21 Rickford D. and Kimmett, E., *Troubled Inside: Responding to the Mental Health Needs of Men in Prison*101, Prison Reform Trust (2005).

violations in prisons are subject to punishment, often in administrative segregation/ isolation units. As a result, prisoners with mental disabilities, who break the rules, will often be placed in these units, which is extremely harmful to their mental wellbeing, sometimes leading to self-harm and suicide. Placing prisoners with mental disabilities in segregation units to punish them for their behaviour cannot act as a deterrent and can dramatically worsen the prisoners' condition. Frequent disciplinary offences and punishment lead to the accumulation of misconduct reports, which have a negative impact on the early release opportunities of prisoners with mental disabilities—the very prisoners who should benefit from parole as a priority. Persons with mental illness are likely to remain in prisons for unnecessarily long periods of time because their illnesses go unnoticed, undiagnosed and untreated. Keeping prisoners with mental disabilities in prison even after the completion of their sentence, violates the human rights of such persons and is unacceptable according to national and international laws. Prison sentences are to be used as a last resort in the case of offenders with disabilities, taking into account the provision for their special needs if imprisoned and the risk they pose to the public.

Conclusion

Therefore it can be rightly concluded that the persons with disability particularly that of the persons with developmental disability are not equally treated and their rights are not equally protected by the present justice system particularly the criminal justice system of our country. Though there are a number of national and international laws and documents exist for the protection of the disabled persons, it is doubtful whether these rights and protections are practically enforced in our country. It is therefore high time to make necessary changes in the present laws and to enforce them vigorously so that the differently abled persons can have a feeling that they are properly taken care of by the legal system.

CONSTITUTIONAL AND HUMAN RIGHTS PROTECTION OF RIGHT TO HEALTH CARE

Dr.Gigi P.V *

Introduction

Constitution of India not only provides for the health care of the people but also directs the State to take measures to improve the condition of health care of the people. The preamble to the Constitution of India secure for all its citizens justice social and economic .The Constitution provides a framework for the achievement of the objective laid down in the preamble.

The right to health has not been integrated directly into the Constitution of India. The only right that is related to right to health is the right to life guaranteed under the Constitution.[1] The Indian Supreme Court by its innovative judicial interpretation of the various provisions has given a new content and scope to the right to life, which has come to stay as a sanctuary for human values. The Supreme Court has interpreted the right to life as embracing the right to live with human dignity, which included the quality of life along with all the basic human needs such as food, clothing, shelter, safe drinking water, education and health care. [2]

In *State of Punjab* v. *Mohinder Singh Chawla*[3] it was declared that since the right to health was an integral part of the right to life the Government has a constitutional obligation to provide health facilities. Similarly in Mr: 'X' v. Hospital 'Z' [4] the Supreme Court held that the right to life includes the right to lead a healthy life so as to enjoy all facilities of human body in their prime condition. In a similar view, in *Chameli Singh* v. *State of U.*P [5] it was held that the

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Article 21 of the Constitution, which declares, "No *person shall be deprived of his life or* personal *liberty except according to the procedure established by law*".

2 *Francis Coralie Mullin* v. *The Administration Union Territory of Delhi* A.I.R1981 SC.753.

3 (1997) 2 SCC 8371

4 A.I.R1999 SC 495

5 A.I.R. 1996 SC 1051

right to life implies the right to food, water, decent environment, education, medical care and shelter

These are basic human rights known to any civilized society. The civil, political, social and cultural rights enshrined in the Constitution cannot be exercised without these basic rights.

The Supreme Court, in *Paschim Banghakhet Mazdoor Samity and others* v. *State of West Bengal and another* [6], while widening the scope of Art: 21 and dealing with the government responsibility to provide medical aid to every person in the country, held that in a welfare State, the primary duty of the government is to secure the welfare of the people. Providing adequate medical facilities for the people is an obligation undertaken by the government in a welfare State. So it was contented that the petitioner should be suitably compensated for the breach of his right guaranteed under Art: 21 of the Constitution. After due regard to the facts and circumstance of the case, compensation was awarded. The Paschim Banga[7] reiterates the position that the right to medical services is part of the right to life and the State has a duty to provide it either through the State machinery or through the private sector.

Later in *Paramand Kattara* v. *Union of India* [8] the court made only a declaration that legal or procedural technicalities cannot stand in the way of the doctor providing emergency medical care to accident victims. Eventhough this decision does not impose any positive obligation on doctors of private hospital to provide medical treatment to accident victims; it was an effective decision for the enforcement of the right of patient.

The court again in *Vincent Panikulangara* v. *Union of India*[9] held that, 'a healthy body is the very foundation for all human activities'. In welfare State, it is the obligation of the State to ensure the creation and the sustenance of conditions congenial to health[10]. Even though this is the recommendation of highest court in

6 4 SCC (1996) Art 21 imposes an obligation on the state to safeguard the right to life of every person. Preservation of human life is thus of paramount importance. The government hospital run by the state is duty bound to extent medical assistance for preserving human life. Failure on the part of the government hospital to provide timely extend medical assistance

7 Id

8 A.I.R 1989 SC 2039

9 A.I.R.1997 SC 994

10 Art: 47 of Indian Constitution "The state shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and in particular, the state shall endeavour to bring out prohibition of the consumption except for medical purpose of intoxications drinks and of drugs which are injurious to health"

India, State and its health machinery system is unable to enforce any strategy for providing quality medical aid to those persons who needed the service.

The court further stated in a series of pronouncements during the recent years that right to health has been carried from the provision of part IV of the Constitution [11] and this cast a duty on the State to raise the level of nutrition and the standard of living and to improve public health. These directive principles are only directive to the State. These are non- justifiable. No person can make claim for non- fulfillment of these directives. But at the sometime if any of the fundamental rights is not fulfilled, then a person can claim those rights as a matter of right and State can be made liable for non-fulfillment of these rights. The effective enforcement of right to health through writ jurisdiction is not at all accessible to common man because of expensive cost of litigation. At the same time it could not be implemented through the court as merely a Directive Principle of State Policy.

The observation in *Paramand Kattara*[12] created a new right- the right to get medical aid and it has become an integral part of the right to life guaranteed under Art; 21 of the Constitution .The Supreme court in *Consumer Education and Research Centre* v. *Union of India*[13] has reiterated this stand. In this case the issue was regarding health problem and the right of labourers to get adequate medical aid. While answering this question, the court said "the facilities and opportunities that are enjoined in Art 38 should be provided to protect the health of the workmen. It was held that the right to health and medical aid is a fundamental right under Art: 21 read with Art. 39 (c), 41 and 43 of Constitution and to make the life of the workmen meaningful and purposeful with dignity of person. Right to life, which includes protection of the health and quality medical aid, is a minimum requirement to enable a person to live with human dignity." [14]

The Supreme court, while examining the issue of the Constitutional right to medical aid under Art : 21,41,and 47 of the Constitution of India in *State of Punjab* v. *Ram Lubhaya Bagga*,[14]observed that the right of one person correlates with a duty upon another individual, employer, government or authority. Hence, the right of a citizen to live under Art: 21 is an obligation on the State. This obligation has been reinforced through Art: 47, as its primary duty. No doubt, the government is rendering this obligation through health centers, but to be more meaningful they must be within the reach the people.

11 A.I.R 1989 SC 2039
12 (1995) 3 SCC 42
13 Id
14 (1998) 4 SCC 167

Every citizen of this welfare State looks towards the State to perform this obligation effectively in a number of ways, including by way of allocation of sufficient funds. State should evolve the necessary legal machinery for handling the issue relating to the matter of negligence or intentional negligence from the part of hospital authorities, doctors and accessory staff. These in turn will not only secure the rights of its citizen to their satisfaction but will benefit the State in achieving its social, political and economic goals. In addition to the Constitutional developments the international conventions and other obligations have a direct impact on the Indian health conditions, in view of India's commitments to abide by and implement the Treaty obligations and the ratifications made by it under Article 51 of the Constitution.

Evolution of medical care law through Human Right Jurisprudence

The right to medical care is an age-old phenomenon. Adoption of the Human Rights paradigm has the potential to revolutionize the health field. It is inconceivable to separate health and human right and they need to be integrated into all aspects of health care. Human Rights violation has a negative impact on health. Indian conceptualization of human right can best be exemplified in the *vedic* prayer "*Sarve Sukhinath sarve-santhi Niramayah*" may everybody in this universe be happy and healthy. [15]This principle highlights the global and multidimensional nature of our commitment to the protection and preservation of human rights. The most important right relating to the body of human person is the right to health and this found place in the realm of human rights even from earlier days. There are several international documents which discusses these principles- which we will look into in the next segment.

International Efforts for Health care protection

The right to medical care, as an international human right, is founded on the edifice of the prescription of the United Nation Charter, [16]the International Bill of

15 V.R. Krishna Iyer, *The Dialetics and Dyanamics of Human Rights in India Yesterday Today and Tomorrow* 299(Eastern Law House Private Limited ,1st ed 1999).

16 Article 55 and 56 of United Nations Charter Article 55. With a view to the creation of condition of stability and well being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self – determination of people, the United Nations shall promote.

(a) Higher standards of living, full employment, and condition for economic and social progress and development.

(b) Solution of International economic, social, health and related problems: and international cultural and educational co-operation; and

(c) Universal respect for and observance of human rights and fundamental freedom for all without distinction as to race, sex, language or religion.

Rights,[17] the United Nations Convention on the Right of the Child, 1989 etc[18]. Therefore, the members of the international community are expected to build their health care Convention on Elimination of All Forms of Discrimination against Women 1979[19],

17 Art 25(1) of Universal Declaration of Human Rights. Everyone has the right to a standard of living adequate for the health and well- being of himself and of his family, including food, clothing, and housing and medical care and necessary social services, and the right to security in the event of unemployment sickness, disability, widowhood, old age or other lack of livelihood in circumstance beyond his control. Article 12 International covenant on Economic social and cultural rights.

(1) The states parties to the present covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

(2) The step to be taken by the states parties to the present parties to present covenant to achieve the full realization of this right shall include those necessary for:

18 Art.24 (1) United Nations Conventions on the Right of the Child, 1989

1 States parties to recognize the right of the child to the employment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States parties shall strive to ensure that no child is deprived of his or her right of access to such health care service.

2 State parties shall pursue full implementation of this right and, in particular, shall take appropriate measures;

(a) To diminish infant and child morality;

(b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development primary health care;

(c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking – water, taking into consideration the dangers and risks of environmental pollution.

(d) To ensure appropriate pre-natal and post-natal health care for mothers:

(e) The ensure that all segments of society, in particular parents and children, are informed, have access to education and care supported in the use of basic knowledge of childhealth and nutrition, the advantage of breast- feeding, hygiene and environmental sanitation and the prevention of accidents;

(f) To develop preventive health care, guidance for parents and family planning education and services.

3 States parties shall take all effective and appropriate measures with a view to abolishing traditional practices pre judicial to the health of children.

4 States parties undertaken to promote and encourage international co- operation with a view to achieving progressively the full realization of the rights recognize in the present article. In this regard, articular account shall be taken of the needs of developing countries.

19 Art 14 of the Convention on Elimination of All Forms of Discrimination against Women 1979.

1 The states parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non monelised sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of this convention to women in rural areas

2 State parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and in particular, shall ensure to such women the right:

To participate in the elaboration and implementation of development planning in all levels;

b) To have access to adequate health care facilities, including information, counseling and service in_family planning(c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking – water, taking into consideration the dangers and risks of environmental pollution.

(d) To ensure appropriate pre-natal and post-natal health care for mothers:

strategies on this edifice. [20] These international documents provided ample recognition for right to medical care and quality treatment.

a) The Scheme of United Nations Charter

The Human Rights provision of the United Nation Charter does not explicitly deal with health as a Human Right. The charter declares that the promotion for respect of human right and fundamental freedom is the purpose behind the establishment of the United Nations Organization. [21]

To achieve this purpose, the United Nation is charged with the responsibility to promote, interalia higher standard of living, full employment, condition of economic and social progress and development and solutions to International economic, social, health and related problems. [22]In a similar vein, the member states are obligated to act in co-operation with the United Nations organization for the achievements of the declared purpose.

(b) The Scheme of International Bill of Rights

Pursuant to the call of the United Nation Charter for the promotion of "human rights and fundamental freedom", International community adopted on 10th

(e) The ensure that all segments of society, in particular parents and children, are informed, have access to education and care supported in the use of basic knowledge of childhealth and nutrition, the advantage of breast- feeding, hygiene and environmental sanitation and the prevention of accidents;

(f) To develop preventive health care, guidance for parents and family planning education and services.

3 States parties shall take all effective and appropriate measures with a view to abolishing traditional practices pre judicial to the health of children.

4 States parties undertaken to promote and encourage international co- operation with a view to achieving progressively the full realization of the rights recognize in the present article. In this regard, articular account shall be taken of the needs of developing countries.

20 Dr. B. Errabi, *Right to Health care: Need for its conversion into a statutory Enforceable Human Need- An Indian perspective*, 2 Delhi. L. Review 51 (1998)

21 See. The Charter of United Nations, Article,1. The purposes of United Nations are

1. To maintain international peace and security and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and to bring about by peaceful means, and in conformity with the principle of justice and international disputes, adjustment or settlement of international dispute or situations which might lead to breach of the peace.

2 To develop friendly relation among nations based on respect for the principle of equal rights and self-determination of people, and to take other appropriate measures to strengthen Universal peace:

3 To achieve international co-Operation in solving international problem of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedom for all without distinction as to race, sex, language, or religion and

4 To be a center for harmonizing the actions of nation in the attainment of these common ends.

22 Article 55 and 56 of United Nations Charter

December the Universal Declaration of Human Rights, which came into force in 1976. [23]

(c) The Universal Declaration of Human Rights

The adoption of the Universal Declaration of Human Rights by the United Nation General assembly brought Human Right revolution in the World. Declaration proclaims that all human beings are born free and equal in dignity and right and they are entitled to a social and international order in which the rights and freedom set forth in this Declaration can be fully realized.[24] The declaration expressly recognized the right to health. [25]

d) The Scheme of International Covenants on Human Rights

The International Covenant on Economic, Social and Cultural Right embodies the second-generation human rights, which are positive in scope and character, imposing positive and affirmative obligation on the State parties. It embodies the right to health comprehensively in Art12. [26]

The International Convention on the Elimination of all Forms of Racial Discrimination 1965 confers on member state a more effective positive obligation with regard to medical care. [27] Similarly Convention on Elimination of all Form of Discrimination against Women 1979,in Art: 12 requires state parties, interalia to take all appropriate measures to eliminate discrimination against women in the field of medical care in order to ensure, on the basis of equality of men and women, access to medical services, including those related to family planning. [28]Convention on the Elimination of All Forms of Discrimination against Women provides special

23 Universal Declaration of Human Rights,. 1948 Art: 1

24 Id. Art: 25 aims to guarantee the pree condition of good health, inducing the availably of health service Art 25(1) Everyone has the right to a standard of living adequate for the health and well- being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or others lack of livelihood in circumstances beyond his control.

25 R.R. Gandhi, *Black stone Inter\national Human Right Documents* 24 (Universal Law publishing Company Private Limited ,1st ed 1999).

26 International Covenant on Economic, Social and Cultural Right, 1996, Art: 10(3) Art: 11 and Art: 12(1)

27 Art 14 of the Convention on Elimination of All Forms of Discrimination against Women 1979.

28 The Convention on the Elimination of All Forms of Discrimination against Women 1976. Art 12(1) states parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure on the basis of equality of men and women, access to health care services, including those related to family planning.

health care protection for women. This Convention outlines women's protection from gender discrimination when receiving health services and women's entitlement to specific gender –related healthcare provisions. [29]

Maternity Protection Convention also confirm appropriate measures for the protection of health care of pregnant women. [30] Copenhegan Declaration & Programme of action of Social Summit mainly aims prevention, treatment and control of communicable disease. It aims to promoting and attaining the highest attainable standard of physical and mental health and access to primary health care without distinction as to race, national origin, gender and disability. [31]

The United Nations Convention on the Rights of the Child, 1989 requires that the State parties shall recognize the right of the child to the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. State parties shall strive to ensure that no child is deprived of his or her right of access to such medical care service. Convention on the rights of the child is also call upon parties to ensure that institutions and facilities for the care of children adhere to access to such medical care service. [32]Convention on the rights of the child is also call upon parties to ensure that institutions and facilities for the care of children adhere to

health standards. It recognize the child right to access information that is pertinent to his/her physical and mental health and well-being. [33] It makes specific reference to the rights of disabled children, in which it includes health services,

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29 Article 12 of United Nations Convention on the Elimination of all Forms of Discrimination against Women 1979

30 Maternity Protection Convention Article 4 provides that on production of a medical certificate or other appropriate certification as determined by national law and practice, stating the presumed date of child birth, a woman shall be entitled to a period of maternity leave of not less than 14 weeks.Article 10 Maternity Protection Convention,a woman shall be provided with the right to one or more daily breaks or a daily reduction of hours of work to breastfeed her child.

31 Copenhegan Declaration & Programme of Action of the Social Summit

32 Convention on the Rights of the Child, 1989,.Art 15 Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedom of others.

1. States parties recognize the right of the child to freedom of association and freedom to peaceful assembly.
2. No restriction may be placed on the exercise of these rights others than those imposed in conformity with the law and which are necessary in a democratic society or public safety public order(Order Public), the protection of Public health or morals or the protection of the rights and freedoms of others.

33 Article 23 Conventions on the Rights of the Child
Article 24 Parties recognize the rights of the children to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. State shall strive to ensure that no child is deprived of his or her right of access to such health care services

rehabilitation and preventive care. The convention also outlines child health in detail and states right to access to health service.

The European Social Charter [34] and American Declaration of the Rights and

Duties of Man [35] also deal with right to preservation of health. The Constitution of the civil and socialist countries of the Hemisphere also includes a statement on the rights to health including medical care and the duty of the state in regard to the health of the nation.

United Nations Convention on the Rights of Person with Disability envisaged right to health care of disabled persons. [36] European Convention on Social and Medical Assistance [37] as per this convention contracting party to the convention undertakes to ensure that nationals who are lawfully present in any part of the territory to which this convention applies and who are without sufficient resources shall be entitled equally with its own nationals to social and medical care.

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34 European Social Charter: 1961

PART-I

Every one has the right to benefit from any measure enabling him to enjoy the highest possible standard of health

PART –II

Article-II: The right to protection of health with a view to ensuring the effective exercise of the right to protection of health, the contracting parties undertaken, either directly or in co-operation with public or private organization, to take appropriate measure designed inter alia: -

1. To remove as far as possible the causes of ill health
2. To provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health
3. To prevent as far as possible epidemic, endemic and other diseases.

35 See American Declaration of Rights and Duties of Man, 1948.

Article: II: - Right to the preservation of health and to well-being.

Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extend permitted by public and community resources.

36 United Nations Convention on the Rights of Person with Disability 2007

Article 25 parties recognize that person with disabilities have attainable standard of health without discrimination on the basis of disability sate parties shall take all appropriate measures to ensure access for persons with disabilities to ensure access for persons with disabilities to ensure access to health services that are gender services including health related rehabilitation. In particular, state parties shall:

(a) provide person with disabilities with the same range, quality and standard of free or affordable health care and programme as provided to other persons, including the area of sextual and reproductive health and population based public health programme

(b) provide these health service needed by person with disabilities, including early identification and intervention as appropriate, and service designed to minimize and prevent further disabilities, including among children and older person

(c) provide these health service as close as possible to people's own communities including in rural areas

37 European Convention on Social and Medical Assistance 1953

The European Union respect fundamental rights are guaranteed by the European Convention for the protection of Human Rights and fundamental freedoms. The activity of the community should include the attainment of highest level of health protection. This treaty also mentions about the public health. It contains that the community shall contribute towards exercising the high level of human health [38]protection by encouraging co-operation between member states. Cairo Declarationon Human rights provided special reference to right to medical care and medical amenities for the people. Protection by encouraging co-operation between member states. [39] Cairo Declaration on Human rights provided special reference to right to medical care and medical amenities for the people.

Right to medical care like all other human Rights, is an internationally recognized legal right, prompting domestic legal systems to provide for their automatic judicial enforcement [40]. A classic example of this is India where the Indian Supreme Court has accorded judicial recognition and importance to various human rights embodied

38 Article 1.States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.

2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.
3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development
4. States Parties shall promote, in the spirit of international cooperation, the exchange of appropriate Treaty of European Union

39 The Cairo Declaration on Human Rights Article 17, everyone shall have the right to medical and social care & to all public amenities provided by society
Article 17(a)- Everyone shall have the right to live in a clean environment, away from vice and moral corruption, an environment that would foster his self-development; and it is incumbent upon the State and society in general to afford that right. (b) Everyone shall have the right to medical and social care, and to all public amenities provided by society and the State within the limits of their available resources. (c) The State shall ensure the right of the individual to a decent living which will enable him to meet all his requirements and those of his dependents, including food, clothing, housing, education, medical care and all other basic needs.

40 (d) Require health professionals to provide care of the same quality of person with disabilities in the provision of health insurance where such insurance is permitted by national law, which shall be provided in a fair and reasonable manner
(e) Prevent discriminatory denial of health care or health services of food and fluid on the basis of disability
Apparel Export Promotion Council v. *A. K. Chopra,* A.I.R. 625SC 1999

in the International Instrument to which India is a party. [41]There have been other international effort for the realization of the right to health care .The World Health Organization has played a pioneering role for the last few years in guiding the health policy, development, and action at the national and global level. The main objective of the World Health Organization shall be the attainment by all people of the highest possible level of health.

The term 'deficiency' in medical services should extend beyond the discriminating definition give under the Consumer Protection Act, 1986 [42] for the purpose of promoting Human Rights. The foundation of this term in fact forms the concern expressed by the International Organization for Consumer Union (IOCU) and the United Nations Guidelines on Consumer Protection. Failure to provide safety of product used in medical care service, experimental medicine and clinical trails on human being and abuse of diagnostic and curative procedure can also lead to Human Right violation. Access to medical care records in commercial transaction in human organs and research involving human embryo or human cells also need to be evaluated in the context of human rights law principles. There are several areas of medical service where violation of Human Rights has been notified. Some instances

Access to Health Care System

Civilized countries world over, consider availability of basic medical facilities as a part of the individual rights. The Indian Constitution declares the right to life as an important Fundamental Right. The duty to provide quality medical facility is a Constitutional mandate under the Directive Principle of State Policy. The court has again reminded the State about its positive duty to provide conditions for meaningful life to all people. This positive duty includes the duty to provide reasonable facilities for medical care. [43]Another issue in this connection is the suspension of medical service either for personal reason or as a form of collective action. When a doctor either by himself or through collective action involving other doctors etc willfully refuses to provide service -it is a gross abuse of right to life of hundred of patients and a denial of access to health care services. The remark made by Lory Backer that the "Hippocratic oath taken by the doctors has turned out to be a hypocrisy", is very meaningful in this context. It is necessary that there is proper check on such unfortunate instances, for promoting human right protection.

41 International Covenant on Economic, Social and Cultural Right, 1996, Art: 10(3) Art: 11 and Art: 12(1)
42 For the definition of the term' deficiency' see Section 2 of the Consumer Protection Act, 1986.
43 *Paschin Benga Keth Mazdoor Samithy* v. *State of West Bengal*, (1996)4 SCC 37.

Access to advanced medical treatment

Progress in modern medical science & technology has helped humanity to overcome many condition of ill health, which was previously considered to be incurable. Many of these procedures and treatments are highly expensive and unaffordable to the common man. Some of the developments include life saving procedures like Kidney, Liver, and bone-marrow transplantation. Even though the procedures are expensive it may help to save the lives of many. Apart from the expenses involved, transfer of live tissues from one man to another involves moral and ethical questions to be decided based on human right aspects. Many non-regenerating human tissues like Kidney, heart and cornea are capable of helping even terminally ill patients but their availability is limited. The alternative mechanism suggested is to look for candaveric, which may lead to large-scale exploitation. This constitutes another area of medical malpractice. Many civilized countries of the world including India have gone in for control over human organ transplantation. Very often-administrative procedures are envisaged for monitoring the process. [44]

So it may be possible to argue that to prevent chance of abuse, strict vigilance is a must. Thus attempts ought to be made for creation of proper machinery to co-ordinate all these activities and to ensure protection to the helpless patients. But the scenario in India is far from satisfactory .The Organ Transplantation Act there is no machinery to ensure absence of abuse of discretion by the administrative agencies. The result is that many valuable lives, which could have been saved, are lost due to the carelessness and lack of interest by the authorities concerned. [45]

The convention on Human Rights and Biomedicine confirmed that individual has to be shielded from any threat resulting from the improper use of scientific developments. It imposes restriction on the use of genetic testing. The right to consent of patients is also ensured under this convention.[46]

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44 Section 14 of Organ Transplantation Act

45 Organ Transplantation Act, 1994

46 46. The Convention on Human Rights and Biomedicine Article 5&9
Article 5 – General rule an intervention in the health field may only be carried out after the person concerned has given free and informed consent to it. This person shall beforehand be given appropriate information as to the purpose and nature of the intervention as well as on its consequences and risks. The person concerned may freely withdraw consent at any time.
Article 9 – Previously expressed wishes. The previously expressed wishes relating to a medical intervention by a patient who is not, at the time of the intervention, in a state to express his or her wishes shall be taken into account

Convention provides that right to consent underlines patient autonomy in their relationship with healthcare professionals and restraints the paternalistic approaches, which might ignore the wish of patients. Privacy in the health field is also safeguarded in the convention. [47]Additional Protocol to the Convention on Human Rights and Biomedicine, insisted personal consent for Genetic Test for health purposes. [48]

Access to Medical Records

Rights to Self determination of an individual extend to his freedom to decide whether to undergo a medical treatment or not. A rational decision in this regard can be taken only if all the information necessary for taking a decision is available to him. This is recognized as part of human rights by all civilized States and also as a part of right to information. The method adopted is to insist on informed consent of the patient. Similar is the case with information relating to his past illness, diagnosis and medical records. An opposite view could have been taken by invoking the principle of right to life. Failure to recognize it will amount to violation of human rights. However disclosure of medical information to third parties may involve breach of confidentiality on part of health authority. Such disclosure is required to protect the public from contagious diseases or to prevent greater harm to the other members of the public. Thus in the case of out break of contagious diseases, a medical officer is bound to disclose such information.

In *Dr.Tokudha Yepthomi* v *Apollo Hospital Enterprises Limited,* [49] the apex Court of India, without considering the human right issues involved, refused to look into the problem of breach of confidentiality in divulging HIV+ status. These are the areas involving blatant human right violations related to medical malpractice and must be considered seriously while enacting legislation

Safety of products used in health Care

An important aspect in the medical service sector is the quality, safety and prices of products used in medical treatments. Substantial injury may arise as a result of prescription of hazardous medicine. Many reported instances show that prescription

47 Id

48 As per Article 3 each member shall, after consulting the representative organizations of ensure that pregnant or breast feeding women are not obliged to perform work which has been determined by the competent authority to be prejudicial to the health of the mother or the child ,or where an assessment has established a significant test to the mothers health or that of her child

49 (1998)7 SCC 626

of hazardous medicine caused havoc to the public. In *A.S. Mittal* v. *Union of India*[50] and *Sunil Blood Bank Case*, Court imposed liability on hospital authority[51]. The problem related to hazardous drugs was considered by the Apex Court in *Vincent Panikulangara* v. *Union of India*[52] and *Common cause* v. *Union of India*. [53] It gave many directions for proper prescription and also effective functioning of blood banks in India. In European countries the wrongful prescription of hazardous medicine is considered as violation of human Rights of the people. The European Human Rights Court held that supply of blood containing HIV positive virus and the failure of the State to award compensation to the victims amounted to human rights violation. [54]

Experimental medicine and clinical trials

Experimentation of medicine in human body is a blatant violation of Human Rights. The Geneva Convention on Human Rights and Biomedicine 1998 provides many safeguards relating to this procedure. Countries like the United States have adopted detailed procedural safeguards relating to clinical trials and experimentation. These Guidelines and rules deal with permissibility and condition for human trials and the norms for promoting human rights of the clinical subjects. It is felt that absence of proper control on experimental medicines and ethical trials cause gross violation of Human rights. This is also another area of medical malpractice, which infringes human rights of people.

Abuse of Diagnostic and Curative Procedure

While the break –though in medical science was helped to promote health of people, the abuse of those very procedures can lead to disastrous consequence. For example, the pee-natal diagnostic technique is often used to determine the sex of the unborn child and has also helped in detecting early disorders in the foetus; but at the same time it has tuggeied off female feoticide. Similarly, organ transplantation which is boon to several people has also evoked instances of theft of vital human organs like kidney.

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50 (1989) 3 SCC 223
51 *Haresh Kumar* v. *Sunil Blood Bank,* 1 CPJ.465, NCRF (1991)
52 (1987) 1 SCR 497
53 (1996)4 SCC 33
54 *Windor work* v.*Nether lands*, 2 E.H.R.R.387 (1979); 4 E.H.R.R. 204(1984); *Vanderlev*.v *Netherland* 11 E.H.146, (1989)

However the pre-Natal Diagnostic Techniques (Prevention of Misuse) Act, 1994 and the Human Organ Transplantation Act, 1994 have very limited application for preventing this medical mal practice. There are many reported incidents where persons of sound mind are confined to a mental hospital because of the involvement of some doctors. The provisions of Mental Health Act[55] have not been able to tackles these malpractice. But at the same time in European countries, compulsory detention of patients in mental hospital and failure to review the detention periodically is treated as violation of Human rights.

Elaborate provisions have been made in the European Convention of Human Rights and Biomedicine to control abuse of human organ transplantation. Any experimentation on human embryo is strictly regulated in England by the Human Fertilization and Embryology Act, 1991. It is felt that absence of a clear understanding of the potential harm resulting from these procedures made India a silent spectator to these issues. Absence of proper and effective legislative control in these areas may result in misuse of the new technologies by the practitioner leading to rampant human right violation. Thus in *Brugganmann & Schecoton* v. *Germany*[56] the European Commission on Human Rights held that failure to consult the father before abortion is a violation of human rights of the father.

A similar conflict may arise in recognizing a biological father as the legal father of child. The modern reproductive technique often involves misrepresentation and malpractice by physician for money. So many concealed techniques are used by the doctors for the success of artificial insemination that is unknown for the spouses. That may be the reason why, the European Human Right Commission refused to accept all unethical practices as a matter of right of doctors and held them as gross Human Right violations .[57]

The patient's health is a major priority on the political agenda of the leading political parties. Position in European countries is far better than India. It is a well known fact that litigation and complaints in health care have increased over the last 10 years.[58] The National Audit office stated that: reported liabilities of clinical negligence continues to increase with the NHS with total potential liabilities of $ 2.4 billion disclosed in the accounts at 31 March 2011, an increase of 20-60 billion.[59]Every

55 Mental Health Act, 1986
56 E.H.R.R.244, (1981)
57 *Karoon* v. *Netherlands* ,14 E.H.R.R 263 (1995)
58 Derek Morgan, *Issue in Medical Law and Ethics* ,19 (Cavendish Publishing Company Limited 2nd ed. , 2000)
59 Prof. Robyn Martin and Linda Johnson, *Health Service Ombudsman for England*, 200 (Australian Medical Law London Cavendish Publishing Co .Ltd, 2nd ed 2011)

year the Health Service Ombudsman reported rises in complaint to his office, even though U .K has effective medical laws.

Medical law in Australia is a morass of statutory enactments and judge –made law. It may only readily be understood when placed in its context. Medical law operates within the federal structure of the Australian State. Each level of Government in Australia (whether local, State, or Federal) has legislative responsibility for different type of health care. [60]So in Australia they have effective legislation for preventing or controlling medical offence and negligence.

Historically, patients have relied on the advice of their medical providers. If any question was asked it was assumed that the doctor was the expert and knew what was best for the patient. Although the majority of health care providers are competent professionals with the utmost concern for the well-being of their patient, medical mistake do occur. And, unfortunately, due to the negligence of health care providers, the medical profession has come under attack in accounts of horrendous medical mistake. Statistics demonstrate that between 44,000 and 88,000 hospital patients die each year as a result of medical negligence.[61] This is the position of medical malpractice in western countries where effective law and maximum health facilities are easily available

The study of health law as an identifiable academic discipline across EU, is a relatively recent development.[62] Some academic commentators have cast the discipline in term of Medical Law which was clearly reflective of the dominance of the clinician in the litigation process. Medical care law may be seen generally as a composite of principles derived from other legal discipline such as standard principles of Criminal laws (applicable in malpractices litigation). [63]There is also increasing trend across member Sates to enact specific laws that relate to medical care. More over there is some evidence that medical law in the member States of the EU is being fundamentally affected by one major ethical work which has been legitimatized through legal developments, that of human rights analysis.

It is high time in India makes effective legal machinery to prevent medical malpractices by the doctors intentionally or under the title of negligence. They committed all these evil things either as a racket or as a single person for money and some other personal achievements. These manipulations can be controlled only

60 Brazier M. and Glover N, *Does Medical Law have a future*, 5 Journal of Medical Ethics703(2001)
61 Marget C. Jasper, *The law of Medical Malpractice*,168 (Oceana Publication, 2nd ed 2011)
62 L.O.Gestin, *Public Health Law: Powers: Duties: Restraint* 123 (University of California Press 2000)
63 Id

through the hands of proper, effective and skilled legal machinery, otherwise the medical practitioners will create confidence and outstanding courage to do whatever they like. Medical practitioner, hospitals have been committing human right violation on a daily basis with little or masses. They have assured "god like" disposition to do anything including depriving people of their basic right to health care. Hence there is a need for codified law with meaningful provisions for balancing the interest of medical practitioners, hospital authorities and patients effectively.

ADMISSIBILITY OF ELECTRONIC EVIDENCE

Dr. Jasmine Alex *

E-governed life in every sphere necessitates dependence on e-transactions and reliance on processes and materials adduced, utilized and generated during such transactions. As a natural consequence of e-governance and e-commerce, in litigations also electronic evidence creeps in and the question regarding admissibility of electronic evidence has come up for consideration before the judiciary as well as the legislature. Amendments in relevant statutes, but have not finally settled the issue and the judicial process continues with contradicting views, mainly because of the complicated technology which can easily vitiate the trustworthiness of evidence. With this premise, this research paper analyses different perspectives of the admissibility of electronic evidence.

Kinds of Electronic Evidence

Electronic evidence which can be brought in evidence in a judicial proceeding varies depending on the nature. For example, information in the nature of 'data' and 'postings' appearing on websites is often brought forth as evidence in litigation. Authenticated printouts of web pages reflecting the content and image of a specific web page on the computer will also form part of evidence.

In many jurisdictions information retrieved from government websites is self-authenticating,[1] subject only to proof that the webpage does exist at the governmental web location. But this does not preclude the opposing party from attacking the genuineness of the evidence adducing substantial evidence to his credit.[2] E-newspapers

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https://en.wikipedia.org/wiki/Self-authenticating_document , visited on 12-01-2017
2 Angela Foster, *Failure to Authenticate Emails Leads to Dismissal of Case*, Litigation News (February 25, 2014)

and periodicals are often treated as self-authenticating.[3] At the same time private websites are not at all considered self-authenticating and require additional proof of the source of the posting or the process by which it was generated[4].

Recently, social network messages are brought in litigations as potentially relevant evidence[5] in civil and criminal trials, which can be retrieved from internet sites known as 'social networks'.[6] Social networking websites permit their members to share information with others. Members create their own individual web pages or profiles through which they post personal information, photographs, and videos and from which they can send and receive messages to and from others whom they have approved as their friends. For example, anyone can create a Face Book Profile at no cost, as long as they have an email address and claim to be over the age prescribed by law to be eligible to get an email address or creating a profile. But the lack of security in this medium raises questions regarding admissibility of social network messages as reliable evidence; there must be confirming circumstances sufficient to uphold the inference that the purported sender was in fact the author.

Like internet evidence, email messages and text messages also raise authentication issues . The general principles of admissibility are essentially the same since email is simply a distinctive type of internet evidence; namely, the use of the internet to send personalized communications.When a computer is simply used as a typewriter, 'computer-stored documents' may be authenticated as evidence.[7] The mere presence of a document in a computer file will constitute some indication of a connection with the person or persons having ordinary access to that file.

Again, computer-generated material which is the product of the machine itself[8] (not of a person using the system), operating according to a program, will also come

3 Nicholas F. LaRocca Jr., *Authentication, Identification, and the Best Evidence Rule,* 36 Louisiana Law Review (1975)

4 In assessing the authenticity of website data, evidence is available from the person(s) managing the website (webmaster). A webmaster can establish that a particular file, of identifiable content, was placed on the website at a specific time. This may be done through direct testimony or through documentation, which may be generated automatically by the software of the web server.

5 RickConner, *Utilizing Social Media in Litigation*, available athttp://media.mcguirewoods.com/publications/2014/Litigator-April-2014.pdf (visited on 10-12-2016)

6 Rick E. Kubler, Holly A. Miller, *Recent Developments in Discovery of Social Media Conte*n, available at http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2015_inscle_materials/written_materials/24_1_recent_developements_in_discovery_of_social_media_content.authcheckdam.pdf (visited on 12-12-2016)

7 Johanne Gauthier,*The Admissibility of Computer-Generated Evidence:* An Overview, available at http://www.cmla.org/papers/Admissibility%20of%20Computer%20Generated%20Evidence.Johanne%20Gauthier.28.Nov.1997.pdf, (visited on 12-12-2016)

8 Here also, the learned computer programmers can intervene with the modalities of hacking.

to the category of e-evidence . Testimony about the computer equipment, hardware and software, the competency of the operatorsand the procedures for inputting data and retrieving the output may be necessary, to establish authenticity in such cases, particularly if these elements are challenged. Basic computer operations relied on in the ordinary course of business are admitted generally without an elaborate exposition of accuracy.At this backdrop, a brisk examination of the currently available legislative measures will help to understand the ambit of recognising e-materials in evidence.

Statutory Frame Work

The Information Technology Act 2000(with latest amendments) and the amendments made in Indian Evidence Act by virtue of Information Technology Act 2000 comprise the basic legal framework in this regard in India[9]. Section 3 of Indian Evidence Act[10] was amended and the phrase "All documents produced for the inspection of the Court" was substituted by "All documents including electronic records[11] produced for the inspection of the Court".[12] Regarding documentary evidence, in Section 59, for the words "Content of documents" the words "Content of documents or electronic records" have been substituted and Section 65A & 65B were inserted to incorporate the admissibility of electronic evidence.

Section 62 of the Evidence Act says that primary evidence of the contents of a document is the document itself. According to section 63, secondary evidence of the contents of a document includes, amongst other things, certified copies of that document, copies made by mechanical processes that insure accuracy, and oral accounts of the contents by someone who has seen that document. There are situations where the original document cannot be produced as stated in Section 65 of the Evidence Act and the secondary evidence listed in section 63 can be used to prove its content. Under section 59 of the Evidence Act, oral evidence cannot prove the contents of documents since the document is absent, the truth or accuracy of the

9 Corresponding amendments were made in Indian Penal Code (45 of 1860), Bankers Books Evidence Act, 1891, etc

10 Sarkar and Sarkar, 1&2, *Law of Evidence*, (Lexis-Nexis 18th edn.,2014); Avtar Singh, *Principles of the Law of Evidence* (Central Law Publications, 21st edn, 2014)

11 According to section 2(1)(t) of the IT Act, an electronic record is "data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche"

12 Section 3 of Indian Evidence Act has been amended by virtue of Section 92 of Information Technology Act, 2000 (Before amendment); section 92 is now omitted vide IT Act 2006.

oral evidence cannot be compared to the document and to prove the contents of a document, either primary or secondary evidence is necessary. But, in the era of e-records, where documents are increasingly stored electronically day by day, the hearsay rule faces new challenges in the matter of digital documents. When electronically stored information was treated as a document in India before 2000, secondary evidence of these electronic 'documents' was adduced through printed reproductions or transcripts, and the authenticity was certified. The signatory would identify signature in court and be open to cross examination by meeting the conditions of both sections 63 and 65 of the Evidence Act. When the creation and storage of electronic information grew more complex, the law had to change more substantially. By the Information Technology Act, 2000 new definitions are given to the words "data", "electronic record",and"computer".

The definition of 'admission'[13] has been changed to include a statement in oral, documentary or electronic form which suggests an inference to any fact at issue or of relevance. New Section 22-A has been inserted into Evidence Act, to provide for the relevancy of oral evidence regarding the contents of electronic records. It provides that oral admissions regarding the contents of electronic records are not relevant unless the genuineness of the electronic records produced is in question. Section 59 of the Evidence Act is amended by the IT Act to exclude electronic records and inserted section 65A and section 65B , instead of submitting electronic records to the test of secondary evidence as contained in sections 63 and 65. Section 65A has given the right to prove the contents of electronic records in accordance with the provisions of section 65B.

It is pertinent to note that in Sections 61 to 65, the word "Document or content of documents" have not been replaced by the word "Electronic documents or content of electronic documents". Thus, the intention of the legislature is explicit i.e. not to extend the applicability of sections 61 to 65 to electronic records. It is the cardinal principle of interpretation that if the legislature has omitted to use any word, the presumption is that the omission is intentional. It is well settled that the Legislature does not use any word unnecessarily.[14]

Section 65A of the Evidence Act is for electronic records just as section 61 does is for documentary evidence. A procedure, distinct from the one for oral evidence is formulated, to ensure electronic records obeys the hearsay rule. Section 65A is a

13 Section 17 Evidence Act

14 *Utkal Contractors & Joinery Pvt. Ltd. v. State of Orissa*, AIR 1987 SC 1454

special law that stands apart from the documentary evidenceprocedure in sections 63 and 65.[15]

Any probative information stored or transmitted in digital form is digital evidence or electronic evidence. Before accepting digital evidence, its relevancy, veracity and authenticity and whether the fact is hearsay or a copy is preferred to the original, is to be ascertained by the court. Digital Evidence is "information of probative value that is stored or transmitted in binary form". Evidence is not only limited to that found on computers but may also extend to include evidence on digital devices such as telecommunication or electronic multimedia devices.

Again, the analysis of the above legal framework encompasses detailed exposition of the following issues w. r. to e-evidence:

(i) Relevancy of Information

Upon the question of admissibility of electronically stored information(ESI), three issues have to be settled; ie., (i) whether it was properly preserved (ii) whether it was isolated for production and then produced, and (iii) whether it can be admitted into evidence. Regarding appreciation of evidence, *Ram Sharan Yadav v. Thakur MuneshwarNath Singh and others*[16] *lays:*

> *"By and large, the Court … while appreciating or analysing the evidence must be guided by the following considerations: (1) the nature, character, respectability and credibility of the evidence, (2) the surrounding circumstances and the improbabilities appearing in the case, (3) the slowness of the appellate court to disturb a finding of fact arrived at by the trial court who had the initial advantage of observing the behaviour, character and demeanour of the witnesses appearing before it, and (4) the totality of the effect of the entire evidence which leaves a lasting impression regarding the corrupt practices alleged."*[17]

While coming to the specific question of admissibility of e-evidence, in *Anvar* P.V v. *P.K.Basheer&Ors*[18] Kurian Joseph, J., for and on behalf of R. M. Lodha,CJI., and

15 Application of the latin maxim, *generalia specialibus non derogant*. When a specific provision is made by some other enactment within the Act, it is presumed that the situation was intended to be dealt with by the special provision. See, Francis Bennion, *Bennion on Statutory Interpretation* 1164 (Lexis nexis 4th edn., 2005)

16 4 (1984) 4 SCC 649: 1985 SCR (1)1089

17 Id. at 1093

18 In the Supreme Court of India, Civil Appellate Jurisdiction Civil Appeal No. 4226 of 2012: The facts of the case shows, in the general election to the Kerala Legislative Assembly held on 13.04.2011, the first respondent was declared elected to Eranad Legislative Assembly Constituency. He was a candidate supported by United Democratic Front. The appellant contested the election as an independent candidate, supported by the Left Democratic Front. Among the five candidates, appellant was second in

Rohinton Fali Nariman,J., elaborately discusses the scope of information in electronic records, as evidence. Accordingly, any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65A, can be proved only in accordance with the procedure prescribed under Section 65B[19]. Section 65B[20] deals

terms of votes; others secured only marginal votes. He sought to set aside the election under Section 100(1)(b) read with Section 123(2)(ii) and (4) of The Representation of the People Act, and also sought for a declaration in favour of the appellant. By order dated 16.11.2011, the High Court held that the election petition to set aside the election on the ground under Section 123(2)(a)(ii) is not maintainable . On appeal, having regard to the admissible evidence available on record, though for different reasons, the apex court also found it extremely difficult to hold that the appellant has founded and proved corrupt practice under Section 100(1)(b) read with Section 123(4) of the RP Act against the first respondent. In the result, the appeal was dismissed.

19 Id., para 12

20 Section 65B: Admissibility of electronic records: (1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible. (2) The conditions referred to in sub-section (1) in respect of a computer output shall be the following, namely: - (a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities; (c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and (d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities. (3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by computers, whether – (a) by a combination of computers operating over that period; or (b) by different computers operating in succession over that period; or (c) by different combinations of computers operating in succession over that period; or (d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly. (4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say, - (a) identifying the electronic record containing the statement and describing the manner in which it was produced; (b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer; (c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it. (5) For the purposes of this section, - (a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without

with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. As section 65B starts with a non obstante clause that notwithstanding anything contained in the Evidence Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under sub-Section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document, i.e., electronic record depends on the satisfaction of the conditions under Section 65B (2).[21]

In Anwar's case it is again clarified:

> *"Only if the electronic record is duly produced in terms of Section 65B of the Evidence Act, the question would arise as to the genuineness thereof and in that situation; resort can be made to Section 45A – opinion of examiner of electronic evidence. The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under Section 65B of the Evidence Act are not complied with, as the law now stands in India."*[22]

The leading case, *Jack R. Lorraine and Beverly MackvMarkel American Insurance Company*[23] has already become the standard rule in US as far as admissibility of ESI

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human intervention) by means of any appropriate equipment;(b) whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities; (c) a computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

Explanation: For the purposes of this section any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process."

21 The conditions embodied in section 65B(2) are:

(i) The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;

(ii) The information of the kind contained in electronic record or of the kind from which the information is derived was regularly fed into the computer in the ordinary course of the said activity;

(iii) During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and

(iv)The information contained in the record should be a reproduction or derivation from the information fed into the computer in the ordinary course of the said activity.

22 In the Supreme Court of India, Civil Appellate Jurisdiction Civil Appeal No. 4226 of 2012; paras 16&17

23 In the United States District Court for The District of Maryland, Civil Action No. Pwg-06-1893; 241 FRD 534 (D Md 2007)

is concerned. Accordingly, "the court need not find that the evidence is necessarily what the proponent claims, but only that *there is sufficient evidence* that the jury ultimately might do so".[24] These judicial prepositions show the discrepancies or lack of effective statutory guidelines in evaluating authenticity of the electronic evidence, which the judiciary is trying to make good each time.

(ii) Authenticity of Information

Admissibility of an electronic record in evidence depends on its authenticity. How can the nature and extent of authenticity be proposed? Precisely, there should be evidence to support a finding that the matter in question is what the party claims[25]. The party who brings in e-evidence need not prove beyond all doubt that the evidence is authentic and has not been altered.

Prior to the year 2000, electronically stored information was treated simply as a document and secondary evidence of these 'documents'(electronic) was adduced through printed reproductions or transcripts, the authenticity of which was certified by a competent signatory. The signatory would identify his/her signature in court and be subjected to cross examination. This simple procedure was in tune with sections 63 and 65 of the Evidence Act. However, as the technology developed tremendously, and the techniques for creation and storage of electronic information became more and more complex, substantial changes in lawto overcome the technical foul plays was required. For example, internet postings may include data posted by the site owner, data posted by others with the consent of the site owner, and data posted by hackers without consent. Again, computer-generated documents and files include electronically stored records or data, computer simulation, and computer animation, where also unauthorized interventions are possible to a greater extent.

24 Id. at 542

25 The conditions embodied in section 65B(2) are:

(i) The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;

(ii) The information of the kind contained in electronic record or of the kind from which the information is derived was regularly fed into the computer in the ordinary course of the said activity;

(iii) During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and

(iv)The information contained in the record should be a reproduction or derivation from the information fed into the computer in the ordinary course of the said activity.

Ruchi Majoo v Sanjeev Majoo [26]is a case deserving mention where the court admitted e-mail communications as authentic evidence.These kinds of situations actually necessitatejudicious and careful intervention of the Bench to determine the standard of authenticity of information in each case.

ii (a) Authentication w.r. to Computer-Stored Records

The standard for authenticating computer records is the same as for authenticating other records. The mere possibility of alteration is not sufficient to exclude electronic evidence. Possibilities of alteration and the evidence in this regard will questiononly the'weight' of evidence, not the 'admissibility'.[27] The law permits the court to seek expert opinion also in this regard.[28]

ii (b)Authentication of Records Created by a Computer Process

Records that are not just stored in a computer but rather result in, whole or part, from a computer process, will often require a more developed foundation. To demonstrate authenticity for computer-generated records, the parties should

26 (2011) 6 SCC 479 : Proceedings included an action filed by the father-respondent in this appeal, before the American Court seeking divorce from the respondent-wife and also custody of master Kush. An order passed by the Superior court of California, County of Ventura in America eventually led to the issue of a red corner notice based on allegations of child abduction levelled against the mother who like the father of the minor child is a person of Indian origin currently living with her parents in Delhi. The mother took refuge under an order dated 4th April, 2009 passed by the Addl. District Court at Delhi in a petition filed under Sections 7, 8, 10, 11 of the Guardians and Wards Act granting interim custody of the minor to her. Aggrieved by the said order the father of the minor filed a petition under Article 227 of the Constitution of India before the High Court of Delhi. By the order impugned in this appeal the High Court allowed that petition, set aside the order passed by the District Court and dismissed the custody case filed by the mother primarily on the ground that the Court at Delhi had no jurisdiction to entertain the same as the minor was not ordinarily residing at Delhi - a condition precedent for the Delhi Court to exercise jurisdiction. The High Court further held that all issues relating to the custody of child ought to be agitated and decided by the Court in America not only because that Court had already passed an order to that effect in favour of the father, but also because all the three parties namely, the parents of the minor and the minor himself were American citizens.

27 See United States v. Safavian, 435 F. Supp. 2d 36, 41 (D.D.C. 2006; United States v. Whitaker, 127 F.3d 595, 602 (7th Cir. 1997); United States v. Bonallo, 858 F.2d 1427, 1436 (9th Cir. 1988) -The fact that it is possible to alter data contained in a computer is plainly insufficient to establish untrustworthiness.; United States v. Glasser, 773 F.2d 1553, 1559 (11th Cir. 1985) -The existence of an air-tight security system [to prevent tampering] is not, however, a prerequisite to the admissibility of computer printouts. If such a prerequisite did exist, it would become virtually impossible to admit computer-generated records; the party opposing admission would have to show only that a better security system was feasible.

28 Evidence Act, section 45A: Opinion of Examiner of Electronic Evidence.-When in a proceeding, the court has to form an opinion on any matter relating to any information transmitted or stored in any computer resource or any other electronic or digital form, the opinion of the Examiner of Electronic Evidence referred to in section 79A of the Information Technology Act, 2000(21 of 2000)., is a relevant fact. Explanation.--For the purposes of this section, an Examiner of Electronic Evidence shall be an expert."

introduce evidence describing a process or a system used to produce a result and showing that the process or system produces an accurate result. In most cases, the reliability of a computer program can be established by showing that users of the program actually do rely on it on a regular basis, such as in the ordinary course of business.[29] While expert testimony may be helpful in demonstrating the reliability of a technology or computer process, such testimony is often unnecessary.[30] Notably, once a minimum standard of trustworthiness has been established, questions as to the accuracy of computer records "resulting from . . . the operation of the computer program" affect only the weight of the evidence, not its admissibility.[31] Federal courts that evaluate the authenticity of computer-generated records sometimes assume that the records contain hearsay and then apply the business records exception.[32] In England, section 60 of the Youth Justice and Criminal Evidence Act, 1999 endorses that computer evidence must follow the common law rule, where a presumption exists that the computer producing the evidential output was recording properly at the material time. The presumption can be rebutted if evidence to the contrary is adduced.

(iii) Best Evidence Rule & Computer Records

The best evidence rule states that to prove the content of writing, recording, or photograph, the "original" writing, recording, or photograph is ordinarily required, unless it is shown to be unavailable.[33] The Supreme Court of India has also endorsed

29 See,United States v. *Salgado,* 250 F.3d 438, 453 (6th Cir. 2001) ("evidence that the computer was sufficiently accurate that the company relied upon it in conducting its business" was sufficient for establishing trustworthiness); *United States v. Moore,* 923 F.2d 910, 915 (1st Cir. 1991) ("[T]he ordinary business circumstances described suggest trustworthiness, . . . at least where absolutely nothing in the record in any way implies the lack thereof.").

30 See *Salgado*, 250 F.3d at 453 ("The government is not required to present expert testimony as to the mechanical accuracy of the computer where it presented evidence that the computer was sufficiently accurate that the company relied upon it in conducting its business."); Brown v. Texas, 163 S.W.3d 818, 824 (Tex. App. 2005) (holding that witness who used global positioning system technology daily could testify about technology's reliability).

31 *United States v. Catabran*, 836 F.2d 453, 458 (9th Cir. 1988); see also United States v. Tank, 200 F.3d 627, 630 (9th Cir. 2000).

32 See, e.g., *Salgado*, 250 F.3d at 452-53 (applying business records exception to telephone records generated "automatically" by a computer); *United States v. Linn*, 880 F.2d 209, 216 (9th Cir. 1989)

33 Situations where best evidence rule does not apply:
- Merely to prove that a writing existed
- Merely to prove that a statement was made
- Where the contents of the writing are collateral to the issues being litigated
- Situations where the best evidence rule does apply:
- Where the writing itself has independent legal significance (eg. Words of a contract, deed, etc.)
- Where the writing is offered into evidence to prove an event
- Where the testimony is based on the writing, not based on personal knowledge

that in the face of the documentary evidence, oral evidence is not entitled to any weight.[34]

In *United States v. Bennett*,[35] in an effort to prove that the defendant had imported drugs from international waters, an agent testified about information he viewed on the screen of the global positioning system (GPS) on the defendant's boat. The Ninth Circuit found that the agent's testimony violated the best evidence rule. The agent had only observed a graphical representation of data recorded by the GPS system; he had not actually observed the boat following the purported path. Because the United States sought to prove the contents of the GPS data, the best evidence rule required the government to introduce the GPS data itself or the printout of that data, rather than merely the agent's testimony about the data. The Federal Rules of Evidence have expressly addressed this concern.[36] Thus, an accurate printout of computer data always satisfies the best evidence rule.[37]

The interference of the court may often relax the strict interpretation of best evidence rule, particularly when it seems that the literal application may obstruct the admission of relevant and reliable information. In *Kajala v Noble*,[38] K was convicted for taking part in a public disturbance with a large number of youth. He was recognized by a prosecution witness from a BBC telecast. The prosecution produced the recorded telecast and also submitted the inability to produce the original as it was the policy of BBC not to allow the originals of their films to be given outside for whatever purposes. K defended that this was not the best evidence, but his contention was rejected. The judiciary was satisfied that those cassettes were the true copy of the film and that was sufficient to support a prima facie case. The court said that best evident rule could not preclude the court from admitting all relevant evidence.

(iii) (a). Computer Records and Hearsay Rule

The two phases of Best Evidence Rule are 'Best evidence' and 'Hearsay'. Many courts in U S have categorically determined that computer records are admissible under Federal Rule of Evidence 803(6),[39] without first asking whether the records are

34 *Murarka Properties v BeharilalMurarka,* (1978) 1SCC 109
35 363 F.3d 947, 953 (9th Cir. 2004)
36 Fed. R. Evid. 1001(3) state that "[i]f data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an 'original'… ."
37 See *Doe v. United States*, 805 F. Supp. 1513, 1517 (D. Haw. 1992)
38 (1982) 75 Cr. App. R. 149 CA
39 the hearsay exception for "records of regularly conducted activity"—or more commonly, the "business records" exception

hearsay. [40]However, courts have recently recognized that many computer records result from a process and are not statements of persons and they are thus not hearsay at all.[41]

This dilemma faced by the judiciary in various jurisdictions results in classification of records stored in computers into three categories: non- hearsay, hearsay, and records that include both hearsay and non-hearsay. First, non-hearsay records are created by a process that does not involve a human assertion, such as: telephone toll records; cell tower information; email header information; electronic banking records; Global Positioning System (GPS) data; and log-in records from an ISP or internet newsgroup. Although human input triggers some of these processes—dialing a phone number or a punching in a PIN—this conduct is a command to a system, not an assertion, and thus is not hearsay. Second, hearsay records contain assertions by people, such as: a personal letter; a memo; bookkeeping records; and records of business transactions inputted by persons. Third, mixed hearsay and non-hearsay records are a combination of the first two categories, such as: email containing both content and header information; a file containing both written text and file creation, last written, and last access dates; chat room logs that identify the participants and note the time and date of "chat"; and spreadsheets with figures that have been typed in by a person, but the columns of which are automatically calculated by the computer program.So when a case comes before the court the judge is not to blindly depend on the e-materials, but has to strictly examine whether it is dependable or not.

In the English case, R v Minors,[42] during trial the Crown sought to rely on the evidence of computer printouts. M was charged with attempting to obtain money from a building society by using a passbook in which entries purporting to show deposits totaling £510, were false. The trial judge held that the requirements of section 69 of the Police and Criminal Evidence Act 1984 regarding the accuracy and functioning of the computers which, produced the printouts had been satisfied. On appeal, Steyn, J., held that the computer printout of M's personal account showing

40 *Haag v. United States,* 485 F.3d 1, 3 (1st Cir. 2007); *United States v. Fujii,* 301 F.3d 535, 539 (7th Cir. 2002); *United States v. Briscoe,* 896 F.2d 1476, 1494 (7th Cir. 1990).

41 See *United States v. Washington*, 498 F.3d 225, 230-31 (4th Cir. 2007) (printed result of computer-based test was not the statement of a person and thus would not be excluded as hearsay); *United States v. Hamilton*, 413 F.3d 1138, 1142-43 (10th Cir. 2005) (computer-generated header information was not hearsay as "there was neither a 'statement' nor a 'declarant' involved here within the meaning of Rule 801"); *United States v. Khorozian*, 333 F.3d 498, 506 (3d Cir. 2003) ("nothing 'said' by a machine . . . is hearsay") (quoting 4 Mueller & Kirkpatrick, Federal Evidence § 380, at 65 (2d ed. 1994))

42 (1982) 2All ER 208

the last four entries in the passbook were not recorded in the computer was rightly admissible as it was tendered by an auditor who had regularly worked with this particular computer for fourteen years. The countervailing considerations were articulated by Steyn, J.,as follows:

"The law of evidence must be adapted to the realities of contemporary business practice. Mainframe computers, minicomputers and microcomputers play a pervasive role in our society. Often the only record of a transaction, which nobody can be expected to remember, will be in the memory of a computer. The versatility, power and frequency of use of computer will increase. If computer output cannot relatively readily be used as evidence in criminal cases, much crime (and notably offences involving dishonesty) will in practice be immune from prosecution. On the other hand, computers are not infallible. They do occasionally malfunction. The phenomenon of a 'virus' attacking computer system is also well established. Realistically, therefore, computers must be regarded as imperfect devices."[43]

The noteworthy observation in the US case of *Lorraine,* that 'original writing rule' [44]tests the genuineness of electronically stored information can be made applicable in India also. This judicious wisdom of weighing the positive and negative aspects always reminds us the caution which the judge has to take in appreciating e-evidence.

Requirement of Secondary Evidence

Section 67A[45] of the Indian Evidence Act cautions that except in the case of a secure electronic signature, an electronic signature in question shall be proved as the electronic signature of the subscriber. Condition to adduce secondary evidence, may be a requirement to ensure justice to the parties in many cases as it would ascertain the genuineness of e-evidence. The English practice in this regard deserves mention. Under the English legal system, the courts are very vigilant to assure fair hearing to the accused, even while they depend on e-evidence. The admissibility of evidence electronically produced which is sometimes defective is illustrated by Owen v *Chesters*,[46] wherein it was held that if the prosecution was to rely on the print-outs which provide measurements produced by an intoseimeter, its proper calibration

43 Id at 210

44 Best Evidence Rule, embodied in Federal Rules of Evidence- 1002, in its express terms, requires "the original writing, recording, or photograph" to be introduced when offered to "prove the content of a writing, recording, or photograph," unless some other exception applies.

45 Added by the Information Technology Act, 2000 and amended by Act of 2008

46 [1985] Crim LR 156: Decided under the Road Traffic Act 1972. In

must be established. In *Morgan v Lee,*[47]the court allowed a police officer to refresh his memory from the result of breath analyses which he had seen in the display of an intoseimeter. More recently, in *Sophocleous v Ringer*[48] the defendant, a motorist, was arrested and at a police station provided a specimen of blood for analysis pursuant to section 8(6) of The 1972 Act as substituted. At the Metropolitan Police Laboratory the analyst made four separate analyses using a computer which printed the results in forms of a graph. The defendant argued that in view of section 69 of the Police and Criminal Evidence Act 1984[49] and in the absence of proof of the accuracy of the computer, the evidence was inadmissible. It was held that since the analyst gave evidence refreshing her memory from the figures produced section 69 was not applicable in the circumstance.

Again, in *R.v Shephard*,[50] it was observed:

"Proof that the computer is reliable can be provided in two ways. Either by calling oral evidence or by tendering a written certificate …, subject to the power of the judge to require oral evidence. It is understandable that if a certificate is to be relied

47 31 Cal. 3d 256; 643 P.2d 968

48 1988 RTR 52[SD-008]

49 Now repealed

50 [1993] 2 WLR 102: The defendant was arrested for the offence of stealing. In her car were goods from Marks & Spencer worth #78.36. The goods consisted of various items of food, including a joint of beef priced at #12.57 and five items of clothing. The defendant had no receipt. She declined to answer questions, initially. Later on interrogation, she said that she had bought the goods at Marks & Spencer at St. Albans. When she returned to her car the bags had split so she transferred the shopping to a bag of her own. She said she never kept receipts and denied stealing the goods. The principal evidence for the prosecution was given by a store detective employed by Marks & Spencer at their St. Albans branch. She said that at 10 a.m. on the morning of 18 March she removed all the till rolls from the tills and recovered a further two till rolls from a cupboard which bore the date 17 March. She explained that the tills were connected to a central computer which fed in the date, time, customer number and till number on each of the till rolls. She further explained that each item of clothing has upon it a seven figure numbered label known as a unique product code or U.P.C. The U.P.C. numbers are unique to clothing of a particular type, size and colour. The till operator punches in the U.P.C. number on the till which then registers the appropriate price. In the case of food each item of food has a price upon it and the operator punches in the price of each item on the till. She said that they had had no trouble with the operation of the central computer. She carried out an examination of all the till rolls which she had recovered from the tills which would have been those in use on 17 March and stamped as such by the central computer and she also examined the two till rolls also stamped and dated 17 March which had been placed in the cupboard where all used till rolls were kept. She thus examined all the till rolls in use on 17 March. She said that there was no trace on the till rolls of the U.P.C.s for the clothing found in the defendant's car. She said there was no record on any of the till rolls of an item of food costing #12.57, the price of the beef. Nor was there any group of prices matching the items of food found in the car. It was quite apparent from the store detective's evidence that she was thoroughly familiar with the operation of these tills and of the computer, albeit she did not pretend to any technical understanding of the operation of the computer. The defendant did not herself give evidence and no evidence was called on her behalf. The jury convicted her.

upon it should show on its face that it is signed by a person who from their job description can confidently be expected to be in a position to give reliable evidence about the operation of the computer. This enables the accused to decide whether to accept the certificate at its face value or to ask the judge to require oral evidence which can be challenged in cross-examination."

(iv) Probative Value of Evidence v. Test of Unfair Prejudice

Any probative information stored or transmitted in digital form is digital evidence or electronic evidence. Before accepting digital evidence, its relevancy, veracity and authenticity and whether the fact is hearsay or a copy is preferred to the original is to be ascertained by the court, for the purpose of assuring fairness in the proceedings relating to administration of justice, both civil and criminal. In the landmark decision of United States Supreme Court, Lorraine *v. Markel American Insurance Company* [51]it was held that when electronically stored information is brought in evidence, the following issues are to be settled: (i) is the information relevant ?; (ii) is it authentic ?; (iii) is it hearsay ?; (iv) is it original or, if it is a duplicate, is there admissible secondary evidence to support it ?; and (v) does its probative value survive the test of unfair prejudice? Following the same lines, in India, in *Amar Singh v. Union of India*[52] the Supreme Court observed:

"Considering the materials on record, this Court is of the opinion that it is no doubt true that the service provider has to act on an urgent basis and has to act in public interest. But in a given case, like the present one, where the impugned communication … is full of gross mistakes, the service provider while immediately acting upon the same, should simultaneously verify the authenticity of the same from the author of the document. This Court is of the opinion that the service provider has to act as a responsible agency and cannot act on any communication. Sanctity and regularity in official communication in such matters must be maintained especially when the service provider is taking the serious step of intercepting the telephone conversation of a person and by doing so is invading the privacy right of the person concerned and which is a fundamental right protected under the Constitution, as has been held by this Court…. the respondent … is equally duty bound to immediately verify the authenticity of such communication if on a reasonable reading of the same, it appears to any person, acting bona fide, that such

51 241 F.R.D. 534 (D. Md. 2007)
52 (2011) 7 SCC 69

communication, with innumerable mistakes, falls clearly short of the tenor of a genuine official communication"[53]

In *Ratan Tata v. Union of India*[54] the CD containing intercepted telephone calls was introduced in the Supreme Court without following any of the procedure contained in the Evidence Act.*Ratan Tata v. Union of India*,[55] regarding 'NiraRadia conversation Tapes' which the investigating agencies submitted required elaborate investigation by CBI instead of State police or other agencies. In *Anvar v. P. K. Basheer*[56] overrulingState (NCT of Delhi) *v Navjot Sandhu alias Afsal Guru*[57] the Supreme Court has already declared new law in respect of the evidentiary admissibility of the contents of electronic records, and the application of sections 63, 65, and 65B of the Indian Evidence Act, re-interpreting technical conditions upon which a copy of an original electronic record may be used can be seen in S. 65B(2) as (i) at the time of the creation of the electronic record, the computer that produced it must have been in regular use; (ii) the kind of information contained in the electronic record must have been regularly and ordinarily fed in to the computer; (iii) the computer was operating properly; and, (iv) the duplicate copy must be a reproduction of the original electronic record. The non-technical conditions to establish authenticity of electronic evidence in section 65B (4) requires the production of a certificate by a senior person responsible for the computer on which the electronic record was created, or is stored. The certificate must identify the original electronic record, describe manner of creation, the device created it, and certifying compliance of sub-section (2) of section 65B.[58]

In *Navjot Sandhu @ Afsal Guru*,[59] the links between terrorists and the masterminds of the attack were established only through phone call transcripts obtained from the mobile service providers, the apex court dealt with the proof and admissibility of mobile telephone call records. While considering the appeal against the accused for attacking Parliament, a submission was made on behalf of the accused that no reliance could be placed on the mobile telephone call records, because the prosecution had failed to produce the relevant certificate under Section 65B(4) of the Evidence

53 Ibid, para 38 and 39
54 W. P (C) 398 of 2010
55 (2014) 1 SCC 93
56 (2014) 10 SCC 473
57 (2005) 11 SCC 600
58 See the earlier cases, Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdas Mehra and others, 1976 (2) SCC 17 : (AIR 1975 SC 1788; AIR 1986 SC 3
59 (2005) 11 SCC 600

Act. The Supreme Court concluded that a cross-examination of the competent witness acquainted with the functioning of the computer during the relevant time and the manner in which the printouts of the call records were taken was sufficient to prove the call records.

In *Jagjit Singh v State of Haryana*[60] the Supreme Court held:

> "… the principles of natural justice cannot be placed in a strait-jacket. These are flexible rules. Their applicability is determined on the facts of each case. Here, we are concerned with a case where the petitioners had declined to avail of the opportunity to watch the recording on the compact disc... No illegality can be inferred merely on the speaker relying upon his personal knowledge of having seen and heard the petitioners for coming to the conclusion that the persons In the electronic evidence are the same as he has seen and so also are their voices. Thus, even if the affidavit of Ashwani Kumar is ignored in substance, it would have no effect on the questions involved."[61]

But, it should be taken into account that non - production of CCTV footage, call and sim details of mobile phones of the accused etc., cannot be said to be mere instances of faulty investigation but amount to withholding of best evidence. The cases of the prosecution that CCTV footage could not be lifted or a CD copy could not be made, shall not simply be admitted by the courts so that the parties may be permitted to take advantage of it. In *K.K. Velusamy v N. Palanisamy*,[62] Electronic evidence used, i.e. recording of the conversation in a CD, was not admitted by the court,[63] on weighing the authenticity of the same.

According to S.114(g) of the Evidence Act, a party in possession of best evidence which will throw light in controversy, if withholds it, the Court can draw an adverse

60 AIR 2007 SC 590

61 Ibid Para 31

62 (2011) 11 SCC 275.

63 The Respondent filed a suit for specific performance alleging that the Appellant-Defendant entered into a registered agreement of sale dated 20.12.2006 agreeing to sell the suit schedule property to him, for a consideration of Rs. 240,000/-; that he had paid Rs.160,000/- as advance on the date of agreement; that the Appellant agreed to execute a sale deed by receiving the balance of Rs. 80,000/- within three months from the date of sale; that he was ready and willing to get the sale completed and issued a notice dated 16.3.2007 calling upon the Appellant to execute the sale deed on 20.3.2007; and that he went to the Sub-Registrar's office on 20.3.2007 and waited, but the Appellant did not turn up to execute the sale deed. On the said averments, the Respondent sought specific performance of the agreement of sale or alternatively refund of the advance of Rs. 160,000/- with interest at 12% per annum from 20.12.2006. The Appellant resisted the suit and therefore contended that the Respondent - Plaintiff was not entitled to specific performance

inference against him notwithstanding that the onus of proving does not lie on him. The presumption under S.114 (g) is only a permissible inference and not a necessary inference. Again, Drawing of presumption under S.114 (g) of Evidence Act depends upon the nature of fact required to be proved and its importance in the controversy, the nature, quality of the evidence produced and its accessibility to the party concerned. It is only after considering all these matters are duly considered that an adverse inference can be drawn against the party.The application of section 131 of the Act,[64] but, puts impediments on the scope of section 114(g).

At the same time, in a case based on circumstantial evidence, circumstances from which inference of guilt is sought to be drawn should be fully proved and such circumstances must be of conclusive nature pointing to the guilt of accused. When it is said that there shall be no gap in such chain of circumstances , it may not be proper for the Court to jump in to the conclusion that the electronic evidence is admissible in evidence . It is to be substantiated in the trial and the opposite party should be given with chance to rebut the same so that the rule of law would prevail. Once electronic evidence is properly adduced, along with the certificate of sub-section (4), the other party may challenge the genuineness and if original electronic record is challenged, section 22A though disqualifies oral evidence as to the contents of the electronic record, oral evidence as to the genuineness of the record may be offered. *Uday Kumar Singh v State of Bihar*,[65] describes again the opposite facet[66], where not considering the electronic evidences, the appeals have been dismissed by the apex court.

(v) Presumptions w. r. to E-evidence

The above discussion, on fairness in appreciating evidence, requires mention about certain presumptions which the law permits. It is true that a fact which is relevant and admissible need not be construed as a proven fact. The judge must appreciate the fact in order to conclude that it is a proven fact. The exception to this

64 "131. Production of documents or electronic records which another person, having possession, could refuse to produce.—No one shall be compelled to produce documents in his possession or electronic records under his control, which any other person would be entitled to refuse to produce if they were in his possession, or control, unless such last-mentioned person consents to their production.

65 Decided on 21 March, 2005: 2005 (1) BLJR 779

66 MANU/SC/0756/2015:These appeals are against a common judgment and order dated 04.03.2009 passed by the Patna High Court in Death Reference Case No. 4/2007 and Death Reference Case No. 12/2008 along with the criminal appeals filed by the accused persons against the judgment and order of the trial court. The trial court convicted the accused persons and awarded death sentence, which was referred before the High Court for confirmation. The High Court after hearing the parties set aside the judgments and orders of conviction passed by the trial court against the accused persons. Hence, these appeals have been filed by the informant/complainant before this Court.

general rule is the existence of certain facts specified in the Evidence Act that can be presumed by the court. Evidence Act has recognized certain presumptions in the matter of E-evidene also. Gazettes in electronic forms,[67] concluded contracts in an electronic record with electronic signatures,[68] electronic records and electronic signatures,[69] electronic signature certificates,[70] electronic messages,[71] electronic records five years old[72] etc.enjoys the privilege of presumptions, subject to rebuttal. Where a proceeding involves a secure[73] electronic record, the court has to presume that the record was not altered since the specific point of time to which the secure status relates. Where any proceeding involves a secure digital; signature, the court has to make the following presumptions: (i) that the secure digital signature was affixed by the subscriber himself with the intention of signing (ii) that the presumption will apply only to secure electronic document or secure digital signature and there is no presumption relating to the authenticity or integrity of the contents.

(vi) Privileged Communication

Communications that are considered "privileged"[74] and thereby not admissible enjoys protection in the case of e-documents and communications also.For example, this legal concept of privilege protects communications in the form of e-mails sent from a client to a lawyer from forced disclosure before a court of law. To ascertain the privilege, according to Brenda R. Sharton and Gregory J. Lyons of US,[75] the following elements should be verified:

67 Section 81A
68 Section 85A
69 Section 85B
70 Section 85C
71 Section 88A; but the court shall not make any presumption as to the person by whom such message was sent. The meaning of the terms 'addressee' and 'originator' will have the same meaning as is assigned to them in s.2(1)(b) and (3) of the IT Act,2000. Accordingly, an addressee means a person who is intended by the originator to receive the electronic record but does not include any intermediary. An originator means a person who sends, generates stores or transmits any electronic message or causes any electronic message to be sent, generated, stored or transmitted to any person, but does not include any intermediary.
72 Section 90A
73 A secure system is defined in s.2(ze) of the IT Act:"Secure system' means computer hardware, software, and procedure that-(a) are reasonably secure from unauthorized access and misuse; (b) provide a reasonable level of reliability and correct operation; (c) are reasonably suited to perform the in tentended functions; and adhere to generally accepted security procedures.
74 Communications between husband-wife; attorney-client; doctor-patient; clergy-leityetc., : U S Courts recognize Privileges for Confidential Relations between -Lawyer-Client; Psychotherapist-Patient; Husband-Wife; Penitent-Clergy and also protects Attorney Work Product; Government Privileges - Political Votes; Trade Secrets; Military and State Secrets; and Informant's Identity.
75 Brenda R. Sharton and Gregory J. Lyons, The Risks of E-Mail Communication-A Guide to Protecting Privileged Electronic Communications, 17Business Law Today,(September/October,2007)available at https://apps.americanbar.org/buslaw/blt/2007-09-10/lyons.shtml (visited on 11-11-2015)

- Whether the communication is between the parties whom the law intents to protect;
- the purpose for which the communication is made;
- whether the communication must be made and kept in confidence
- Whether the privilege has been waived

Most often with electronic communications, it is the 'in confidence' element may be waived, by virtue of the nature of the medium through which the communication is transferred. This happens by disseminating the communication to an outside party or too widely disseminating beyond the actual parties to which it should be confidentially communicated and thus putting a formerly privileged communication at risk of conversion to non-privileged status. So, to what extent the communications are privileged in the e-era, remains as a question which needs further research.

(vii) Protection against Compulsion to Produce E-documents

Section 131[76] of the Evidence Act extents protection from compulsion to produce documents in possession or electronic records under the control of aperson, which any other person would be entitled to refuse to produce if they were in his possession or control, unless the other person consents to their production. Thus in effect, even if the document is under the custody of some other person, the privilege of protection of the document cannot be suffered simply due to the reason that it is under some other's custody.

Human Rights Issues Pertaining to E-evidence

Our courts face a greater challenge in dealing with human rights issues associated with the submission of e-records, particularly when alterations and forgeries are alleged in connection with the e-evidence submitted. It is also important to see that sometimes, introducing personal information into evidence or publicizing it is not at all appropriate. The questions, whether there would be a Constitutional violation if the evidence was acquired illegally or in violation of the rights of an accused; whether it would be appropriate to use for a purpose different from what the individual had initially consented to, may be addressed by the judge very seriously Supreme Court in *People's Union for Civil Liberties v. Union of India*,[77] the violation of right to privacy affected by rampant instances of phone tapping of politician's

76 As substituted by the IT Act, 2000
77 AIR 1997 SC 568: JT 1997 (1) SC 288:1996 (9) SCALE 318:(1997) 1 SCC 301: 1996 Supp 10 SCR 321

phones by CBI, was the main issue. The court ruled that tapping of telephone is a serious invasion of privacy attract ting the scope of Article 21 of the Constitution unless it is permitted under the just, fair and reasonable procedure established by law. Again in *Rayala M. Bhuvneswari v. NagaphomenderRayala*[78] the High Court of AP held that the act of tapping by the husband of conversation of his wife with others without her knowledge was illegal and amounted to infringement of her right to privacy under article 21 of the Constitution. These talks even if true cannot be admissible in evidence.

If a gathering, or acts of an individual is captured using electronic means or individuals are tracked by GPS, or other personal information is stored digitally, and subsequently if it is admitted in evidence, innocent parties also may be dragged to court – proceedings and it may create risks of even endangering those people's safety, particularly when it is linked with the acts of terrorism etc. Courts should be particular to see that evidence may be excluded if it does not meet Constitutional and evidentiary requirements. In some cases, measures would also be adopted to ensure that personal data are redacted, de-identified, aggregated, or protected under specific rules of 'Best Practices of Information Governance'.Another peculiar aspect is that advanced technologies ranging from satellites to smart phones are providing new and sophisticated ways to document human rights incidents and potential violations. Thus, volumes of digital data and information are available instantaneously – and often transmitted widely and posted on websites made visualized for the entire world. Law requires that for digital evidence to be admissible, it must be authenticated. It simply means that data and information must be shown to be what the proponent claims that it is. To authenticate digital evidence, the focus must be on the three key aspects of information technology: People – Process – Technology. Factors to be considered in evaluating the integrity of digital data include 'who created the evidence', 'what processes and technology were used', and 'what was the chain of custody throughout the entire digital evidence lifecycle'. Because digital information can be created easily and without any verifiable record of who did so, and it can be changed, often without detection, courts are grappling with ways to authenticate digital evidence under these circumstances. The challenges to authentication presented by each of the technology developments that have taken place in recent

78 AIR 2008 AP 98: The petitioner filed a divorce petition against his wife and to substantiate his case sought to produce a hard disc relating to the conversation of his wife recorded in U.S. with others. She denied some portions of the conversation. The court denied sanction to depend on the same which was obtained illegally.

years, shall be considered. For example, the "mobile revolution" helps people to create and access data through a variety of mobile devices, including laptops, smart phones and tablets. The proliferation of mobile devices results in the creation and transmission of huge amounts of digital information. With the availability of mobile devices, millions of people are now creating documentation which may become "evidence" in human rights cases around the world. Moreover, creating and assimilating such events through Watts App, Trolls etc would vitiate the trust worthiness of evidence. The trend toward consumerisation of information technology indicates that organizations are encouraging users to connect their personal consumer devices, including laptops and handheld devices, to company networks to access applications and professional information for their jobs, as well as for personal use. Thus, in the computing environments of the future, networks will have fewer clearlydefined boundaries. Mobile devices will be used for both business and personal work and communication to access web sites, business applications, e-mail, and social networking sites. Social media sites are transforming the way people communicate. A few Rules are available across the jurisdictions to control rather regulate the boom of such kind of activities.

E- evidence in Criminal Trial

Appreciation of e-evidence, in criminal cases needs special care and attention as it is the basic principle of administration of criminal justice that to find an accused guilty, his guilt should be proved beyond the shadow of doubt. While adducing as well as appreciating evidence, the judge should be guided by this fundamental principle. *Mohd.ArifAshfaq v State of NCT of Delhi*,[79] is an illustration, wherein the court dismissed the appeal, affirming the judgment of the Trial Court and High court convicting and sentencing the accused, considering the wireless messages, mobile call details, SIM cards, IMEI number of the mobile found etc., as relevant evidence. The court here explained, the responsibility to weigh e-evidence in criminal cases as follows:

"The responsibility of the prosecution is more as compared to the case where the ocular testimony or the direct evidence, as the case may be, is available. The Court, before relying on the circumstantial evidence and convicting the accused thereby has to satisfy itself completely that there is no other inference consistent with the innocence of the accused possible nor is there any plausible explanation. The Court must, therefore, make up its mind about the inferences to be drawn from each proved

79 (2011) 13SCC 621

circumstance and should also consider the cumulative effect thereof. In doing this, the Court has to satisfy its conscience that it is not proceeding on the imaginary inferences or its prejudices and that there could be no other inference possible excepting the guilt on the part of the accused. … There indeed cannot be a universal test applicable commonly to all the situations for reaching an inference that the accused is guilty on the basis of the proved circumstances againsthim nor could there be any quantitative test made applicable. At times, there may be only a few circumstances available to reach a conclusion of the guilt on the part of the accused and at times, even if there are large numbers of circumstances proved, they may not be enough to reach the conclusion of guilt on the part of the accused. It is the quality of each individual circumstance that is material and that would essentially depend upon the quality of evidence. Fanciful imagination in such cases has no place. Clear and irrefutable logic would be an essential factor in arriving at the verdict of guilt on the basis of the proved circumstances."[80]

At the same time, in *GajrajvState of NCT of Delhi*,[81] the court dismissed the appeal taking in consideration the IMEI number of the mobile of the deceased, Call records and other relevant evidences.

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80 Id at para 76

81 Criminal Appeal No.2272 of 2010, decided on on 22 September, 2011:In this case, during the course of investigation, the police was able to ascertain, that mobile phone (sim) no.9871879824 was being used on a mobile handset bearing IEMI no.35136304044030, belonged to the deceased. On further investigation it was found, that the aforesaid mobile handset bearing IEMI no.35136304044030 was being used for mobile phone (sim) no.9818480558, which belonged to the accused, immediately after the murder of the deceased ..Sim no.9818480558 was also registered in the name of the accused-appellant. It is through this investigative process, that the police eventually reached the accused-appellant The police recovered from the accused-appellant three mobile handsets, one of which was ofPanasonic make bearing IEMI no.35136304044030, i.e., the handset in which sim no.9871879824 was used by the deceased. The police also recovered from the accused-appellant, the licensed revolver of the deceased Harish Kumar. Complete and effective recovery was not made of the sum of Rs.3 lakhs which Minakshi (wife of the deceased Harish Kumar) had stated was in possession of the deceased, at the time he had her. The conviction of the accused-appellant was sought merely on circumstantial evidence, namely, the use (and possession) of mobile handset bearing IEMI no.35136304044030 on the date of murder itself, i.e., on 23.7.2005 by the accused-appellant for mobile phone (sim) no.9818480558 (which was registered in the name of the accused-appellant), the recovery of the revolver of the deceased Harish Kumar along with live and spent cartridges, as well as, the deposit of Rs.9,000/- in the account of the accused-appellant with the State Bank of India, Kundan Nagar Branch, Delhi.
Dissatisfied with the order passed by the Trial Court, the accused- appellant preferred Criminal Appeal before the High Court of Delhi. The appeal preferred by the accused-appellant, came to be dismissed on merits and the sentence awarded by the Trial Court was however modified, inasmuch as, in the event of nonpayment of fine, imposed on the accused-appellant for the offence punishable under section 302 of Indian Penal Code, the High Court reduced the period of imprisonment in lieu thereof, from three years to six months.The accused-appellant has approached the Supreme Court by filing the instant appeal so as to assail the orders passed in Sessions Case and in Criminal Appeal.

In *Mohd.AjmalKasabvState of Maharashtra*,[82] as appreciated by the court, the most reliable evidence regarding conspiracy came from the recordings of intercepted telephone calls between the terrorists and their coconspirators abroad. The phone calls made by the terrorists from Hotel Taj, Nariman House and Hotel Oberoi came to be noticed and were intercepted by a watchful member of the Anti Terrorist Squad, further the call details records, callphonex call details, IP address information, voxbone call detail records, E-mails, Chat logs, CDs, printouts, CCTV footage and other oral & documentary evidence, played an important role in dismissing the appeal by the court.In Re Ramlilalike CCTV footage and recordings in the CDs along with other evidences. Again in *Tomaso Brunov State of U P*,[83] emphasizing on the importance of production of CCTV footage, call details, SIM cards, etc as the best evidence, the court allowed the appeal pointing that the trial court as well as the High Court ignored this crucial aspect of non-production of CCTV footage.

Conclusion

To conclude, the only thing which the lawyers as well as the judge has to keep in mind is that the admissibility of e-evidence shall not be overlooked. In civil proceedings, to a greater extent the hearsay rule has been eroded to the point of extinction by the later developments relating to appreciation of e-evidence. In criminal proceedings, attempts have been made by the judiciary to adapt existing rules to cater the needs of the fast growing technological society. The paramount concern is that in the interest of justice, the accused should be given with a fair trial. It is equally in the interest of justice that offences involving dishonesty, terrorism etc., shall not be immuned from prosecution simply because computer printouts are inadmissible. It is suggested that the rule against hearsay should be reformulated only to this extent that removal of the requirement of documentary evidence from the hearsay rule in criminal cases rendering them simply admissible should be subject to a discretion similar to that vested in judges by section 78 of the police and Criminal Evidence Act 1984 of UK[84] to exclude such evidence if it is prejudicial to the accused/victim (as the case be), may be appreciable. Even with the insertion of

82 (2012) 9 SCC 234.

83 Criminal Appeal No. 142 Of 2015 arising out of S.L.P.(Crl.) No. 1156/2013, decided on 20 January, 2015

84 Exclusion of unfair evidence.(1)In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.
(2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence.

sections 65A and 65B in the Evidence Act, the judiciary which is the ultimate interpreter of law is bound to weigh the evidence in each individual case. Moreover, the evidence which is available in the form of electronic records, or be derived with the assistance of e-technology cannot simply be ignored in judicial proceedings; the judicious reliance, at the same time, will enhance the efficacy of the system of administration of justice, both civil and criminal.

CONCEPT OF PRIVACY IN THE MEDICAL CONTEXT

*Dr. U Deepti**

Introduction

Privacy has been hailed as 'an integral part of our humanity', the 'heart of our liberty'[1], and 'the beginning of all freedom'[2]. Privacy however, is a value so complex, so entangled in competing and contradictory dimensions, so engorged with various and distinct meanings, that sometimes it becomes despair to usefully address it. 'Privacy' has been used as the key term for a plethora of debates of a wide range of issues, from right to abortion to unreasonable searches of premises, from unauthorized taking of photographs to the disclosure of secret documents. Though the word privacy is used almost everywhere, it is an uphill task to explain what privacy really entails. As Arthur Miller notes that privacy is 'difficult to define because it is exasperatingly vague and evanescent'.[3] Therefore, before understanding the concept of privacy in the medical context it is very important to understand and consider thoroughly the relevance of the term 'privacy' in the lives of a common man.

PRIVACY – UNDERSTANDING THE CONCEPT

Generally, privacy must be viewed as the bundle of interests that individuals have in their personal sphere free from interference from others. In the words of Roger

1 * Visiting Professor, Co-operative School of Law, Thodupuzha, Idukki,Kerala
See, *Vickery* v *Nova Scotia Supreme Court (Prothonotary)* [1991] 1 SCR 671, 687. This case questions whether media have a right to inspect, copy, and broadcast exhibits filed in court proceedings, including those read out or displayed in open court? The applicant sought the permission to have access to have taped confession filed and shown in the proceedings. The majority decision, written by Stevenson J. on behalf of six justices, held that the media was not entitled to view and copy the tapes. It held that the privacy interests of the accused, by that point deemed an innocent party, outweighed the public's interest in the exhibit. Allowing members of the public to attend trials is sufficient to fulfill the open court principle.

2 Daniel J. Solove, *Understanding Privacy,* 1 (Harvard University Press 2008).

3 Daniel J. Solove, *Conceptualizing Privacy*, 90 California Law Review 1087, 1088 (2002).

Clarke privacy has psychological, sociological, economic and political dimensions.[4] Moreover, according to William Blackstone, the law has 'so particular and tender a regard to the immunity of a man's house that it stiles it his castle, and will never suffer it to be violated with impunity'.[5] The modern legal academic discussion of the topic began with the seminal paper by Warren and Brandies.[6] According to them privacy is the most comprehensive of rights and the right most valued by civilized men.[7]

The international community accords privacy the status of a human right through key documents like Universal Declaration of Human Rights which specifically protects territorial and communication privacy[8] and the ICCPR[9]. The right to privacy is also dealt with in various other international instruments, such as the United Nations Convention on the Rights of the Child,[10] and the United Nations Convention on Migrant Workers.[11]

On a regional level, European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950[12], Charter of Fundamental Rights of the European Union,

4 See, E Barendt, *Privacy and Freedom of Speech* in A Kenyon and M Richardson (ed.), *New Dimensions in Privacy Law: International and Comparative Perspectives*, 30, 31 (Cambridge University Press 2006).

5 4 William Blackstone, *Commentaries On The Laws Of England*, 168 (1769), quoted in Daniel J. Solove, Marc Rotenberg, & Paul M. Schwartz, *Information Privacy Law*, 4 (Aspen Publishing, 2nd ed 2006).

6 S Warren and L Brandeis, *The Right to Privacy*, 4 Harvard Law Review 193 (1890).

7 Id.

8 Article 12 provides: No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

9 Art 17 provides as follows:
(1) 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. (2) Everyone has the right to the protection of the law against such interference or attacks.

10 Art 16 of the United Nations Convention on the Rights of the Child, 1989 provides:
1. No child shall be subject to arbitrary or unlawful interference with his or her privacy, home or correspondence, nor to unlawful attacks on his or her honour and reputation. 2. The child has the right to the protection of the law against such interference or attacks.

11 Art 14 states: No migrant worker or member of his or her family shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home, correspondence or other communications, or to unlawful attacks on his or her honour and reputation. Each migrant worker and member of his or her family shall have the right to the protection of the law against such interference or attacks.

12 Article 8 states:
(1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health of morals, or for the protection of the rights and freedoms of others.

2000[13], American Convention on Human Rights, 1969[14] and the American Declaration on Rights and Duties of Mankind, 1948[15] contain provisions similar to those in the Universal Declaration and International Covenant and recognize right to privacy. Furthermore, the European Commission of Human Rights and the European Court of Human Rights constituted under the European Convention of Human Rights have been active in the enforcement of right to privacy and have consistently viewed Article 8's protection expansively and interpreted the restrictions narrowly.[16]

Interestingly privacy is not a universal concept. For example, the African Charter on Human and People's Rights does not include any protection for a right to privacy. Also, until recently right to privacy was not explicitly guaranteed through any constitutional provision.[17] However, in 2007, the Constitution of Thailand explicitly recognized right

13 Articles 7 states: **Respect for private and family life**-Everyone has the right to respect for his or her private and family life, home and communications.
Article 8 states: **Protection of personal data**
1. Everyone has the right to the protection of personal data concerning him or her. 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. 3. Compliance with these rules shall be subject to control by an independent authority.

14 Article 11. **Right to Privacy**
1. Everyone has the right to have his honor respected and his dignity recognized.
2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.
3. Everyone has the right to the protection of the law against such interference or attacks.
Article 14. **Right of Reply**
1. Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish.
2. The correction or reply shall not in any case remit other legal liabilities that may have been incurred.
3. For the effective protection of honor and reputation, every publisher, and every newspaper, motion picture, radio, and television company, shall have a person responsible who is not protected by immunities or special privileges.

15 Article V states: **Right to protection of honor, personal reputation, and private and family life.** Every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life.
Article IX states: **Right to inviolability of the home.**
Every person has the right to the inviolability of his home.
Article X states: **Right to the inviolability and transmission of correspondence.**
Every person has the right to the inviolability and transmission of his correspondence.

16 Strossen N, *Recent United States and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis* 41 Hastings Law Journal 805 (1990).

17 *Paul* v *Davis*, 424 U.S. 693, 712-13 (1976). In this case a police chief issued list of persons to shop owners who were considered to be shoplifters. The respondent found his name in the list and claimed that thereby his reputation in the society has been injured. The court held that the respondent was not deprived of any liberty or property interests protected by the Due Process Clause. However, the Supreme Court went on to state that 'zones of privacy may be created by specific constitutional guarantees, thereby imposing limits upon government power'.

to privacy under s.35.[18] Though, in the western society and other countries like India, with the active help of judiciary, the concept of privacy is accepted as a fundamental right, but its precise meaning remains open for debate.

The U.S. Supreme Court for the first time explicitly recognized a Constitutional right to privacy in *Griswold* v *Connecticut*[19] and held that it had a 'natural rights' foundation.[20] In this case, the Court struck down a State law prohibiting the possession, sale, and distribution of contraceptives to married couples arguing that the Fourteenth Amendment's liberty clause forbade the State from engaging in conduct such as search of marital bedrooms for evidence of illicit contraceptives that was inconsistent with a government formed on the concept of ordered liberty. In *Roe* v *Wade*[21] the court further affirmed and expanded the right of privacy to include a woman's right to have an abortion. The decision in this case shows that right of privacy was settling into the liberty component of the Due Process Clause. Further, the Court in *Washington* v *Glucksberg*[22] discussed and affirmed in principle the idea

18 Constitution of the Kingdom of Thailand 2007, online at http://www.asianlii.org/th/legis/const/2007/1.html (visited on 13th Nov 2016).
s.35 states:
A person's family rights, dignity, reputation and the right of privacy shall be protected.
The assertion or circulation of a statement or picture in any manner whatsoever to the public, which violates or affects a person's family rights, dignity, reputation or the right of privacy, shall not be made except for the case which is beneficial to the public. Personal data of a person shall be protected from the seeking of unlawful benefit as provided by the law. Constitution also provides the liberty of communication by lawful means. Disclosure of communication between persons shall be protected through s.36 of the Constitution which states that: A person shall enjoy the liberty of communication by lawful means. The censorship, detention or disclosure of communication between persons including any other act disclosing a statement in the communication between shall not be made except by virtue of the provisions of the law specifically enacted for security of the State or maintaining public order or good morals. In Thailand, privacy is also protected through ordinary law, such as criminal law. s. 323 Criminal Procedure Code law is very important in the context of medical confidentiality. The law makes it a criminal offence for a member of the health care profession to fail to maintain medical confidentiality For e.g., **Section.323** states that: Whoever, knows or acquires a private secret of another person by reason of his functions as a competent official or his profession as a medical practitioner, pharmacist, druggist,midwife, nursing attendant, priest, advocate, lawyer or auditor, or by reason of being anassistant in such profession, and then discloses such private secret in a manner likely to cause injury to any person, shall be punished with imprisonment not exceeding six months or fined not exceeding one thousand Baht, or both.

19 381 U.S. 479 (1965).

20 Id. at 486.

21 410 U.S. 113 (1973). Roe, a pregnant single woman, brought suit challenging the constitutionality of the Texas abortion laws. These laws made it a crime to obtain or attempt an abortion except on medical advice to save life of the mother. The Court ruled that a right to privacy under the due process clause of the 14th Amendment extended to a woman's decision to have an abortion, but that right must be balanced against the State's two legitimate interests in regulating abortions: protecting prenatal life and protecting women's health.

22 521 U.S. 702, 721 (1997). Dr. Harold Glucksberg challenged Washington's Natural Death Act which banned assisted suicide and claimed that assisted suicide was a liberty interest protected by the Due

that right of privacy are 'fundamental rights'.

Under the Indian Constitutional law, the right to privacy is implicitly guaranteed by Article 21 of the Constitution.[23] Since 1960s, the Indian judiciary, and the Supreme Court in particular, has dealt with the issue of privacy, both as a fundamental right under the Constitution and as a common law right.[24] But it refrained from defining the concept in iron-clad terms. Instead the Courts preferred to have it evolve on a case by case basis.[25]

The Allahabad High Court in *Nihal Chand* v *Bhagwan Dei*[26] took a step when it recognized an independent existence of the right to privacy as emerging from the customs and traditions of the people besides being a statutory right. It observed that 'the right to privacy based on social custom....is different from a right to privacy based on natural modesty and human morality, the latter is not confined to any class, creed, colour or race and it is a birth right of every human being and is sacred and should be observed. The right should not be exercised in an oppressive way'.[27] The concept of privacy as a fundamental right was first evolved in 1964 in the case of *Kharak Singh* v *State of Uttar Pradesh*[28]. Interestingly, it was, the minority view expressed by Justice Subba Rao in the decision that laid the foundations for the development of the law in India. Justice Subba Rao held:

Process Clause of the Fourteenth Amendment to the United States Constitution. The Court held that because assisted-suicide is not a fundamental liberty interest, it was not protected under the 14th Amendment.

23 *R. Rajagopal* v *State of T.N.*, 6 SCC 632(1994).

24 Though there is no specific statute protecting privacy however, there are provisions in various statutes which address this right. For example, Section 26 of the India Post Office Act 1898; Section 5(2) of the Telegraph Act 1885; Section 69 of the Information Technology Act 2008 Section 122 of the Evidence Act, etc. There are also a few statutory provisions contained in the Code of Criminal Procedure Section 327(1), the Indecent Representation of Women (Prohibition) Act, 1980 (Sections 3 and 4), the Medical Termination of Pregnancy Act, 1971 Section 7(1)(c), the Hindu Marriage Act, 1955 (Section 22), the Special Marriages Act, 1954 (Section 33), the Children Act, 1960 (Section 36), and the Juvenile Justice Act, 1986 (Section 36), all of which seek to protect women and children from unwarranted publicity.

25 *Govind* v *State of Madhya Pradesh,* AIR 1975 SC 1378.

26 *B. Nihal Chand* v *Mt. Bhagwan Dei*, AIR 1935 All 1002. In this case the plaintiff claimed for the closing of a newly constructed door which had been opened by the defendant in his house on the side of the sahan and rooms of the plaintiff on the ground that it invaded the plaintiff's right of privacy.

27 Id.

28 AIR 1963 SC 1295. In this case, the petitioner was charged and tried for committing dacoity and he was subjected by the police to domiciliary visits and surveillance. While determining the validity of such visits and surveillance by the police, the apex court examined whether the right to privacy formed a part of personal liberty. The court observed that personal liberty is a compendium of rights that go to make up the personal liberty of an individual and that the right to life in Art. 21 of our Constitution is similar to that of Fourteenth and Fifteenth Amendments to the US Constitution.

> It is true our Constitution does not expressly declare a right to privacy as a fundamental right but the said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security. In the last resort, a person's house, where he lives with his family, is his 'castle' it is his rampart against encroachment on his personal liberty.

This judicial decision, especially Justice Subba Rao's observations, paved the way for later elaborations on the right to privacy under Article 21. For instance, in *R. M. Malkani* v *State of Maharashtra*[29], the Supreme Court held that the telephonic conversation of an innocent citizen will be protected by Courts against wrongful or high handed interference. However, the court went on to state that the above said protection is not extended to the guilty citizen against the efforts of the police to vindicate the law and prevent corruption among public servants.[30] Similarly, in *People's Union for Civil Liberties* v *Union of India*[31], the Supreme Court went on to hold that telephone-tapping would, infract Article 21 of the Constitution of India unless it is permitted under the procedure established by law. The Supreme Court, for the first time discussed right to privacy in the context of the freedom of the press in *R. Rajagopal* v *State of T.N.*[32] popularly known as 'Autoshanker case'. In this case the court held that a citizen has a right to safeguard privacy of his own, his family, marriage, procreation, motherhood, childbearing and education among other matters. No one can publish anything concerning the above matters without his consent whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right of the individual concerned and would be liable in an action for damages. However, position may be differed if the person voluntarily puts into controversy or voluntarily invites or raises a controversy.[33] In *State of*

29 AIR 1973 SC 157. The petitioner's voice had been recorded in the course of a telephonic conversation where he was attempting to blackmail. He asserted in his defence that such conversation cannot be admitted under the provisions of Indian Evidence Act and his right to privacy under Article 21 had been violated.

30 Id.

31 AIR 1997 SC 568.

32 1994 SCC (6) 632.

33 This rule is subject to an exception that if any publication is based on public record including court record it will be unobjectionable. If a matter becomes a matter of public record, the right to privacy no longer exists and it becomes a legitimate subject for comment by press and media among others. Again, an exception must be carved out of this rule in the interests of decency in cases where female who is victim of a sexual assault, kidnapping, abduction or a like offence should not further be subjected to the indignity of her name and the incident being published in press or media. The second exception is that the right to privacy or the remedy of action for damage is simply not available to public officials as long as the criticism concerns the discharge of their public duties; not even when the publication is based on untrue fact and statements unless the official can establish that the statement had been made with

Maharashtra v *Madhulkar Narain*[34], the court went on to state that 'right to privacy' is available even to a woman of easy virtue and no one can invade her privacy.

The above discussion of judicial decisions of both U.S. and India shows that privacy-related issues have cropped up in a variety of cases ranging from child rearing, procreation, marriage, and termination of medical treatment, police surveillance, biographical films, abortion to telephone-tapping to the right of confidentiality of an HIV-infected person. Thus, it is extremely challenging despite the best efforts of legal scholars to define a fluid concept like privacy because it touches almost every aspect of a person and society to one degree or another and the term 'privacy' confounds attempts at delivering a universal definition.[35] As the Australian Law Reform Commission[36] notes that 'the very term "privacy" is one fraught with difficulty as the concept is an elusive one and the commission describes that the privacy can be divided into a number of related and separate concepts like information privacy, bodily privacy, privacy of communications and territorial privacy. Moreover, Prof. J Thomas McCarthy has noted 'like the emotive word 'freedom', 'privacy' means so many different things to so many different people that it has lost any precise legal connotation that it might once have had'.[37] For example, Warren & Brandeis defined privacy as 'right to be alone'.[38] Schoeman defined privacy as 'the right to determine what personal information is communicated to others' or 'the control an individual has over information about himself or herself'[39]. On the other hand, Garfinkel argues that 'privacy is about self-possession, autonomy, and integrity'.[40]

A doubt that may arise is as to how one may relate privacy to autonomy? It is to be understood that autonomy is located within one portion of this right because as mentioned above one of the constitutionally protected areas of privacy is that of

reckless disregard of truth. All that the alleged condemner needs to do is to prove that he has written after reasonable verification of facts.

34 AIR 1991 SC 207. A police Inspector visited the house of one Banubai in uniform and demanded to have sexual intercourse with her. On refusing he tried to have her by force. She raised a hue and cry. When he was prosecuted he told the court that she was a lady of easy virtue and therefore her evidence was not to be relied. The court rejected the argument of the applicant and held him liable for violating her right to privacy under Art. 21.

35 See eg, A Samuels, *Privacy: Statutorily Definable?* 17 Statute Law Review 115 (1996).

36 Australian law reform commission, Vol.1, Report 108, May 2008, online at www.alrc.gov.au. (visited Dec 25, 2016).

37 D Solove, *A Taxonomy of Privacy*,3 University of Pennsylvania Law Review 477, 479 (2006).

38 S Warren, L Brandeis, *The Right to Privacy*, 4 Harvard Law Review 193 (1890).

39 F. D. Schoeman, *Philosophical Dimensions of Privacy*, 22 (Cambridge University Press 1984).

40 See generally, S. Garfinkel, *Database Nation: The Death of the Privacy in the* 21*st Century* (O'Reilly & Associates 2001).

private decisions. Thus, right to privacy is not the liberty i.e, right to make and act on private decisions; it includes the claim which means a right that others not interfere with these private decisions, for any such interference would be an invasion of a protected area of privacy.[41] According to Wellman[42], this direct and essential connection between privacy and autonomy is not properly recognized by the courts. As one finds that the expression 'a private decision' is conspicuous by its absence from the opinions in the privacy cases. For example, even in *Roe v Wade*[43] the argument was not that a decision to undergo abortion is constitutionally protected because it is a private decision, but that it is encompassed by the right to privacy because it involves the exercise of one of the fundamental liberties recognized in the US Constitution. Hence, the emphasis is upon how fundamental, not how personal and private, the decision is.[44] In *People's Union for Civil Liberties* v *Union of India*[45], Kuldip Singh J argued privacy 'as a concept may be too broad and moralistic to define it judicially. Whether right to privacy can be claimed or has been infringed in given case would depend on the facts of the said case'.

Interestingly, according to James Whitman[46], there is no such thing as privacy. In support of his argument he states that English, American, French and German have different approaches to the concept of '*privacy*'. For e.g., American privacy is more concerned with personal liberty[47], while Europeans give more attention to the concept of human dignity. He brings to our attention that 'privacy' is culturally biased and this is proven by the fact that in European countries it is recognized as a fundamental human right and in Asia this is only an emerging concept. So, according to him, what works in one region may not work in other part of the globe as it is basically culturally biased.

41 See generally, Wellman C, *An Approach to Rights*, 185 (Kluwer Academic Dordrecht 1997).
42 Id.
43 410 U.S. 113 (1973).
44 Id.
45 AIR (1997) 1 SCC 301, 311.
46 J Whitman, *The Two Western Cultures of Privacy: Dignity v Liberty*, 113 Yale Law Journal 1151,1161,1221 (2004). See also, *R Bruyer, Privacy: A Review and Critique of the Literature*, 43 Alberta Law Review 553, 569 (2006).
47 Frank A. Riddick, *Privacy in the Context of Health Care*, Report of The Council On Ethical and Judicial Affairs, American Medical Association, 1 (2001). In United States, privacy is linked to freedom from intrusion by State or other individuals. It also is understood to refer to a domain of personal decisions about important matters. In less legalistic forms, privacy can be viewed as a necessary condition for maintaining intimate relationships that entail respect and trust, such as love or friendship. The statutory definition focuses on an individual's right to control personal information. see e.g., Federal Privacy Act of 1974, 5 U.S.C. § 552a (1982).

Though, one finds it difficult to give a universally acceptable definition for privacy one cannot deny the fact that this right is of importance for every individual to possess and retain a sense of self worth both individually and as a member of society.[48] Also, with the Web revolution and the emergence of data mining, privacy concerns have posed technical challenges fundamentally different from those that occurred before the information era. In the information technology era, privacy refers to the right of users to conceal their personal information and have some degree of control over the use of any personal information disclosed to others.[49] In sum, privacy must be viewed as the bundle of interests that individuals have in their personal sphere free from interference from others.[50]

PRIVACY IN THE MEDICAL CONTEXT

Physician-patient relationship is fiduciary in nature. Therefore, undoubtedly privacy must be viewed as a key governing principle of the patient-physician relationship. Patients are required to share information sometimes utmost personal with their physicians to facilitate correct diagnosis and treatment so as to avoid adverse drug prescriptions and further complications in their physical health. Also, a 'rights-based' approach might regard the duty of keeping confidences as a respect for the right to privacy.[51] According to Johnson[52] the three important elements for maintaining confidentiality are patient's autonomy; doctor's integrity; and the consequences for the future relationship. Therefore, Clegg[53] rightly argues:

48 *Vickery* v *Nova Scotia Supreme Court (Prothonotary)* 1 SCR 671, 687 (1991). per Cory J. see also, Elizabeth Wicks, *Human Rights and Healthcare*, 120 (Hart Publishing 2007). According to Wicks, whatever view of the concept is adopted, it is clear that the protection of personal information is a central aspect of privacy.

49 See generally, M. Ackerman, L. Cranor, and J. Reagle, *Privacy in E-Commerce: Examining User Scenarios and Privacy Preferences* in *Proc. of the ACM Conference on Electronic Commerce*, 1-8 (Denver, Colorado, USA 1999).

50 See example, R Clarke, *What's 'Privacy'?* Australian National University (2004), online at www.anu.edu.au/people/ Roger.Clarke/DV/Privacy.html. (visited 14th Dec 2016). According to him, privacy is a 'right' in a legal sense, but, for definitional purposes, the word 'interest' may be more accurate. As per legal jurisprudence a right is always an interest, even if not all interests are accorded the status of legal rights.

51 Marc Stauch, Kay Wheat, John Tingle, *Sourcebook on Medical Law*, 242 (Cavendish Publishing Limited, 2nd ed 2002). For example, U.K. Medical Research Council's guidance on confidentiality states:
Respect for private life is a human right, and the ability to discuss information in confidence with others is rightly valued. Keeping control over facts about one's self can have an important role in a person's sense of security, freedom of action, and self-respect.

52 Johnson, AG, *Pathways in Medical Ethics*, 74-75 (Edward Arnold 1990).

53 HA Clegg, *Professional Ethics*, in M Davidson (ed), *Medical Ethics*, A Guide to Students and Practitioners 44 (London 1957).

> The doctor's consulting-room should be as sacrosanct as the priest's confessional. The whole of the art and science of medicine is based on the intimate personal relationship between patient and doctor, and to this it always returns, however scientific medicine becomes and whatever the great and undeniable benefits society receives from the application of social and preventive medicine.

Further, both deontological and teleological reasoning can be used to justify the existence of a duty of confidence between patients and doctors. The consequentialist argues that optimum medical care and protection can be provided to patient if a doctor is able to provide a sense of emotional and personal assurance that his medical information will not be disclosed so that a patient never finds himself in an embarrassing position while talking to the physician about his illness.[54] Doctors routinely ask a series of questions about bodily functions that people would not dream of discussing with anyone else. As Raanan Gillon[55]notes:

> When a patient's medical problems may relate to genitourinary functions a doctor may need to know about that patient's sexual activities, sometimes in detail. When a patient's problems are psychological a doctor may need to know in great detail about the patient's experiences, ideas and feelings, relationships past and present, even in some contexts about the person's imaginings and fantasies.
>
> Such intrusive medical inquiries are based not on prurience or mere inquisitiveness but on the pursuit of information that is of potential assistance to the doctor in treating and helping the patient. Nonetheless many patients are unlikely to pass on this information unless they have some assurances of confidentiality.

Hence, according to consequentialist, justification for the duty of medical confidentiality is people's better health, welfare, the general good and overall happiness.[56] The language of the public interest defence has a strong utilitarian flavor. The utilitarian view is particularly appropriate to confidentiality as it will readily admit that the duty is not absolute and can be breached in certain circumstances. It would be argued that the breach is justified when the utility of disclosure outweighs

54 Marc Stauch, Kay Wheat, John Tingle, *Sourcebook on Medical Law*, 242 (Cavendish Publishing 2nd ed 2002).

55 'Confidentiality' in Helga Kuhse and Peter Singer (eds), *A Companion to Bioethics*, 425-31 (Blackwell, Oxford 1998).

56 Gillon, R, *Philosophical Medical Ethics*, 108 (John Wiley 1986).

the utility produced by keeping the confidences. As will be seen, the only legal justification at common law for disclosure is either that the patient has consented, or that it is in the public interest to disclose. [57] According to deontological theorists it is the duty rather than purpose which is the fundamental concept of ethics.[58] At the end, both utilitarians and deontologists alike as a means to some morally desirable end calls for the general welfare, respect for people's autonomy, and respect for their privacy.[59]

Confidentiality is beneficial for individual patients and for society as a whole. For example, in the context of transmittable diseases, especially sexually transmittable diseases, so long as the patient continues to trust his or her doctor the doctor will be able to educate and influence the patient in ways that can reduce the likelihood of the disease being passed on to other members of the community. As soon as confidentiality is broken the trusting relationship is likely to be undermined and the opportunity to help reduce the spread of disease is lost.[60] On the other hand, if a patient confides in his doctor that he has committed a very serious crime, such as child abuse, should the doctor inform the police or keep the information as confidential and similarly in the case of drug use? Here, no one will deny that there is a clear public interest for pedophiles and drug users to willingly come forward to seek help. Thus, Emily Jackson strongly argues that 'working out whether disclosure is justified in a particular case will often involve a complex balancing exercise between competing interests'.[61]

Ethical Obligation

A doctor's duty to respect his or her patients' confidentiality has its origin in the first code of medical ethics. The Hippocratic Oath[62], states that:

> What I may see or hear in the course of the treatment or even outside of the treatment in regard to the life of men, which on no account one must spread abroad, I will keep to myself holding such things shameful to be spoken about.

57 *AG* v *Guardian Newspapers (No 2)*, [1990] AC 109, p.282.
58 Gillon, R, *Philosophical Medical Ethics*, 108 (John Wiley 1986).
59 Id.
60 '*Confidentiality*' in Helga Kuhse and Peter Singer (eds), *A Companion to Bioethics*, 425-31 (Blackwell, Oxford 1998).
61 Emily Jackson, *Medical Law, Text, Cases and Materials*, 392 (Oxford University Press, 2nd ed 2010).
62 Charles J. Sykes, *The Attack on Personal Rights-At Home, At Work, On-Line, and in Court*, 98 (St. Martin's Griffin 1999).

This concept of confidentiality, which underpins medical care, has withstood the test of time. This is obvious by the fact that the patient confidentiality receives unqualified protection in the modern version of the Oath i.e., at the International level, the Declaration of Geneva[63]:

> I will respect the secrets which are confided in me, even after the patient has died.

The International Code of Medical Ethics also states:

> A doctor shall preserve absolute secrecy on all he knows about his patients because of the confidence entrusted in him.

In India, the above undertaking is repeated in the Indian Medical Council (Professional conduct, Etiquette and Ethics) Regulations, 2002. The Medical Council of India's Code of Ethics Regulations protects patient confidentiality by stating that the physician 'shall not disclose the secrets of a patient that have been learnt in the exercise of his or her profession except in a court of law under orders of the Presiding Judge; in circumstances where there is a serious and identified risk to a specific person and or community; or in case of notifiable diseases'.[64] In addition to the treating doctors, administrators and the public information officer of a healthcare institution are also ethically required not to disclose health information of a patient.[65] Similarly, according to Indian Council of Medical Research (ICMR) guidelines for biomedical research on human participants, researchers must maintain the confidentiality of their subjects' health and other personal information, especially as the promise of preserving confidentiality is appropriately part of the informed consent agreement.[66]

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63 Declaration of Geneva, online at 2012,http://www.mma.org.my/Portals/0/Declaration%20of%20Geneva.pdf. (visited 23rd June 2012).

64 Regulation 7.14 of Indian Medical Council (Professional conduct, Etiquette and Ethics) Regulations, 2002.

65 Id.

66 **Ethical Guidelines for Biomedical Research on Human Participants- Principle IV. Principles of privacy and confidentiality** whereby the identity and records of the human participants of the research or experiment are as far as possible kept confidential; and that no details about identity of said human participants, which would result in the disclosure of their identity, are disclosed without valid scientific and legal reasons which may be essential for the purposes of therapeutics or other interventions, without the specific consent in writing of the human participant concerned, or someone authorized on their behalf; and after ensuring that the said human participant does not suffer from any form of hardship, discrimination or stigmatization as a consequence of having participated in the research or experiment.

Legal Obligation

Common law

Stemming originally from confidential relationships such as marriages and business relations a duty of confidence did find protection in common law.[67] The modern English law of confidence stems from the judgment in *Prince Albert* v *Strange*[68], where Lord Cottenham, restrained the defendant from publishing a catalogue of private etchings made by Queen Victoria and Prince Albert. The requirements for breach of confidence were laid down in *Coco* v *A N Clark*[69], where Megarry J developed an influential tri-partite analysis of the essential ingredients of the cause of action for breach of confidence: the information in question must have the necessary quality of confidence; the information must be imparted in circumstances importing an obligation of confidence; and there must be an unauthorized use of the information to the confider's detriment. According to this threefold test, legal protection would only be provided for personal information where the confider and the discloser of the information are in a relationship of confidence.[70] While this was originally developed for business purposes, over the time it has been expanded to cover almost any situation involving secrets, including cases falling under misuse of private information. Therefore, in *Spycatcher*[71] case, Lord Goff set out a broader test in which the focus moved from the relationship of confidence to the nature of the information and the confidant's knowledge:

> a duty of confidence arises when confidential information comes to the knowledge of a person… in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others.

Similarly, in *A* v *B (a company)*[72], Lord Woolf stated that a duty of confidence will arise whenever the party subject to the duty is in a situation where he either knows

67 Wicks, Elizabeth, *Human Rights and Healthcare*, 121-122 (Hart Publishing 2007).

68 *Prince Albert* v *Strange* (1848) 1 Mac. & G. 25.

69 *Coco* v *A N Clark* [1969] RPC 41. Coco entered into negotiation with AN Clark to develop a moped. After some time, Clark elected not to develop moped with Coco and instead chose to develop it independently. Coco became suspicious that Clark was using some of his designs for the new moped. He therefore applied for an injunction. The court found that Coco had failed to establish that the similarities between the two mopeds were achieved by the use of information provided him to AN Clark, hence injunction cannot be given.

70 Wicks, Elizabeth, *Human Rights and Healthcare*, 122 (Hart Publishing 2007).

71 *A-G* v *Guardian Newspapers* [1990] 1 AC 109, 281.

72 2 All ER 545, 554 (2002).

or ought to know that the other person can reasonably expect his privacy to be protected. The imposition of the obligation thus, does not depend as such on a pre-existing relationship between the parties. It is both the nature of the information and the circumstances in which it was disclosed that create the duty of confidentiality.[73] Further, in *Douglas* v *Hello*[74], Sedley LJ said that the law no longer needs to construct an artificial relationship of confidence in order to protect a person's privacy. This was affirmed by *Venables* v *News Group Newspapers*[75] where the President of the Family Division noted that a duty of confidence could arise independently of any relationship between the parties and therefore, the court could restrain publication of personal information regardless of the circumstances in which it was obtained. Accordingly, a private diary dropped in a public place and found by a passer-by would be protected by a duty of confidence.[76]

There has been some uncertainty as to the jurisdictional basis for the obligation of confidence.[77] The judges in *Attorney-General* v *Guardian Newspapers (No 2)*[78] has made it clear that the basis for the obligation of confidence lays in the law of equity. Emily Jackson[79] too notes, 'the origins of the legal duty of confidence lies in the equitable jurisdiction of the Chancery Division to grant injunctions in order to prevent the infringement of legal and equitable rights'. Further, Lord Bingham in *AG* v *Guardian Newspapers (No.2)*[80]explained that the duty of confidence arises from an obligation of conscience:

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73 Emily Jackson, *Medical Law, Text, Cases and Materials*, 354 (Oxford University Press, 2nd ed 2010).

74 *Douglas* v *Hello* (2001) QB 967.

75 1 All ER 908, 933 (2001).

76 *A-G* v *Guardian Newspapers* 1 AC 109, 282 (1990).

77 *Morrison* v *Moat*, 9 Hare, 241, 255 (1951). While deciding a suit for an injunction to restrain the use of a secret medical compound, Sir George James Turner, V.C., said:
That the court has exercised jurisdiction in cases of this nature does not, I think, admit of any question. Different grounds have indeed been assigned for the exercise of that jurisdiction. In some cases it has been referred to property, in others to contract, and in others, again, it has been treated as founded upon trust or confidence, - meaning, as I conceive, that the court fastens the obligation on the conscience of the party, and enforces it against him in the same manner as it enforces against a party to whom a benefit is given, the obligation of performing a promise on the faith of which the benefit has been conferred; but upon whatever grounds the jurisdiction is founded, the authorities leave no doubt as to the exercise of it.

78 [1990] 1 AC 109.

79 Emily Jackson, *Medical Law, Text, Cases and Materials*, 354 (Oxford University Press, 2nd ed 2010).

80 3 All ER 545 (1988). See also, *Ashworth Security Hospital* v *MGN Ltd*, [2000] 1 WLR 515, 527, where Lord Phillips MR stated :
It is well settled that there is an abiding obligation of confidentiality as between doctor and patient, and in my view when a patient enters a hospital for treatment, whether he be a model citizen or murderer, he is entitled to be confident that details about his condition and treatment remain between himself and those who treat him.

> The cases show that the duty of confidence does not depend on any contract, express or implied, between the parties. If it did, it would follow on ordinary principles that strangers to the contract would not be bound. But the duty 'depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it'…A third party coming into possession of confidential information is accordingly liable to be restrained from publishing it if he knows the information to be confidential and the circumstances are such as to impose upon him an obligation in good conscience not to publish….Like most heads of equitable jurisdiction, its rational basis does not lie in proprietary right. It lies in the notion of an obligation of conscience arising from the circumstances in or through which the information was communicated or obtained.

Hence, the question that arises is as to what gives rise to an enforceable duty of confidentiality? The nature of this obligation which applies to all confidential information and not only to medicine was discussed by the Court of Appeal in *A-G* v *Guardian Newspapers Ltd (No 2)*[81] also known as *Spycatcher* case, in which it was affirmed that there was a public interest in a legally enforceable protection of confidences received under notice of confidentiality. Moreover, the obligation may be imposed by an express or implied term of contract or can even exist independently of any contract on the basis of an independent equitable principle of confidence.[82] In *Ashworth Security Hospital* v *MGN Ltd*[83], Lord Phillips MR held that there is an inherent obligation of confidentiality between doctor and patient and when a patient enters a hospital for treatment, whether he be a model citizen or murderer, he is entitled to be confident that details about his condition and treatment remain between himself and those who treat him.

A threefold test was laid down in *Stephens* v *Avery*[84] for establishing a breach of the duty of keeping patient's confidential information, which necessitates that the information in question must have the necessary quality of confidence; the

81 (1988) 3 All ER 545. An example of a utilitarian approach may be found in this case when Lord Goff said that 'although there is a public interest in preserving confidences which should be preserved and protected by the law, nevertheless, that public interest may be outweighed by some other countervailing public interest which favours disclosure'.

82 [1988] 3 All ER 545, 639, per Lord Keith.

83 [2000] 1 WLR 515, 527.

84 (1988) 2 All ER 477. The plaintiff and the defendants were close friends and used to share all secrets. The defendants passed on to these secrets to editors and publishers of a newspaper, which included details of the defendant's sexual conduct. The plaintiff brought an action against the defendant claiming damages. See also, *Coco* v *A N Clark* [1969] RPC 41.

information must be imparted in circumstances importing an obligation of confidence; and there must be an unauthorized use of the information to the confider's detriment. To determine whether the circumstances of communication are confidential, McInerney J, in *Mense* v *Milenkovic*[85] expressed that there must be an objective test. This approach was clearly expressed in following words:

> If the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realized that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose on him the equitable obligation of confidence.

Therefore, equity may impose an obligation of confidence upon a defendant having regard to not only what the defendant knew, but to what he ought to have known in all the relevant circumstances.[86] In other words even if the revelation did not itself harm a particular person, if it could be said to have caused a public harm, for example, to lead to a lack of trust in doctors, this could be sufficient to justify protecting the information in equity.[87] But according to the opinion of Lord Goff in *Spycatcher* case[88], the nature of information and the confidant's knowledge is more important than the relationship of confider's. As he strongly argues:

> A duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others.

Human Rights

The unauthorized disclosure of medical information is a human rights issue has been clearly established by the European Court of Human Rights. The European

85 [1973] VR 784, 801. see also, *A* v *B (A Company)* [2002] 2 All ER 545.Lord Wolf CJ stated that:
A duty of confidence will arise whenever the party subject to the duty is in a situation where he either knows or ought to know that the other person can reasonably expect his privacy to be protected.

86 J A Devereux, *Australian Medical Law*, 949 (Routledge-Cavendish ,3rd ed 2007).

87 *Ashworth* v *MGN Ltd* [2001] 1 All ER 991.

88 *A-G* v *Guardian Newspapers* [1990] 1 AC 109, 281. The facts in this case involved Peter Wright, a former member of the British security services, who was subject to the Official Secrets Act 1911. He wrote his memoirs about his time in the security service, and the book was published, first in Australia. The British Government immediately acted to ban the book in the UK. However, the book continued to be available legally in Scotland as well as overseas, and some English newspapers published the articles from the book.

Convention on Human Rights, incorporated into English law by the Human Rights Act 1998 protects right to a 'private life' under Art 8.[89] This Article impliedly protects patient's interest in privacy and medical confidentiality apart from the 'right to respect for private and family life'. However, Article 8 is not an absolute right, and is qualified by Article 8(2). Article 8 (2) makes it clear that rights can be limited provided they are prescribed by the law and are necessary in a democratic society for a number of specified aims, including the rights and freedoms of others, the prevention of crime and the protection of health and morals. Therefore, at the core of Article 8's protection is the prevention of arbitrary interference by public authorities and the Court has been reluctant to present a comprehensive definition, as it is not 'possible or necessary to attempt an exhaustive definition of the notion of private life'.[90] It is clear, however, that a broad range of privacy interests are encompassed within Article 8's protection, including an individual's relations with others,[91] physical and moral integrity,[92] personal integrity,[93] legal recognition of gender,[94] and sexuality,[95] as well as the more obvious aspects of personal information.[96] It is difficult for individuals to establish that any disclosure of their medical records constitutes a *prima facie* violation of Article 8. The principal obstacle to a successful claim is that it has often been possible for public authorities to establish that disclosure is justifiable under Article 8(2).[97]

89 Article 8(1) states: Everyone has the right to respect for his private and family life, his home and his correspondence. Article 8(2) states: There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

90 *Niemietz* v *Germany* 16 EHRR 97, Para 29.

91 Id.

92 *Costello-Roberts* v *United Kingdom* (1993) Series A, No 247.

93 *Burghartz* v *Switzerland* (1994), 18 EHRR 101.

94 *Goodwin* v *United Kingdom* (2002) 35 EHRR 18.

95 *Smith* v *United Kingdom* (2000) 29 EHRR 493.

96 *Leander* v *Sweden* (1987) 9 EHRR 433.

97 For example, in *MS* v *Sweden* (1997) 45 BMLR 133 , the applicant's claim for industrial injury compensation led to her medical records, including sensitive information about termination of pregnancy, being forwarded to the social insurance office without her knowledge. The European Court confirmed that disclosure of confidential information as an interference with the applicant's Article 8(1) rights but it was justified under Article 8(2) on the grounds of protecting the economic well being of the country, because the medical information was relevant to the granting of public funds. Similarly, in *Z* v *Finland* (1997) 25 EHRR 371 the ECHR held that seizing Z's medical records and ordering her doctors to give evidence did not amount to a violation of Article 8 because although a patient has an important interest in protecting the confidentiality of his or her medical records, that interest may be outweighed by the Government's interest in investigating and prosecuting a crime. See also, *Stone* v *South East Coast SHA,* [2006] EWHC 1668 (Admn); *R (on the application of B)* v *Stafford Combined Court* [2006] EWHC 1645 (Admn).

In addition to Article 8(2)'s qualification of the right to privacy, Article 8 has to be put into the balance with Article 10[98], the right to freedom of expression, and section 12 of the Human Rights Act, which specifies that, 'the court must have particular regard to the importance of the Convention's right to freedom of expression'.[99] This right is of particular relevance to the media and their freedom to publish. In *A* v *B (a company)*[100] Woolf CJ stated that when courts are looking into any publication of confidential information made by the media, the concept of free press has to be acknowledged and so any interference with it has to be justified.[101]The first real signs of a reconciliation of Article 8 and the common law on confidence came in the 2001 case of *Douglas v Hello*[102] when the wedding photographs from the private wedding of Michael Douglas and Catherine Zeta Jones were taken by a freelance photographer and sold to the Hello magazine without the consent of the bride and groom, Sedley LJ said that the law no longer needs to construct an artificial relationship of confidence in order to protect a person's privacy. Consequently, the courts stated that 'if freedom of expression is to be impeded,…it must be on cogent grounds recognized by law'.[103] Similarly, in *Venables* v *News Group Newspapers Ltd*[104] Butler-Sloss P[105] stated that:

> In the light of s.12 of the 1998 Act and Art 10(1) of the Convention, which together give an enhanced importance to freedom of expression and consequently to the right of the press to publish…. There is no doubt, therefore, that Parliament has placed great emphasis upon the importance of Art.10 and the protection of freedom of expression, inter alia for the press and for the media.

98 Article 10 provides that everyone has the right to freedom of expression, including the right to receive and impart information.

99 Emily Jackson, *Medical Law, Text, Cases and Materials*, 358 (Oxford University Press ,2nd ed 2010).

100 [2002] 2 All ER 545,552

101 Id.

102 [2001] 2 All ER 289.

103 Id, at 324. Section 12(4) states that 'the court must have particular regard to the importance of the Convention right to freedom of expression'.

104 [2001] 1 All ER 908. Jon Venables and Robert Thompson were convicted of murder when they were minors. When the claimants reached the age of majority the court granted them parole. Their case had attracted wide media and public attention and the court' s grant of injunction not to disclose the identities of murders were remained only till they were minors. Both of them feared for their privacy as the press was continuously keeping great interest in the developments of this particular case. So they sought injunction from the court that their identities should not be disclosed to the media. The main issue before the court was that the whether there is jurisdiction to grant an injunction in respect of an adult to protect his identity and also the applicability of the convention as this is a private proceedings and court is a public authority.

105 Id. at 919.

Therefore, the judge held that it is necessary to place the right of confidence above the right of the media to publish freely, information about the accused and gave lifelong injunction to protect the identities of both. The need to balance the interests protected by Articles 8 and 10 in the context of patient information arose in *Campbell* v *MGN Ltd*[106]. The House of Lords had to determine whether the press's freedom to publish information about the model Naomi Campbell's treatment for drug addiction should take priority over her right to privacy. An important issue on which the court gave emphasis in this case was whether there was a public interest, including freedom of the press which justified the infringement. The court decided that the taking of photographs and publication of the story was in breach of confidence. Baroness Hale[107], while recognizing that, 'information about a person's health and treatment for ill-health is both private and confidential and it stems not only from the confidentiality of the doctor-patient relationship but from the nature of the information itself'; strongly went ahead with the statement that:

> not every statement about a person's health will carry the badge of confidentiality or risk doing harm to that person's physical or moral integrity. The privacy interest in the fact that a public figure has a cold or a broken leg is unlikely to be strong enough to justify restricting the press's freedom to report it. What harm could it possibly do? Sometimes there will be other justifications for publishing, especially where the information is relevant to the capacity of a public figure to do the job. But that is not this case there was, as the judge found, a risk that publication would do harm. The risk of harm is what matters at this stage, rather than the proof that actual harm has occurred. People trying to recover from drug addiction need considerable dedication and commitment, along with constant reinforcement from those around them. That is why organizations like NA were set up and why they can do so much good. Blundering in when matters are acknowledged to be at a 'fragile' stage may do great harm.[108]

Hence, there is a balancing exercise between the right to respect for private life under the ECHR, Article 8 and the right to freedom of expression under Article 10.

106 [2004] All ER 995. Ms Campbell accepted that the newspaper had been entitled, in the public interest, to disclose the information that she was a drug addict and that she was receiving treatment for her addiction, because she had previously falsely and publicly stated that she was not a drug addict. But she claimed that the details of her attendance at Narcotics Anonymous, and accompanying photographs, amounted to a breach of her privacy and claimed damages for breach of confidence and compensation under the Data Protection Act 1998.

107 Id. at para 145.

108 Id. at para 157.

The *Campbell* case also involved careful consideration of the Data Protection Act, 1998 with the Court of Appeal giving its first judgment on the statute. The Court of Appeal in this case took the view that the formulation of a law protecting personal privacy has run in parallel with the development of the law of data protection and it is to be expected that the two areas will draw closer together.[109]

Also, the right to privacy which lies at the heart of an action for breach of confidence has to be balanced against the right of the media to impart information to the public. And the right of the media to impart information to the public has to be balanced in its turn against the respect that must be given to private life. While talking about the balancing exercise between right to privacy of an individual and the right of the media to impart information to the public I agree with B.P. Jeevan Reddy, J judgement in *R.Raj Gopal* v *State of T.N*[110] delivered by the Indian Supreme Court. The Court held that 'it is the right to be let alone and a citizen has the right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. No one can publish anything concerning the above matters without his consent whether truthful or otherwise and whether laudatory or critical. Exception may be made if a person voluntarily thrusts himself into a controversy or any of these matters becomes public part of public records or relates to an action of public officials concerning the discharge of his official duty'.[111] The discussions of case-laws demonstrate, clearly that the balance is being struck on a case-by-case basis and freedom of expression is not always the trump card.[112] This is made clear in the words of Dame Butler Sloss[113]:

> the common law continues to evolve, as it has done for centuries, and it is being given considerable impetus to do so by the implementation of the convention into our domestic law.

109 [2004] 2 All ER 991, 1038. Similarly, in *H* v *Associated Newspapers*, a newspaper applied successfully for relaxation of an injunction preventing it from publishing any information about a healthcare worker with HIV/AIDS.

110 1994 SCC (6) 632.

111 Id.

112 See for example, *A HA* v *X* (2001) 61 BMLR 22; *Z* v *Finland* (1997) 25 EHRR 371; *MS* v *Sweden* (1997) 45 BMLR 133. The court's approach in *Z* v *Finland* and *MS* v *Sweden* suggests that typically the requirement for maintaining confidentiality is that the maintenance of the confidentiality of the documents themselves i.e., the documents should not be read into the public record or otherwise put into the public domain; the minimum public disclosure of any information derived from the documents; and the protection of the patient's anonymity, if not in perpetuity then at any rate for a very long time indeed.

113 *Venables* v *News Group Newspapers Ltd* [212] 1 All ER 908, 932.

Emily Jackson[114] argues 'medical information will be the sort of information which is treated as confidential, and the doctor-patient relationship is plainly one in which duty of confidence exists'. In *Attorney General* v *Guardian Newspapers Ltd and others (2)*[115], Lord Goff stated a duty of confidence arises when someone knows, or ought to know, that the information he or she has acquired is confidential. Also, it is both the nature of the information and the circumstances in which it was disclosed that create the duty of confidentiality[116] and one must remember that the only legal justification at common law for disclosure of confidential information is that either the patient has consented, or that it is in the public interest to disclose.[117] Interestingly, the factors that give rise to a duty of confidentiality are thus both vague and somewhat question-begging. All these principles would apply in a medical context and prove to be useful for sustaining the relationship, where the duty of discretion has been endorsed judicially by the courts effectively.

Conclusion

Angus H Ferguson[118] in his thesis notes that 'lack of research on history of medical confidentiality generally gives the impression to the public that, medical confidentiality has been a relatively unchallenged feature of medical practice'. Therefore, writers are always forced to depend on Hippocratic Oath or some judicial rulings in order to place current challenges to medical confidentiality into some historical context.[119] However, questions relating to preserving the confidentiality of patients can no longer be resolved by simply referring to the codes, as it requires rational, careful analysis of changing conditions.[120] In the modern era, patient's relationship is not just confined to his physician. There are now networks of doctors, nurses and other healthcare professionals involved in care. As Brody[121] notes 'there is

114 Emily Jackson, *Medical Law, Text, Cases and Materials*, 354 (Oxford University Press ,2nd ed 2010).
115 *Attorney General* v *Guardian Newspapers Ltd and others* (2) [1988] 3 ALL ER 545, 660-61, per Lord Goff.
116 Emily Jackson, *Medical Law, Text, Cases and Materials*, 354 (Oxford University Press ,2nd ed 2010). see also, *A-G* v *Guardian Newspapers* [1990] 1 AC 109, 281.
117 *AG* v *Guardian Newspapers* (No 2) [1990] AC 109, 282, per Lord Goff.
118 Angus H Ferguson, *Should a Doctor tell? Medical Confidentiality in Interwar England and Scotland*, University of Glasglow, thesis submitted for Doctor of Philosophy, 2005, online at http://theses.gla.ac.uk/3150/ (visited on 25th Dec 2016).
119 JV McHale, *Medical Confidentiality and Legal Privilege*, 13 (Routledge 1993).
120 Peter de Cruz, *Comparative Healthcare Law*, 47 (Cavendish Publishing 2001).
121 Brody, H, *The physician-patient relationship*, in R. M. Veatch ed., ,*Medical Ethics*, 83 (Bartlett publishers 1989).

also a need for patient records to which many people must have access, as part of the care 'team' and the need to communicate information to insurance companies or new employers; and there is the computerization of records. No wonder there is a need for an analysis of 'what it is, why it is basic to the physician relationship, as well as a sense of its limits'. As with most matters relating to law and ethics, rules on confidentiality need to keep abreast of current developments, and the rapidity of technological change, therefore general guidance cannot supply definitive solutions to all problems or all unexpected situations that might arise in the course of doctor-patient relationship.[122] As Peter de Cruz[123] argues 'general guidance cannot supply definitive solutions to all problems or all situations that might arise in the course of a doctor-patient relationship'. As with most matters relating to law and ethics, rules on confidentiality need to keep abreast of current developments, and the rapidity of technological change.

122 Id. at 49.
123 Peter de Cruz, *Comparative Healthcare Law*, 49 (Cavendish Publishing 2001).

LEGAL ENVIRONMENT OF CONSENT IN HEALTH CARE LAW
AN OVERVIEW

- *Jizamol.P.R*[*1]

Consent is perhaps the only principle that runs through all aspects of health care provisions today. It represents the legal and ethical expression of the basic right to have one's autonomy and self-determination. The element of consent is one of the critical issues in the area of medical treatment today. In India in recent years there has been an increase in the number of malpractice suits that have arisen because of lack of consent or inadequate consent from the patients for various procedures. Many clinicians are unaware of the legal and ethical requirements and clinical aspects of consent in Medicine in India. Unlike many other countries, the Indian Statute Book does not contain separate legislation regarding age for consent to medical treatment. It is well known that the patient must give valid consent to medical treatment; and it is his prerogative to refuse treatment even if the said treatment will save his or her life.

Consent to treatment is the principle that a person must give their permission before they receive any type of medical treatment or examination. This must be done on the basis of a preliminary explanation by a clinician. [2]If the medical practitioner attempts to treat a person without valid consent then he will be liable under both tort and criminal law. Patients must give valid consent to medical treatment and it is his prerogative to refuse treatment even if the said treatment will save his or her life. So, consent should be obtained to safe guard oneself from future medical litigation, before examination of a patient for diagnosis, therapeutic intervention, treatment and surgery.

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2 2. http:/www.nhs.uk/coditions/consent to treatment/pages/introduction.aspx. (*visited on* 03rd December, 2016)

Analysing how the concept and role of consent was born and developed we can see that not only the Egyptian civilisation, the Greek and Roman, documents showed how the doctor's intervention had, in some way, first to be approved by the patient. [3] The earliest expression of this fundamental principle, based on autonomy, is found in the Nuremberg Code of 1947[4].The code makes it mandatory to obtain voluntary and informed consent of human subjects. Similarly, the Declaration of Helsinki adopted by the World Medical Association in 1964 emphasizes the importance of obtaining freely given informed consent for medical research by adequately informing the subjects of the aims, methods, anticipated benefits, potential hazards, and discomforts that the study may entail. [5]Several international conventions and declarations have similarly ratified the importance of obtaining consent from patients before testing and treatment.[6]

The foundation of the traditional theory of consent to treatment lies in the law of battery, and is found in decisions of US courts as early as 1905.[7]Justice Cardozo offered what has become perhaps the best-known statement of the principle of consent in the 1914 New York case of *Schloendorff v. New York Hospital*[8]. "Every human being of adult years and sound mind has a right to determine what shall be done with his own body: and a surgeon who performs an operation without his patient's consent commits an assault...." [9]

Consent can make physical invasion lawful but the reality of such consent may be closely scrutinized by the law and it is subject to certain policy limitations, consent will not normally render legitimate a serious physical injury. Traditional doctor-patient relationship was one in which the doctor and the patient were unequal bargaining partners in a contract for services with the doctors special knowledge creating the advantage. Over the past decade a considerable volume of litigation in common law countries has focussed on the consent issue and as a result the doctrine of informed consent, as it has come to be called has assumed a role of significance in the medical negligence debate. It is a doctrine which has shown every sign of getting

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3 V Mallardi, *The origin of informed consent.* - NCBI - NIH available at https://www.ncbi.nlm.nih.gov/pubmed/16602332 (*visited on* 03rd December , 2016)

4 1947. Nuremberg Code: The Nuremberg Code was adopted immediately after World War II in response to medical and experimental atrocities committed by the German Nazi regime.

5 KK Aggarwal, *Real Consent and not Informed Consent Applicable in India, 25*Indian Journal of Clinical Practice (September 2014)

6 Article 8 of European Convention on Human Rights

7 *Pratt v. Davis,* 79 N.E. 562 (1906)

8 (1914),211 N.Y. 125, at 126

9 Andrew Grub ,*Principles of Medical law* 133 (Oxford University Press, 2004)

out from the difficulties, which we could see in the light of recent judgements .Now, the doctor need to give the patient the complete knowledge which will make him or her an equal bargaining partner. Thus informed consent is meant to transform the essence of the doctor-patient relationship to a contractual one, as contractual relationships are thought to promote individual autonomy and freedom of choice[10]. The essential ingredient for validity of the act which involves two persons, "consensus ad idem" which means two persons are said to consent if they agree upon the same thing in the same sense. [11]

Lord Diplock had stated that, consent is a state of mind personal to the patient whereby he agrees to the violation of his bodily integrity.[12] Not every agreement to undergo treatment is in law a valid consent because it may be based upon inadequate information to make a meaningful decision whether to undergo the procedure.

The English courts have unreservedly accepted that a patients bodily integrity is inviolable such that any physically invasive medical treatment or procedure however trivial, is unlawful unless authorised by consent or other lawful authority. The common law application of consent is not fully developed in India, although the Indian courts have often referred to these principles. In such situations, obviously one has to refer to the principles of the Indian Contract Act and the Indian Penal Code. The relationship between a medical professional and his patient is a contract by parties competent to contract giving rise to contractual obligations.[13]

Every human being who is an adult and of sound mind has a right to determine what should be done with his body. Therefore consent obtained should be legally valid. A doctor who treats without valid consent will be liable under the tort and criminal laws. The law presumes the doctor to be in a dominating position, hence the consent should be obtained after providing all the necessary information.

The doctor-patient relationship is a special type of contract which starts when a patient comes to a doctor seeking medical care, and when the doctor starts treating the patient the contract comes into being. One of the essential features of establishing a contract is consent, which means "an agreement, compliance or permission given voluntarily without any compulsion".[14]Although there is no legal definition of

10 Stone AA. , *Informed Consent. Special Problems for Psychiatry,* 30 Hospital and Community Psychiatry 321-327(1979).

11 Sec 13 of Indian Contract Act

12 *Sidaway v. Bethlehem Royal Hospital Governors[*1985]1AllER643,658,

13 *Consent and medical treatment: The legal paradigm in India* ,I25(3) Indian J Urol 343,347 (July-Sept 2009)

14 Pillay VV, *Medical Law and Ethics. In: Handbook of Forensic Medicine and Toxicology*, 24,25 (Paras Publication, 2003)

consent in Indian law, Sec. 13 of the Indian Contract Act states that "two or more persons are said to consent when they agree upon the same thing in the same sense". This has been reflected in Article 21 of the Indian Constitution, which declares, "No person shall be deprived of his life or personal liberty except according to the procedure established by law" The expression personal liberty under Art. 21 is of the widest amplitude and covers a wide variety of rights, including the right to live with human dignity and all that goes along with it, and any act which damages, injures, or interferes with the use of any limb or faculty of a person, either permanently or temporarily[15].

Doctor-patient relationship and contract:

Doctor-patient relationship is based on certain principles of contract law in true commercial sense in addition to trust and faith. An agreement enforceable by law is a 'contract'. [16] When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal.[17] When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted becomes a promise (here refers to medical examination, diagnosis, procedure or operation, etc.).[18] The person making the proposal is called the "promisor" (here refers to "doctor") and the person accepting the proposal is called the "promisee" (here refers to "patient").[19] When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does, or abstain from doing or promises to do or abstain from doing, something, such act or abstinence or promise is called a consideration (here refers to "doctors fee") for the promise.[20] Every promise and every set of promises forming the consideration for each other is an agreement.[21] All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object and are hereby not expressly declared to be void. [22] The most important aspect of this contract is Ubermaie Fide (of utmost good faith), i.e. Relationship between the parties is fiduciary

15 *Maneka Gandhi v Union of India*, AIR 1978 SC 597
16 Section 2(h) ,Indian Contract Act
17 Section 2 (a), Id
18 Section 2 (b), Id
19 Section 2 (c), Id
20 Section 2 (d), Id
21 Section 2 (e), Id
22 Section 10 , Id

Consent, in terms of medical law may be described as the autonomous authorization of intervention by individual patients undergoing medical or surgical treatment. Consent in the context of a doctor-patient relationship, means the grant of permission by the patient on his volition for an act to be carried out by the doctor, such as a diagnostic, surgical or therapeutic procedure[23] Doctor should inform the patient regarding: Diagnosis, Nature of treatment or procedure, Risks involved, Prospects of success, Prognosis if the procedure is not performed, and Alternative methods of treatment[24]

CONSENT

Consent may be Implied or Expressed. An implied consent is not written, that is, its existence is not expressly asserted, but nonetheless, it is legally effective. It is the most common type of consent in both general and hospital practice. It implies consent to medical examination in a general sense but not to procedures more complex than inspection, palpation and auscultation. Implied consent is apparent when a patient comes to hospital or doctor's clinic for treatment, it is also apparent in a case of comatose patient requiring immediate treatment or a mentally incompetent patient requiring treatment when legal guardian is not available. An expressed consent is where the terms of which are stated in distinct and explicit language. It may be in oral or written form. Written should be preferred as it has the advantage of easy proof and permanent form. Oral consent is also equally valid if properly witnessed .Oral consent should be taken in the presence of a disinterested party like any literate paramedical staff e.g. nurse, pharmacist.

Loco Parentis

"*To act in loco parentis* [in place of the parent]" has come to mean not only "to act as a *surrogate* for the parent," but also, implicitly, "to act with the devotion, motivation, and dedication of the parent" in the best interest of the child.

In an emergency involving children, when their parents or guardians are not available, consent is taken from the person in charge of the child e.g. a school teacher can give consent for treating a child who becomes sick during a picnic away from home town, or the consent of the head master of a residential school.

23 KK Aggarwal, *Real Consent and not Informed Consent Applicable in India,* 25 Indian Journal of Clinical practice (September 2014)

24 Informed consent was practically non-existent till the time Consumer Protection Act came into existence. This is seen as more of a legal requirement than the ethical moral obligation on part of the doctor towards his patient.

Proxy consent or surrogate decision maker

When a person is incapable of giving expressed consent a substituted consent can be taken from the next of kin. Generally accepted order is spouse, adult child, parents, siblings, lawful guardian .Consent of relative can also be taken if the consequence of informing the patient about the disease is more dangerous as compared to the actual risk of the procedure.[25]

However, the common law application of consent is not fully developed in India, although the Indian courts have often referred to these principles. In such situations, obviously one has to refer to the principles of the Indian Contract Act and the Indian Penal Code

Common meaning of consent is permission whereas the law perceives it as a contract i.e. an agreement enforceable by law. Consent to treatment is the principle that a person must give their permission before they receive any type of medical treatment or examination. This must be done on the basis of a preliminary explanation by a clinician.[26]

The validity of the consent is based on 3 elements:

- **Voluntariness**
- **Capacity**
- **Knowledge**

1. *Voluntariness*

Patients should give consent completely voluntarily without any force either from the Doctor or any third party (e.g. relatives). According to Sec. 14 of the Indian Contract Act, consent is said to be free when it is not caused by coercion[27] , undue influence[28], fraud[29] misrepresentation[30] and mistake[31] Consent obtained with compulsion either by the action or words of the doctor or others is no consent at all. Especially in our country we need to keep in mind that initiative to the treatment

25 Kohli A, *Medical consent in India-Ethical and legal issues* , 1 Anil Aggarwal's Internet Journal of Forensic Medicine and Toxicology (July-December, 2007)
26 http://www.nhs.uk/conditions/consent-to-treatment/pages/introduction.aspx (visited on 3rd December 2016)
27 Sec.15 ,The Indian Contract Act
28 Sec.16, Id
29 (Sec.17), Id
30 (Sec.18), Id
31 Sec.19), Id

may not be of the patient she and she may be coerced by relatives into giving consent. Here the Doctors have to ensure voluntariness of the consent.

2. Capacity to Consent

The patient should be in a position to understand the nature and implication of the proposed treatment, including its consequences. In this regard the law requires following special considerations.

a. Age of Consent

Consent is a contract and to make a valid contract both the parties must have attained majority. The Indian Majority Act, 1875 declares that every person domiciled in India shall be deemed to have attained majority when he/she has completed 18 years of age. According to Sec. 11 of the Indian Contract Act "Every person is competent to contract who is of the age of majority according to the law to which he is the subject, and who is of sound mind and is not disqualified from contracting by any law to which he is the subject". In our country only a person who is a major by law i.e. above the age of 18 can give valid consent for the treatment. Hence any person who is a minor, cannot legally give consent. The concept of a "mature minor" i.e. a minor who is mature enough to understand the implications of his or her treatment though well established in some western countries[32] is not routinely recognized in our country. It is also important for a Doctor to remember that even though a minor may represent himself/herself as a major even then the onus of finding out whether the patient is minor or not is on the physician.

But according to Section 90 IPC a child less than twelve years of age or insane person cannot give valid consent. By implication from the above provision , one can say that in general a boy or girl can consent to medical or surgical treatment if he or she is above twelve years of age provided the treatment is intended for his or her benefit and is undertaken in good faith. Section 88 and Section 90 of the IPC suggest that the age for giving valid consent for any medical procedure is twelve years. Hence a doctor taking consent for medical or surgical treatment from a person aged twelve years or more can be legally said to have taken a valid consent and cannot be held criminally liable on this account. However Sections 87 IPC mentions eighteen years as the age for giving consent for acts not intended and not known to be likely to cause death or grievous hurt. These acts are not necessarily for the benefit of the

32 *Gillick v. Wisbechand Norfolk* AHA [1985]3AllER402(HL)

person. Hence Section 87 IPC is not applicable to the medical profession as the acts are NOT done for the person's benefit.

b. Mental Incapacity

It is well accepted that a person should be mentally capable to give consent for his or her own treatment. This implies that patients who are mentally retarded or mentally incapable due to any diseases, process may not be capable of giving their own consent. In such cases consent from the legal guardian is essential.

As per Sec. 12 of the Indian Contract Act "A person is said to be of sound mind for the purpose of making a contract, if at the time he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interest". So a person in the lucid interval can make a valid contract. The fact that the person is mentally ill, or has learning difficulties is not in itself sufficient ground to determine that he is not competent. If he possesses sensory and mental powers to process the information, data and to derive a conclusion he can give a valid consent.

Patients under the influence of alcohol or drugs as well as patients suffering from extreme pain form a separate category; validity of consent in such situations is liable to be questioned.

3. *Knowledge Forms the Crux of the Matter Regarding the Consent*

This in turn includes-Nature of the diagnosis, nature of treatment planned, foreseeable risk involved in the treatment, prognosis if treatment is not carried out and finally a knowledge about any alternative therapy available.

It is duty of a Doctor to disclose all these points to the patients so that patients may exercise his right to self-determination about the proposed course of the treatment. The consent must be to do a lawful act and it must not disobey any provision of the law[33]. The consent must not be against morality or public policy[34].

Unilaterally executed consents are void. Consent being an agreement between two or more persons, all concerned parties must execute the same. The doctor himself must take the consent because this is a contract between the doctor and the patient. Consent signed only by the patient and not by the doctor is null and void. In case of minors the consent of one parent is sufficient vide 89 IPC. While treating the inmates of a hostel, the consent of the warden or the principal of the school should

33 Consent for euthanasia is null and void in India
34 Performing sterilization operation on a prostitute, with consent.

be taken (loco parentis). As per the MTP Act of 1971, consent of the guardian is mandatory to terminate the pregnancy of a minor girl. But if the girl is not willing then the pregnancy should never be terminated. In case of a married woman pregnancy can never be terminated at the request of her husband. But, if the woman is consenting, consent of the husband is not mandatory .For the purpose of the treatment of either husband or the wife, consent of the person to be treated should be taken. But in case of any treatment or operation, when the loss of potency or fertility is involved, it is always advisable to take the consent of both the spouses . When an unknown person brings an accident victim in a serious condition to the hospital, he should not be asked to sign the consent form, but his identity must be noted in the medical record. In such circumstances, if possible, consent can be obtained from the relatives by telephone. If this is not possible then the doctor should go ahead with the operation for the best interest of the patient. For the purpose of transplantation of human organs, consent of the donor is required. In case of cadaver transplantation, however, consent of the next kith and kin is required, even though directive is available mentioning the wishes of the deceased about his organs to be transplanted. . Consent can be taken immediately before the specific procedure in emergency situations. But in case of elective procedures, it should preferably be taken at least a day or two before. On the day of the operation a patient may not be considered mentally sound to execute a contract when he is not likely to be in the right frame of mind. Consents duly witnessed and signed by uninterested third parties are more dependable legally, as the parties concerned cannot subsequently deny execution. Nurses, assistants and medical students cannot always be considered as uninterested third parties. The court may question their interest. The same also holds good regarding the patient's relatives.[35]

For further clarity we could say that the consent obtained by the doctor should have: specificity[36], full disclosure must be there for consent to be legally valid. There should not be any suppression of facts. Legal standards may require physicians to disclose information that a reasonable practitioner in a similar situation would disclose ('professional standard of disclosure'), or information that a reasonable patient would find material to his or her decision ('materiality standard'). Exceptions to disclosure requirements are:

35 http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2779959/#CIT8 (viewed on 8th December 2016)

36 The consent must be both person- and procedure-specific. The consent is an agreement between a doctor and a patient. The consent is not valid if the assistant does an operation when the patient has consented to be operated on by a particular doctor. Similarly, when the consent is for a particular procedure, the doctor cannot perform another without a fresh consent.

a. Emergencies: When the time required for disclosure would create a substantial risk of harm to the patient or third parties, full disclosure requirements may not apply.

b. Waiver: Patients may waive their rights to receive information. This should be a knowledgeable waiver, i.e. patients should be made aware that they have a right to receive the information, to designate a surrogate to receive the information, or to be informed at a later date.

c. Therapeutic privilege: Information can be withheld, when disclosure per se would be likely to cause harm to patients (e.g. when a patient with an unstable cardiac arrhythmia would have his or her situation exacerbated by the anxiety attendant on full disclosure of the risk of treatment). In emotionally disturbed patients the doctor should request a specialist consultation to establish that the patient is emotionally disturbed. The doctor should also note his decision in the patient's records explaining his intentions and the reasons for it.

d. Incompetence: Incompetent patients may not, as a matter of law, give an informed consent. State law generally provides alternative mechanisms by which consent can be obtained, and requires disclosure to a substitute decision-maker.

e. Involuntary treatment: Many states allow psychiatric treatment to occur without patients' informed consent. This occurs most commonly when patients' refusals of treatment are specifically overridden following clinical, administrative, or judicial review.

The relationship between a medical professional and his patient is a contract by parties competent to contract giving rise to contractual obligations. Parties are generally competent (in accordance with the Indian Majority Act) (i) if they have attained the age of 18, (ii) are of sound mind, and (iii) are not disqualified by any law to which they are subject to. Furthermore, there is a stipulation in the contract law stating that consent of any party (in our case it is the patient) that is obtained by coercion, undue-influence, mistake, misrepresentation or fraud, will render the agreement invalid.

But unfortunately the Indian Statute Book does not contain separate legislation regarding consent to medical treatment nor do the various acts relating to majority, minority and guardianship throw any light on the subject. As a result, the laws for consent in general are also being applied to the medical profession.

According to Section 90 IPC a child less than twelve years of age or insane person

cannot give valid consent. By implication from Section 90 IPC, one can say that in general a boy or girl can consent to medical or surgical treatment if he or she is above twelve years of age provided the treatment is intended for his or her benefit and is undertaken in good faith.

Section 88 and Section 90 of the IPC suggest that the age for giving valid consent for any medical procedure is twelve years. Hence a doctor taking consent for medical or surgical treatment from a person aged twelve years or more can be legally said to have taken a valid consent and cannot be held criminally liable on this account. However Sections 87 IPC mentions eighteen years as the age for giving consent for acts not intended and not known to be likely to cause death or grievous hurt. These acts are not necessarily for the benefit of the person. Hence Section 87 IPC is not applicable to the medical profession as here (in Section 87 IPC), the acts are NOT done for the person's benefit.

Another school of thought however feels that valid consent can only be given at or above eighteen years of age.[37] They feel that consent is a contract between two parties and as the Indian Contract Act states that to enter into a contract both parties must be at least eighteen years of age, this should be the age for giving valid consent in medicine. However it should be noted that the Indian Contract Act is for conditions like marriages, financial agreements etc. and is not specific for the medical profession.

Similarly, Section 92 of the IPC offers legal immunity to a registered medical practitioner to proceed with appropriate treatment even without the consent of the patient in an emergency when the victim is incapable of understanding the nature of the treatment or when there are no legal heirs to sign the consent. If the patient is conscious and refuses treatment without which that person might endanger his/her life, then the surgeon can inform the judicial magistrate and get the sovereign power of guardianship over persons under disability (*parens patriae*).[38]

Further, Section 375 of the IPC exempts the husband of a girl above the age of 15 years from indictment of rape, even if he has sexual intercourse with her against her will. Nevertheless, a girl under 18 years of age cannot give valid consent to undergo medical termination of pregnancy as per the Medical Termination of Pregnancy (MTP) Act, 1971 (Sec (3) (4) (a)).We could see the absence of firm and unambiguous legal provisions regarding consent in relation to the medical treatment is reflected

37 Bastia BK, Kuruvilla A, Saralaya KM ,*Validity of consent- A review of statutes*, 59Indian J Med Sci. (Feb,2005).

38 *Charan Lal Sahu and others v. Union of India* ,AIR 1990 SC 1480

(As per provisions of the MTP Act, only a girl above 18 years can give consent to undergo abortion. But the onus of verifying the age is not on the doctor. The usual convention is that a person can give consent for general physical examination after 12 years of age and for surgery after 18 years of age. The difference in these views needs an explanation. Section 88 of the IPC, which is specifically meant for doctors –when read with Section 90 IPC –, suggests that the valid age of consent is 12 years, if the act is done in good faith for the benefit of the person (e.g. surgery). Thus, it would appear that a person could give valid consent for surgery at 12 years. However, in such cases, although a criminal charge cannot be brought against him, but civil suit can be initiated for damages because a child below 18 years cannot enter into a valid contract. Criminal law in India put doctors on different footings and provided protection from criminal cases in General Exceptions which cannot be basis of routine medical practice in India. [39]

However it should be noted that the Indian Contract Act is for conditions like marriages, financial agreements etc. and is not specific for the medical profession. Further, even though consent is said to be a contract (under Indian Contract Act), various Acts do not override the Indian Penal Code. If a person analyses the history of laws relating to health services, we can understand that no other field has undergone sweeping changes as the health sector. There is a u-turn in the concept of contractual obligations between a medical professional and his patient. For example, Section-16 of the Indian Contract Act 1872, which had hitherto considered doctor-patient relations as 'fiduciary relationship'; has been completely denied its dominance because of the judgment and order in *VP Shantha v Indian Medical Association of India*[40]. It redefined the relationship between doctor-patient as a contractual obligation between two different distinct, equal parties. It has completely revoked the fiduciary relationship between them i.e., the doctor having an undue influence over the thinking process of patient so far.

Those doctors who do consider consent to be a contract take the consent of the parent or guardian for medical procedures in which death or grievous injury can occur when the age of the patient is less than eighteen years. They feel this will be of benefit in cases involving civil liability. Here the decision of House of Lords in the famous case, *Gillick v. West Norfolk and Wisbech*[41], need to be analysed. It was stated

39 K Arunakaran Mathiharan, *A Need For Clarity Law On Consent And Confidentiality In India*, 27The National Medical Journal Of India(2014)

40 *Challenges in Current Medico-Legal Environment in India* | eHEALTH http://ehealth.eletsonline.com/2009/12/11348/#sthash.m5mstDeA.dpuf (visited on 10th December 2016)

41 [1985]3AllER402,

that capacity is a question of fact in every case and requires that if the patient is able to understand what is involved in the decision to be taken .then it amounts to valid consent. Thus in the case of children, the validity of consent is based on whether the patient has acquired sufficient maturity and intelligence to understand what is involved.[42]

LIABLITY UNDER TORT AND CRIME

If a medical practitioner attempts to treat a person without valid consent, then he will be liable under both tort and criminal law. Tort is a civil wrong for which the aggrieved party may seek compensation from the wrong doer. Crime is an action or omission which constitutes an offence which is punishable under law. Mensrea and Actus reus play an important role in deciding the cases of criminal liability. The consequences would be payment of compensation (in civil) and imprisonment (in criminal).

To commence, the patient may sue the medical practitioner in tort for trespass to person. Alternatively, the health professional may be sued for negligence.

In tort law, usage of force against any human body, without proper justification, is actionable irrespective of the quantum of force. If the medical practitioner attempts to treat a patient without obtaining proper consent, he will be held guilty under tort law. But this is not the end of story. Any purported consent must also meet the requirements of the tort of negligence. Negligence is not concerned with the presence or absence of consent, but with the defendant's failure to comply with a legally imposed duty of care.

NEGLIGENCE-IN TORT

Winfield[43]has defined negligence as a tort which is the breach of a legal duty to take care which results in damage, undesired by the defendant to the plaintiff. An act to be negligent, two matters must be established

- that a legal duty exists
- breach of that duty (quantum of care demanded).

The duty exists not to harm the patient through careless acts. But what is considered here are not the doctor's acts. Instead the concern is with what doctor must do prior to acting so as to ensure that proper consent has been given for those

42 *Schloendorff v*. Society of *New York Hospital*, 105 N.E. 92 (*N.Y.* 1914)
43 Winfield and Jolowicz, *Tort*,.4(Sweet and Maxwell,19th ed,2014)

acts. The concern is with the knowledge or information which the patient is entitled to be given (assuming the patient to be competent) before any purported consent is valid. Thus the main question is whether it was carried out with proper permission.[44] Thus in an action for negligence / battery for performance of an unauthorized surgical procedure, the Doctor can put forth as defence the consent given for a particular operative procedure, as consent for any additional or further operation.

Negligence mechanism is a great development at common law which occurs throughout the20th century.[45] The root of professional negligence can be found in the case of *Donoghue v. Stevenson*,[46] where a woman succeeded in establishing that a manufacturer of ginger beer owed her a duty of care, where it had been negligently produced. Following this, the duty concept has expanded into a coherent judicial test, which must be satisfied in order to claim in negligence. A medical professional is expected to have the requisite degree of skill and knowledge. The rule in professional negligence is a little different, for professionals such as medical practitioners an additional perspective is added through a test known as the *Bolam Test* [47] which is the accepted test in India. A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular act.

This approach has been accepted in the judgment of the Indian Supreme Court in the case of *Jacob Mathew v. State of Punjab*.[48]The standard of care, when assessing the practice as adopted is judged in the light of the knowledge available at the time of the incident, and not at the date of trial.

The duty of care for a medical professional starts from the time the patient gives an implied consent for his treatment and the medical professional accepts him as a patient for treatment, irrespective of financial considerations. This duty starts from taking the history of the patient and covers all aspects of the treatment, like writing proper case notes, performing proper clinical examination, advising necessary test and investigations, making a proper diagnosis, and carrying out careful treatment[49]

44 Id at.179
45 *Derry v. Bonney,* 38 Wn.2d 876, 231 p. 2d 637, Wash, 1951.
46 *Donoghue v. Stevenson* [1932] AC 562.
47 *Bolam v. Friern Hospital Management Committee,* [1957] 1 WLR.
48 Stone AA. , *Informed Consent. Special Problems for Psychiatry.*
49 Abdul Rahman, *Medical Negligence and Doctor's Liability*, 2(2)Indian J Med Ethics (Apr-Jun 2005)

CRIMINAL NEGLIGENCE

With the awareness in the society and the people in general gathering consciousness about their rights, measures for damages in tort, civil suits and criminal proceedings are on the augment. Not only civil suits are filed, the accessibility of a medium for grievance redressal under the Consumer Protection Act, 1986 , having jurisdiction to hear complaints against medical professionals for 'deficiency in service', has given rise to a large number of complaints against doctors, being filed by the persons feeling aggrieved. The criminal complaints are being filed against doctors alleging commission of offences punishable under Sec. 304A or Sections 336/337/338 of the Indian Penal Code, 1860 (IPC) alleging rashness or negligence on the part of the doctors resulting in loss of life or injury of varying degree to the patient.

> Section 304A of the Indian Penal Code of 1860 states that whoever causes the death of a person by a rash or negligent act not amounting to culpable homicide shall be punished with imprisonment for a term of two years, or with a fine, or with both.

In the *Santra* case[50], the Supreme Court has pointed out that liability in civil law is based upon the amount of damages incurred; in criminal law, the amount and degree of negligence is a factor in determining liability. However, certain elements must be established to determine criminal liability in any particular case, the motive of the offence, the magnitude of the offence, and the character of the offender.

In *Poonam Verma v Ashwin Patel* the Supreme Court distinguished between negligence, rashness, and recklessness.[51] A negligent person is one who inadvertently commits an act of omission and violates a positive duty. A person who is rash knows the consequences but foolishly thinks that they will not occur as a result of her/ his act. A reckless person knows the consequences but does not care whether or not they result from her/ his act. Any conduct falling short of recklessness and deliberate wrongdoing should not be the subject of criminal liability.

Thus a doctor cannot be held criminally responsible for a patient's death unless it is shown that she/ he was negligent or incompetent, with such disregard for the life and safety of his patient that it amounted to a crime against the State.[52]

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50 *State of Haryana v. Smt. Santra* , (2000) 5 SCC 182

51 *Poonam Verma vs Ashwin Patel,* (1996) 4 SCC 332

52 *Medical negligence and the law*. 4(3) Indian Journal of Medical Ethics116-118. available at http:/www.ijme.in/index.php/ijme/article/view/592/1506. (visited on 10th December 2016)

Sections 80 and 88 of the Indian Penal Code contain defences for doctors accused of criminal liability. Under Section 80 (accident in doing a lawful act) nothing is an offence that is done by accident or misfortune and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution. According to Section 88, a person cannot be accused of an offence if she/ he performs an act in good faith for the other's benefit, does not intend to cause harm even if there is a risk, and the patient has explicitly or implicitly given consent

For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution. The word 'gross' has not been used in Section 304A of IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be 'gross'. The expression 'rash or negligent act' as occurring in Section 304A of the IPC has to be read as qualified by the word 'grossly') Conviction for any substantial criminal offence requires that the accused person should have acted with a morally blameworthy state of mind. Recklessness and deliberate wrongdoing are morally blameworthy, but any conduct falling short of that should not be the subject of criminal liability. Common-law systems have traditionally only made negligence the subject of criminal sanction when the level of negligence has been high a standard traditionally described as gross negligence. In fact, negligence at that level is likely to be indistinguishable from recklessness. To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent. Res ipsa loquitur is only a rule of evidence and operates in the domain of civil law especially in cases of torts and helps in determining the onus of proof in actions relating to negligence. It cannot be pressed in service for determining per se the liability for negligence within the domain of criminal law. Res ipsa loquitur has, if at all, a limited application in trial on a charge of criminal negligence.

ASSAULT AND BATTERY

The intentional interference with the person of another without legal justification amount to an actionable assault and battery for which damages may be recoverable

by the injured person. Such damages will of course include compensation for actual injuries suffered as the result of the assault but in addition a Judge or Jury is at liberty in a proper case to award the plaintiff exemplary damages in respect of an assault or battery as a means of punishing the defendant for reprehensible conduct in invading the Plaintiff's personal right without justification. Bodily interference which would otherwise amount to an assault or battery may, however, be justified by showing that the "patient" voluntarily submitted to the conduct in question. No action lies, therefore, against a medical man who interferes with the person of a patient if the patient's consent to the interference has been obtained. But for a medical man to administer treatment to or perform an operation upon a patient without the latter's consent amounts, subject to some exceptions which will be noticed in due course, to an actionable assault [53]

The traditional definition of battery is an act that directly and either intentionally or negligently causes some physical contact with another person without that person's consent.

The essential requirements are:

- There should be use of force
- The same should be without legal justification

If a person has consented to contact expressly or by implication, then there is no battery. It is a rare case in which a doctor would be held liable for criminal breach, unless there is gross disrespect to the patient's bodily autonomy, for instance, if a patient's organs are taken without his consent. The consent obtained, of course, after getting the relevant information will have its own parameter of operation to render protection to the medical practitioner. If the doctor goes beyond these parameters, he would be treating the patient at his risk, as it is deemed that there is no consent for such treatment at all. A doctor who went ahead in treating a patient, to protect the patient's own interest, was held liable as he was operating without consent.[54]

This case law also signifies the traditional notion of paternalism prevalent among the members of the medical fraternity. It is a notion where the doctor takes-up the role of a parent of the patient and starts deciding on behalf of the patient himself. Unfortunately, the law does not accept this notion. The first priority of law is always the right of autonomy of the patient provided he is endowed with necessary capacity. A medical practitioner who believes that a medical procedure is appropriate and

53 Glanville Williams , *Textbook on Criminal Law*, 568 (Stevens & Sons,1983)
54 *Ram Bihari Lal v Dr. J. N. Srivastava.* AIR 1985 MP 150.

necessary for a patient's well-being can perhaps be forgiven for believing that the principle of autonomy should be sacrificed in the best interest of the patient. [55]Regarding proxy consent, when the patient is unable to give consent himself, there are no clear regulations or principles developed in India. If such a situation exists, the medical practitioner may proceed with treatment by taking the consent of any relative of the patient or even an attendant.[56]

Liability under the Consumer Protection Act

In 1995, the Supreme Court decision in *Indian Medical Association v VP Shantha* brought the medical profession within the ambit of a 'service' as defined in the Consumer Protection Act, 1986. This defined the relationship between patients and medical professionals as contractual. Patients who had sustained injuries in the course of treatment could now sue doctors in 'procedure-free' consumer protection courts for compensation.

- The Court held that even though services rendered by medical practitioners are of a personal nature they cannot be treated as contracts of personal service (which are excluded from the Consumer Protection Act). They are contracts for service, under which a doctor too can be sued in Consumer Protection Courts.
- A 'contract for service' implies a contract whereby one party undertakes to render services (such as professional or technical services) to another, in which the service provider is not subjected to a detailed direction and control. The provider exercises professional or technical skill and uses his or her own knowledge and discretion. A 'contract of service' implies a relationship of master and servant and involves an obligation to obey orders in the work to be performed and as to its mode and manner of performance. The 'contract of service' is beyond the ambit of the Consumer Protection Act, 1986, under Section 2(1) (o) of the Act.
- The Consumer Protection Act will not come to the rescue of patients if the service is rendered free of charge, or if they have paid only a nominal registration fee. However, if patients' charges are waived because of their incapacity to pay, they are considered to be consumers and can sue under the Consumer Protection Act. . It is also easier for people to force negligent doctors to Consumer Protection Forums.

55 Mill, J.S., *On Liberty* 68(Penguin,1982).
56 *C A Muthu Krishnan v M. Rajyalakshmi.* AIR 1999 AP 311.

JUDICAL PRNOUNCEMENTS ON CONSENT ISSUE

In *Nizam's Institute of Medical Sciences* v. *Prasanth S. Dhananka*[57], the hospital and the surgeon were held liable for negligence, as consent was not taken for removal of tumour but only for excision biopsy. Recently, a three judge's bench of the Supreme Court of India, awarded a compensation of Rs.25, 000 and waiver of surgery fees to a women whose uterus was removed by a lady obstetrician without her consent.[58]Indian Supreme Court in *Rajkot Municipal* Case[59]held that if the claim depends upon proof of contract, action does not lie in tort. If the claim arises from relationship between the parties independent of the contract, an action would lie in tort at the election of the plaintiff, although he might alternatively have pleaded in contract In *Ram Biharilal's case*—the surgeon did not explain the hazards of chloroform anesthesia before taking consent of the patient for operation of appendicitis. On finding the appendix to be normal, he proceeded to remove the gallbladder without consent and risking the ill effects of the patient under chloroform. In this case the surgeon was held negligent.[60]However in *Chandra Shukla v Union of India*, it was held that if there are no circumstances for a doctor to sense foul play or doubt about the capacity of the patient, he is protected.[61]. In *Dr. T.T. Thomas vs. Elisa*[62] the court delivered a verdict in favour of the plaintiffs stating that consent under such an emergent situation is not mandatory.

Situations Where Consent May not be Obtained

- **Medical Emergencies:** The wellbeing of the patient is paramount and medical rather than the legal considerations come first. It may not be necessary to obtain a consent obtain where lifesaving procedures are to be undertaken for example:
  - In an accident case;
  - In a major surgery or post-surgery where additional emergency procedures are required, as for example, doing a tracheostomy to ease breathing.

57 (2009) 6 SCC 1.
58 *Samira Kohli* v. *Prabha Manchanda*, (2008) 2 SCC 1.
59 *Rajkot Municipal Corporation* v. *Manjul Ben Jayantilal Nakum*, (1997)9 SCC 552.
60 *Ram Behari Lal v Dr JN* Srivastava AIR 1985 MP 150, ACJ.
61 AIR 1987 ACJ 628.
The relationship between the patient and his wife were strained. A patient was operated on for sterilization. While giving consent he deposed that he is married and has two baby girls. In fact, he was undergoing an operation only for getting the money as incentive. After the operation, his father contended that the patient was of unstable mind and was not competent to give consent.
62 AIR 1987 Ker 52.

- In case of person suffering from a notifiable disease[63]
- Members of Armed Forces
- New admissions to prisons
- In case of a person where a court may order for psychiatric examination or treatment.
- Under section 53(1) of the Code of Criminal Procedures, a person can be examined at request of the police, by use of force. Section 53(2) lays that whenever a female is to be examined, it shall be made only by, or under the supervision of a female doctor.

The Question "Which Consent Is Applicable In India: Real Or Informed"?

In the *Samira Kohli v Dr. Prabha Manchanda and Ors*[64], the Hon'ble Supreme Court of India observed: Consent given only for a diagnostic procedure, cannot be considered as consent for therapeutic treatment. Consent given for a specific treatment procedure will not be valid for conducting some other treatment procedure. The fact that the unauthorized additional surgery is beneficial to the patient, or that it would save considerable time and expense to the patient, or would relieve the patient from pain and suffering in future, are not grounds of defence in an action in tort for negligence or assault and battery. The only exception to this rule is where the additional procedure though unauthorized, is necessary in order to save the life or preserve the health of the patient and it would be unreasonable to delay such unauthorized procedure until patient regains consciousness and takes a decision. For the patients to play a significant role in decision making they must have adequate information. .In India, real consent and not informed consent is applicable. The components of real consent as stated by the Hon'ble Supreme Court of India are: "A doctor has to seek and secure the consent of the patient before commencing a 'treatment' (the term 'treatment' includes surgery also). The consent so obtained should be real and valid, which means that: The patient should have the capacity and competence to consent; his consent should be voluntary and his consent should be on the basis of adequate information concerning the nature of the treatment procedure, so that he knows what is consenting to."

63 In case of AIDS/HIV positive patients, the position in India regarding its being a notifiable disease or not is not yet clear. However, the Supreme Court in *Mr. X v. Hospital Z* has held that wherever there is a danger of transmitting HIV infection to the 'would be spouse', the doctor/hospital would be under a duty to inform the 'would be spouse', of the danger. Rather, not doing so would make the doctor/hospital *participiens criminis* under sections 269 and 270 of IPC

64 *Nizam's Institute of Medical Sciences* v. *Prasanth S. Dhananka* (2009) 6 SCC 1.

As per Supreme Court of India, "The nature and extent of information to be furnished by the doctor to the patient to secure the consent need not be of the stringent and high-degree mentioned in Canterbury[65] (informed consent) but should be of the extent which is accepted as normal and proper by a body of medical men skilled and experienced in the particular field. It will depend upon the physical and mental condition of the patient, the nature of treatment, and the risk and consequences attached to the treatment." Global scenario and Trends are shifting from 'real consent' concept evolved in Bolam and Sidaway to the 'reasonably prudent patient test' in Canterbury.

The court consciously preferred the 'real consent' concept evolved in Bolam and Sidaway in preference to the 'reasonably prudent patient test' in Canterbury, having regard to the ground realities in medical and health-care in India. But if medical practitioners and private hospitals become more and more commercialized, and if there is a corresponding increase in the awareness of patient's rights among the public, inevitably, a day may come when we may have to move towards Canterbury. But not for the present."[66]

Need of the Hour:

In India, the entire gamut of laws on consent turns into complex propositions if an emergency medical situation arises. In a few of the milestone decisions, the apex court ruled that a medical practitioner has a duty to treat a patient in an emergency. Emphasizing the paramount duty of any "welfare state", the Supreme Court stated that Art. 21 imposes an obligation on the State to safeguard the right to life of every person .Indian position, although we do not have much litigation, unlike in the West, it may be concluded that the courts have assigned immense significance to the requirement of consent. A medical practitioner in India has a duty to provide all the necessary information to the patient in a language that is understandable to him. Regarding the quantum of information, there are no clear parameters laid down by the courts. There is no mandate that a doctor should always obtain written consent and failure of which would hold him liable. However, if there is written consent, the medical practitioner would have greater ease in proving consent in case of litigation. To standardize the practice, the Medical Council of India (MCI) has laid down

65 Id, According to *Canturbury v. Spence*, 1972 (464)Federal report 2d 772, It should be free from imposition and it is a settled rule that a therapy not authorized by the patient shall amount to tort- a common law battery .Thus a physician is bound to make adequate disclosure to the patient.

66 Id

guidelines that are issued as regulations in which consent is required to be taken in writing before performing an operation. The MCI guidelines are applicable to operations and do not cover other treatments. For other treatments, the following may be noted as general guidelines:

1. For routine types of treatment, implied consent would suffice
2. For detailed types of treatment, ideally express oral consent may be needed
3. For complex types of treatment, written express consent is required

These statutory provisions do not provide clarity on whether a person between 12 and 18 years of age can give consent to undergo an invasive therapeutic procedure or investigation. It is important to explicitly state whether a person of this age group can give consent independently to undergo medical treatment or his/ her consent should be accompanied by parental/guardian consent. In practice in the absence of clear-cut legal provisions most doctors consider the consent of a person less than eighteen years sufficient for medical examination only and for any other medical procedure ask for the consent of the parents

A professional is liable both under law of contract and tort. In general a professional man owes to his client a duty in tort as well as in contract to exercise reasonable care in giving advice or performing services. Liability in contract depends on the express or implied terms agreed upon by the patient and the medical man. While tortuous duties of professional man are limited to taking reasonable care, the contractual duties are generally more onerous in nature. A contract is founded upon mutual consent and agreement. A tort is inflicted against or without consent. A contract requires privity of parties. In tort no privity between parties is needed. A tort is violation of right in rent, a right vested in some determinate person, either personally or as a member of the community, and available against the world at large, whereas a breach of a contract is an infringement to a right in personam, i.e. of a right available only against some determinate person or body. In a breach of contract, the motive for breach is immaterial while in a tort it is often taken into consideration. In a breach of contract, damages are only compensation. Where the injury is caused to a person, character or feelings and the facts disclosed improper motive or conduct which aggravates the plaintiffs injury, he may be awarded exemplary damages to punish the defendant and to deter him in future in certain cases in tort but rarely in a contract. The same act may amount to a tort and a breach of contract as well.

Tort is basically the origin of common law. Indian legal system has many similarities with common law principles and thus courts in India have enough space for interpretation in that line to hold a physician liable for medical negligence in those areas of medical practice where Consumer Protection Act cannot address. Often they need the expert opinion of those in medical field is required. The authenticity of the reports by persons who do not want to defame their colleagues.

Under civil law, at a point where the Consumer Protection Act ends, the law of torts takes over and protects the interests of patients. This applies even if medical professional provide free service.[67]In cases where the services offered by the doctor or hospital do not fall in the ambit of 'service' as defined in the consumer Protection Act, patients can take recourse to the law relating to negligence under the law of torts and successfully claim compensation. The onus is on the patient to prove that the doctor was negligent and that the injury was a consequence of the doctor's negligence. Such cases of negligence may include transfusion of blood of incorrect blood groups, leaving a mop in the patient's abdomen after operating, unsuccessful sterilization resulting in the birth of a child, removal of organs without taking consent, operating on a patient without giving anaesthesia, administering wrong medicine resulting in injury, etc . All this highlights the need for specific legislation for age for giving valid consent for medical procedures.

Remarkable developments in the field of medicine might have revolutionized health care. But they cannot be afforded by the common man. The woes of non-affording patients have in no way decreased. Gone are the days when any patient could go to a neighbourhood general practitioner or a family doctor and get affordable treatment at a very reasonable cost, with affection, care and concern. Their noble tribe is dwindling. Health care (like education) can thrive in the hands of charitable institutions. It also requires more serious attention from the State. In a developing country like India where teeming millions of poor, downtrodden and illiterate cry out for health-care, there is a desperate need for making health-care easily accessible and affordable. The private hospitals who think of increasing their profit, illegal sale of organs for money, the section of parents ready to sell their children for the sake of money., the mafia involved in trade of human organs etc all makes us think as to how to tackle these problems. Consent promotes the rights of a patient as autonomous beings to ensure that they are treated with justice, generosity,

67 Talha Abdul Rahman, *Medical negligence and doctor's liability*, 2(2) Indian J Med Ethics(Apr-Jun 2005)

and respect. Neglecting its importance can lead to unethical behaviour and the loss of patient's rights.

Patients nowadays no longer want to be treated as passive recipients of medical care. Medical litigation and demands for medical accountability is the trend of the day. To avoid negligence and breaching, the doctor should exercise his skill with competence in accordance with accepted practice. He should discuss his diagnosis and treatment plan with the patient. If the patient inquires about the risks of proposed medical treatment, the doctor must disclose the material risks to the patient. It is good practice to document contemporaneously his advice to which the patient has consented. In doubt, it is prudent for the doctor to seek a second opinion from his colleagues professing a similar skill. It can therefore be concluded that Consent should be taken seriously by all clinicians and medical researchers in the broader interest of patient-doctor relationship and there should be no compromise in providing information that is not "reasonable" in the eyes of the court. In the event of an adverse medical outcome written records of such discussions can be doctor's best defence as the court can demand relevant documents

SUGGESTIONS:

1. Fixing the age for giving consent.
2. Work on your rapport - The importance of good rapport between the patient and doctor cannot be overemphasized. The level of rapport is a better predictor of the risk of litigation than the actual content of any particular discussion
3. Discuss all treatment options with regardless of insurance coverage - Determining what should be disclosed as a *material* risk in the consent process can be challenging.
4. By adopting paid insurance agents for guiding illiterate persons to take a decision
5. By using the ABCDEF mnemonic which is useful for guiding and documenting your discussion with the patient:

- **A**lternative therapies available
- **B**enefits of the therapy proposed
- **C**ommon but not devastating risks
- **D**evastating but not common risks

- **E**xtra considerations specific to this patient
- **F**acial expressions, body language, and questions.

6. Decide how much medication information the patient needs
7. Discuss how test results will be communicated - Laboratory or radiology investigations and their results introduce a unique set of issues. Particularly for non-routine lab work, it is prudent to discuss the advantages, disadvantages, and limitations of the test being ordered or recommended.
8. Keep a record of referrals - A patient generally has the right to refuse specialty treatment or referral to a specialist, once informed of the risks of delay or lack of treatment after making such a decision. If a patient still refuses referral, document the decision in case it results in a delayed diagnosis or an adverse outcome.
9. Avoid making guarantees about procedure - All procedures, including associated anaesthesia; require a discussion of risks and benefits. If appropriate, also discuss available alternative procedures and your reasons for not recommending them
10. Documentation is a necessity. It records the process that is vital to good patient care and it may be the only proof that a discussion took place. Legal case opinions shed little light on what represents adequate documentation.
11. Specific statute or guidelines that give a clear picture.
12. Special courts.

RIGHT TO HEALTH OF MINE WORKERS IN INDIA – A LEGAL PERSPECTIVE

Cicy Joseph[1]

Introduction

Mineral is important for development of a nation. In this regard, our nation is blessed with rich deposits.[2]Apart from providing wealth, mines in turn create employment opportunities also.[3] As mining is a hazardous occupation, workers are naturally exposed to adverse conditions. Apart from hard physical labour, they are exposed to stress and environmental pollutants, such as, dust, noise, heat, vibration, poor illumination, radiation etc. It is relevant to note that initiatives at municipal and international level are taken to protect their interests. This paper considers these various international documents, statutes and judicial contributions in bettering the welfare of workers.

International Initiatives

Even though there are a number of international conventions which refer to the health of mine workers amongst other provisions[4], there were no conventions specifically addressing the issue of safety and health of the mine workers till 1986.

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1 Research Scholar , NUALS and Guest Faculty, SILT

2 Anil Sasi, *Safety Concerns – Inside India's Mines; A Worker dies every 10 days,* The Indian Express(June 1, 2016).Today India is one of the leading countries in production of coal, iron ore, bauxite and other minerals. Rivers forests, minerals and such other sources constitute a nation's natural wealth. India produces 89 minerals by operating 569 coal mines, 67 oil and gas mines, 1,770 non-coal mines, and several more small mines, running into over a lakh.)

3 Anil Sasi, *In the Mines: Where death is a weekly Affair,* The Indian Express(August 10, 2016). It offers direct employment of about 1 million on a daily average basis and an overall sector contribution of about 5 per cent to the country's gross domestic product.

4 International Labour Conferences Minimum Age (Industry) Convention, 1919 (No.5), Hours of Work (Coal Mines) Convention, 1931 (No.31), Labour Inspection Convention, 1947 (No.81), Working Environment (Air Pollution, Noise and Vibration) Convention, 1977 (No.148), Occupational Safety and Health Convention, 1981 (No.155), Occupational Health Services Convention, 1985 (No.161), Promotional Framework for Occupational Health and Safety Convention 2006 (No.187) are some of them.

International Labour Organisation's Code of Practice for Safety and Health in Coal Mines, 1986, is prepared to help those responsible for improving standards of safety and health and to provide guidelines for the drafting of safety and health regulations for the coalmining industry. It contains provisions on general safety and health measures, specific measures for work underground, road and shaft driving, coal getting, transport, and so on, and procedures for the control of dust, firedamp, fire, and other hazards.[5]

Safety and Health in Mines Convention 1995, adopted by International Labour Organisation is a comprehensive guideline for proper protection of life and health of mine workers.[6] The Convention provides for preventative and protective measures at the mines. It provides the employers and workers duty to safety and health in mines.[7] The measures that the employers should take to minimise hazards and the immediate steps to be taken in case of accidents are detailed.[8] The rights and duties of the workers and their representatives for a feasible working environment are also provided in the convention.[9] The member States has the option to strictly implement the provisions of the convention.[10]Because ratifying the Convention is optional, many prominent mining nations, including India where mining calamities/incidents are quite high, have chosen not to participate.[11]This led ILO to require a nation that ratifies the Convention shall be legally bound by its rules.[12]It is relevant to note that India's not signing the Convention is said to protect the interest of the large scale mining companies which are flouting the mining regulations.[13]

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5 The first two chapters deal with the objectives and application of the code. The next two chapters address, within a national framework, the responsibilities, duties and rights of the competent authority, the labour inspectorate, employers, workers and their organizations, suppliers, manufacturers and designers, and contractors, and occupational safety and health (OSH) management systems and services and OSH reporting. Part II of the code provides for a methodology for identifying hazards and addressing risks. Part III of the code addresses various hazards that commonly exist in the production of coal from underground mines - from dust, explosions, fires and water inrushes to electrical hazards, machinery and hazards on the surface. Each section describes hazards, assesses risk and provides guidance on eliminating or controlling risk. It also covers the proper design and maintenance of coalmines and transport, competence and training, personal protective equipment (PPE), emergency preparedness, and special protection and hygiene issues.

6 As of the end of 2015, 31 nations have ratified the Convention.

7 Part II, Articles 2, 3, 4 and 5

8 Part III, Section A, Articles 6 to 12

9 Part III, Section B, Articles 13 and 14

10 Part V Article 18

11 *Up to date Conventions and Protocols not ratified by India*, available online at www.ilo.org; country id 102691 (visited on 22.01.2017)

12 Safety and Health in Mines Convention 1995, Part II, Article 2

13 Jagdish Patel, *ILO Conventions and India*, People's Training and Research Centre available online at http://www.mfcindia.org/main/bgpapers/bgpapers2013/am/bgpap2013c.pdf (visited on 22.01.2017)

Code of Practice on Safety and Health in Opencast Mines, issued by ILO in 1991 applies to any situation or operation involving occupational safety and health aspects in opencast mines. The Code is considered to have enumerated in detail the basic requirements for protecting workers' health[14]. It casts competent authorities with responsibility for safety, health, and working conditions with regard to opencast mining.[15] The objectives of this Code include prevention of accidents, harmful effects on the health of those employed, and diseases arising from employment in opencast mines. Apart from ensuring appropriate design, proper technologies, and safe operation of opencast mines, it provides for the means of analysing existing technologies from the standpoints of safety and health and conditions of work. It also intends to modify these technologies to remove the hazards discovered by the analyses.[16] To provide guidance in setting up administrative, legal, and educational frameworks within which preventive and remedial measures can be implemented is another one envisaged by the Code.[17] By promoting the fullest consultation and cooperation between Governments, employers' organisations, and workers' organisations in improvement of health and safety in opencast mining, the Code protects the interests of mine workers.[18] Though India, a member of International Labour Organisation, is supposed to implement these provisions, no positive measures have been taken in this regard.

Health and Safety Regulation in other Countries

United States

In the U.S., mine safety is regulated by the Mine Safety and Health Administration, or MSHA, which is an agency of the U.S. Department of Labor. This agency is responsible for enforcing the regulations of the Federal Mine Safety and Health Act of 1977. Often just called the Mine Act, this law sets safety and health standards for miners and requires annual inspections of all U.S. mines by MSHA[19]. Occupational safety and health in Canada is governed by a combination of federal laws and laws of

14 The code enumerates 25 clauses with approximately 150 sub clauses
15 Chapter II, Clauses 2.1 to 2.5
16 Clauses 3 and 4
17 Clause 4.1 and 4.2 enumerates the need for appointment of inspectors, proper keeping of records, clauses 10 to 15 details the precautions to be taken in each minute areas of mining and the timely training to be provided to the employees
18 Clauses 15 to 20
19 Sarah Fried, *Mining Laws, Regulations, and Treaties: Safety and Reclamation*, available online at http://study.com/academy/lesson/mining-laws-regulations-and-treaties-safety-and-reclamation.html (visited on 20.01.2017)

the provinces or territory. The principal federal law is the Canadian Labor Code Part II. For example concerning coal mines the law includes; duties of employers and employees and establishes the Coal Mining Safety Commission, duties of every employer of employees in a coal mine, which includes compliance with conditions imposed by the Coal Mining Safety Commission- permit inspections; and submitting all plans and procedures to the Coal Mine Safety Commission and conforming activities to those plans. In addition the provision requires that employers obtain approval for operating any machine for which no safety standard exists; and search employees and others for alcohol and drugs. The laws also sets out duties of employees, the right of employees to refuse to operate a machine or thing which the employee considers to be dangerous, employees right to complain, mandatory safety and health committees for employers of 20 or more employees, establishes the Coal Mine Safety Commission, and the Advisory Council on Occupational Safety and Health. Other employers and employees in Canada are covered by safety and health laws adopted by provinces and territories.[20] The United States is a party to the Safety and Health in the Mines Convention 1995. A tripartite panel consisting of representatives covering American government, labour and business decided that no new legislation is needed as the MSHA is wholly in consonance with the Convention[21].

Germany

Mining legislation in Germany consists of the Federal Mining Act of 1980 and a number of Mining Ordinances on technical and procedural issues, like the Health and Safety Mining Ordinance of 1991, the Ordinance on the Environmental Impact Assessment of Mining Projects of 1990. These provisions set up a uniform mining law for all important mineral resources in the form of a comprehensive law covering all aspects of mining, including health and safety and environment, supervised by one single administration. This comprehensive system has been strengthened in the past years several times with the transferring into national German legislation of new European legislation on concessions, environment and health and safety in the extractive industries, e.g. the transposition of the EU Environmental Impact Assessment Directive and the EU Mining Waste Directive for the mining sector

20 US Department of Labour ,*A Synopsis of Mining Law for Canada*, available online at; http://arlweb.msha.gov/minelink/compend/canada.html.V5W1Tvl97IU on 11.12.2016

21 Text of the American Senate Treaty Document from the official site of US Government available online at https://www.congress.gov/treaty-document/106th-congress/8/document-text?overview=closedhttp://www.revolvy.com/main/index.php?s=Safety%20and%20Health%20in%20Mines%20Convention,%201995&item_type=topic last visited on 22.12.2016

within the procedures of mining law, rather than in general environmental law through an amendment of the Federal Mining Act and an additional Ordinance[22].

South Africa

In South Africa the Mine Health and Safety Inspectorate was established in terms of the Mine Health and Safety Act, 1996 (Act No. 29 of 1996), as amended, for the purpose of executing the statutory mandate of the Department of Mineral Resources to safeguard the health and safety of mine employees and communities affected by mining operations. The Mine Health and Safety Act, 1996, provides for the protection of the health and safety of employees and other persons affected by the South African mining industry and, amongst others, provides for the promotion of a culture of health and safety as well as the enforcement of health and safety measures or legislation. According to the Act, employers bear primary responsibility for a safe and healthy work environment. Risk management approaches to addressing health and safety hazards are mandatory. Moreover, the workers have rights to participate in health and safety, to health and safety information, to training and to withdraw from dangerous workplaces[23]. The Mine Health and Safety Inspectorate strives towards a safe and healthy mining industry. This is to be achieved by reducing mining related deaths, injuries and ill health through the formulation of national policy and legislation, the provision of advice, and the application of systems that monitor and enforce compliance with the law in the mining sector[24]. Over the years safety performance of the mines in South Africa has improved due to the effective implementation of the regulations of the country[25].

Legal Provisions in relation to the Health of Mine Workers in India

India has a vast array of policies, laws, regulations and procedures, often modelled on international best practices, for ensuring sustainability in mining and other development action. The Mines and Minerals (Regulation and Development) (MMRD) Act of 1957 as amended up to 2015 and the Rules framed under it have provisions to ensure environmental integrity in mining operations. However,

22 See generally *Mining Policy and Regulations of Germany*, available online at http://www.un.org/esa/dsd/dsd_aofw_ni/ni_pdfs/NationalReports/germany/mining.pdf l(visited on 24.12.2016)

23 M.A. Hermanus, *Occupational Health and Safety in Mining: Status, New Developments and Concerns*, available online at https://www.saimm.co.za/Journal/v107n08p531.pdf (visited on 13.01.2017)

24 Id

25 Id

relatively more effective provisions are contained in the environmental policies and laws which apply to all industries including mining. The most important environmental requirement is a comprehensive statutory environmental impact assessment (EIA) programme which was started in 1994 and is being continued with refinements since that date. The air and water pollution control, administered through State Pollution Control Boards (SPCB), is another important area for effecting environmental mitigation in mining.

Safety, welfare and health of workers employed in mines are the concern of the Central Government (Entry 55-Union List)[26]

Mines Act 1952 & Mines Rules 1955

The Mines Act and the Mines Rules are the direct legislations which directly cover the health and safety aspects of the mine workers in India. As per the Act the owner, agents and managers should provide wholesome drinking water and latrines and urinals in clean sanitary conditions for all the workers. Main provisions[27] of the Act consummately covers many of the health aspect which if strictly implemented would adequately protect the employees of mines. The health safety and welfare of the people employed in the mine are the main concern of the Act. Inspectors are appointed to examine and inquire into the safety and other health conditions of a mine. The chief Inspector can conduct safety health survey in any mine at any time. Drinking water should be arranged at suitable points such that majority of the workforce can have access to it. Sufficient latrines and urinals separately for male and female should be arranged. Mines should be properly lighted and ventilated for the

26 Article.55. "Regulation of labour and safety in mines and oilfields"

27
- Section19 - Drinking water in every mine provided and maintained at suitable points with sufficient supply of cool and wholesome drinking water.
- Section 21 – provision of readily accessible first-aid boxes or cupboards with prescribed contents during all working hours.
- Section 23 - notice of the occurrence / accidents to such authority in such form and within such time as may be prescribed.
- Section 25. Notice of certain diseases – sending notice of notified disease to the Chief Inspector and to such other authorities in such form and within such time as may be prescribed. If any medical practitioner who attends on a person with notified disease shall without delay send a report in writing to the Chief Inspector
- Section 30 – (1) No work for more than forty-eight hours in any week or for more than nine hours in any day. (2) The periods of work with his interval for rest shall not in any day spread over more than twelve hours, and that he shall not work for more than five hours continuously before he has had an interval for rest of at least half an hour.
- Section 35 - Limitation of daily hours of work including over-time work: not allowed to work in the mine for more than ten hours in any day inclusive of overtime in normal condition.

health of the employed people. A person should be in charge of the first aid box which should have the prescribed contents. Convenience of conveyance to the nearest hospital in case of casualties should be available during working hours. There is also provision for inquiries in case of accidents which should be completed within a period of 2 months[28]. For removal of difficulties in the Mines Act and for better implementation of the Act the **Mines Rules 1955** has been enacted by the Parliament. The Act and the Rules together form a comprehensive legislation for the protection of the mine workers of the country. The analysis of the major provisions of the Rules[29] makes us realize that the legal provisions in India for the health and safety of the mine workers are not at par with the international parameters. The new technologies do not match with the existing legislative provisions of our country. The high capacity machines are very dangerous and the workers are not trained to deal with any disaster. Safety measures are not developed very well. Employees are purely temporary and are not conversant with the mining activities[30].

Directorate General of Mines Safety (DGMS) is the enforcement agency which ensures compliance of the stated provisions through inspections by inspecting officers. The health, safety and welfare provisions of Mines Act and Rules are

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28 Ipsita Misra, "*Mining Safety and the Law*", available online at www.manupatra.co.in (visited on 23.01.2017)

29 Rule 29 B - Occupational Health of Workmen.

- Rule 29 P - Annual Report on Radiological Results of Medical Examinations
- Rule 29 Q- Appointment of Workmen Inspectors.
- Rule 30 Drinking water bottles for underground workers - 5-6 Ibs. water bottles to each worker employed underground. 3 litres per person employed in a mine where ever the wet bulb temperature exceeds 30°C. .
- Rule 37 - Approval of chemical closets as underground latrines
- Rule 38 provides for maintaining sanitation in the mines
- Rule 40 - Provision of Ambulance Van —The arrangements for Ambulance Van may be made roviding an Ambulance Van at the mine itself, or for a group of mines either collectively or through a Central Agency like Coal/Mica Mines Welfare Fund Organisation, State Govt. Agency, St. John Ambulance Association etc.
- Rule 42 – First Aid Services Rule 45 A - Record of Blood Grouping Identity Cards to Workmen
- Rule 62 - Rest shelters
- Rule 72 - Appointment of Welfare Officers
- Rule 75 - Proper maintenance of Attendance Register at mines
- Rule 78 - Attendance of Labour Employed by Contractor
- Rule 81 - Kit for determination of blood alcohol concentration MMR 1961 Regulation 124. Precautions against dust – minimising of emissions of dust and suppression of dust which enters the air at any work place below ground or on surface.
- Regulation 125. Precautions against irruption of gas – Where any working is extended to within 30 meters of any stopped -out area or disused workings containing or likely to contain an accumulation of inflammable or noxious gases, there shall be maintained at least one bore-hole not less than 1.5 metres in advance of the working.

30 Id at 28

invariably checked during the course of general inspection of the mines. The violations observed during the course of general inspection of the mines. The violations observed during the course of such inspections are being followed up by subsequent follow up inspection. In case of non-compliances, the improvement notices, prohibitory orders etc. are also being issued till it is complied.

Even though there are regulations like Mineral Concessions Rules, 1960, Mineral Conservation and Development Rules 1988 there are no specific provisions dealing with the health and safety of the mine workers. The Water Pollution Act, 1974, The Air Pollution Act of 1981 similarly seeks to prevent, control and abate air pollution. The state boards lay down the standards of emission of air pollutants in to the atmosphere from industries (including mines) and vehicles after consulting the central board and noting its ambient air quality standards. The Act empowers the authorities (SPCBs) to enforce the provisions of the Act including measures to close down a defaulting unit and /or stop its supply of electricity and water.

The 'environmental' provisions in the mining policies and laws are secondary to their main objective of promoting mineral development. To that extent their role in ensuring environmental integrity in mining operations is somewhat limited. The more important and potentially more effective provisions are contained in the environmental policies and legislations generic to all industries including mining.

However, from the point of view of mining (and many other industries), the most important environmental requirement is a comprehensive statutory Impact Assessment Programme (EIA) which was started in 1994. Under the powers EPA read with Rule 5 (3) of EPR 2009) which now governs the EIA procedures for mining and other specified industries. EIA has been broadly defined as "the process of identifying, predicting, evaluating and mitigating the biophysical, social and other relevant effects of development proposals prior to major decisions being taken and commitments made" (IAIA, 1999).

Mines and Mineral Development and Regulation (MMDR) Amendment Act, 2015

The MMDR Amendment Act, 2015 seeks to introduce a more predictable and clear regulatory and policy environment for the mining sector, so as to do away with delays and improve transparency in allocation of mineral resources. It is disheartening to note that the amendment nowhere covers the health and safety aspects of the mine workers. However, a short analysis of the major provisions is made under;

Establishment of District Mineral Foundation(DMF): Safeguarding interests of affected persons. The Amendment introduces a mandatory provision to establish a trust, a non-profit body known as the District Mineral Foundation in all districts where mining related operations take place. The establishment of the DMF has been introduced to address the concerns of local people in such districts, and work for the interest and benefit of the locals in mining affected areas. The DMF has nothing to do with the workers of the mines. It is established to help the local people who are adversely affected by the mining activities.

2015 Act has denied and removed the provision of compensation rehabilitation and resettlement of persons having usufruct and traditional rights over land and resources which was there in the in the 2011 Bill. Now all compensation, rehabilitation and resettlement is limited to occupational rights similar to 1957 Act.

With a limited vision of expediting growth in the mining industry, the amendment offers little for protecting people's interest and the environment. It fails to make communities and institutions of local government partners in the processes of mineral development. It fails to deliver on the promise to capture windfall profits from mining and share the mining wealth with local communities. From the perspective of the environmental, it holds little promise of steering the mining sector towards environment-friendly practices. In fact, it is more likely to encourage poor mining practices. Ironically, it even hurts the long-term growth prospects of the mining sector by limiting impetus for scientific exploration of minerals.

Even though India is rich with number of Rules and Regulations as described above, the following analysis shows the extreme level of failure in the implementation of these Rules and Regulations.

The status quo of Indian mine workers

India's major quarries are spread over the states of Rajasthan, Jharkhand, Karnataka, Tamil Nadu, and Andhra Pradesh. The massive unscientific mining has in the process eroded soil, caused extensive water loss, degraded forests, pastures and biodiversity in the entire state. It leaves behind a tale of destroyed ecology, biodiversity, land degradation, polluted grazing lands, farms and water catchments. Village economies are downgraded and more people are forced out of their traditional occupation, many of whom had to migrate for a livelihood. The deracinated people, having no other alternative, are forced to take up to mining[31] and the vicious circle

31 Mine Labour Protection Campaign , *Mine workers and their predicament in India*, available online at http://www.mlpc.in/inner_index.html (visited on 21.10.2016)

continues from which the mine workers and their generation do not have an escape until stringent laws come to their rescue. The mine workers are exposed to various potentially harmful substances including but not limited to fuels, reagents, solvents, detergents chemicals coal dust, silica dust, asbestos, noise, welding fumes, trona dust and metal dust[32].

Majority of the workforce in these quarries are forced to work in these mines due to their inability to find any jobs because of poverty, famine, failed crops or droughts. In Rajasthan alone, there are 2.5 million mine workers employed in over 30,000 small and large mines[33]. More than 90 % of the workforce belongs to the so called "untouchables"(tribals or dalits) which make them unaware of the proper wages and the state sponsored welfare and social security schemes. The people of the mining villages receive no benefits and extremely low wages, wages that comes nowhere near the government-approved minimum wage. An adult male worker only receives Rs.70-120 per day, depending upon his skill, after 8-10 hours of gruelling work. Comparatively, the daily wage for a woman is Rs. 45-55, and a child receives Rs. 30-40 a day[34]. The workers have no holidays, no weekly days off, any medical leave, and no maternity leave. A survey has revealed that 97% of workers in sandstone mines are indebted and a majority of them are in bondage[35]. These debts are passed on from one family member to the other or from one generation to the next, and can even cause a worker to be sold to another contractor. Confirming this trend, a report from the ministry of labour, government of India, states that till March 2004, the number of bonded labourers identified and released are 7488, among which 6331 are rehabilitated[36].

Despite mining being amongst one of the most dangerous and unhealthy occupations, child labourers are becoming more common in the mining industry. The International Labour Organisation estimates that about one million children aged 5 to 17 are engaged in small-scale mining and quarrying activities worldwide[37].

32 Douglas F. Scott, *Selected Health Issues in Mining*, available online at http://www.cdc.gov/niosh/mining/userfiles/works/pdfs/shiim.pdf last visited on 21.11.2016

33 *Mine Workers and their predicament in India*, MLPC available online at http://www.mlpc.in/ (last visited on 10.01.2017)

34 Id

35 Mine Labour Protection Campaign Survey 2001 available online at www.mlpc.on (last visited on 20.01.2017)

36 Centre for Education and Communication *Feasibility Study for Setting Standards in Natural Stone Sector in Rajasthan*; available online at http://www.indianet.nl/pdf/FeasibilityStudyForSettingStandardsInNaturalStoneSectorInRajasthan.pdf (visited on 20.01.2017)

37 ILO, *Burden of gold child labour in small scale mines and quarries,* available online at http://www.ilo.org/global/publications/magazines-and-journals/world-of-work-magazine/articles/WCMS_081364/lang--en/index.html (visited on 20.12.2016)

Under life-threatening conditions, an estimated 70,000 children work in the coal mines in the Jaintia Hills in northeast India alone, according to a children's rights organization working to end the practice. The youngest of the miners are just 7 years old. For the very minimal wages they work narrow, unreinforced seams in 5,000 small mines.[38]This work tends to call for the children to be in awkward positions such as crouched over the chutes to pick out pieces of slate from coal as it is rush by through the washer. These cramped positions cause the children to become deformed and bent backed. Stunted growth may even occur from these positions as well as curvature of spine. In mines, children descend to the bowels of the earth to crawl through narrow, cramped, and poorly lit makeshift tunnels where the air is thick with dust. They constantly risk fatal accidents due to falling rock, explosions, collapse of mine walls, and the use of equipment designed for adults[39]. Children are forced into twelve hour work days therefore, being in such wretched settings for such a long duration, resulted in serious health problems. Many children are under weight or experience diseases that correlate with their work environment such as tuberculosis and bronchitis. The clouds of dust inhaled by the children lay the foundation for asthma and miners consumption. The work is very hands-on therefore accidents to the hands tend to occur such as cut broken or crushed fingers. Many accidents occur to due to physical and mental fatigue caused by long hours of work and hard work as well. Within the mines it is pure blackness, clouds of deadly dust and the harsh grinding roar of the machinery is ringing their years. These mines are an unsanitary hazardous working place to everyone. Children are often required to do the same work as adults. In underground mining operations, for example, children work in ore extraction, assist in drilling, push carts, clean galleries, and remove water from the mines. In river mines, they dig and dive for sediments. In mineral concentration, they crush stones, haul minerals, pick gemstones, and wash gold. In the mines of industrial materials, such as clay, coal, and sand, children - often young girls - carry huge loads on their heads and backs, sometimes in extreme heat[40].

A large number of mine workers throughout Rajasthan are victims of asbestosis. Similar to silicosis, asbestosis is contracted by mine workers through the inhalation of small, fibrous asbestos particles. Once inhaled, these fibers become lodged in the

38 Daniel Ettor, *India's child coal miners*, The Christian Science Monitor, available online at http://www.csmonitor.com/World/Global-News/2010/0920/India-s-child-coal-miners accessed on 20.01.2017

39 ILO ,*The burden of gold child labour in small scale mines and quarries,* available online at http://www.ilo.org/global/publications/magazines-and-journals/world-of-work-magazine/articles/WCMS_081364/lang--en/index.htm (last visited on 20.12.2016)

40 Id

lungs and eventually make their way into the bloodstream. This also leads to pulmonary fibrosis and premature death. The mining of asbestos in Rajasthan dates back to 1960. However, due to the obvious health risks presented by the extraction of asbestos and the soaring number of asbestosis victims, the mining of asbestos was made illegal in Rajasthan in 1986 with all asbestos mines closed by 2005[41].

India is the third largest producer of coal in the world. The large quantities of toxic metals produced in the process of coal mining include lead, mercury, nickel, tin, antimony, and arsenic as well as radio isotopes of thorium and strontium. Small amounts of heavy metals can be necessary for health, but too much may cause acute or chronic toxicity. Many of the heavy metals released in the mining and burning of coal are environmentally and biologically toxic elements, stored in unregulated coal wastes. A power plant that operates for 40 years will leave behind 9.6 million tons of toxic waste. This coal waste constitutes the nation's second largest waste stream after municipal solid waste[42]. Chronic exposure to coal dust can lead to black lung disease, or pneumoconiosis, which took the lives of 10,000 miners worldwide over the last decade. Rates of black lung are on the rise, and have almost doubled in the last 10 years. There are a number of negative health effects of coal that occur through its mining[43]. Miners can also suffer other serious, long-term respiratory ailments: industrial bronchitis is very common among coal workers. A report on the effects of coal by the Physicians for Social Responsibility (PSR) found that coal combustion affects not only the human respiratory system, but also the cardiovascular and nervous system[44].

The areas near uranium mine in Jharkand have resulted in irreparable damages to the inhabitants. The report[45] states that 40 years of mining has made the villagers prone to diseases linked to radiation pollution, including congenital deformities, sterility, spontaneous abortions and cancer - yet mining continues unabated near these Indian villages, without proper security measures in place.

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41 *Mine workers and their predicament in India*, Mine Labour Protection Campaign, available online at http://www.mlpc.in/inner_index.html (visited on 18.07.2016)

42 *Health Effects of Coal*, Source Watch available online at http://www.sourcewatch.org/index.php/Health_effects_of_coal (visited on 22.01.2017)

43 Id .Negative health effects from include: Reduction in life expectancy,Respiratory hospital admissions, Black lung from coal dust, Congestive heart failure, Non-fatal cancer, osteoporosis, ataxia, renal dysfunction, Chronic bronchitis, asthma attacks, Loss of IQ from air and water pollution and nervous system damage, Degradation and soiling of buildings that can effect human health like sulphur dioxide, acid deposition etc,, Ecosystem loss and degradation, with negative effects on health and quality of life.

44

45 Sanjay Pandey, U*ranium mining fuels health crisis*(Aljazeera, 12.08.2014)

Small-scale mining is an important area where imminent concern is needed for the health of the employees. The maximum production csapacity of 50,000 tonnes/ year has been accepted as a criterion to Indian small-scale mine. Such mines constitute about 90% of total number of mines, 42% of the total non-fuel minerals and metals, 5% of the fuel minerals. Some 3000 small scale mines account for a work force of about 0.5 million people. Yet this sector is a neglected sector in Indian economy and still considered as an unorganized sector[46]. The majority of stone mines are in the unorganised and small-scale sector and provide employment to lakhs of people living around the mines. Reliable data about these workers are not available since employment details are not maintained, though rough estimates suggest that 25 lakh workers are engaged in mining operations in Rajasthan. Roughly 57 silicosis deaths have been reported from the State since 2009-10 and over 891 cases detected. These workers are among the poorest of the poor. Working conditions in stone quarries are far from satisfactory. Most of the small mine operators are reluctant to adopt safety and health measures and do not comply with the provisions of the Mines Act, 1952. Silicosis is an incurable respiratory disease caused by inhaling silica dust and is widespread among miners[47].

There is a shortage of trained occupational health professionals in much of the mining industry of our country. Even those that are available sometimes have problems in applying their knowledge. Getting access to current occupational health information is still a problem in many areas.[48]

Between 2009 and 2013, there have been 752 documented fatalities in mining operations in India, according to the Office of Directorate General of Mines Safety, Ministry of Labour and Employment[49]. Notwithstanding the progressive improvements in the safety standard of India's coal mines, in 2015, every ten days there was a mining fatality in the country and every third day on an average, there was a serious accident in the coal mining sector making it the most dangerous profession in India[50]. This data is from the reported fatalities alone. Many accidents

46 Mrinal K. Ghose, *Contribution of small scale mining to employment, development and sustainability: An Indian Scenario*, available online at http://link.springer.com/article/10.1007/s10668-006-9024-9 (visited on 13.12.2016)

47 Arti Dhar, *Amend Mines Act to contain Silicosis: Rajasthan HRC*, available online at http://www.thehindu.com/news/national/other-states/amend-mines-act-to-contain-silicosis-says-rajasthan-state-human-rights-commission/article7070876.ece (visited on 25.12.2016)

48 Norman S. Jennings, *Improving Safety and Health in Mines*, available online at http://pubs.iied.org/pdfs/G00545.pdf (visited on 20.12.2016)

49 Id

50 Anil Sasi, *Safety Concerns: Inside India's mines, a worker dies every 10 days*, Indian Express (June 1st, 2016)

in the mining sector especially in the small scale mining are never known to the outside world. Moreover, the chances of getting compensation are also the least. In case of any accident in the course of employment of a mine employee, he cannot hold an employer liable as there is no proof of employment, no social security and no opportunities of alternate employment. Thus the cost of accidents for the employer becomes ZERO. The fact that the cost involved in the case of accidents are much lesser than the precautionary measures if taken also gives the least chances to the mine workers for a safe working atmosphere.[51]. Even if the workers, would have proof of employment and social security coverage, the cost of even 100 accidents at the mine in a year, would be lower than cost of investing in collective protection for the employer, as cost of labour is abysmally low. With an ineffective and unenforced framework for safety standards and regulations and the management culture that does not value human lives, employers will continue to allow accidents to happen.

Regulatory Failure

A study[52], which took data from 111 major mining sites, says there is barely any regulation or inspection of pollution. Hundreds of thousands of lives could be saved, and millions of asthma attacks, heart attacks, hospitalisations, lost workdays and associated costs to society could be avoided, with the use of cleaner fuels, stricter emission standards and the installation and use of the technologies required to achieve substantial reductions in these pollutants. There is a conspicuous lack of regulations for power plant stack emissions. Enforcement of what standards which do exist, is nearly non-existent as per the study.

Implementations of regulations are hardly possible when the businesses are family owned and engage in small scale artisanal mining. Rajasthan has thousands of unorganised mines, which can be as small as one-twentieth of a hectare. They fall out of the purview of government control and there are no official records/accounts of these mines. There are no safety measures, a mine worker die every month, his family is denied any compensation, and the widow often has to send the young children in those very mines to make out a daily living[53].

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51 International Labour Organisation, *Safety and Health for Sandstone Mineworkers*, available at http://www.industriall-union.org/sites/default/files/uploads/documents/2016/Health_Safety/india_osh_sandstone_mine_workers_en_final_web_20160229.pdf (visited on 12-06-2016)

52 John Vidal, *Indian Coal power plants kill 1,20,000 people a year; says Green Peace*, available online at http://www.theguardian.com/world/2013/mar/10/india-coal-plants-emissions-greenpeace (visited on 12.1.2017)

53 MLPC ,*Proposal from Mine Labour Campaign Trust India*, available online at http://www.ohchr.org/Documents/Issues/TransCorporations/Submissions/CivilSociety/MineLabourProtectionCampaignTrustIndia.pdf (visited on 12.1.2017)

A total of 2,520 mines, owned by various private and public companies were inspected in 2012-13 by the Indian Bureau of Mines (IBM). Of these, states a report of the IBM, 1,780 — many of which were of iron ore, bauxite and limestone — were found to be flouting mining and environmental guidelines[54].

The IBM carries out inspection under the Mineral Conservation and Development Rules, 1988, and the Environment Protection Act, 1986, through its 17 offices in different parts of the country. Rule-breakers are issued a letter for violation and given 45 days to make things right. In case a miner's response is unsatisfactory, a show-cause notice is issued, giving him another 30 days for rectification. But IBM is more of a paper tiger. In 2012-13, it started prosecution proceedings against only 23 errant mine owners and collected a paltry penalty of Rs. 30,000. In the last four years, it took in only Rs1,70,800 as penalty from about 5,000 mine owners — an average of Rs34 per owner[55].

As analysed, the instances happening in India even after 50 years of enacting of the Mines Act and Mines Rules, undoubtedly prove the ultimate failure in implementation of the health and safety measures made by the legislature.

Judicial Response

There expects a drastic change in the judicial activism in this area with the establishment of the National Green Tribunal. From the analysis of the litigation settled in NGT, it is observed that very few cases have been filed from the mineral rich states of India. For ex. 10 cases settled from Madhya Pradesh and 5 from Orissa. There are strong oppositions against the proposed and ongoing mining activities in these areas. MoEF has granted environmental clearance for these projects. The litigations filed in these cases are comparatively fewer.[56]

In April 2015, the National Green Tribunal has come down heavily on Meghalaya government for not framing the coal mining plan for safety of workers and directed it submit the guidelines within six weeks. The NGT strongly criticized the illegal mining activities carried on without the least respect to the mine workers health, which resulted in the death of 15 mine workers. In October 2014, the National Green Tribunal has said that the state government has an obligation to provide

54 Id
55 Id
56 Swapan Kumar Patra, V.V. Krishna, *National Green Tribunal and Environmental Justice in India*, 44(4) Indian Journal of Geo Marine Science 445,453(April 2015)

humane working conditions, safety gadgets, proper remuneration and other such facilities to workers engaged in the mining of coal. The green bench had also prohibited coal mining in the entire state of Meghalaya but allowed transportation of extracted coal kept in the open with due "checks and balances[57]

The Rajasthan State Human Rights Commission (SHRC) on 4th April 2015 has asked the government to take a fresh look at the Mines Act, 1952 to contain the alarming spread of occupational diseases and effectively deal with violators. The commission has recommended the constitution of an independent agency with adequate powers to deal with all issues relating to occupational diseases and another panel to conduct studies and research. In a special report on silicosis submitted to the government, the SHRC has said it should be made compulsory for mine owners to use modern technology for extraction of sandstone and other dimensional stones[58].

In *Rural litigation and Entitlement Kendra* v. *State of Uttar Pradesh*[59], a large scale pollution was caused by lime stone quarries adversely affecting the safety and health of the people living in the area. On the suggestions of the Committee appointed by the Supreme Court, the Court ordered the closure of certain limestone quarries.

In *M/s BCCL V. Their Workmen*[60] The Supreme Court held that no person who is underage can work in the mines and therefore there is no justification for upholding the order of appointment as they have now attained 30 years.

Rural Litigation and Entitlement Kendra V UP[61]Mining operation in the Missouri Hill Range was the subject matter of PIL. The court found immediate closure of mining would cause hardship to the owners, but emphasized that this is the inevitable price to be paid for protecting the right of the people to live in a healthy environment.

Before the formation of National Green Tribunal, there are very few cases which specifically concern the safety and health of the mine workers which shows that the mine workers are totally ignorant about the labour regulations and the rights they have and also to the fact that they are under the threat of loss of their only lively hood to them and their family.

The laws and regulatory instruments, however, work badly, mainly due to lax enforcement and inadequate coordination among a multiplicity of functionaries.

57 *All Dimasa Students Union Dima Hasao Dist. Committee Vs. State of Meghalaya & Ors. And Impulse NGO Network Vs. State of Meghalaya & Ors.* decided on 16th April 2015

58 Aarti Dhar, *Amend Mines Act to contain silicosis: Rajasthan HRC*, The Hindu (April 5th , 2015)

59 AIR 1988 SC 2187.

60 AIR 2002 SC 2343

61 [1988] INSC 254

This has resulted in an aggressive citizens' movement, and pro-active judiciary, which sometimes assumes the role of policy maker and super administrator.

Possible Remedies

Three key areas of occupational health — testing, diagnosis and control — are being approached differently in different countries. An approach that is fair to all is necessary; one that is practical, cost-effective and sustainable.And one that is philosophically, legally and morally acceptable, and is effective in reducing exposure and mitigating the effects.

Jack Caldwell in his article[62] proposes a number of remedies[63] for an accident free mine industry. Proper measures are to be taken by the mine owners to prevent gross accidents or immediate rescue measures in case of accidents so that even if a worker commits a human error, the accident will not occur. For example, at a blasting site, if all workers are moved to a safety room protected from the blast no one will be injured. As such precautionary measures are updated with the modern technology are expensive the mine owners are least bothered. Also, if the blasting is conducted by properly trained persons, accidents can be avoided. Investment in a safety room, training of staff and ensuring safe practices at the workplace are all necessary constituents of collective protection.

Enforcement should not be an end in itself; it must be matched by a continuing decline in preventable harm to miners. The long-term goal should be to ensure that, without exception, an individual can devote a lifetime to a mining career and emerge healthy and unharmed. If the power of the inspectorate is to be sensibly deployed and effective, the quality of staff must be high, and no compromises made. Regulators will continue to need a high level of technical and professional expertise.

Adherence to any of the regulations is only possible when the companies are large corporates. Similarly, Independent gender audit should be periodically undertaken of large and small mines separately with clearly specified indicators and which include the participation of the women workers in these exercises. Gender audit

62 Jack Caldwell, *Health and Safety in Mines*m, available online at http://technology.infomine.com/reviews/HAS/welcome.asp?view=full (visited on 20.12.2016)

63 Maintain a well written Health and Safety Plan (HASP), Employ and empower a skilled health and safety professional, Enforce health and safety standards and procedures, Train all the people who work on the site, Have a tailgate meeting every morning and before any new or unusual activity, Practice incident control, Practice continuous performance improvement in a non-accusatory environment, Audit health and safety practices and procedures independently, Bar anyone from the site who violates health and safety procedures

should be made mandatory within the project period as apre-condition to sanction of lease

Having a Convention, codes of practice, legislation and regulations does not guarantee better occupational safety and health standards. There is a need for sustained action and vigilance if conditions that lead to tens of thousands of mineworkers being killed or injured, let alone getting sick, every year are to be changed.

The laws and schemes in India are ill implemented and their existence is not known to the mine workers and their families. Further the domination of mafia and muscle power of the mining lobbies make it a highly hazardous industry in terms of human rights protection. There is thus an urgent need of demanding training, decent work facilities, safety equipment and working condition for mine workers and their family**.** The examination of the ability of the workforce to behave safely must be an integral part of risk assessment and other safety management tools such as audits. There is no point in advocating the importance of safety behaviour if it is not feasible to behave safely.

SUGGESTIONS:

1. First proper enumeration of workers in the census and other official surveys has to be taken seriously and immediate steps should be taken to have full and complete list of the mine workers.
2. Enumeration of all mining activities should also be done and laws should be amended so as to include small scale and family mining activities under the purview of mining regulations.
3. All the mine employees irrespective of the size of mines should be compulsorily educated about the rights they have as labourers and also about the safety measures to be abided by when on work.
4. The modalities of how basic amenities like housing, drinking water, toilets electricity education and medical facilities have to be worked out at the time of sanctioning.
5. The applicants of mining lease should be assessed not only on grounds of capital investment capacity but also ability and track record for providing proper working conditions particularly this is necessary where migrant labor is hired for mine related works.

6. In terms of legal safeguards, the regulations should be amended together to include provisions for the above policy issues especially workers are concerned. The granting of mining leases should have precautionary rules and safeguards of worker's rights.
7. The legal responsibility of protection for protection of mine workers should be pinned to all levels of mine ownership whether they employ workers directly or indirectly.
8. Redressal and grievance mechanisms should provide enabling facilities for women workers to put up complaints and participate in assessment, review and redressal of grievances.
9. The sanction of mining lease should be set as a precondition, the provision of safe drinking water and accessible water for domestic use for workers at the mine site as well as near housing settlement.
10. Close monitoring of the working of the mines by Safety Supervisors in the mines, Internal Safety Organisation of the mining companies and by the Inspecting officers of DGMS.
11. Taking suitable actions as per the statute for non-compliance such as stoppage of work, issue of violation letters, issue of prohibition notices/ orders, launching of prosecutions under the court of law etc.
12. Strengthening the mechanism of training & re-training or workers & supervisors.
13. Inquiry into accidents, analysis for ascertaining the causes and circumstances leading to accidents and taken suitable action for preventing similar accidents in future should be done in a time bound manner.
14. Introducing the concept of Safety Management through risk assessment for identification of hazards, assessment of risks in the hazards, evolving control measures, implementation of control measures and monitoring the effectiveness of the control measures through safety audit. This is a new concept and is being introduced gradually in conjunction with existing practices of legislative safety management. Workers at all levels are involved in the process of decision making on risk management for its effective implementation through greater involvement.
15. Reinforce the application of labour law and ensure recognition of employment relationship through legal contractual arrangements.

16. A medical examination at the time of employment and periodic medical examination prescribed under the Mines Act and the Factories Act should be made mandatory for contract and casual labour in hazardous occupations
17. Improving the awareness of workers at all levels regarding safety issues involved in the work process and the safe operating procedures for each job.

Moreover, the fact that the employees and family stay very near to the mine complicates the issue further. All the mines should be given license on a precondition of making stay of family not near the mines to effect their life and proper transportation facilities to be given to the mine workers to and fro their employment.

Conclusion

An immediate legislative alteration and strict implementation of the above measures will rectify the health issues in the mining sector to a great extend. For any plan to be effective, people from nearby communities must be involved in all decision-making. A comprehensive legislation specifically dealing with the health aspects of mining is imminent in this area as the problems are many and the solutions are umpteen.

EXTRATERRITORIAL CRIMINAL JURISDICTION OVER MARITIME WATERS THE THEORETICAL JUSTIFICATION

*Nikhilesh Nedungattummal**

Introduction

In a wide sense "jurisdiction" means the power of control, which the sovereign of a given territory has over the persons, property and institutions within that territory.[1] Subject to the restrains of international law, the sovereign may do as he pleases within his territory. State jurisdiction concerns each state's right to regulate conduct or consequences of events that takes place in a specified area. A state's jurisdiction may take various forms via legislative, judicial and administrative or executive actions.[2] The extent of a state's jurisdiction` may differ in each of these contexts. Almost all legal systems have rules that define the rights of actors and institutions to deal with legal disputes and violations; this is conventionally covered under the topic of jurisdiction. The meaning of jurisdiction is far from clear in general jurisprudence.[3] Jurisdiction refers to particular aspects of general legal competence of states often referred to as 'sovereignty'.[4] Jurisdiction is an aspect of sovereignty and refers to judicial, legislative, and administrative competence. Jurisdiction refers to a state's power under international law to govern person and property by its (national law) and to make, apply and enforce such rules of conduct to that end. A state cannot exercise jurisdiction outside territory except the custom or convention allows. The legal systems in a hierarchical arrangement will necessarily have to determine which legal issues and disputes are to be decided at which level of governance. With respect to international law, an important element is defining what problems or situations will be handled through national legal systems as opposed to international forums.

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1 *Reserch Scholar,Mahatma Gandhi University,Kottayam.
Albert Levitt, *Jurisdiction over Crimes*, 16 Am. Inst. Crim. L. & Criminology 316 (1925).

2 Sir Robert Jennings and Sir Arthur Watts, 1 Oppenheim's International Law, at 456 (Universal ,9th ed1998).

3 George, *Extraterritorial Application of Penal Jurisdiction* 64 Mich. L. Rev., 609 (1966).

4 Ian Brownlie, Principles of Public International Law, at 299 (Oxford University, 7th ed 2008).

The disputes among neighbours can find almost all the nook and corners in this world. In a civilized society this disputes are resolved through the determination of boundaries by courts or tribunals by appreciating the existing laws, customs and regulations of that particular society. Consider this in a broader sense we can clearly identify that the root cause of almost all the international disputes are control and regulation over territory, individuals and institutions. The states always exercise full control over its territories, which include land, water and air. Exercising control over territories is an essential attribute of sovereignty. As stated by permanent court of international justice, "all that can be required of a state is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests upon its sovereignty[5]." The international community give complete freedom to states to exercise jurisdiction in its territories except in certain circumstances. This means the present day sovereign states have some sought of restriction in exercising its jurisdiction over its territories, absolute sovereignty concept is vanished from this universe.

The criminal law has three distinct sections; substantive, procedural and therapeutic[6]. The substantive part deals with the types of conduct which organized society has forbidden as inimical to its welfare. The procedural part deals with the apprehension of an alleged offender and the determination of his guilt or innocence. The therapeutic part deals with the treatment of the offender whose guilt has been determined. The principles and theories of jurisdiction over criminal offenses form part of procedural criminal law.[7]

The Studies of jurisdiction in public international law, the subject is further divided into either two categories (prescriptive and enforcement jurisdiction)[8] or three categories (prescriptive/legislative, judicial/adjudicative and executive/ enforcement jurisdiction).[9]This article is mainly focused on public international law i.e. "the criminal jurisdiction"[10] and explains the former category of the jurisdiction and its extraterritoriality.

5 S. S. Lotus Case, (1927) PCIJ Series A no 10 (Official Case No) ICGJ 248 (PCIJ 1927).

6 Albert Levitt, *Some Societal Aspects of the Criminal Law*, 13(1) J. Crim. L. & Criminology 90(1922). Therapeutic part of criminal law deals with the treatment of the offender whose guilt has been determined.

7 Albert Levitt, 16 Am. Inst. Crim. L. & Criminology 316 (1925) (cited in note 1)

8 Vaughan Lowe, *International Law,* at 329, (O.U.P 2007).

9 Michael Akehurst, *Jurisdiction in International Law*, 46 Brit. Y.B. Int'l L. 145 (1972-73).

10 "Criminal jurisdiction" in this context refers not only to jurisdiction over criminal matters in a narrow sense. It refers to jurisdiction over all matters related to coercive measures by the state authorities that are implemented to secure compliance with the law.

Even though lots of conventions and international consensus are there regarding exercising of criminal jurisdiction, there exist a lot of ambiguities, how far a state can exercise its criminal jurisdiction over maritime waters. The concrete question to be dealt with is twofold. First, do the courts in cases involving criminal jurisdiction over maritime waters use the established principles of jurisdiction, or do they deviate from these principles and apply new logic and reasoning to issue of jurisdiction in different maritime zone cases? Second, given this observation, is there any novelty in the principles of jurisdiction in coastal state criminal jurisdiction cases? Both the above questions are big controversial issues in the international jurisprudence. In this paper author going to discuss different elements and theories of criminal jurisdiction and try to justify how far a state can exercise its jurisdiction in its maritime waters.

The Extraterritorial Criminal Jurisdiction

Claiming jurisdiction beyond territorial waters is becoming increasingly common in the 21st century. Many states claim authority to project law beyond their own territorial borders and, as Alejandro Chehtman observes: 'extraterritoriality is deeply entrenched in the modern practice of legal punishment'.[11] The extent to which states can assert extraterritorial criminal jurisdiction is a pivotal issue, which sits at the 'very heart of public international law'.[12] In the contemporary world A number of circumstance have developed through both common law and statute that allows courts to consider acts or omissions that are not committed within the territory, hence extending the scope of criminal jurisdiction by way of 'extra-territorial jurisdiction'.[13] The common law recognized and developed the limits of territorial jurisdiction in the Privy Council decision in *Liangsiriprasert* v. *Government of the United States of America* [1991]:

> Crime has ceased to be largely local in origin and effect. Crime is now established on the international scale and the common law must now face this new reality… there is nothing in precedent, comity or good sense that should inhibit the common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the criminal offences in England… (Per Lord Griffiths).

11 Alejandro Chehtman, *The Philosophical Foundations of Extraterritorial Punishment,* at 1 (O.U.P 2010).
12 Danielle Ireland Piper, *Extraterritorial Criminal Jurisdiction: Does the Long Arm of the Law Undermine the Rule Of Law?*, 13 M.J.I.L 2 (2012).
13 Commonwealth Secretariat, *Criminal Jurisdiction: Is it Wide Enough?*, 34 (2) Commonwealth Law Bulletin 357 (2008).

Even though it is recognized by the international community through various decisions of the courts and states both conceptually and in practice, assertions of extraterritorial jurisdiction are controversial, particularly when there are competing claims. For example, at the time of writing, India and Italy are disputing their competing claims of jurisdiction in relation to the killing of two Indian fishermen by Italian naval officers near the coast of Kerala. Both Italy and India claim the right to hear the matter on the basis that both have relevant laws applying extraterritorially. The Indian Supreme Court recognised the extraterritorial criminal jurisdiction of Indian courts by the principle of passive personality. This decision of the Indian supreme court which justified the extraterritorial criminal jurisdiction create lot of controversies whole over the world so it is high time to discuss the principles that are justifying the criminal jurisdiction.

Elements of Criminal Offence

Criminal offences composed of many elements and differ from each other in varying ways. However certain elements are common to all criminal offenses. These are of importance in a study of jurisdiction over criminal offenses because the courts will inquire into some or all of them before they will inquire into some or all of them before they will assume or reject jurisdiction over a particular offense. The common elements of criminal offences are no criminal offence without an offender. The offender must be capable to commit that offence. He must be of sound mind. The offender must have done that he was under a duty not to do, or he failed to do that he was under a duty to do. He must have been guilty of a forbidden act or omission.[14]

The act or omission must have had injurious consequences. The function of criminal law is to shield society from harmful consequences of human activities. Most of the states punish offenders if the consequences of the offenders' activities occur within their territorial limits. No criminal offence exists unless the act (or omission) or consequences of the act, or both have been forbidden by the sovereign having control of the territory where they occur. The act or consequence must injure, threaten or be likely to injure or threaten, someone society wishes to protect. The final two common elements are concerned with the time when and place where the other elements exists. Act and consequences within the territorial limits of any given sovereign are of importance to his criminal law. Act my treat as criminal character place where they occur and consequences surround them. E.g. if a man fire into a no man's land his act is likely to be treated as innocent. But if he fire in a crowded area

14 Beale, *The Proximate Consequence of an Act*, 33 Harv.L.Rev., 633. (1920).

he is likely to start a panic. In the no man's land the act is harmless; in the crowded area the act is criminal.

Principles of Criminal Jurisdiction

We are concerned here only with the agent known as the criminal courts and with the power of the court over offences and offenders. For our purpose the following definition of jurisdiction will be accurate and adequate: Jurisdiction over criminal offences means 'the power of a given court to inquire into and determine whether or not an alleged offense has been committed by a designated accused person,[15] and to apply the penalty for an offense so determined'.

Certain principles which indicate the extent of jurisdiction which criminal courts have will be the following. The jurisdiction of any court varies with its position in the hierarchy of tribunals[16]and the charter of the offense committed.[17] The character of the penalty to be imposed may delimits jurisdiction of the courts.[18] The territory where the offense was committed limits jurisdiction.[19] The character of the accused may determine jurisdiction.[20] The citizenship of the offender determine jurisdiction.[21] Citizenship of the offender may limit the jurisdiction.[22]The repeal of a penal statute

15 John Bouvier, *A Law Dictionary Adapted to the Constitution and Laws of the United States of the American Union*available online at www.constitution.org (visited on 12-01-2016)

16 The lower courts are given jurisdiction within very narrow limits, while the higher courts have general jurisdictional capacities. In India the criminal offences are first come up before the first class judicial magistrate court.

17 Petty offences are tried in lower court. The grievous offences are committed to the session's court or the special court constituted for that purposes.

18 Some of them have jurisdiction to try offenses where the penalty for their commission is a jail sentence or a small fine, but they do not have jurisdiction to try offenses the penalty for which is imprisonment in the penitentiary or a fine of considerable proportions or above a designated amount.

19 Ordinarily the courts have jurisdiction only in their own territorial limits. The Sessions Courts have jurisdiction to try offenses committed within the city limits, but not those committed within other parts of the county. Some courts, however, have jurisdiction over offenses committed anywhere within the territory belonging to their sovereign.

20 Certain courts have jurisdiction over juvenile offenders; and others have jurisdiction over female offenders. No courts have jurisdiction over foreign sovereigns and their personal representatives'.Where jurisdiction over an offense is within the concurrent jurisdiction of two or more courts the one first taking jurisdiction may keep it. The other courts cannot oust it of its jurisdiction.

21 All most all the jurisdiction in the world insists the presents of the accused at the time of trial.

22 All persons within the territory where the court functions are amenable to the laws of that territory whether they are citizens of that territory or foreign territories. Foreigners who enter the territory of a sovereign are also amenable to the laws of the sovereign. Jurisdiction will exercised over such persons if the offend against the criminal laws of the territory. Sovereignty means control and direction of all things and persons within the territory of the sovereign. Subject of other sovereigns are under no duty to enter the territory. A pirate is a man without a country. He is deemed an enemy of all mankind. The courts of any territory where the pirate is found have jurisdiction over him no matter where his offenses may have been committed.

may oust jurisdiction. The assumption of jurisdiction by one court may bar another court from exercising jurisdiction over the same offense. The presence or absence of the offender may determine jurisdiction.

The above principles are generally accepted wherever Anglo- American law is in force. They present no practical difficulties in the administration of justice. They all assume that the various elements of an offense are present within the territory where the court functions. But what of the cases where the elements of an offense are not all within the territory where the court functions? Suppose that each of the elements occurs in a different judicial unit: which court has jurisdiction over the offense? The attempt by legislatures and courts to answer this question has given rise to various theories of jurisdiction which will now be considered. For want of better names the theories may be called The Territorial Commission Theory, The Territorial Security Theory and The Cosmopoliton Justice Theory. These theories are not mutually exclusive; nor do they indicate hard and fast boundary lines. They shade into each other by almost imperceptible degrees and it is difficult at times to know just where to place a given rule as found in the statutes or decisions. But they do indicate different methods of dealing with similar sets of facts. In the following pages the various theories will be discussed with reference to a single question: To what extent does the particular theory aid in fulfilling the function of the criminal law?

The Principles of International Criminal Jurisdiction

The word jurisdiction may be most accurately thought of for present purposes as referring to the "competence" of States under international law to punish and prosecute for crime rather than it describing the domestic (court and tribunals) powers, procedures or hierarchies of various courts or other governmental agencies within States; in short, the focus here is upon the international capacity as accorded by international law to States as entities to exercise jurisdiction over crime.[23]

As Wheaton observes:

> "By the common law of England, which has been adopted in this respect by the United States, criminal offences are considered altogether local and justciable only by the courts of that country where the offence is committed. But this principle is peculiar to the jurisprudence of Great Britain and

23 Harvard Research in International Law, *Draft Convention on Jurisdiction with Respect to Crime*, 29 Am.J. Int'l L 435, 623 (Supp. l935).

> United States, and even in these two countries, it has frequently been disregarded by the positive legislation of each in the enactment of statutes, under which offences committed by a citizen or subject within the territorial limit of a foreign state had been made punishable in the courts of that country to which the person owes allegiance, and whose laws he is bound to obey. There is some contrariety in the opinions of different public jurists on this question; but preponderance of their authority is greatly in favour of the jurisdiction of the courts of the offender's country".[24]

Practice shows no uniformity among States in exercising criminal jurisdiction, and the variety of approaches may be traced in part to differing geographical, political, religious and historical factors which influenced the development of individual State legal systems.[25]For example, it is said that one reason for the emphasis found in Anglo-American countries on the territorial nature of crime, which gives rise to jurisdiction based on the place of the act, is because of the predominance in those nations of sea frontiers which hinder the easy movement of people and therefore criminals across State boundaries; whereas, in Europe a broader view of jurisdiction is taken because "the Continent is a network of land or river frontiers, and act or transactions of an international character have been more frequent owing to the rapidity and facility of movements across the frontiers between these countries".[26]Similarly, among Middle East nations the tendency to look to the nationality of the criminal rather than to the place of the act may be seen as a result of the religious tenets of the Muslim faith which viewed a believer as taking his Koranic laws with him wherever he may travel.[27]

Whatever the original causes, variations in the exercise of criminal jurisdiction do exist, although it is now customary to justify these variations on the basis of State sovereignty and independence. As stated by the Permanent court of International Justice, "All that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests upon its sovereignty".[28]It is, unfortunately, a difficult matter to determine just what these limits are, which has led Schwarzenberger to conclude that the "only, but decisive limitation which... International law imposes on sovereign

24 Coleman Phillipson, *Wheaton's Elements of International Law*, at 19 (Stevens and Sons ,5th ed 1916).
25 Starke, *An Introduction to International Law*, at 273 (Butterworth's ,8th ed 1977).
26 *Id.*
27 Liebesny and Herbert, *Judicial Systems in the Near and Middle East: Evolutionary Development and Islamic Revival*, 37(2) *The Middle East Journal* 217 (1983).
28 S. S. Lotus Case, (1927) PCIJ Series A no 10 (Official Case No) ICGJ 248 (PCIJ 1927).

States is that ... criminal jurisdiction must not actually be exercised outside the territory, or places assimilated to it, of the State which claims . . . jurisdiction".[29] Whether or not it is accurate to say that there are no other limitations, it is certain that wide latitude in the exercise of criminal jurisdiction is presently permitted:

International law sets little or no limitation on the jurisdiction which a particular State may arrogate to itself. It would appear to follow from the much discussed *Lotus Case* (1927), decided by the permanent court of International Justice, that there is no restriction on the exercise of jurisdiction by any State unless that restriction can be shown by the most conclusive evidence to exist as a principle of international law. In that case the Permanent Court did not accept the French thesis. France being one of the parties which put forward a claim to jurisdiction by a State must be shown to be justified by international law and practice. In the Court's opinion, the onus lay on the State claiming that such exercise of jurisdiction was unjustified, to show that it was prohibited by international law.[30]

Broadly speaking, the variety of State claims to exercise jurisdiction may be divided into two general types: personal jurisdiction, asserted over individuals on grounds of State allegiance or protection, and territorial jurisdiction, asserted over a geographically defined portion of the earth which is claimed as State territory.[31] In the *WoodPulp Cases*[32] the report for the hearing in the European Court of Justice stated that 'the only two legal bases of jurisdiction in international law are the principles of nationality and territoriality. Within these two types, however, may be found more specific grounds of jurisdiction with their own distinctive labels

An analysis of modern national codes of penal law and penal procedure, checked against the conclusions of reliable writers and the resolutions of international Conferences or learned societies, and supplemented by some exploration of the jurisprudence of national courts, discloses five general principles on which a more or less extensive penal jurisdiction is claimed by States at the present time. These five general principles are[33]: first, (1). The Territorial Principle, determining jurisdiction by reference to the place where the offense is committed; second, (2). The Nationality Principle, determining jurisdiction by reference to the nationality or national

29 Schwarzenberger, *A Manual of International Law*, at 90-97 (Stevens and Sons, 5th ed 1967).
30 *Id* .
31 *Id.*
32 Mann, *The long Arm of Community Law* (1989), E.L.R p. 169.
33 Mika Hayashi, *Objective Territorial Principle or Effects Doctrine : Jurisdiction and Cyberspace*, 6 In. Law journal 285 (2006), available online at< http://www.morlacchilibri.com/inlaw/downloads/in.law_08_2.pdf>, (visited on 10-2-2015).

character of the person committing the offense; third, (3). The Protective Principle, determining jurisdiction by reference to the national interest injured by the offense; fourth, (4).The Universality Principle, determining jurisdiction by reference to the custody of the person committing the offense; and fifth,(5). The Passive Personality Principle, determining jurisdiction by reference to the nationality or national character of the person injured by the offense.[34]Recognizing that these traditional principles were formulated and developed long before man obtained the capability to enter the previously inaccessible domain of ocean space, the question that will be immediately presented at the occurrence of a criminal act on the maritime zone is whether or not any of these principles may be interpreted to provide an adequate pigeonhole for so novel a situations that are arises in different maritime zones. Such an attempt to pigeonhole would certainly be in keeping with the traditional approach to crime, and one ought to begin at least with the customary analysis:

The essence of current practice is its mechanical approach to jurisdiction. A court will ask where the crime was committed, or what the nationality of the criminal was or the victim, or whether the security of the State was threatened.[35] These simple questions will be used as mechanical jurisdictional tests; the answer to them will be accepted uncritically.[36] A state while exercising jurisdiction should assure that no express bar in taking jurisdiction is there at the time of exercising criminal jurisdiction under the following basic principles of jurisdiction in international law.[37]

The Territorial Principle

In the territorial principle[38] of jurisdiction the locus of the offense fixes jurisdiction. It relies on the location of the offence and only courts of that locality where the offence is committed only have jurisdiction and could not be prosecuted in any other place. To determine where the locus was you had to determine where the "gist of the offense" had occurred. By "gist of the offense" is meant that element of the offense without which it cannot be said that a crime has been committed.[39]

It is the universally recognised and has been regarded as most fundamental of all principles governing jurisdiction. As per this principle a state may assert jurisdiction

34 *Id*

35 John P. Grant & J. Craig Barker, *Harv. Research in International Law: Contemporary Analysis and Appraisal,* 127 (2007).

36 LotikaSarkar, *The Proper Law of Crime in International Law*, (1962) Int'l comp. L. Q. 446.

37 Haijiang Yang, Jurisdiction of the Coastal State Over Foreign Merchant Ships in International Waters and the Territorial Sea, 31 (Springer 2006).

38 This theory also calls as territorial commission theory.

39 Albert Levit, *Jurisdiction over Crimes*, 16 (3) Journal of Criminal Law and Criminology 317 (1926).

over persons, things and events within its claimed boundaries[40] moreover a state may apply its criminal law to the conduct of persons on, under or over the territory of the state regardless of the nationality of the offender. This principle is tempered in as much as all states should respect the sovereignty of other states and should observe the rules of international law. The view that a state has jurisdiction over its own territory has indeed been considered obvious,[41] for it is the single reflection of the essential and complete territoriality of sovereignty, i.e. of the total legal competence of the state.[42]As such it is further complemented by instances where the State exercises prescriptive jurisdiction over activities initiated in its territory but completed outside its territory ('subjective territorial jurisdiction') or activities completed within its territory although initiated outside its territory ('objective territorial jurisdiction').[43]The principle boasts a series of practical strengths, including the taking of evidence, the convenience of the forum, availability of the witness and the involvement of the related parties in the case. Although it is sometimes implied that the territorial principle is exclusive, the special constellation in which an act of the object of jurisdiction is commenced inside and ended in outside might pose some challenge to the above position. In such a case, jurisdiction can be justified when one of constituent elements of the act is consummated within the state territory.

The Lotus Case[44] Originate in a collision on the high seas between French steamer and a Turkish collier in which the latter sank and Turkish crew members and passengers lost their lives. The French steamer having put into port in Turkey, the officers of the watch on board at the time of the collision were tried and convicted of involuntary manslaughter. The Permanent Court of International Justice (PCIJ) was asked to decide whether Turkey had acted in conflict with international law by instituting proceeding, i.e. by the fact of exercising criminal jurisdiction and, if so, what reparation was due. France contended that the flag state of the vessel alone had jurisdiction over acts performed onboard on the high seas. Turkey argued in reply, in part, that vessel on high seas form part of the territory of the nations whose flag they fly. By the casting vote of president (vote equally divided six on either side), the court decided that Turkey had not acted in conflict with international law by exercising criminal jurisdiction. The majority six judges avoided dealing with precise question

40 Brownlie, Principles of Public International Law, 301 (Oxford ,5th ed 1998).
41 Harvard Research in International Law, *Draft convention on Jurisdiction with Respect to Crime, with Comment*, 29 Am. J. Int'l. L. Supp (1935).
42 Ian Brownlie, *Principles of Public International Law*, 297 (Oxford, 6thed 2003).
43 Mika Hayashi, *Objective Territorial Principle or Effects Doctrine : Jurisdiction and Cyberspace*.
44 S. S. Lotus Case, (1927) PCIJ Series A no 10 (Official Case No) ICGJ 248 (PCIJ 1927).

of the compatibility of the relevant article of the Turkish penal code with international code with international law. This article provided for punishment of acts abroad by foreigners against Turkish national and involved and protective principle of jurisdiction. Judge Moore, in a separate opinion, agreed with the majority as to the outcome but expressly rejected the protective principle.

The majority of the court opinion is that the objective territorial principle is applied in this case. This principle was familiar but to apply it the court had to assimilate the Turkish vessel to Turkish national territory. The pronouncement of the opinion there is vagueness and generality. Thus on the question of criminal jurisdiction the court observed that:

Though it is true that in all systems of law the territorial character of criminal law is fundamental, it is equally true that all or nearly all these systems extend their jurisdiction to offences committed outside the territory of the state which adopts them and they do so in ways which vary from state to state. The territoriality of the criminal law, therefore, is not absolute principle of international law and by no means coincides with territorial sovereignty[45].

On question of jurisdiction in general the court expressed its view in passage which reads in part:

Far from laying down a general prohibition to the effect that states may not extend the application of their laws and the jurisdiction of their courts to persons, property or acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every state remain free to adopt the principles which it regards as best and most suitable.[46]

While analysing all the above inferences we can say that a state can stretch its wide arm to its land territories, internal waters, territorial sea, archipelagic waters, as well as the air space above all that areas. In the case of water territories Under UNCLOS[47], a coastal state has sovereign rights and jurisdiction in the EEZ (Exclusive Economic Zone) and the CS (Continental Shelf) over certain matters.

The general territorial jurisdiction of a state extends into the sea so far as the cannon shot will reach, which was formally usually calculated to be one marine league, i.e. about three (3) miles. The reason for fixing the three miles limit from the

45 Id *at*. 20.
46 Id
47 The United Nations Convention on Law of the Sea, 1982 1833 UST 3; 21 ILM 1261 (1982)

coast was that till the end of the 18th century, the range of artillery was about three miles or one marine league. This limit is still accepted by several countries of the world, though the range of modern guns has considerably increased. In recent times, The President of India by a Proclamation issued by him under article 372 of clause (2) of the constitution of India declared:

Notwithstanding any rule of law or practice to the contrary which may have been observed in the past in relation to India or any part thereof, the territorial waters of India extend into the sea to a distance of six nautical miles[48] measured from the appropriate base line.

According to "The Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976; the limit of the territorial waters is the line every point of which is at a distance of twelve nautical miles from the nearest point of the appropriate baseline. The Exclusive Economic Zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured".

India's territory, therefore, would comprise its land, its internal waters such as rivers, lakes and canals, about seven miles of sea from its coasts at low water mark and air space above its land and waters. The air space above the territory of India is subject to its control. There have been certain international conventions on this problem. A state, however, has the right to prohibit the disturbance of its air space by wireless communications from foreign stations. The territory of a state also includes its floating territories such as ships, the artificial islands, its aircrafts etc.

The Nationality Principle

Government of a person can assert jurisdiction over him outside its claimed territories[49]. There is general support for the basic opinion that a state may exercise jurisdiction over the extraterritorial conducts of its nationals.[50]However, the opinion obviously requires a qualification, namely, the performance of the jurisdiction based on the nationality should be permissible under the *lex loci delicticommissi*. Furthermore, no jurisdiction may go so far as to amount to interference to domestic jurisdiction to another state. A writer has suggested that the principle can be extended

48 A nautical mile measures 6080 feet in British practice. Therefore six nautical miles work out to be about seven miles.

49 Geoffrey R. Watson, *Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction*, 17 Yale J. Int'l L. 41 (1992).

50 Haijiang Yang, Jurisdiction of the Coastal State Over Foreign Merchant Ships in International Waters and the Territorial Sea,32 (Springer 2006).

by reference as alternative evidence of allegiance owed by foreigners to the host state[51]. Such jurisdiction appearing to be based more on the territorial principle. In the light of the probable overlapping jurisdiction and double burden, state show in practice restrained in applying this principle, which is commonly limited to certain grave offences. Section 4(1) of The Indian Penal Code[52] declares that the provisions of the code apply to offences committed by Indian citizens in any place without and beyond India. It enunciates the 'Active Nationality Principle'. The application of the 'Passive Nationality Principle' which is found in the state practice of several states on the continent (for example see Art. 6 of the Turkish Penal Code) does not find an expression in the Indian penal code.

The Protective Principle

Under this approach importance is given to the need for control of the offender whether he is within the realm of the sovereign or not. Having broken the laws in one part of the realm, he was likely to break them in another part. It was not the place where they were broken, but the fact that they had been broken, which was of primary concern. The offender must be taken into custody wherever he could be found if the safety of property and persons was to be assured.

This principle allows the states to take jurisdiction over foreigners abroad if they act prejudice the security of the state. Protective principle is founded on notion that a state may take jurisdiction over a defendant of another state if the defendant is accused of overthrowing or attempting to overthrow the states government[53]. It's proper when the prescribed conduct has a potentially adverse effect upon the state's sovereignty. This principle is primarily applied in criminal law, e.g. espionage, counterfeiting currency, immigration and economic offences.[54]The court of UK and USA applied this principle. One of the example is courts above mentioned states have punished aliens for abetment by acts on the high seas of illegal immigration[55]. The critics of this theory argues that the concept of security that may lead to arbitrary interpretation and then possibly to abuse of the principle.

51 Ian Brownlie, *Principles of Public International Law* 303 (Oxford ,6thed 2003).

52 The Indian Penal Code, 1860.

53 Allyson Bennett, *That Sinking Feeling: Stateless Ships, Universal Jurisdiction, and the Drug Trafficking Vessel Interdiction Act*, 37 Yale J. Int'l L. 433 (2012).

54 Ian Brownlie, *Principles of Public International Law* at 304.

55 *NaimMolvan* v. *Attorney General for Palestine (The "Asya")*, 81 L. L. L Rep 277, United Kingdom: Privy Council (Judicial committee), 1948, available online at <http://www.refworld.org/docid/3ae6b6544.html> (visited on 1st March 2015).

The Universality Principle

This principle is closely related to the jus-cogens doctrine and suggest that every state has jurisdiction over crimes which are universally recognised as, and subject to, international contumely and damnation as crime against humanity, such as torture, genocide and nowadays, terrorism when such heinous crimes are involved, the universality principle provides that any nation has jurisdiction. The ancient crimes come under this principle are piracy, naval mutiny and slave trading. The jurisdiction of port state can be treated as creeping universal jurisdiction to prosecute foreign ships visiting its ports for the violation of international rules and standards elsewhere outside its jurisdictional zones.[56]

States had, however, recognized and accepted extended jurisdiction in relation to those crimes that were regarded as so abhorrent to mankind that they deserved international condemnation and censure such that any State could assert criminal jurisdiction over individuals wherever they were found. Universal jurisdiction, however, only applies to a narrow range of offences such as piracy, grave breaches of the Geneva Conventions, torture, slavery; the list is limited and restricted to offences of grave concern.

Universal jurisdiction means exactly that the power of a state to try an offender irrespective of the nationality of the offender or where the crime occurred; so at first blush it would appear that no nexus is required between the offender and the state asserting jurisdiction. The International Court of Justice in the Arrest Warrant case made it clear that a nexus was required and universal jurisdiction could not be asserted if the offender was not within its territory or there was other nexus with the State. Hence there are practical limitations to what amounts to universal jurisdiction. The matter has however been reopened before the International Court of Justice in Certain Criminal Proceedings in France (Republic of the Congo v. France), when the issue will be revisited.

A state's ability to assert universal jurisdiction comes into sharp focus when dealing with offences under the Torture Convention, the grave breaches under the Geneva Convention therefore, unless domestic law permits for universal jurisdiction, small states may find this limits their ability to deal with serious crime.

56 Haijiang Yang, Jurisdiction of the Coastal State Over Foreign Merchant Ships in International Waters and the Territorial Sea, at 32.

The Passive Personality Principle

This principle is also known as passive nationality principle[57].A state may assert jurisdiction over persons and events outside of its claimed territory when a legal person of the state has been harmed. It is stated in the Harward research on jurisdiction that, this theory jurisdiction can be determining by reference to the nationality or national character of the person injured by the offense.[58] This principle is derived from the idea of "protection" assuming jurisdiction regardless of whether committed by a national or an alien and regardless of it being an offence under the local law[59]. The passive personality principle is based on the duty of a state to protect its nationals abroad. "Under this principle, the sovereign asserting jurisdiction is concerned with the crime's effect, rather than where it occurs"[60]. The court further held that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its border that has consequences within its borders which the state reprehends.[61] The passive personality principle is the most controversial of the five accepted bases of jurisdiction in international law. In a sense it is a corollary of the principle of security and endows jurisdiction upon the State whose national is the victim of the offence committed abroad.

Historically the passive personality principle created lot of controversies, the main controversies are whether or not it is a valid basis of jurisdiction under international law and the basis for this controversy was that the principle subjects an individual to the laws of a country with which the individual's only connection is the victim's nationality. In the late 19thcentury, the use of the passive personality principle was a source of conflict between certain states. The principle appeared in several states' penal codes during the nineteenth century. In 1886, Mexico's assertion of passive personality jurisdiction caused great friction between the United States and Mexico. The landmark case in this principle is The Cutting case in 1886[62]which concerns an American citizen published a defamatory statement in Texas about a

57 M. Travers, LeDroit, Penal International Law*, at 73* (1920); Beckett, *The Exercise of Criminal Jurisdiction Over Foreigners*, 6 Brit. Y. B. Int'l L., 44 (1925).

58 Harvard Research in International Law, *Draft convention on Jurisdiction with Respect to Crime, with Comment*.

59 Draft Convention on Jurisdiction with Respect to CrimeHarvard Research in International Law, *Draft convention on Jurisdiction with Respect to Crime, with Comment*, 29 Am. J. Int'l. L. Supp(1935).

60 *United States* v. *Aluminum Co. of America*, (2dCir. 1945) (L. Hand, J.), 148 F.2d 416, 443-44, The Second Circuit held that "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends. This principle is known as the "effects doctrine."

61 Id.

62 J. B. Moore, 2 *Digest of International Law,* 28 (Washington 1906).

Mexican. The Cutting was arrested when he was in Mexico and convicted of the offence (a crime under Mexican law). Mexico maintains its right to jurisdiction upon the basis of the passive personality Principe. The conflict concluded, however, without a decision on the validity of the passive personality principle because each country dropped the issue after Mr. Cutting was released for diplomatic reasons.

The best example is the S. S. Lotus case. France objected to this principle in the Lotus Case, arguing that Turkey had no jurisdiction simply on the ground of the victims being Turkish nationals. The majority of the Court declined to pass upon the French argument, as they considered that Turkey's jurisdiction could be predicated on the ground that the offence had produced effects upon its " territory " (i.e. on the Turkish vessel) by virtue of the objective France objected to this principle in the Lotus case, arguing that territoriality principle.

During the early twentieth century, more countries implemented the passive personality principle in their penal codes. The principle of passive personality has found no place in Anglo- American jurisprudence, but is recognised by many Continental penal codes such as the German, Greek, Romanian and Swiss, and has been introduced into Israeli law[63]. In the present scenario the principle could be used all nations in a uniform manner in order to combat international terrorism and crimes beyond territorial waters[64].

Current application of passive personality principle

Even though there were controversies in exercising jurisdiction under the passive personality principle at the initial stages of its evolution in the second half of the 20th century the international community widely accepting this principle. The recent acceptance, however, is limited to the principle's application against international terrorism, and not to ordinary torts and crimes, which are considered within the strict domain of the sovereign where these acts occur. This limitation is due to the international community's desire to attain equilibrium of the interests of the country whose national has been victimized against that of the country with territoriality jurisdiction. In this manner the sovereignty interests of the country with territoriality jurisdiction can be protected.

In 1970s many countries included passive personality principle in their penal

63 C. Shachor, Landau, *Extra-Territorial Penal Jurisdiction and Extradition*, 29 Int'l & Comp. L.Q., (1980), available online at <http://www.sisaket.go.th/ssis/papers/english/International Court of Justice. Judgments of May 26, 1961, and June 15, 1962. The Case concerning the Temple of Preah Vihear.PDF> , (visited Mar 5, 2015).

64 John G McCarthy, *The Passive Personality Principle and Its Use in Combating International Terrorism*, 13 Fordham Int'l L.J., 298 (1989).

statute. In 1972, Israel amended its criminal laws by codifying the passive personality principle. Three years later, the French legislature also amended its penal code to include passive personality jurisdiction. U.S. courts have also begun to apply the passive personality principle.

In *United States* v. *Benitez*[65], the defendant, a Colombian national, was convicted of conspiring to murder U.S. Drug Enforcement Administration agents in Colombia. In Benitez, the Court of Appeals for the Eleventh Circuit held that the United States gained jurisdiction on both the passive personality and protective principles.

Moreover, in *United States* v. *Yunis*[66], the United States prosecuted a Lebanese citizen for hijacking a Jordanian airplane in the Mediterranean in June 1985. The only nexus between the hijacking and the United States was the presence of U.S. nationals on board the hijacked plane. In March 1989, a jury in the District Court for the District of Columbia convicted the defendant of hijacking and other crimes. One of the bases for the jurisdiction of the U.S. court over the hijacking was the passive personality principle. The court held that the U.S. assertion of passive personality jurisdiction was proper under both international law and U.S. law.

Furthermore, an analysis of U.S. actions in the *AchilleLauro*[67]hijacking incident also demonstrates U.S. acceptance of the passive personality principle. 4 On October 7, 1985, members of the Palestine Liberation Front seized the *AchilleLauro*, an Italian cruise ship, and murdered one passenger. The passenger killed was one of twenty eight U.S. nationals on board the ship. In order to terminate the hijacking, Egypt provided an aircraft to the hijackers. U.S. fighter planes forced the aircraft carrying the *AchilleLauro* hijackers to land in Italy. Asserting jurisdiction on the basis of the passive personality principle, the United States requested that Italy extradite the offenders to the United States to stand trial for the murder of the U.S. national. Although Italy refused to extradite the hijackers, the U.S. actions illustrate U.S. recognition of the passive personality principle.

Indian judiciary also recognized the principle through the recent supreme court decision in *Enricalexie*[68] case, The Italian commercial Vessel *M. V. EnricaLexie*, with the Military Protection Detachment on board, was heading for Djibouti on 15th

65 *United States of America* v. *Armando Benitez*, (1984, 11th Cir.) 741 F.2d 1312.

66 *United States of America* v. *FawasYounis,* (1991), 924 F.2d 1086.

67 M Halberstam, *Terrorism, Politics and Law: The AchilleLauro Affair. By Antonio Cassese*, 85 A.J.I.L, 410 (1991).

68 *Republic of Italy thr. Ambassador and Ors* v. *Union of India (UOI) and Ors,* Writ Petition (Civil) No. 135 of 2012 (Under Article 32 of Constitution of India), [Along with Special Leave Petition (Civil) No. 20370 of2012], decided on: 18.01.2013.

February, 2012; it came across an Indian fishing vessel, St. Antony, which it allegedly mistook to be a pirate vessel, at a distance of about 20.5 nautical miles from the Indian sea coast off the state of Kerala, and on account of firing from the Italian vessel, two fisherman in the Indian vessel were killed. The ship continued its voyage and when it reached 38 nautical miles from the sea territory of India the ship got one email from the maritime rescue co-ordination board, Mumbai and in accordance with the mail the ship deviate its voyage and reached Cochin port to assist the enquiry about the maritime piracy incident. The Neendakara coastal police took case against the military person on board the ship under section 302 read with section34 of Indian penal code and arrested both of them in the alleged incident. They approached Kerala high court under article 226 to quash the criminal proceedings against them. The court heard the mater and reserved the judgment that's why they filed a writ petition under article 32 of Indian constitution before the Supreme Court. The court held that the India have criminal jurisdiction over the Italian mariners who killed two Indian fishermen. Close perusals of the above decision we can clearly understand that Indian courts also recognize the principle of passive personality.

Methods of applying passive personality principle

There is no uniformity as to the methods of applying the Passive personality principles. Countries that have codified the passive personality principle utilize one or more of seven possible methods in its application. First, the principle can be applied broadly to cover all crimes. Second, the principle is used in cases involving specifically enumerated crimes. A third method employed exercises passive personality jurisdiction over crimes with a certain minimum degree of punishment. Fourth, some countries provide that the principle is to be used only when the executive consents to its assertion. A fifth method of codifying the principle allows its use only when the accused is found in the territory of the country seeking to exercise jurisdiction. Sixth, some countries asserts passive personality jurisdiction when the country with territoriality jurisdiction does not prosecute. Finally, the principle can be used when the act is also a crime in the country where it occurred. The broad method is the least utilized application of the principle[69].

The first method of application of the passive personality principle is used by the French legislature, they vehemently opposed this principle at the time of *S. S. Lotus case* (1927) used this method when it amended the French Penal Code in 1975 to include passive personality jurisdiction. The French statute provides that the

69 Geoffrey R. Watson, "The Passive Personality Principle", 28 Tex. Int'l L. J. 1(1993).

perpetrator of any crime against a French national abroad may be prosecuted under French law[70].

The second method applies the passive personality principle to specifically enumerated crimes. This method of using the passive personality principle can be found in two U.S. criminal laws the Hostage Taking Act[71] and the Antiterrorism Act[72]. Under the authority provided by these statutes, the United States can apply passive personality jurisdiction in cases involving hostage taking, homicide, attempted to commit homicide, and physical violence with intent to cause serious bodily injury to a U.S. national. This method is also codified to apply the passive personality principle to only certain classes of crimes. The Greek penal code utilizes this method by limiting passive personality jurisdiction to felonies and misdemeanours. Another method applies the passive personality principle to crimes with a minimum degree of punishment. The Italian penal code employs this method, by applying passive personality jurisdiction to offenses for which the minimum penalty is one year of incarceration. This method excludes petty crimes for which only minor punishment is provided.

Some countries have codified the passive personality principle but require executive consent in each case that relies on the principle for jurisdiction. This method enables a government to avoid conflicts with other states over the assertion of passive personality jurisdiction. For example, the Norwegian Penal Code provides that the king must commence all legal proceedings based on passive personality jurisdiction. Finland, Italy, and Sweden also require executive consent for the application of the principle.

The Antiterrorism Act of the United States includes a provision that is analogous to the executive consent requirement in the Norwegian code. This provision requires an officer in the U.S. Attorney General's office, an administrative office of the executive branch, to certify that the prosecution involves a certain type of crime. Without the certification, a U.S. court cannot exercise passive personality jurisdiction over a crime prosecuted under this statute.

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70 The French Penal Code Article 113-7 provides: "French criminal law is applicable to any felony, as well as to any misdemeanour punishable by imprisonment, committed by French or foreign national outside the territory of the French Republic, where the victim is a French national at the time of the offense".

71 The United States Hostage Taking Act of 1984, which was used in Yunis, grants jurisdiction over hostage takings committed by individuals outside the United States when the victims are U.S. nationals.

72 The Omnibus Diplomatic Security and Antiterrorism Act of 1986 (the "Antiterrorism Act"), involves the assertion of passive personality jurisdiction over violent crimes that are committed abroad by foreigners that injure U.S. nationals.

Some countries assert passive personality jurisdiction only when the alleged criminal is found in the territory of the country intending to prosecute. The Italian penal code contains this method of using passive personality jurisdiction. This method can be used in two ways. First, it can be applied to cases where the alleged offender voluntarily enters the country. Second, it can be applied in cases of extradition, kidnapping, or arrest in international waters where the offender is brought into the territory of the prosecuting country. In the second case, the "found in the territory" limitation stems from the principle in international law that a person cannot be tried for a crime unless they are present at the trial.

Another method of using passive personality jurisdiction is to employ it when the state with territoriality jurisdiction does not try the crime. The Korean Criminal Code utilizes this method; it protects the offender from "double jeopardy. This method also guards against diplomatic tension caused by two countries disputing who has jurisdiction over the criminal act.

There is also a requirement in some countries' statutes that the act be a crime in the country in which it occurred. The Finnish penal code includes this requirement for the assertion of passive personality jurisdiction. This method relieves an individual of the burden of having to know the laws of foreign countries. Greece, Norway, and Sweden also utilize this method. Although the validity of the passive personality principle is no longer in question, the principle is still a matter of controversy because no agreement has been reached regarding its scope. When the international community reaches an agreement on the scope of the principle, it will become an even more effective basis of jurisdiction.

The 'Effects Doctrine

Commentators on extraterritoriality often refer to the 'effects' doctrine as an additional basis for asserting extraterritorial jurisdiction.[73] A development which is linked to the protective principle and to the objective territorial principle is the emergence of a particular type of extra-territorial jurisdiction known as the 'effects doctrine'.[74] The theory is that states can assert jurisdiction over conduct occurring extraterritoriality if that conduct has an effect on their territory. The scope of the

73 Amnesty International, *International Law Commission: The Obligation to Extradite or Prosecute (Aut Dedere Aut Judicare)*, Report, Amnesty International, February 2009, available oline at <http://www.amnesty.org/en/library/asset/IOR40/001/2009/en/a4761626-f20a-11dd-855f-392123cb5f06/ior400012009en.pdf>, (visited on 31 05 2015).

74 Tim Hillier, Sourcebook on Public International Law, Cavendish Publishing Limited, at 276 (London 1998).

'effects' principle is controversial, particularly in relation to purely economic effects.[75] The effects doctrine has been particular significant in the area of US anti-trust or anti-cartel law.[76] In the *Alcoa* decision *US v Aluminium Co of America*[77] the US Second Circuit Court of Appeals stated that:

> *Any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends.*

The court suggested that jurisdiction would be founded if two conditions were met: the performance of a foreign agreement must be shown to have had some effect in the US, and secondly, this effect must have been intended. Some commentators argue that asserting jurisdiction based on the 'effects' principle is incompatible with the traditional view of international jurisdiction.[78] In particular, there is concern that in expanding the jurisdiction of the regulating state, the 'effects' principle fails to provide an effective framework for protecting the interests of other states who might be affected by this expansion. For example, Gerber observes:

In a world fragmented into numerous territorial entities, when a state claims jurisdiction based on the effects principle, it is very likely that at least one other state will have a territorial interest in the conduct involved.[79]

Austen Parrish also expresses concerns about the 'effects' principle.[80] He describes it as the 'beginning of the end to meaningful territorial limits on legislative jurisdiction and as 'problematic for both conceptual and pragmatic reasons'. He argues that it has no clear constraints and gives 'license for near universal jurisdiction'. Parrish is of the view that the effects test has expanded the potential for jurisdictional conflict between states.

Recent literature and case-law contain interesting attempts to extent its implementation beyond the field of antitrust criminal law, so as to address human rights violations, international terrorism, breaches of the law of the sea,[81] ordinary criminal law violations.

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75 Jennifer A Zerk, *Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas*, Working Paper No 59, (Harvard Corporate Social Responsibility Initiative 2010).

76 Edwards, *Extraterritorial Application of the US Iranian Assets Control Regulations*, 75 AJIL870 (1981).

77 (1945) 148 F 28 147.

78 David J. Gerber, *Beyond Balancing: International Law Restraints on the Reach of National Laws,* 10 Yale Journal of International Law185, 189 (1984).

79 David J Gerber, *Beyond Balancing: International Law Restraints on the Reach of National Laws*, 10 Yale Journal of International Law 191 (1984).

80 Austen Parrish, *The Effects Test: Extraterritoriality's Fifth Business* 61 Vanderbilt Law Review 1455 (2008).

81 Bernard H. Oxman, *Jurisdiction of States*, 3 Encyclopedia Pub. Int'l. L. 58 (1997). "In limited circumstances, the effects doctrine may be the basis for enforcement jurisdiction at sea, for example with respect to non-economic installations, pollution and illicit broadcasting (1982 Law of the Sea Convention, Articles 60(1)(c), 109, 220(6), 221)."

Justification for Applying these Theories to Ships

Ships are treated as the floating territory of one state is amenable to the penal laws of that state. Like the citizenship of a citizen ships nationality can be identified by the flag it flays. The ships always fly the flag of the country by which it is registered. The laws also insist that there should be a direct relation between the ship and the country by which it's registered. The flag of registry have the legal and economic control over the ship. In international law the ship is treated as the floating territory of the nation by which it's registered so the laws of registry countries are applicable to the ships.

In the present scenario the concept of the registration of the ships are 'flag of convenience' by which the owner of the ship can register the ship any of the flag of convenience registries irrespective of their nationality. The concept of 'genuine link' is narrow down and economic gain becomes the motto of the states. The flag registry countries liberally register ships for their economic gains. Because of this reason the criminals, smugglers, pirates and terrorists use this opportunity and register ships in flag of convenience registries and use the ships for criminal activities. In these circumstances the traditional principles of criminal law such as the nationality principle and the territoriality principle have limited application. To fight against crimes in the seas application of the protective, universality and passive personality are imminent necessity of the day.

If we peruse the history of major crimes that were occurred in this world clearly and unequivocally find that the element of sea leg is there in each of this crimes. The main crimes that are occurring in the sea are piracy, slave trade, drug trafficking, unauthorized broadcasting, transnational crimes of migrant smuggling and human trafficking, maritime counter proliferation of weapons of mass distraction etc[82]. Terrorist are using ships as means to strike the most protected areas in the world and some of the countries are promoting terrorism and provide facilities in their states so the protective principle and passive personality principle have increasing scope in the present scenario.

Conclusion

It is submitted that to exercise criminal jurisdiction there exist "sufficient connection" or a "genuine link" between the offence and the State. Through the above discussed internationally recognized theories the author here by try to justify

82 United Nations Law of the sea convention, 1982, Art. 110

the extension of criminal jurisdiction of a state to its Contiguous Zone (CZ), Exclusive Economic Zone (EEZ) and the Continental Shelf (CS) and in some particular instances the coastal state can extent its criminal jurisdiction over High Seas. The international community widely accepted the five well recognized theories of jurisdiction. Even though slight controversy is exist in accepting the passive personality principle, all most all the civilized nations accepted that theory and take part to their penal laws. Because of the political and economic reasons many of the countries are not able to take severe action against the pirates, terrorists and the smugglers in their waters so the ocean now becomes the hub of the pirates, smugglers and the terrorists.

All this theorises are justifying the extraterritorial application of criminal jurisdiction in different grounds. State may assert prescriptive jurisdiction over the extraterritorial conduct of their nationals and potentially over extra territorial criminal conduct affecting their nationals through active and passive nationality jurisdiction. If the actors or the victims have any direct relation with the country by which crime is committed, then that country can take appropriate penal action against the wrong doer to protect the interest of the victim. The International community should give much more importance to the territorial principle and the passive personality principle then only the crimes of maritime waters can be wipe out from this universe.

TRANSGENDERS - VICTIMS OF HUMAN RIGHTS VIOLATIONS

*Lekshmi Priya R & Arya V**

Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

INTRODUCTION

Human Right is a powerful ideal[1]. Human rights are the rights of all persons in the world[2]. All human beings are born free and equal in dignity and rights[3]. Human Rights as a positivistic and global matter are defined according to the international law and diplomacy – those fundamental rights of persons that are internationally recognized[4]. It is conferred on an individual due to the very nature of his existence and they are inherent in all individuals irrespective of their caste, creed, religion, sex and nationality[5].Different counties ensure these rights in different way; in India they are contained in the Constitution as fundamental rights, i.e. they are guaranteed statutorily, in the UK they are available through precedence, various elements having been laid down by the courts through case law[6]. In addition, international law and conventions also provide certain safeguards[7]. Human rights are the articulation of the need for justice, tolerance, mutual respect, and human dignity in all the activities[8]. But today, human rights violation is rampant; throughout the world particularly in developing countries including India, in spite of adopting a number of declarations,

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1 *LL.M Students,School Of Indian Legal Thought,Mahatma Gandhi University, Kottayam Jim Ife, *Human Rights and Social Work: Towards Rights-Based Practice* 5 (Cambridge University Press, 2012).

2 Eva Brems, *Human Rights: Universality and Diversity* 4 (MartinusNijhoff Publishers, 2001) .

3 Article 1 of The Universal Declaration of Human Rights (UDHR)

4 David P Forsythe, *Encyclopaedia of Human Rights*, 20 (Oxford University Press, 2009)

5 http://archive.mu.ac.in/myweb_test/SYBA%20Study%20Material/fc.pdf (Visited on 27-12.2016)

6 Faisal, "Historical Development of Human Rights", http://www.legalservicesindia.com (Visited on 29-12-2016)

7 Id.

8 Mridushi Swarup, "Human Rights of Vulnerable Sections", http://www.legalservicesindia.com (Visited on 29-12-2016)

conventions and covenants[9].Violation of these rights would be a failure to recognize the worth of human values.

One of the most fundamental of human rights is gender equality. Gender equality is at the very heart of human rights[10].The consideration of equality is seen as a fundamental human right[11]. Indian constitution also enshrines the concept of equality[12]. Gender discrimination has been a universal phenomenon in the human history from the time immemorial[13]. But the discrimination faced by the Transgenders is discussed only quite recently. Because Transgender is a word that has come into widespread use only in the past couple of decades[14]. Transgendered people are individuals of any age or sex whose appearance, personal characteristics, or behaviours differ from stereotypes about how men and women are "supposed" to be[15]. Transgenders are a unique population in that they have problems and needs that may differ from others. But the society considers their problem trivial. So they are always victims of Human Rights violations. In spite of national and international protections, transsexuals have been a neglected community worldwide[16]. Baring few

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9 Jebagnanam Cyril Kanmony, *Human rights violation* xiii (Mittal Publications,2010).

10 "Women's Human Rights and Gender Equality", *United Nations Human Rights* , http://www.ohchr.org/EN/Issues/Women/WRGS/Pages/WRGSIndex.aspx (visited on 29-12-2016

11 *Information Forum on National Policies in the Field of Equality Between Women and Men: Proceedings*, 3 (Council of Europe, 1996).

12 By virtue of Article 14 of Indian Constitution : "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth".
By virtue of Article 15 :
" (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them
(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to
(a) access to shops, public restaurants, hotels and palaces of public entertainment; or
(b) The use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public".
By virtue of Article 16 :
"(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State
(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect or, any employment or office under the State."

13 Lion M. G. Agrawal, *Freedom fighters of India*, 271, (Gyan Publishing House, 2008).

14 Susan Stryker, *Transgender History*, 1 (Seal Press, 2008).

15 Rani Megha and Dr. SrivastavaManushi, 5(1)"Socially excluded transgender people in patriarchal society",
International Journal of Research in Social Sciences, (2015), http://www.indianjournals.com/ (Visited on 29-12-2016)

16 Sunita, "Discrimination and Dilemma of Transgender People", http://www.legalservicesindia.com/ (Visited on 29-12-2016)

countries, there is no recognition of their rights and are sometimes forced to lead animal survival life[17].The discrimination based on their class and gender makes the transgender community one of the most disempowered group in Indian Society[18]. In the light of the Constitutional guarantees provided, there is no reason why Transgender Community should not get their basic human rights[19].

WHO ARE TRANSGENDERS?

According to The Transgender Persons (Protection of Rights) Bill, 2016; "transgender person" means a person who is—

(A) neither wholly female nor wholly male; or (B) a combination of female or male; or (C) neither female nor male; and whose sense of gender does not match with the gender assigned to that person at the time of birth, and includes trans-men and trans-women, persons with intersex variations and gender-queers[20].

Transgender is an umbrella term used to describe people whose gender identity (sense of themselves as male or female) or gender expression differs from that usually associated with their birth sex. Many transgender people live part-time or full-time as members of the other gender[21]. Broadly speaking, anyone whose identity, appearance, or behaviour falls outside of conventional gender norms can be described as transgender[22]. According to Sen, transgender is the most commonly used term to describe people who "cross socially constructed gender boundaries."[23] Transgender is a blanket term that covers all people whose sense of gender identity does not match their physiological sex[24]. A person may be a female-to-male transgender (FTM) in that he has a gender identity that is predominantly male, even though he was born with a female body[25]. Similarly, a person may be a male-to-female transgender (MTF)

17 Id.
18 Dr. K. Leelavathy, "Socio-Economic Problems of Transgender in Workplace", 3(4) *International Journal of Scientific Research*, 1 (2014)
19 Justice P.Sathasivam, "Rights of Transgender People – Sensitising Officers to Provide Access to Justice", Lecture delivered on Refresher Course for Civil Judges -I Batch at Tamil Nadu State Judicial Academy on 12-02-2011.
20 The Transgender Persons (Protection Of Rights) Bill, 2016, Bill No. 210 of 2016
21 Margaret Schneider, *Answers to Your Questions About Transgender Individuals and Gender Identity*, 1(American Psychological Association 2006).
22 Id.
23 I. Sen, *Human Rights of Minority and Women's, (Transgender Human Rights),*41 (Isha Books, 2005).
24 AnithaChettiar, "Problems Faced by Hijras (Male to Female Transgenders) in Mumbai with Reference to Their Health and Harassment by the Police", 5(9) *International Journal of Social Science and Humanity*, 752 (2015).
25 Siddharth Narrain, "Crystallising Queer Politics – The *Naz Foundation* Case And Its Implications For India's Transgender Communities", *2 NUJS L. Rev. 455* , 456 (2009).

in that she has a gender identity that is predominantly female, even though she was born with a male body or physical characteristics. 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 born with bodies which incorporate both or certain aspects of both male and female physiology[26]. 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[27].Transgender, relates to one's internal identification as a particular gender; thus to identify as transgender does not necessarily determine one's sexual orientation as gay, lesbian or bisexual[28]. There was historical evidence of recognition of "third sex" or persons not confirm to male or female gender in near the beginning writings of ancient India[29]. The concept of "tritiyaprakriti" or "napumsaka" had been an integral part of the Hindu mythology, folklore, epic and early Vedic and Puranic literatures. Hindu mythology contains various examples of androgynies and individual who undergo sex changes both among deities and human[30]. In Ramayana[31] and Mahabharata[32] also we can see the presence of transgenders.

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26 George D. Cameron, *International Business Law: Cases and Materials*, 252 (Van Rye Publishing LLC 2015)

27 Id. at p 253

28 SevatiSoren, SaritaBarpanda, SmritiMinocha and Sarah Crowe, "Issues Faced By Transgender Persons In Odisha" , 9 (2015).

29 M.Michel Raj, "Historical Evolution Of Transgender Community In India", 4(1), *Asian Review of Social Sciences*, 17 (2015).

30 Tahmina Habib, "A Long Journey towards Social Inclusion: Initiatives of Social Workers for Hijra Population in Bangladesh", 10 (2012), https://gupea.ub.gu.se/bitstream/2077/32545/1/gupea_2077_32545_1.pdf (Visited on 02-01-2017)

31 Lord Rama, in the epic Ramayana, was leaving in the forest upon being banished from the kingdom for 14 years, turns around to his followers and asks all the 'men and women' to return to the city. Among his followers, the hijras alone did feel bound by this direction and decide to stay with him. Impressed with their loyalty, Rama sanctioned them the power to confer blessings on people on auspicious occasions like child birth and marriage, and also at inaugural functions.Arjun, who rejected to have sexual intercourse with minor deity, was cursed by her to be neither man nor woman and he used to entertain people with performing through music and dancing

32 Aravan, the son of Arjuna and Nagakanya in Mahabharata, offer to be sacrificed to Goddess Kali to ensure the victory of the Pandavas in the Kurukshetra war, the only condition that he made was to spend the last night of his life in marriage. Since no woman was willing to marry one who was doomed to be killed, Krishna assumes the form of a beautiful woman called Mohini and married him. The Hijras of Tamil Nadu considered Aravan their progenitor and call themselves Aravanis. Kama Sutra also provides vivid description of sexual life of people with 'third nature' (TritiyaPrakriti).

PROBLEMS FACED BY TRANSGENDERS

The majority of the Society only recognised two genders and due to this consideration the transgender community had faced and still facing discrimination as there is identity crises because of the non-recognition of their rights either by the legislature or by the judiciary[33]. As a result of the prevailing social stigma, society discriminate transgender based on their sexuality or gender identity. Social stigma includes being looked down upon, labelling and negative or generalised attitude towards such as sex work or sex solicitors[34].Violence faced by the transgender community is often invisible or under reported in mainstream media[35]. While deciding a case supreme court observed that "Our society often ridicules and abuses the Transgender community and in public places like railway stations, bus stands, schools, workplaces, malls, theatres, hospitals, they are side lined and treated as untouchables, forgetting the fact that the moral failure lies in the society's unwillingness to contain or embrace different gender identities and expressions, a mind-set which we have to change."[36]Transgender people encounter difficulties in virtually every aspect of their lives, both in facing the substantial hostility that society associates with those who do not conform to gender norms and in coping with their own feelings of difference[37]. There is need for social acceptance of transgender group; for instances, there is no space available for them in the hospital, the authorities do not admit them in women's ward because women do not feel comfortable or free in their presence and in men's ward they face sexual abuse[38]. Besides, there are no separate toilet facilities for transgender people[39]. Unfortunately our designers of the built environment made the public facilities such as restrooms, toilets, jails, shelters etc. are of gender specific[40]. These gender specification in the public places cause great harm to the transgender people. Most of these people are being denied access, verbally harassed, or physically assaulted in public restrooms[41]. These experiences

33 AniketDhwaj Singh and AnushriMaskar, "Transgender & Human Rights: Challenges And Issues", 3(12) *Law Mantra*, 1, http://journal.lawmantra.co.in/ (visited on 06-01-2017)

34 Dr. K. Leelavathy, "Socio-Economic Problems of Transgender in Workplace", 3(4*) International Journal of Scientific Research*, 1 (2014).

35 PreranaKodur and Gowthaman Ranganathan, "A Report On The Human Rights Violations Against Transgenders In Karnataka", 4 (National Law School of India University 2014).

36 *National Legal Service Authority* vs *Union Of India &Ors* (AIR 2014 SC 1863)

37 https://www.socialworkers.org/da/da2008/finalvoting/documents/Transgender%202nd%20round%20-%20Clean.pdf (Visited on 03-01-2016)

38 Leelavathy, "Socio-Economic Problems of Transgender in Workplace", (cited in note 18)

39 Id.

40 Ruth Baracan, "Dirty Spaces: Separation, Concealment and Shame in tha Public Toilet", *Toilet: Public Restrooms and the Politics of Sharing*, 33 (NYU Press New York, 2010).

41 Jody L. Herman, "Gendered Restrooms and Minority Stress: The Public Regulation of Gender and its Impact on Transgender People's Lives", https://williamsinstitute.law.ucla.edu/wp-content/uploads/Herman-Gendered-Restrooms-and-Minority-Stress-June-2013.pdf, (visited on 10- 01-2017).

impacted respondents' education, employment, health, and participation in public life[42].Transgender people also experience dismissal from jobs, eviction from housing, and denial of services, even by police officers and medical emergency professionals[43]. Some members of the society ridicule gender-variant people for being 'different' and they may even be hostile and even from police; they face physical and verbal abuse, forced sex, extortion of money and materials; and arrests on false allegations[44].The nature of the harassment includes verbal abuse, assault; bullying, sexual violence etc., the impact is social restrictions which resulted in immense psychological disturbances and the outcome are migration, no attendance in social participation, avoiding social institutions like schools, marriages, festivals, and places of worship[45]. Absence of protection from police means ruffians find transgender people as easy targets for extorting money and as sexual objects[46].Stigma and discrimination against transgender people frequently cause them to be rejected by their families and denied healthcare services, including access to HIV testing, counselling and treatment[47]. Transgender people are almost everywhere denied legal recognition of their gender and may also be penalized by laws criminalizing same-sex behaviour[48]. They are pushed to the margins of the society by making education, healthcare, housing and employment inaccessible to them[49].

The circumstances before the landmark case[50] of *National Legal Services Authority*

42 Id.

43 Xavier, J., Honnold, J. A and Bradford, J. "The health, health-related needs, and life course experiences of transgender Virginians", (Richmond: Virginia Department of Health 2007)

44 Dr. VenkatesanChakrapani, *Hijras/Transgender Women In India: HIV, Human Rights And Social Exclusion, TG Issue Brief*, 8 (2010).

45 Aijaz Ahmad Bund, "Other Sex: A Study on Problems of Transgender women of District Srinagar", 17 (2) *IOSR Journal Of Humanities And Social Science*, 79 (2013).

46 Id.

47 World Health Organization, *A Technical Brief HIV And Young Transgender People*, 8 (WHO Document Production Services, Geneva, 2015).

48 Id.

49 PreranaKodur and Gowthaman Ranganathan, A Report On The Human Rights Violations Against Transgenders In Karnataka (cited in note 35)

50 Seeking directions from the Supreme Court to address denial and violations of rights faced by the transgender community, a writ petition (civil: No. 400 of 2012) was filed by National Legal Services Authority. A supporting intervention was filed the same year on behalf of hijra activist Laxmi Narayan Tripathi by the Lawyers Collective. Issues raised included the grievances of the members of transgender community seeking a legal declaration of their gender identity other than the one assigned to them at birth. The petitioners appealed that non-recognition of the identity of transgender people is in violation of their fundamental rights as laid down in the Constitution of India. In response to the petition, the Hon'ble Supreme Court of India delivered a landmark NALSA judgement on April 15, 2014. The Apex court recognized the need for granting full citizenship, regardless of gender assigned at birth, protecting rights and making provision of entitlements for transgender individuals.

v. *Union of India and Ors*[51] were worse and the lack of or rather to say that no initiatives from the side of state and central government has been made to ensure a dignified life including the basic necessities for the lives of transgender community[52]. If there has been any development or improvement in the life of Transgenders they would never had been subjected to prostitution, poverty, and illiteracy[53].

As all human beings have the right to live with dignity at all times, regardless of their legal, social or political status so do transgenders[54].

LEGAL FRAME WORKS TO PROTECT THE HUMAN RIGHTS OF TRANSGENDERS

It is the duty of the states to ensure the human rights of the transgenders. The legal obligations of States to safeguard the human rights of transgender people are well established in international human rights law[55]. India is party to a number of international conventions and agreements which protect the fundamental rights of all persons and everyone, regardless of their gender; it means that the protections included in these conventions apply equally to transgender persons in the same way as they do to males and females[56]. Article 1 of Universal Declaration of Human Rights states that, all human beings are born free and equal in dignity and rights. The Yogyakarta Principles[57] are a set of legal principles on how international law should apply to human rights violations based on sexual orientation and gender identity or expression[58]. The principles are intended as a coherent and comprehensive identification of the obligation of States to respect, protect and fulfil the human rights of all persons regardless of their sexual orientation or gender identity[59]. The Principles seek to provide: 'a consistent understanding of the comprehensive regime

51 AIR 2014 SC 1863

52 AniketDhwaj Singh and AnushriMaskar, Transgender & Human Rights: Challenges And Issues, 6 (cited on note 33)

53 Id. at p. 1

54 AnithaChettiar, Problems Faced by Hijras (Male to Female Transgenders) in Mumbai with Reference to Their Health and Harassment by the Police, .758 (cited in note 24)

55 Jack Byrne, *Transgender Health and Human Rights*, 1 (United Nations Development Programme 2013).

56 Sevati Soren, SaritaBarpanda, SmritiMinocha and Sarah Crowe, issues Faced By Transgender Persons In Odisha, 12 (cited in note 28)

57 A group of human rights experts from 25 countries formulated these principles, which were adopted at a meeting in 2006 in Yogyakarta, Indonesia

58 "Human Rights of Lesbian, Gay, Bisexual and Transgender persons", http://www.sida.se/contentassets/21013d2a0a3048ed8d3debd5de0a13d0/human-rights-of-lesbian-gay-bisexual-and-transgender-persons-conducting-a-dialogue_3327.pdf (visited on 05-01-2017)

59 Naz Foundation v. Govt. of NCT of Delhi (160 Delhi Law Times 277)

of international human rights law and its application to issues of sexual orientation and gender identity, in order to promote and protect all human rights for all persons on the basis of equality and without discrimination[60].' International Covenant on Civil and Political Rights provides that, every human being has the inherent right to life[61]. International Convention on Economic, Social and Cultural Rights also includes rights such as, right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions[62], right of everyone to education[63], right of everyone to social security[64] and the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts[65].

In United Kingdom the transgender peoples' rights were started to protect through legislation to a limited extent under Gender Recognition Act, 2004. It allowed for the first time, the transgender people whose birth was registered in the United Kingdom to have their acquired affirmed gender recorded on their birth certificate[66]. Under this Act the applicant have to submit an application before the gender recognition panel for gender recognition[67]. If the panel recognizes the acquired or affirmed gender successfully, the applicant will be issued with a Gender Recognition Certificate (GRC), which permits the holder to be recognized for all legal purposes (including marriage) as belonging to their acquired gender[68]. This Act was passed as a response to the decision of European Court of Human Rights in *Christine Goodwin* v *The United Kingdom*[69]. It was held that:

> "In the twenty- first century the right of the transsexuals to personal development and physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clear light on the issues involved. In short, the

60 "The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity", http://www.yogyakartaprinciples.org/principles_en.htm (visited on 05-01-2017)

61 Article 6 of ICCPR

62 Article 11 of ICESCR

63 Article 13 of ICESCR

64 Article 9 of ICESCR

65 Article 6 of ICESCR

66 House of Commons Women and Equalities Committee, "Transgender Equality", *First Report of Session 2015–16,* 11 (authority of the House of Commons London: The Stationery Office Limited, 2015),

67 Id.

68 Id.

69 Georg Nolte, " Jurisprudence under special regimes to subsequent agreement and subsequent practice", *Treaties and Subsequent Practice*, 261 (OUP Oxford, 2013), [GC] ECHR 2002- IV

unsatisfactory situation in which post- operative transsexual live in an intermediate zone as not quite one gender or the other is no longer sustained"

Section 22[70] of the GRA safeguards the privacy of people with GRCs by defining information in relation to the gender recognition process as "protected information" for the purposes of the Data Protection Act 1998. In this way the Act is intended to protect the privacy rights of transgender people under Article 8 of the ECHR[71].

Another important legislation in United Kingdom is the Equality Act, 2010. It provides explicit provision for the protection of the rights of transgender people.

70 Section 22 of the Gender Recognition Act, 2004 States that: "Prohibition on disclosure of information (1) It is an offence for a person who has acquired protected information in an official capacity to disclose the information to any other person. (2) "Protected information" means information which relates to a person who has made an application under section 1(1) and which— (a) concerns that application or any application by the person under section 5(2) or 6(1), or (b) if the application under section 1(1) is granted, otherwise concerns the person's gender before it becomes the acquired gender. (3) A person acquires protected information in an official capacity if the person acquires it— (a) in connection with the person's functions as a member of the civil service, a constable or the holder of any other public office or in connection with the functions of a local or public authority or of a voluntary organisation, (b) as an employer, or prospective employer, of the person to whom the information relates or as a person employed by such an employer or prospective employer, or (c) in the course of, or otherwise in connection with, the conduct of business or the supply of professional services. (4) But it is not an offence under this section to disclose protected information relating to a person if— (a) the information does not enable that person to be identified, (b) that person has agreed to the disclosure of the information, (c) the information is protected information by virtue of subsection (2)(b) and the person by whom the disclosure is made does not know or believe that a full gender recognition certificate has been issued, (d) the disclosure is in accordance with an order of a court or tribunal, (e) the disclosure is for the purpose of instituting, or otherwise for the purposes of, proceedings before a court or tribunal, (f) the disclosure is for the purpose of preventing or investigating crime, (g) the disclosure is made to the Registrar General for England and Wales, the Registrar General for Scotland or the Registrar General for Northern Ireland, (h) the disclosure is made for the purposes of the social security system or a pension scheme, (i) the disclosure is in accordance with provision made by an order under subsection (5), or (j) the disclosure is in accordance with any provision of, or made by virtue of, an enactment other than this section. (5) The Secretary of State may by order make provision prescribing circumstances in which the disclosure of protected information is not to constitute an offence under this section. (6) The power conferred by subsection (5) is exercisable by the Scottish Ministers (rather than the Secretary of State) where the provision to be made is within the legislative competence of the Scottish Parliament. (7) An order under subsection (5) may make provision permitting— (a) disclosure to specified persons or persons of a specified description, (b) disclosure for specified purposes, (c) disclosure of specified descriptions of information, or (d) disclosure by specified persons or persons of a specified description. (8) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 5 on the standard scale.", http://www.legislation.gov.uk/ukpga/2004/7/pdfs/ukpga_20040007_en.pdf (visited on 10-01-2017)

71 Article 8 of ECHR states that: - "Right to respect for private and family life 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

The UK thereby became one of a small group of countries to have passed such legislation[72]. Protection for transgender people was achieved by means of Section 7[73] of the Act, which refers to the "protected characteristic" of "gender reassignment[74]". Under the Act, discrimination against people covered by Section 7 can take the following forms: indirect discrimination (where a rule, practice or procedure is applied to everyone, but disadvantages people who have the protected characteristic); or direct discrimination on the grounds that a person; has the protected characteristic; or is perceived to have the protected characteristic (regardless of whether that perception is correct); or is associated with someone who has the protected characteristic. The Act also provides those people covered by Section 7 with protection from harassment, and victimization[75].

It is quite clear that in United Kingdom is one of the few countries which explicitly protect the rights of the transgendered people to some limited extent. Even though these legislations are there for protection of the transgendered people in United Kingdom, the issues related to gender specific public places affect the well-being of the transgendered people.

Article 21 is the heart and soul of the Indian Constitution, which speaks of the rights to life and personal liberty[76]. Article 21 is the procedural *Magna Carta* protective of life and liberty[77].The right to life within the meaning of Article 21 means the right to live with human dignity and the same does not merely connote drudgery[78]. Recognition of one's gender identity lies at the heart of the fundamental right to dignity[79]. Gender, constitutes the core of one's sense of being as well as an

72 House of Commons Women and Equalities Committee, "Transgender Equality", 23 (cited in note 66)

73 Section 7 of the Equality Act, 2010 states that:- "Gender reassignment (1)A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex. (2)A reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment. (3)In relation to the protected characteristic of gender reassignment— (a) a reference to a person who has a particular protected characteristic is a reference to a transsexual person; (b) a reference to persons who share a protected characteristic is a reference to transsexual persons.", http://www.legislation. gov.uk/ukpga/2010/15/section/7, (visited on 10-01.2017).

74 House of Commons Women and Equalities Committee, "Transgender Equality", 23 (cited in note 66)

75 Id.

76 Article 21 of the Constitution of India: No person shall be deprived of his life or personal liberty except according to procedure established by law.

77 RaginiTrakrooZutshi, JayshreeSatpute, Md. SaoodTahir, *Refugees and the Law,Human Rights Law* 536 (Network, 2011).

78 Id.

79 National Legal Services Authority v. Union of India and Ors

integral part of a person's identity[80]. Legal recognition of gender identity is, therefore, part of right to dignity and freedom guaranteed under our Constitution[81].

The Transgender Persons (Protection of Rights) Bill, 2016 is a proposed Act[82] of the Parliament of India which pursues to terminate the discrimination faced by transgenders in India. The Bill makes provisions for ensuring equality of rights and guarantees non-discrimination, the right to life and personal liberty, freedom of speech etc., and a significant provision made in the Bill, relates to the protection of the community from violence and exploitation[83]. The Bill states that all educational institutions funded or recognised by the appropriate government must ensure that the Transgender community has an equal access to schools and colleges so that the said community can maximize on the social and academic development[84].The bill also states that the appropriate Government shall take steps to secure full and effective participation of transgender persons and their inclusion in society[85]. The Supreme Court's NALSA ruling had indicated that transgender people would be included in the OBC category, and had further clarified that, if familial caste were SC or ST, the transgender individuals would be able to claim benefits and protections under reservation, on account of being both OBC and trans; unfortunately there is no provision for OBC or caste-based reservations in the present Bill, which is a big lacuna[86].

CONCLUSION

It is the birth right of every person who born in the territory of a state to acquire the citizenship or nationality of that state. The sole causes of all public calamities are the denial of the rights of man. Equal right to every man is the general principle and social distinctions should be based upon general good. Liberty gives freedom to do everything positively which injures nobody. Thus in the enjoyment of liberty, one

80 Id.

81 Id.

82 The Rights of Transgender Persons Bill, 2014, piloted by Tiruchi Siva, Member of Parliament, was introduced in the RajyaSabha on December 10, 2014. Members across party lines discussed the bill in detail and rallied for its passage. However, there was an unanticipated delay in discussing the bill in the LokSabha. On December 26, 2015 the Ministry of Social Justice and Empowerment uploaded a bill on transgender "protection" on its website. Transgender Persons (Protection of Rights) Bill, 2016 of the government is unrecognisable from the private member's bill passed by the RajyaSabha.

83 SaifRasul Khan, The Rights Of Transgender Persons Bill, 2014: Provisions And Lacunas, 2(6)*Law Mantra*, 1, http://journal.lawmantra.co.in/ , (visited on 07-01-2017)

84 Id. at ,p.2

85 *The Transgender Persons (Protection of Rights) Bill*, 2016

86 Nirangal, *The Transgender Persons (Protection of Rights) Bill 2016*, http://orinam.net /resources-for/law-and-enforcement/trans-persons-protection-rights-bill-2016/ (Visited on 07-01-2017)

should assure that the other members of the society is not denied of the same right and nothing is prevented which is not forbidden by law.

Part III of the constitution of India guarantees civil liberties common to most liberal democracies, such as equality before law, right to life, freedom of speech and expression, peaceful assembly, freedom of practice of religion, right to constitutional remedies etc. for the protection of civil liberties. These are basic human freedoms every citizen of India is entitled for development of his personality. The Constitution of India guarantees that the state shall not deny to any person equality before law and equal protection of law within the territory of India and it prohibits discrimination on grounds of religion, race, caste, sex or place of birth also. As such transgender is no way different from any other citizen of the country. It is sad to say that the Indian society which is praised by all for its great culture and rich heritage consider the transgender group degenerated, and so would like to keep them aloof from the rest of the society. One should know their plight and treat them as individuals with dignity and pride as everyone has. They should be given equal opportunity for growth and development of their life and personality. Their freedom and liberty cannot be compromised with the narrow mindedness and barbarism of others. So they must be treated as a separate group on par with the other two genders and given all privileges those genders enjoy.

THE RIGHT TO HEALTH OF WOMEN PRISONERS IN INDIA

WITH SPECIAL REFERENCE TO AGED PRISONERS AND CHILDREN OF WOMEN PRISONERS

*C.S.Roopa**

Law has recognized that just by being a prisoner, a citizen does not cease to be citizen. Through various judicial pronouncements, like in *Charles Shobraj v Superintendent, Tihar Jail,* the Supreme Court of India has clearly pointed out though the prison life necessitates curtailment on certain rights like the freedom of movement, freedom to practice profession of one's choice, every prisoner is entitled to the basic freedoms that has been guaranteed by the Constitution of India, 1950.[1] Considerable attention needs to be paid to the problems relating to the health of the prisoners, especially the women prisoners. Though women prisoners occupy only a smaller percentage of the correctional institutions than men, the substantial escalation of women sent to prison demands attention to the right to health of the women prisoners as they suffer from serious diseases in comparison to the male prisoners. In this context, there is a need to understand the various health problems faced by the women inmates of the prisons in India and the various instruments, at both national and international level that guarantee the right to health of the women prisoners. The various health issues that are faced by women prisoners include violence and abuse, substance abuse, alcohol use, mental health issues, infectious diseases, etc. These problems can affect even the pregnant women and the children of women prisoners. There is also a need to have an analysis of the existing prison conditions pertaining to the health of the women prisoners, including the aged prisoners, and also the children of women, and to decide upon as to what can be done to tackle the existing tribulations and improve their health conditions. There is a need to implement programmes to sensitise the prison authorities on gender issues and their special needs.

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1 AIR 1978 SC 1514

Medical neglect of women in prisons occurs for many reasons, some of which includes, delay in providing treatment, failure on the part of prison authorities to refer seriously ill prisoners for treatment, providing poor or low quality medical services, lack of qualified medical practitioners, lack of requisite resources and medical staff, inadequate reproductive health care, shackling during pregnancy, lack of sufficient treatment for substance-abuse, lack of adequate and appropriate mental health services, etc.

Children of imprisoned mothers are often the silent victims of forced separation during the phase of their maternal imprisonment. Their best interests are not protected and are often being ignored and neglected. Unless the problems of these children are efficiently addressed, the children of imprisoned parents are likely to be delinquents and future criminals, thereby creating intergenerational cycle of prisoners. Child in womb is also a legal person. There is a need to ensure that all the women prisons in India are mandated to make the best arrangements to provide both, prenatal and postpartum services, even without any request on the part of the inmates. Children of women prisoners can be categorised as those who are born to mothers while in prison; those who may be permitted to stay with their mothers in prison; those who leave prison after attaining the prescribed age, while their mothers still remain in the prison; those who have lived with their mothers in the prison and leave the prison along with their mothers; those who are left outside while either or both of their parents undergo imprisonment; adult or married children of the prisoners; children of prisoners from a previous marriage; children who turn into adulthood when their mothers continue to serve a sentence.[2]

The health of the aged women prisoners in India is one of the ignored areas where adequate attention needs to be paid. The aged prisoners experience both, physical as well as mental issues. There are various factors that can deteriorate the health status of the aged prisoners, such as mobility issues, diabetes, dementia, arthritis, stroke, hypothermia, respiratory diseases, terminal illness, falls, cognitive and emotional disorders, the inability to bear excessive heat or cold climatic conditions, inability to chew or swallow food, gastrointestinal problems, weight loss, variance in blood pressure, loss of balance, cardiac problems, high level of medication and lower level of activity, changes in the nervous system, bone and joint related problems, problems of hearing and vision, lower muscular strength, problems associated with urinary tract, various types of cancers, etc.[3] The aged prisoners should not be dehumanized

2 Prayas, *Forced Separation: Children of Imprisoned Mothers,* 2-3 (Prayas: Social Work in Criminal Justice-Afield Action Project of the Tata Institute of Social Sciences 2002).

3 S.J.Loeb, D.Steffensmeier, *Older male prisoners: health status, self-efficacy beliefs and health-promoting behaviours*, 12 Journal of Correctional Health Care 269.269-278 (2006).

or treated as a commodity with the prejudiced view that they pose a risk to public safety. There is a need to plan wider than relying on formulaic justice to assure that the aged population in the prison do not languish or die in prison.[4]

The aged inmates can broadly be categorized as those who enter prison at a young age and who undergo sentence for a long period and becomes aged, aged first-time offenders, those who are convicted for committing crime and incarcerated at later stages of their lives, habitual aged offenders or aged recidivists who enter and leave the prison on a frequent basis and those who are incarcerated for shorter periods in their oldage.[5]

Efforts at international level:

The Right to Health of prisoners, especially women prisoners find place in various international instruments, namely the International Covenant on Economic, Social and Cultural Rights, 1966[6], the United Nations Standard Minimum Rules for the Treatment of Prisoners, 1955[7], the Body of Principles of All Persons under Any Form

4 Barry Holman, *Older prisoners should be released, Crime and Criminals: Opposing viewpoints*, 5-81 (Greenhaven Press 2010).

5 Stan Stojkovic, *Eldelry Prisoners: A growing and forgotten group within correctional systems vulnerable to elder abuse*, 19 Journal of Elder Abuse and Neglect 97-117 (2007).

6 Resolution 2200A, General Assembly (16 December, 1966), UN Doc S/RES 2200A (XXI);
Article 12(1) reads: "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."
Article 12(2) reads: "The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
(b) The improvement of all aspects of environmental and industrial hygiene;
(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness."

7 Resolution 663 C, First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1955 (July 31, 1957), UN Doc S/RES/663 C (XXXIV); Resolution 2076, Economic and Social Council (May 13, 1977), UN Doc S/RES 2076 (LXII);
Rule12 reads: "The sanitary installations shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner."
Rule13 reads: "Adequate bathing and shower installations shall be provided so that every prisoner may be enabled and required to have a bath or shower, at a temperature suitable to the climate, as frequently as necessary for general hygiene according to season and geographical region, but at least once a week in a temperate climate."
Rule 14 reads: "All parts of an institution regularly used by prisoners shall be properly maintained and kept scrupulously clean at all times."
Rule 15 reads: "Prisoners shall be required to keep their persons clean, and to this end they shall be provided with water and with such toilet articles as are necessary for health and cleanliness."
Rule 21(1) reads: "Every prisoner who is not employed in outdoor work shall have at least one hour of suitable exercise in the open air daily if the weather permits."

of Detention or Imprisonment, 1988[8], the Universal Declaration of Human Rights,

Rule 21(2) reads: "Young prisoners, and others of suitable age and physique, shall receive physical and recreational training during the period of exercise. To this end space, installations and equipment should be provided."
Rule 22 reads: "No detained or imprisoned person shall, even with his consent, be subjected to any medical or scientific experimentation which may be detrimental to his health."
Rule 23(1) reads: "In women's institutions there shall be special accommodation for all necessary pre-natal and post-natal care and treatment. Arrangements shall be made wherever practicable for children to be born in a hospital outside the institution. If a child is born in prison, this fact shall not be mentioned in the birth certificate."
Rule 24 reads: "The medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary, with a view particularly to the discovery of physical or mental illness and the taking of all necessary measures; the segregation of prisoners suspected of infectious or contagious conditions; the noting of physical or mental defects which might hamper rehabilitation, and the determination of the physical capacity of every prisoner for work."
Rule 25(1) reads: "The medical officer shall have the care of the physical and mental health of the prisoners and should daily see all sick prisoners, all who complain of illness, and any prisoner to whom his attention is specially directed."
Rule 25(2) reads: "The medical officer shall report to the director whenever he considers that a prisoner's physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment."
Rule 26(1) reads: "The medical officer shall regularly inspect and advise the director upon:
(a) The quantity, quality, preparation and service of food;
(b) The hygiene and cleanliness of the institution and the prisoners;
(c) The sanitation, heating, lighting and ventilation of the institution;
(d) The suitability and cleanliness of the prisoners' clothing and bedding;
(e) The observance of the rules concerning physical education and sports, in cases where there is no technical personnel in charge of these activities."
Rule 26(2) reads: "The director shall take into consideration the reports and advice that the medical officer submits according to rules 25 (2) and 26 and, in case he concurs with the recommendations made, shall take immediate steps to give effect to those recommendations; if they are not within his competence or if he does not concur with them, he shall immediately submit his own report and the advice of the medical officer to higher authority."
Rule 82(1) reads: "Persons who are found to be insane shall not be detained in prisons and arrangements shall be made to remove them to mental institutions as soon as possible."
Rule 82(2) reads: "Prisoners who suffer from other mental diseases or abnormalities shall be observed and treated in specialized institutions under medical management."
Rule 82(3) reads: "During their stay in a prison, such prisoners shall be placed under the special supervision of a medical officer."
Rule 82(4) reads: "The medical or psychiatric service of the penal institutions shall provide for the psychiatric treatment of all other prisoners who are in need of such treatment."

8 Resolution 43, General Assembly (December, 1988), UN Doc S/RES 43/173;
Principle 24 reads: "A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge."
Principle 25 reads: "A detained or imprisoned person or his counsel shall, subject only to reasonable conditions to ensure security and good order in the place of detention or imprisonment, have the right to request or petition a judicial or other authority for a second medical examination or opinion."

1948[9], the Basic Principles for the Treatment of Prisoners, 1990[10], Convention on the Elimination of All Forms of Discrimination against Women, 1979[11], United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), 2010[12], Declaration on Elimination of

9 Resolution 217 A, General Assembly (10 December, 1948), UN Doc S/RES 217 A (III);
Article 2 reads: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty."
Article 25(1) reads: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."
Article 25(2) reads: "Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection."

10 Resolution 45, General Assembly (14 December, 1990), UN Doc S/RES 45/111;
Principle 9 reads: "Prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation."

11 Resolution 34, General Assembly (December, 1979), UN Doc S/RES 34/180;
Article 1 reads: "For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."
Article 2 reads: "States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women."
Article 3 reads: "States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to en sure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men."

12 Resolution 65, General Assembly (21 December, 2010), UN Doc S/RES 65/229;
Rule 6 reads: "The health screening of women prisoners shall include comprehensive screening to determine primary health care needs, and also shall determine:
(a) The presence of sexually transmitted diseases or blood-borne diseases; and, depending on risk factors, women prisoners may also be offered testing for HIV, with pre- and post-test counselling;
(b) Mental health care needs, including post-traumatic stress disorder and risk of suicide and self-harm;
(c) The reproductive health history of the woman prisoner, including current or recent pregnancies, childbirth and any related reproductive health issues;
(d) The existence of drug dependency;
(e) Sexual abuse and other forms of violence that may have been suffered prior to admission."
Rule 8 reads: "The right of women prisoners to medical confidentiality, including specifically the right not to share information and not to undergo screening in relation to their reproductive health history, shall be respected at all times."
Rule 9 reads: "If the woman prisoner is accompanied by a child, that child shall also undergo health screening, preferably by a child health specialist, to determine any treatment and medical needs. Suitable health care, at least equivalent to that in the community, shall be provided."
Rule 10(1) reads: "Gender-specific health-care services at least equivalent to those available in the community shall be provided to women prisoners."
Rule 10(2) reads: "If a woman prisoner requests that she be examined or treated by a woman physician

Violence against Women, 1993[13], International Covenant on Civil and Political

or nurse, a woman physician or nurse shall be made available to the extent possible, except for situations requiring urgent medical intervention. If a male medical practitioner undertakes the examination contrary to the wishes of the woman prisoner, a woman staff member shall be present during the examination."
Rule 11(1) reads: "Only medical staff shall be present during medical examinations unless the doctor is of the view that exceptional circumstances exist or the doctor requests a member of the prison staff to be present for security reasons or the woman prisoner specifically requests the presence of a member of staff as indicated in rule 10, paragraph 2 above."
Rule 11(2) reads: "If it is necessary for non-medical prison staff to be present during medical examinations, such staff should be women and examinations shall be carried out in a manner that safeguards privacy, dignity and confidentiality."
Rule 12 reads: "Individualized, gender-sensitive, trauma-informed and comprehensive mental health care and rehabilitation programmes shall be made available for women prisoners with mental health care needs in prison or in non-custodial settings."
Rule 13 reads: "Prison staff shall be made aware of times when women may feel particular distress, so as to be sensitive to their situation and ensure that the women are provided appropriate support."
Rule 14 reads: "In developing responses to HIV/AIDS in penal institutions, programmes and services shall be responsive to the specific needs of women, including prevention of mother-to-child transmission. In this context, prison authorities shall encourage and support the development of initiatives on HIV prevention, treatment and care, such as peer-based education."
Rule 15 reads: "Prison health services shall provide or facilitate specialized treatment programmes designed for women substance abusers, taking into account prior victimization, the special needs of pregnant women and women with children, as well as their diverse cultural backgrounds."
Rule 16 reads: "Developing and implementing strategies, in consultation with mental health care and social welfare services, to prevent suicide and self-harm among women prisoners and providing appropriate, gender-specific and specialized support to those at risk shall be part of a comprehensive policy of mental health care in women's prisons."
Rule 17 reads: "Women prisoners shall receive education and information about preventive health care measures, including from HIV, sexually transmitted diseases and other, blood-borne diseases, as well as gender-specific health conditions."
Rule 18 reads: "Preventive health care measures of particular relevance to women, such as Papanicolaou tests and screening for breast and gynaecological cancer, shall be offered to women prisoners on an equal basis with women of the same age in the community."
Rule 33(1) reads: "All staff assigned to work with women prisoners shall receive training relating to the gender-specific needs and human rights of women prisoners."
Rule 33(2) reads: "Basic training shall be provided for prison staff working in women's prisons on the main issues relating to women's health, in addition to first aid and basic medicine."
Rule 33(3) reads: "Where children are allowed to stay with their mothers in prison, awareness-raising on child development and basic training on the health care of children shall also be provided to prison staff, in order for them to respond appropriately in times of need and emergencies."
Rule 35 reads: "Prison staff shall be trained to detect mental health care needs and risk of self-harm and suicide among women prisoners and to offer assistance by providing support and referring such cases to specialists."

13 Resolution 48, General Assembly (20 December, 1993), UN Doc S/RES 48/104;
Article 2(c) reads: "Violence against women shall be understood to encompass, but not be limited to physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs."
Article 3 reads: "Women are entitled to the equal enjoyment and protection of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."
Article 4 reads: "States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination. States should pursue by all appropriate means and without delay a policy of eliminating violence against women."

Rights, 1966[14], etc.

Further, the International Covenant on Economic, Social and Cultural Rights,1966[15], the United Nations Convention against All Forms of Discrimination Against Women, 1979[16], Body of Principles of All Persons under Any Form of Detention or Imprisonment, 1988[17], the United Nations Convention on the Rights of the Child, 1989[18], the United Nations Standard Minimum Rules for the Treatment of prisoners, 1955[19], United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), 2010[20], etc.

14 Resolution 2200A, General Assembly (16 December, 1966), UN Doc S/RES 2200A (XXI);
Article 3 reads: "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant."

15 Resolution 2200A, General Assembly (16 December, 1966), UN Doc S/RES 2200A (XXI);
Article 10(2) reads: "Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits."

16 Resolution 34, General Assembly (December, 1979), UN Doc S/RES 34/180;
Article 12(2) reads: "Notwithstanding the provisions of paragraph I of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation."

17 Resolution 43, General Assembly (December, 1988), UN Doc S/RES 43/173;
Principle 5(2) reads: "Measures applied under the law and designed solely to protect the rights and special status of women, especially pregnant women and nursing mothers, children and juveniles, aged, sick or handicapped persons shall not be deemed to be discriminatory. The need for, and the application of, such measures shall always be subject to review by a judicial or other authority."

18 Resolution 44, General Assembly (November, 1989), UN Doc S/RES 44/25;
Article 3(1) reads: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."
Article 6(2) reads: "States Parties shall ensure to the maximum extent possible the survival and development of the child."
Article 7(1) reads: "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and. as far as possible, the right to know and be cared for by his or her parents."
Article 9(3) reads: "States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests."

19 Resolution 663 C, First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1955 (July 31, 1957), UN Doc S/RES/663 C (XXXIV); Resolution 2076, Economic and Social Council (May 13, 1977), UN Doc S/RES 2076 (LXII);
Rule 23(1) reads: "In women's institutions there shall be special accommodation for all necessary pre-natal and post-natal care and treatment. Arrangements shall be made wherever practicable for children to be born in a hospital outside the institution. If a child is born in prison, this fact shall not be mentioned in the birth certificate."
Rule 23(2) reads: "Where nursing infants are allowed to remain in the institution with their mothers, provision shall be made for a nursery staffed by qualified persons, where the infants shall be placed when they are not in the care of their mothers."

20 Resolution 65, General Assembly (21 December, 2010), UN Doc S/RES 65/229;
Rule 42(2) reads: "The regime of the prison shall be flexible enough to respond to the needs of pregnant

have incorporated few provisions for the protection of the pregnant women and women with children in the prison.

Some international efforts have also specifically been made towards creating policies specifically addressing the health problems of the aged women prisoners. Some of the international instruments in this regard include the Universal Declaration of Human Rights, 1948[21], the International Covenant on Civil and Political Rights,

women, nursing mothers and women with children. Childcare facilities or arrangements shall be provided in prisons in order to enable women prisoners to participate in prison activities."
Rule 42(3) reads: "Particular efforts shall be made to provide appropriate programmes for pregnant women, nursing mothers and women with children in prison."
Rule 42(4) reads: "Particular efforts shall be made to provide appropriate services for women prisoners who have psychosocial support needs, especially those who have been subjected to physical, mental or sexual abuse."
Rule 48(1) reads: "Pregnant or breastfeeding women prisoners shall receive advice on their health and diet under a programme to be drawn up and monitored by a qualified health practitioner. Adequate and timely food, a healthy environment and regular exercise opportunities shall be provided free of charge for pregnant women, babies, children and breastfeeding mothers."
Rule 48(2) reads: "Women prisoners shall not be discouraged from breastfeeding their children, unless there are specific health reasons to do so."
Rule 48(3) reads: "The medical and nutritional needs of women prisoners who have recently given birth, but whose babies are not with them in prison, shall be included in treatment programmes."
Rule 49 reads: "Decisions to allow children to stay with their mothers in prison shall be based on the best interests of the children. Children in prison with their mothers shall never be treated as prisoners."
Rule 50 reads: "Women prisoners whose children are in prison with them shall be provided with the maximum possible opportunities to spend time with their children."
Rule 51(1) reads: "Children living with their mothers in prison shall be provided with ongoing health-care services and their development shall be monitored by specialists, in collaboration with community health services."
Rule 51(2) reads: "The environment provided for such children's upbringing shall be as close as possible to that of a child outside prison."
Rule 52(1) reads: "Decisions as to when a child is to be separated from its mother shall be based on individual assessments and the best interests of the child within the scope of relevant national laws."
Rule 52(2) reads: "The removal of the child from prison shall be undertaken with sensitivity, only when alternative care arrangements for the child have been identified and, in the case of foreign-national prisoners, in consultation with consular officials."
Rule 52(3) reads: "After children are separated from their mothers and placed with family or relatives or in other alternative care, women prisoners shall be given the maximum possible opportunity and facilities to meet with their children, when it is in the best interests of the children and when public safety is not compromised."

21 Resolution 217 A, General Assembly (10 December, 1948), UN Doc S/RES 217 A (III);
Article 5 reads: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

1966[22], the International Covenant on Economic, Social and Cultural Rights, 1966[23], Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984[24], Basic Principles for the Treatment of Prisoners, 1990[25], Convention on the Rights of Persons with Disabilities, 1984[26], the United Nations Principles for Older Persons, 1991[27], United Nations Standard Minimum Rules for the Treatment of Prisoners, 1955[28]. The Council of Europe has also considered several

22 Resolution 2200A, General Assembly (16 December, 1966), UN Doc S/RES 2200A (XXI);
Article 6(1) reads: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."
Article 7 reads: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."
Article 9 reads: "Everyone has the right to liberty and security of person."
Article 10(1) reads: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

23 Resolution 2200A, General Assembly (16 December, 1966), UN Doc S/RES 2200A (XXI);
Article 12(1) reads: "The State Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

24 Resolution 61, General Assembly (13 December, 2006), UN Doc S/RES 61/106;
Article 16(1) reads: "Each State Party shall undertake to prevent in any territory in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment."

25 Resolution 45, General Assembly (14 December, 1990), UN Doc S/RES 45/111;
Principle 9 reads: "Prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation."

26 Resolution 39, General Assembly (10 December, 1984), UN Doc S/RES 39/46;
Article 15(1) reads: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."
Article 15(2) reads: "State Parties shall take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment."
Article 17 reads: "Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others."

27 Resolution 46, General Assembly (16 December, 1991), UN Doc S/RES 46/91;
Article 12 reads: "Older persons should have access to social and legal services to enhance their autonomy, protection and care."
Article 13 reads: "Older persons should be able to utilize appropriate levels of institutional care providing protection, rehabilitation and social and mental stimulation in a humane and secure environment."
Article 14 reads: "Older persons should be able to enjoy human rights and fundamental freedoms when residing in any shelter, care or treatment facility, including full respect for their dignity, beliefs, needs and privacy and for the right to make decisions about their care and the quality of their lives."
Article 17 reads: "Older persons should be able to live in dignity and security and be free of exploitation and physical or mental abuse."
Article 18 reads: "Older persons should be treated fairly regardless of age, gender, racial or ethnic background, disability or other status, and be valued independently of their economic contribution."

28 Resolution 663 C, First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1955 (July 31, 1957), UN Doc S/RES/663 C (XXXIV); Resolution 2076, Economic and Social Council (May 13, 1977), UN Doc S/RES 2076 (LXII);
Rule 6(1) reads: "The following rules shall be applied impartially. There shall be no discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

aspects for the welfare of the aged prisoners.[29]

The Principles of Medical Ethics, laid down by the World Medical Association is also relevant to the role of the health personnel, particularly the physicians, in the protection of the prisoners and detainees against torture and other cruel, inhuman or degrading treatment of punishment. The Human Rights Committee, General Comment 28 has stated that pregnant women who are deprived of their liberty should receive humane treatment and respect for their inherent dignity at all times, and in particular during the birth and while caring for their newborn children and required the State parties to report on facilities, medical and health care for imprisoned mothers and their babies.[30]

In *Estelle v. Gamble*[31], it was established that there was an obligation on the part of the prisons to take care of the health care needs of the prisoners. If there was any failure of the part of the prison authorities in this regard, the complainant ought to prove that he or she has not received the mandated services and that it was due to deliberate indifference on the part of the prison authorities. However, such a difficult standard made it easy for the prisons in avoiding the medical responsibility.

Todaro v. Ward[32] was the first major case that challenged women's access to the health care services in the correctional institutions. It was this decision that enabled the American Medical Association, the American Public Health Association and the American Correctional Association to create standards for the health care in prisons.

In *Brown v. Beck*[33], it was held that though the medical care provided to the prisoners is not perfect or even very good, it has to be reasonable.

Efforts at national level:

Article 38[34] of the Constitution of India, 1950 imposes a duty upon the State to protect the welfare of the citizens, which also includes the health of the women

29 Council of Europe Recommendation No. R (98)7 of the Committee of Ministers to Member States concerning the ethical and organizational aspects of health care in prison, 1998;See also< http://legislationline.org/documents/action/popup/id/8069> (visited on November, 2016).

30 Human Rights Committee, General Comment 28 on the Equality of rights between men and women (Article 3), Para 15, **U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000).**

31 429 U.S.97(1976)

32 565 F.2d 48 (2d Cir.1977)

33 481 F.Supp.723 (1980)

34 Article 38(1) reads: "The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life."

prisoners and their children. The Prisons in Indian and their administration is a State Subject under the Constitution of India, 1950.[35] The Prisons in India are bound to follow the Prisons Act, 1894, and also the various rules laid down by the State governments in this regard. Various manuals have also been issued for the proper administration of the prisons.

The Committee on the Status of Women in India (1974) in its report submitted to the Government has articulated serious concern for the inadequate attention paid to the welfare of the women prisoners. The National Expert Committee on Women Prisoners (1986-87) under the Chairmanship of Justice V.R.Krishna Iyer has pointed out the impact of brutality on women and children in prisons. The Committee observed that the special needs of the children of women prisoners were not addressed and that the arrangements in the prisons were quite inadequate. The Committee also felt that the living conditions of the women in prisons were pathetic. The Committee also proposed for a proper classification system which should include medical, criminological and social assessment of the inmate that would serve as basis for care, treatment, employment, training, education and rehabilitation of the inmates. The All India Committee on Jail Reforms, constituted by the Government of India under the Chairmanship of Mr. Justice A.N.Mulla in 1980 in their report in 1983 proposed a draft National Policy on Prisons which included provisions to take care of the special needs of women prisoners, including mentally ill prisoners and also to consider the special needs of pregnant and lactating women prisoners. The Committee observed that the position of the women prisoners was highly vulnerable. The Committee made various recommendations to safeguard the health of the women prisoners.[36]

The Law Commission of India in its 135th Report, proposed the insertion of certain specific provisions as to female prisoners in the Code of Criminal Procedure,

35 Indian Constitution, 7th Schedule, List II, Entry 4.

36 Rec 368 reads: "A separate place with proper facilities should be provided on court premises for women prisoners awaiting production before presiding magistrates."
Rec 371 reads: "Women prisoners should be lodged in separate institutions/annexes meant exclusively for them."
Rec 375 reads: "Women guards should be arranged to look after women prisoners in sub-jails."
Rec 378 reads: "Newly admitted women prisoners should be medically examined for pregnancy. Pregnant women prisoners should be transferred to the local maternity hospital for delivery."
Rec 380 reads: "Pregnant and nursing women should be prescribed a special diet and exempted from unsuitable kinds of work."
Rec 383 reads: "There should be a separate ward for women in prison hospitals."
Rec 393 reads: "State governments should encourage and support voluntary women's organisations in looking after women offenders."

1973. It has also been recommended by the National Commission for the Protection of Child Rights that pregnant women in jails or those who have children dependent on them should be considered for early release on personal bonds. The Integrated Child Protection Scheme, the National Plan of Action, 2005 and Juvenile Justice (Care and Protection of Children) Rules, 2007 also recognise the need for care and protection children of prisoners.

The Model Prison Manual, 2003 has incorporated few provisions in its chapters taking into account the health of the women prisoners, including pregnant women and lactating prisoners.[37] Moreover, few provisions have also been incorporated to

37 Ch. 24.01 reads: "The State Government shall establish separate prisons for women offenders."
Ch. 24.15 reads: "Women prisoner shall be searched by female warders in the presence of other senior women personnel/women officer with due regards to consideration of privacy and decency."
Ch. 24.35 reads: "Management of kitchens or cooking food on caste or religious basis should be totally banned in prisons for women."
Ch. 24.36 reads: "Adequate and nutritious diet should be given to nursing women and to children accompanying women prisoners."
Ch. 24.37 reads: "Food articles should be of a good quality."
Ch. 24.38 reads: "Pregnant and nursing women prisoners should be prescribed a special diet."
Ch. 24.39 reads: "Women prisoners should get special diet on festivals and national days, as may be specified in the rules."
Ch. 24.40 reads: "Medical Officer should ensure that food is cooked under hygienic conditions and is nutritious."
Ch. 24.41 reads: "There should be a separate kitchen for every 100 prisoners."
Ch. 24.42 reads: "Some women staff should be given special training in management of diet and kitchens and such trained staff should supervise the kitchens and cooking in prisons for women."
Ch. 24.43 reads: "Prison officers, including the Superintendent, must supervise every aspect of the prison diet system, i.e., issue of rations, management of kitchens and distribution of food."
Ch. 24.44 reads: "There should be a separate kitchen for women prisoners."
Ch. 24.45 reads: "Women prisoners should not be allowed to have their own mini kitchens inside the prison barracks."
Ch. 24.46 reads: "Clean drinking water should be supplied to prisoners and it should be tested periodically."
Ch. 24.47 reads: "State/UT Government shall lay down dietary scales for women prisoners keeping in view their calorie requirements as per medical norms. The diet shall be in accordance with the prevailing dietary preferences and tastes of the local area in which the prison is located."
Ch. 24.48 reads: "Every prisoner shall be entitled to receive every day food at prescribed times and according to the scale laid down."
Ch. 24.49 reads: "The State/UT Government may, at any time, vary either temporarily or permanently, the scale laid down in the Prison Manual of the respective state, provided reasons for doing that are recorded in writing by the authorities concerned."
Ch. 24.50 reads: "Where the lady Medical Officer, for reasons of health, considers the prescribed diet to be unsuitable or insufficient for a women prisoner, or her child, she may order in writing a special diet or extra diet, for a specific period of time. Special consideration shall be given in this regard to pregnant/ nursing prisoners."
Ch. 24.51 reads: "Rules relating to diet of prisoners, those on specific medical advice for expectant and nursing mothers, and infants and children, shall be scrupulously observed."
Ch. 24.52 reads: "Women prisoners sentenced to six months imprisonment or below should be issued two saris, two blouses, two petticoats, one towel and two sets of customary undergarments."

safeguard the health of the children of women prisoners.[38]

The Supreme Court has widely interpreted Article 21 of the Constitution of India in *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*[39]to include in its ambit the right to live with dignity. In *Consumer Education and Resource Centre v. Union of India*[40] it was recognised that right to health is an integral part of right to life. In *State of Punjab v. Mohinder Singh Chawla*[41]also the Supreme Court has held that the right to life includes right to health. It was also further held that subjecting a person to unsafe scientific test as part of investigation will also amount to denial of right to health. In *D.Bhuvan Mohan Patnaik v. State of Andhra Pradesh*[42], it was held that even convicts are entitled to the precious right guaranteed by Article 21 of the Constitution of India and that they shall not be deprived of life and personal liberty except according to the procedure established by law. Women prisoners and their

Ch. 24.53 reads: "Women prisoners sentenced to more than six months of imprisonment should be issued three saris, three petticoats, three blouses, two towels and three sets of customary undergarments."
Ch. 24.54 reads: "Adequate warm clothing, according to local conditions and change of seasons, shall also be provided."
Ch.24.61 reads: "Women prisoners should be given one pillow with pillow cover and woolen blankets according to climatic conditions."
Ch.24.62 reads: "Women prisoners shall be provided two cotton sheets for every six months."
Ch. 24.97 reads: "Every woman prison shall have a 10 bed hospital for women. Treatment programmes should be properly planned and developed in every woman's prison. At least one and more woman gynecologist and psychiatrist shall be provided. Modern equipments for X-ray, ECG, ultrasound and sonography should be available."
Ch.24.98 reads: "Female offenders suffering from mental disorders, anxiety, drug addiction are sex perversion should get proper medical treatment and psychotherapy."
Ch.24.99 reads: "Socio-legal counselling cell shall be set up in each institution to be managed by volunteers from a designated law school, school of social work, or a non-governmental voluntary agency."
Ch.24.103 reads: "Special consideration shall be given to premature release of women prisoners particularly in cases where she has been the sole breadwinner, or where no surrogate care is possible for the dependents of women prisoners. As far as possible to release on suspended sentences, or otherwise, of expectant mothers shall be ensured avoid delivery of their child inside the prison."

38 Ch. 24.29 reads: "There shall be a creche and a nursery school attached to a prison for women where the children of women prisoners shall be looked after. Children below three years of age shall be allowed in the creche and those between three and six years shall be looked after in the nursery school."
Ch. 24.32 reads: "Scales of diet for children shall be decided keeping in view the calorific requirements of growing children as per medical norms and climatic conditions."
Ch. 24.33 reads: "Children shall be regularly examined by a Lady Medical Officer to monitor their physical growth who shall also be vaccinated for various diseases including polio and small-pox at the appropriate time. Extra clothing and diet may also be provided to such children on the written recommendations of the Medical Officer."

39 AIR 1981 SC 746

40 (1995) 3 SCC 42

41 AIR 1997 SC 1225

42 AIR 1974 SC 2092

children are also entitled to the same. In *Sunil Batra v. Delhi Administration*[43], the same was reiterated and the Supreme Court has given various directions to ensure the protection of the prisoners. In respect of the treatment of women prisoners, the Supreme Court, in *R.D.Upadhyay v. State of Andhra Pradesh*[44], while disparaging the conditions prevailing in jails and perceiving the dismal conditions to which female inmates were subjected, has issued various directions for the protection of pregnant women, women expecting delivery in prison and the rights of children of women prisoners. It has been held in *Bibhuti Nath Jha v. State of Bihar*[45] that right to health is part of right to life and is available even to the undertrial prisoners, including the women. In *Paramanand Katara v. Union of India*[46], the Supreme Court ruled that by virtue of Article 21 of the Constitution of India, 1950, the State has an obligation to preserve the life of all, which includes even those who are criminally liable to punishment. The State is thus bound to take care of the health of the aged prisoners too.

Women prisoners are empowered to secure free legal aid by virtue of Article 39A of the Constitution of India. Sentencing them to imprisonment does not mean that their rights can be violated. The same has been mandated not only by Article 39A, but also by Articles 14 and 21 of the Constitution of India. It is a necessary sine qua non of justice and without it, injustice will be the result and indubitably every act of injustice corrodes the foundations of democracy and the rule of law. Powers are conferred on the President of India and the Governors of the States, by virtue of Articles 72 and 161 of the Constitution of India to grant pardon or show mercy to the prisoners. The Code of Criminal Procedure, 1973 has incorporated a provision to postpone the capital sentence on pregnant woman.[47]The International Covenant on Civil and Political Rights, 1966 also has incorporated a similar provision to protect the women prisoners.[48]

Inspite of various efforts on the part of the Central and State Governments, the Indian Judiciary and the Correctional Administration system to implement the recommendations of various prison reforms and various reformatory practices, the conditions of the women prisoners in India remains unsatisfactory. Policies and

43 AIR 1980 SC 1579
44 AIR 2006 SC 1946
45 (2005) 12 SCC 286
46 (1989) 4 SCC 286
47 Section 416 reads: "If a woman sentenced to death is found to be pregnant, the High Court shall order the execution of the sentence to be postponed, and may, if it thinks fit, commute the sentence to imprisonment for life."
48 Article 6(5) reads: "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women."

programmes must be designed in such a way that there is proper and sufficient allocation of funds to meet the health care needs of the women prisoners and their children.

Recommendations:

To the judicial authorities:

- To assure that all the women offenders, especially the aged who enter the prison shall receive adequate care.
- To take into consideration the mental and physical health conditions of all the women offenders.
- To carry out surprise inspection in the women prisons and geriatric wards to see if there is any human rights violations.

To the governmental authorities:

- There is a need for comprehensive Code on prison administration and treatment of prisoners, with special provisions to cater the special needs of the women prisoners.
- Prison should be brought into the Concurrent List of the Seventh Schedule to the Constitution of India so as to strengthen the process of standardized and uniform national approaches to reform the prison administration.
- The Juvenile Justice (Care and Protection of Children) Act, 2015 needs to be amended so as to include provisions for the care, protection, development and rehabilitation of children of imprisoned parents.
- The 12th Five Year Plan (2012-2017) has not taken into consideration the need for care and protection of children of prisoners.
- Adequate funds should be allotted for the proper management of the women prisons.

To the correctional authorities:

- The prison authorities must identify women who have been victims of violence or abuse before their imprisonment and support them with proper counseling and requisite treatment.
- There is a need to implement gender- sensitive approach to the health care needs of women prisoners, taking into account the need to provide specialized de-addiction treatment programmes.

- Prison authorities must also focus on promoting mental health and well-being of the women offenders as women's mental health is likely to get deteriorated in prisons that are overcrowded and when less attention is paid to prisoners without proper differentiation in terms of health status.
- Prison authorities should pay special attention to those women prisoners who have a tendency to commit suicide or do self-harm. Individual-focused care treatment would be necessary to handle such issues.
- Special attention should be paid to the women prisoners who are entering the prison with HIV, Hepatitis B and/or Hepatitis C and such other diseases.
- The pre-natal and post-natal care given to the women prisoners should be equivalent to that available outside the prison.
- Special programmes should be initiated to respond to the special health needs of pregnant women, lactating prisoners, children in prison and the aged women prisoners.
- Every woman prisoner who is newly admitted should be required to undergo medical examination for pregnancy.
- At the time of delivery, in the absence of adequate facilities in the prison hospitals, the pregnant women prisoners should be transferred to the nearest well-equipped maternity hospitals for child-birth. The birth of the child should be immediately registered without mentioning the place of birth as prison, if such a situation arises.
- To have a multidisciplinary support, involving prison officials, specialists, non-governmental organizations, community health service providers and the also the community at large to assure better health to all the women prisoners and their children.
- Geriatric unit may be created in the prisons if the number of aged inmates exceeds a particular number, as may be stated in the prison manuals of each State. The unit must aim at providing adequate care and attention to meet the physical, psychological, nutritional and medical needs of each of the inmates. Counselling services may also be offered to those who undergo psychological problems. The unit should be placed under the guidance and supervision of a full-time well experienced medical officer, who shall report to the head of the prison.
- Provision shall be made to arrange for indoor and outdoor recreation of the aged inmates so as to enable mental stimulation in them.
- Group psychotherapy can enable the aged inmates to help one another, to

acquiesce to the circumstances and also to attain relative contentment.

- The supervisor and the prison authorities must work together in making arrangements for assuring adequate care of the aged prisoners after their release. Reliable agencies may be approached to assure such a support.
- The prison officials must render qualitative services for the rehabilitation of the aged prisoners.
- There is a need to incorporate a screening process to carry out a complete health check for the inmates who enter the prison at later stages of their life and also for the aged inmates at regular intervals. Screening process instituted by the Ohio Department of Rehabilitation and Correction can be implemented in the Indian prisons too, viz., a detailed medical history, a physical examination, various diagnostic tests, tests for contagious diseases, tests for hearing and vision, understanding substance abuse history, screening for mental health, etc.[49]
- Proper training needs to be given to the staff of correctional institutions to enable them to understand the social, physical and psychological needs of the aged offenders and the subsequent procedures to be followed by them for referring the aged offenders to the experts or availing for community services. [50]
- To grant leave to the aged prisoners on a regular basis, as an integral ingredient of prison regime, thereby enabling them to maintain contact with their families, as an initiative to help them from being isolated.
- To carry out vocational training programmes in the prison for the aged prisoners.
- Compassionate release programmes for the aged prisoners can be implemented in the Indian prisons in circumstances of ill health of the aged inmates. However, they could be placed under stringent supervision by making use of modern technologies, such as electronic monitoring, GPS (Global Positioning System) tracking etc.
- Aged prisoners may also be released if they have crossed the age of 65 years or more, as may be prescribed, if have committed less-serious offence, if they have served a substantial portion of their sentence and also if they are no longer a threat to the community at large.
- The prisons need to be equipped to protect the rights of women prisoners with disabilities.

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49 B.J.Anno, C.Graham, J.E.Lawrence, R.Shansky, *Correctional health care: Addressing the needs of aged, chronically ill, and terminally ill inmates,*.125-131 (National Institute of Corrections, U.S.Department of Justice 2004).

50 Robert D. Hanser, *Special needs offenders in the community* .376 (Pearson Prentice Hall, 2007).

- Special diet must be prescribed for pregnant and lactating prisoners and children of imprisoned mothers.
- There is a need to well organize institutional as well as non-institutional services for children of imprisoned mothers.
- State governments may encourage voluntary organizations who are willing to look after women prisoners and their children.
- There is a need for the Child Welfare Committee[51] to collaborate with the juvenile justice system, as far as parental incarceration is concerned. There must be proper coordination and sharing of information between these systems, inspite of carrying out different responsibilities.
- Proper planning should be made for those children, who may be required to leave the prison after a particular age. Children of any age, who are leaving prison must be made well-prepared to encounter the society outside the prison and also to take part in various social activities. Persistent support, in the form of financial support, healthcare services, etc. needs to be provided to those children in order to enable them to reintegrate into the society.
- For those children, living with their mothers, in the prison, a register needs to be maintained to record the details of the entry and exit of each child. This may be done to assure that no child is being ignored or forgotten.
- Children who are allowed to reside in the prison along with their mothers should be placed only in safe environment. It should also be assured that they are not exposed to any dangerous conditions or people. Children should be permitted to reside inside prison only after improvements have been made in this regard.[52]
- Women prisoners and their children should not be place in crowded rooms. Sufficient space needs to be allotted to them.
- In the event of illness of these children, arrangements must be made to get them consulted by a qualified registered medical practitioner.
- Children of imprisoned mothers need to be provided with adequate clothing and essential materials for maintenance.
- Alternative arrangements should be made to take care of the children of the imprisoned mothers, when the latter suffers from any serious illness.
- The basic facilities such as creche and primary education must be provided for

51 The Juvenile Justice (Care and Protection of Children) Act, 2015, Section 27.

52 S.P.Pandey, Awdhesh K.R.Singh, *Women prisoners and their dependent children: The Report of the Project Funded by Planning Commission, Government of India* 101-104 (Serials Publications 2006).

children of imprisoned mothers within the prison premises. Diversified recreational activities must be provided to children of all age groups within the prison premises. Play grounds, sports equipments, indoor game equipments, etc. must be provided by the prison authorities. Assistance may be sought from various organizations to assure such facilities.

- There is a need to carry out regular inspection in prisons to see that the rights of children of imprisoned parents are not being violated.
- In circumstances of pre-trial detention, arrangements should be made for the welfare of the children of detainees simultaneously.
- At all the stages of criminal proceedings in India, the authorities must identify the women detainees or prisoners with dependent children. Enquiries must be made to find out whether any woman conceals the fact of having any child or children with the fear that they are likely to be placed under the custody of the State.[53] In the event of deciding as to who should be entrusted with the responsibility of taking care of the children of imprisoned mothers, decisions should arrived at, taking into consideration the best interests of these children, without resorting to any blanket policy.

To the prison staff:

- To undergo the requisite training and work efficiently in improvising the health conditions of the women prisoners and their children.
- To coordinate and cooperate with the various service organisations in this regard.

To the Non-governmental organizations and other community services:

- To make an assessment to determine if the basic needs of the women prisoners are satisfied once they are admitted into the prison.
- To review the programmes formulated for the women prisoners and to make recommendations in terms of the health or other important matters.
- It must be remembered that the children living in prison are not prisoners. They should be protected from all forms of physical and psychological abuse in prisons.
- The prison authorities should be provided with proper training and orientation on a regular basis.

53 Nell Bernstein, *All Alone in the World: Children of the Incarcerated* 18 (The New Press 2005).

- The prison authorities must respect the human rights of all the prisoners, including the aged prisoners. There is a need to carry out a detailed analysis of the aged women offenders to find out whether their health needs are properly taken care of by the prison authorities.

Conclusion:

The various national and the international instruments and various judicial pronouncements impose an obligation on the State to ensure that adequate care services are being provided to the women prisoners and their children. If a person has acted against the law, the same should be mirrored in the sentence and not in the care one receives. Children of imprisoned parents must not be left unattended, without receiving the treatment they deserve. The present legal framework should be strengthened to meet the needs of the imprisoned mothers and their children.[54]The opportunities available to all the young prisoners should also be made available to the aged prisoners. Before the release of aged prisoners, issues involving accommodation, health care services, employment, pension, etc. needs to be resolved. The aged prisoners who come to prison with a past should definitely be offered good future. There is a need for joint effort of the policy makers, non-governmental organisations, researchers and the public at large to develop an integrated framework towards developing geriatric-sensitive programmes for the aged prisoners. There is a need to carry out relevant study in the context of aged prisoners in India.

It must always be remembered that the convicted women go to prison as punishment and not for punishment.

54 Cynthia Seymour, *Children with parents in prison: Child welfare policy, program, and practice issues*,. LXXVII Child Welfare 469, 486 (September/October, 1998).

TRAFFICKING AS CRIME AGAINST HUMANITY ARTICLE 7 OF THE ICC STATUTE

Ms. Sedigheh Alirezaei[1]

Introduction

It is extremely unfortunate that even with the dawn of new century and modernity, trafficking still continues to be one of the most prevalent and widespread illegal activity in the world. It is quite clear that human trafficking is a gross crime not only against the persons who are being trafficked, but it is indeed a crime against humanity. All the firms of exploitation that we see, are gross violations of human rights and they question the dignity, safety, health, and various other aspects of the society at large. After drug dealing, human trafficking in line with arms dealing, is the largest criminal industry in the world, and stands as the fastest growing trade in terms of the number of victims it pursues and the tainted profit it generates.

Trafficking is a crime which involves the violation of both criminal as well as immigration laws. Traffickers usually resort to violence and corruption in order to carry out their business. For the purpose of this article, the phenomenon of trafficking will be examined from the human rights perspective, viewing it as a crime against humanity.

Trafficking – A historical perspective

Trafficking has been prevalent in our society since ancient times. In fact, we can also say that trafficking is a modern day slavery. In the ancient times, slavery was a prevalent phenomenon in various cultures. It was since then that human beings have been traded as chattels to various countries. Various portions of the world witnessed slavery and slave trade. The concept of slavery began with the war prisoners.

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The Slave trade in Ancient Rome

Slaves existed at Rome in the earliest times of which we have any record, but they do not appear to have been numerous under the kings in the earliest ages of the Republic. But, the immense number of war prisoners taken in the constant wars of the Republic, and the increase of wealth and luxury, augmented the number of slaves to a prodigious extent. Gradually, along with the war prisoners, the slave dealers also accompanied the army, and frequently, after a great battle had been gained, many thousands had been sold at once. The slave trade had also began to be carried on, the pirates Delos, became the chief of this traffic. It is said that when the Cilian pirates had possession of the Mediterranean, as many as 10,000 slaves were imported and sold there in one day.[2]

The Slave trade in Ancient Greece

Slavery and servitude was common practice and an integral component of ancient Greece, as it was in other societies of the time, including ancient Israel and early Christian societies.[3] In Greece, slavery existed from the earliest period of her history. Initially, slaves were acquired in the form of war prisoners. But with time, as the supply produced by war seldom totaled the demand, a race of kidnappers sprung up, who partly merchants, and partly pirates, roamed in the shores of the Mediterranean to acquire more slaves. The slaves of the Greeks were generally barbarians, and imported from foreign countries.[4]

The Transatlantic Slave Trade

The Atlantic slave trade or transatlantic slave trade took place across the Atlantic Ocean from the 16th through the 19thcenturies. Most of the people who were enslaved had been transported through the popularly known triangular trade route. The Triangular trade route connected the economies of three continents – Europe, Africa and America. It is estimated that between 25 and 30 million people, men, women and children, were deported from their homes and sold as slaves in the different slave trading systems. In the transatlantic slave trade alone the estimate of those deported

2 W. O. Blake, *History of Slavery and the Slave Trade, Ancient and Modern. The Forms of Slavery that prevailed in Ancient Nations, particularly in Greece and Rome. The African Slave Trade and the Political History of Slavery in the United States*, 46,47(Miller,1st edn 1859)

3 John Byron, *Slavery Metaphors in Early Judaism and Pauline Christianity: A Traditio-historical and Exegetical Examination*,40(Mohr Siebec 2003)

4 W. O. Blake, *History of Slavery and the Slave Trade, Ancient and Modern.*

is believed to be approximately 17 million. These figures exclude those who died aboard the ships and in the course of wars and raids connected to the trade.[56] It was during this phase, when America witnessed a dawn of slaves at their disposal. The Africans were transported to America to be sold throughout the continent. In order to be able to transport the maximum number of slaves, the ship's steerage was frequently removed. Spain, Portugal, the Netherlands, England and France, were the main triangular trading countries.[7]

During 19th and early 20th centuries, a network of Chinese and Japanese women were trafficked to cities such as Singapore and other parts of Asia including countries like Japan, China, Korea and India. It was then known as the 'Yellow Slave Traffic'. Even in the European countries, trafficking of women and other slaves were taking place long back and the women especially were trafficked to India, China, Japan etc. which was earlier known as the 'White Slave Traffic'.[89] Even men were trafficked to Western colonies in Asia as there was a strong demand from Western military personnel and Chinese men.[10] Trafficking of Japanese women was supported by the Japanese government as it helped in improving the economy of their country.

The Armenian Genocide

Another incident which drew the world's attention towards the concept of crime against humanity is the Armenian Genocide incident. The Armenian Genocide, which is also referred as Armenian Holocaust, was the Ottoman government's systematic extermination of its minority Armenian subjects inside their historic homeland, which lies within the territory constituting the present-day Republic of Turkey. The genocide was carried out during and after World War I and implemented in two phases: the wholesale killing of the able-bodied male population through massacre and subjection of army conscripts to forced labor, followed by the deportation of women, children, the elderly and infirm on death marches leading to the Syrian desert. Driven forward by military escorts, the deportees were deprived of

5 http://www.unesco.org/new/en/culture/themes/dialogue/the-slave-route/transatlantic-slave-trade/ [Accessed on 20 February 2016]

6

7 Id

8 Harald Fischer-Tiné (2003). ,*White women degrading themselves to the lowest depths': European networks of prostitution and colonial anxieties in British India and Ceylon ca. 1880–1914*,40(2) Indian Economic Social History Review (2003)

9 –90 [175–81].

10 James Francis Warren (2003). *Ah Ku and Karayuki-san: Prostitution in Singapore, 1870–1940*, 87(NUS Press,2003)

food and water and subjected to periodic robbery, rape, and massacre.[11]

That genocide followed decades of persecution, punctuated by two similar but smaller rounds of massacres in the 1894-96 and 1909 periods that claimed two hundred thousand Armenian deaths. The starting date is conventionally held to be 24 April 1915, the day Ottoman authorities rounded up and arrested, subsequently executing, some 250 Armenian intellectuals and community leaders in Constantinople. In all over, one million Armenians were put to death during World War I.[12]

The Conceptualization of Crime Against Humanity

With such incidents, the world faced the challenge of inhuman treatments against the entire human race. With this came up the concept of 'Crime Against Humanity' for the first time. On the international forum, this term was first used at the backdrop of the Armenian Genocide issue on 24th May, 1915, when a Joint Declaration was passed by the governments of France, Great Britain and Russia, condemning the deportation and systematic extermination of the Armenian population of the Ottoman Empire.

The declaration was important on several fronts. First, it stood as the first 'official' appearance of the concept of crime against humanity at the international level, which would be confirmed decades later by judges at the international tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR).

Furthermore, the use of the word *crime* conveys the recognition of criminal responsibility.[13]

There has been a number of attempts to bring forth international instruments in relation to human trafficking, such as, International Agreement for the Suppression of the White Slave Traffic 1904, International Convention for the Suppression of the White Slave Traffic 1910, International

Convention for the Suppression of the Traffic in Women and Children 1921, International Convention for the Suppression of the Traffic in Women of Full Age 1933, and Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others, 1949.

11 Christopher J. Walke,*Armenia: The Survival of a Nation,* 200 (Palgrave Macmillan, 2nd edn 1990)

12 Vahakn N. Dadrian ,*The History of the Armenian Genocide: Ethnic Conflict from the Balkans to Anatolia to the Caucasus*, 55(Berghahn Books 1995)

13 Sévane Garibian ,*From the 1915 allied joint declaration to the 1920 Treaty of Sèvres : back to an international criminal law in progress,*52Armenian Review 87-102(2010)

However, the Trafficking Protocol adopted by the UNO recognizes the definition of the practice of trafficking under the International Law for the first time. The UNO also recognized the transnational implications of human trafficking in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (also referred to as the *Trafficking Protocol* or the *Palermo Protocol*). It is an international agreement under the UN Convention against Transnational Organized Crime (CTOC) which entered into force on 25 December 2003. The *Trafficking Protocol* is the first global, legally binding instrument on trafficking which enumerates a specific definition of trafficking in persons.

Article 2 of the said Protocol enumerates its purpose as to prevent and combat trafficking in persons, paying particular attention to women and children; to protect and assist the victims of such trafficking, with full respect for their human rights; and to promote cooperation among States Parties in order to meet those objectives.

The definition of human trafficking that has been adopted in Article 3 Paragraph (a) of the Protocol goes as:

> "*Trafficking in persons shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.*"

Trafficking, however, is not an ordinary crime with transnational dimensions. It has increasingly been recognized that trafficking can rank among the most serious crimes of concern to the international community as a whole or delictajurisgentium (acts which are defined as crimes under International law). Among different categories of crimes recognized by the international community, trafficking can be regarded as a crime against humanity.[14] Further, in the case of Prosecutor v Kunarac[15], the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) has held that enslavement is a crime against humanity and it included trafficking of human beings.

14 Tom Obokata ,*Trafficking of human beings as a crime against humanity: some implications for the international legal system*, 54 The International and Comparative Law Quarterly445- 457 (Apr., 2005)

15 (Trial Judgment) IT-96-23 (22 Feb 2001) 542.

Nuremberg and Tokyo Trials

These trials were held for the purpose of bringing Nazi war criminals to justice, the Nuremberg trials were a series of 13 trials carried out in Nuremberg, Germany, between 1945 and 1949. The four major Allied powers—France, the Soviet Union, the United Kingdom, and the United States—set up the International Military Tribunal (IMT) in Nuremberg, Germany, to prosecute and punish —the major war criminals of the European Axis. The defendants, who included Nazi Party officials and high-ranking military officers along with German industrialists, lawyers and doctors, were indicted on such charges as crimes against peace and crimes against humanity.

Similarly, International Military Tribunal for the Far East (IMTFE) was created in Tokyo, Japan, for the trial of senior Japanese political and military leaders pursuant to its authority to try and punish Far Eastern war criminals.

The Nuremberg trials can be said to be a milestone toward the establishment of a permanent international court, and they also provide as important precedent for dealing with instances of genocide and other crimes against humanity.

The Principle of International Criminal Responsibility

Drawing an analogy with trafficking we can find traces of criminal jurisprudence involving the nature of international character involving international criminal responsibility, with the Treaty of Versailles which was signed on 28 June 1919. It not only marked the end of World War I, it also provided the provisions for creation of an international Court. Art 14 of the Covenant of the League of Nations entailed the League could investigate for setting up court which would operate at the international level. Consequently, the Permanent Court of International Justice was established under the Statute of the Permanent Court of International Justice which was accepted in Geneva on 13 December 1920. In addition to this, The Nuremberg trials and the Tokyo trials provided a volume of judgment which made great contribution towards evolving case laws in the field individual criminal responsibility under international law. The Charter of the International Military Tribunal at Nuremberg enumerated the words like crimes against peace; war crimes; crimes against humanity, which exposed the world towards the new era of international criminal responsibility.

This concept is also very important when viewed from the context of the problem of human trafficking. As seen before, trafficking has been accepted as a transnational

crime and is also considered to be a crime against humanity. It is indeed from these international experiences which forms the base of the criminal jurisprudence which provided that trafficking in human beings are as well recognized as a form of crime against humanity.

However, the major development towards establishing international criminal responsibility began during the 1990s. These initiatives included the establishment of the International Criminal Tribunal for the former Yugoslavia, International Criminal Tribunal for Rwanda, and finally the International Criminal Court. The creation of two new *ad hoc* International Criminal Tribunals, respectively for the former Yugoslavia (ICTY: May 25, 1993) and Rwanda (ICTR: November 8, 1994) was the occasion for the United Nations Security Council to redefine the notion of crime against humanity. As already mentioned earlier in this article, that during these trials, the courts held the opinion, that human trafficking could be considered within the definition of enslavement and thus is a crime against humanity. Therefore, these trials have contributed heavily towards the fact that crime against humanity also includes the conditions of human trafficking and they are gross violation of human rights.

In recent times, human trafficking has emerged as a flourishing cross border trade and has become a major area of concern. As per the United Nations, it has been estimated that 700,000 to 4 million people are being trafficked every year all over the world.[16] Among them, the majority of the trafficked persons are women and children who are forcefully indulged into prostitution, slavery, labor and many other types of exploitation. It is seen that sometimes the trafficked persons are subject to such exploitation voluntarily due to their poor economic condition.

Many conventions and protocols have been framed by the United Nations Office of Drugs and Crimes (UNODC) under the International Law to prohibit and prosecute human trafficking such as United Nations Convention Against Transnational Organized Crime, Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children and the United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air. The UNODC has also instituted the United Nations Global Initiative to Fight Human Trafficking (UN GIFT) in March 2007 to combat human trafficking in cooperation with the International Labor Organization (ILO), UN Children's Fund (UNICEF), International Organization for Migration (IOM),

16 US Department of State, *Trafficking in Persons Report 2010*

Organization for Security and Co-operation in Europe (OSCE) and Office of the High Commissioner for Human Rights (OHCHR).[17]

Furthermore, International Law has also included the Universal Declaration of Human Rights, 1948; the United Nations Convention for the Suppression of Trafficking in Persons and of the Exploitation of the Prostitution of Others, 1949; the International Covenants on Civil and Political Rights, 1966 and the Convention on the Elimination of all Forms of Discrimination Against Women, 1979 towards the initiative of prohibiting and combating trafficking of human beings.

The Legal framework for combating human trafficking was first institutionalized in 1904 as an international agreement to suppress the white slaves by the League of Nations and later in 1910 a Convention for the suppression of the White Slave Traffic came into force. During that period, white slaves were referred to prostitutes and white slavery was referred to prostitution. In 1921, the convention included children and in 1933, it made provision for female children. The above mentioned convention was again amended by the Protocol signed at Lake Success, New York on 4th May 1949.[18]

The Rome Statute& Trafficking as Crime against Humanity

The United Nations defines human trafficking as a crime against humanity and it includes in its definition of human trafficking as the act of recruiting, transferring, transporting, harboring, and receiving of person by use of coercion, force or any other means for exploiting these persons.[19] Millions of people are trafficked every year, be it men, women or children. They are exploited through forced labor, servitude, sexual abuses and many other forms of exploitation, even in warfare. United Nations with the assistance of UNODC and UN.GIFT enforced the United Nations Convention against Transnational Organized Crime (UNTOC) and Protocol to Prevent, Suppress and Punish Trafficking in Persons (Trafficking in Persons Protocol) in fighting this crime against humanity.

17 Fisher J., *Human Trafficking: Law Enforcement Resource Guide*,(Create Space Independent Publishing Platform 2009)

18 International Convention for the Suppression of the White Slave Traffic, signed at Paris on 4 May 1910, amended by the Protocol signed at Lake Success, New York, 4 May 1949. Available at http://treaties.un.org/pages/ViewDetails.aspx. (visited on 21 January 2016)

19 UNODC, *Human Trafficking*, Available at http://www.unodc.org/unodc/en/human-trafficking/what-is-humantrafficking.html. (visited on 14 March 2016)

Further success and a major development towards establishing the international criminal responsibility was the establishment of the International Criminal Court and adoption of the Rome Stature of the International Criminal Court (ICC). The shocking facts and figures of the trade and the victims has aroused concern and awareness in the legal arena and ultimately established the International Criminal Court (ICC) besides various laws and conventions to combat the trade and the heinous crime.

The Rome Statute was adopted by a UN diplomatic conference on 17 July 1998 and it entered into force on 1 July 2002. The International Criminal Court has been operational and 122 countries of the world have given their consent to the Rome Statute so far to deal with human trafficking which is a crime against humanity.

Articles 5 to 8 of the Statute deal with the definition of the crimes coming under the jurisdiction of the ICC, however, it is with Article 7 that a major evolution has taken place in respect of crimes against humanity. Article 7 of the Statute entails:

> *For the purpose of this Statute, „crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:*
> *Murder;*
> *Extermination;*
> *Enslavement;*
> *Deportation or forcible transfer of population;*
> *Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;*
> *Torture;*
> *Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;*
> *Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph*
> *3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;*
> *Enforced disappearance of persons;*
> *The crime of apartheid;*
> *Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health*

> The Rome Statute enumerates acts that, —*when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack,*" *constitute a "crime against humanity*.[20]The enslavement provision as defined under article 7(1)(c) , is further elaborately defined under Article 7(2)(c) as the —*exercise of any or all the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children*.[21] The Elements of Crimes to the Rome Statute elucidate that exercising —*any or all powers attaching to the right of ownership over one or more persons*" *includes, but is not limited to, "purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.*" [22]

Article 7(1)(c) of the Rome Statute has also included —*Trafficking in persons, in particular women and children*, and also in the Elements of Crimes but the definition of trafficking is not accurate and appropriately expressed in the Statute except the —*attaching to the right of ownership over one or more persons*— and/or —*by imposing on them a similar deprivations of liberty*.

It is essential at this point to further discuss Article 7(2) (c) which explains that:

"Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

Therefore, the first point for consideration in this context is the relationship between trafficking and enslavement. While it may be easy to treat these two acts synonymously, trafficking and slavery are not necessarily the same. The key element of enslavement in the above mentioned Article, read with the definition of slavery under the Slavery Convention, 1926, is the right of ownership. In Article 1(1) it defines slavery as, *„the status or condition of a person over whom any or all of the power attaching to the right of ownership are exercised*". However, in the context of trafficking of human beings, subsequent exploitation faced by the trafficked persons, can be regarded as slavery because of the reason that the right of ownership is fully exercised and retained when people are exploited in the sex and other industries in States of

20 Rome Statute, Article 7(1)
21 Rome Statute, Article 7(2)(c)
22 Rome Statute, Article 9, Elements of Crimes

destination. In most cases, even the passports are confiscated so that there remains no opportunity for the victim to return to their home country.[23]

It is also pertinent to note here that this interpretation is consistent with the opinion of the ICTY in the *Kunarac* case, which elaborated on the meaning of slavery and enslavement under international law. The Trial Chamber noted that a mere ability, among others, to buy, sell, or trade, although an important factor to be taken into consideration, is in itself insufficient in determining whether or not the enslavement is committed.[24] Therefore it would not be wrong to say that trafficking is not only limited to transportation of the people. But while arguing that trafficking is a crime against humanity, it has been held that there are several key elements which must be satisfied before an act can be elevated to a crime against humanity. To begin with, an attack against a civilian population must be widespread or systematic'. An attack encompasses any mistreatment of civilian population, although it must involve multiple commissions of acts.[25] Further, it was held in *Prosecutor v Tadic* (Trial judgement)[26] the term widespread is interpreted to mean the large-scale nature of the act involving a multiplicity of victims and therefore isolated acts committed by perpetrators cannot generally be considered as such. Moreover, a crime may be regarded as widespread when committed by the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.[27] And in the trial judgment of the case, *Prosecutor v Akayesu*, the court decided that Systematic conduct requires the—organized nature of the acts of violence.[170] In the backdrop of these judgments, it will not be wrong to contend that trafficking can definitely be said to be a crime against humanity, since it is undoubtedly widespread and carried on in a systematic way affecting all the states involved in it.

Trafficking may thus be treated as slavery especially when the traffickers themselves continue to exploit their victims. In addition to this, another basis for establishing trafficking as a crime against humanity, especially in cases which do not involve enslavement, Art. 7(1)(d) of the Rome Statute can be referred. A careful analysis of the article will show that trafficking can also be included under acts other than enslavement. Forcible transfer under Article 7(1)(d)33 is one such example. Together with deportation, forcible transfer is defined as forced displacement of the persons

23 Tom Obokata ,*Trafficking of Human Beings as a Crime against Humanity: Some Implications for the International Legal System*,

24 Christopher J. Walke, *Armenia: The Survival of a Nation*

25 *Prosecutor v Vasiljevic* (Trial Judgment) IT-98-32 (29 Nov 2003) 29

26 IT-94-1-T (7 May 1997) 648

27 *Prosecutor v Blaskic* (Trial Judgment) IT-95-14-T (3 Mar 2000) 206

concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.'

Now reading this provision in the light of the report of the Preparatory Commission for the ICC, the term forcible is not restricted to physical force, but may include threat of force or coercion, such as that Caused by fear of violence, duress, detention, psychological oppression or abuse of power Against such person or persons or another person, or by taking advantage of a coercive environment.[28]

Therefore, it can be established that human trafficking is not only a violation of basic human rights principles, it is indeed a crime against humanity. It poses certain basic questions on the human civilization regarding the inhuman treatment that trafficked persons are compelled to undergo. In most cases, since trafficking is done with the motive of sexual exploitation, it violates the right of dignity and integrity of woman. It has been a trend of the patriarchal society to show the dominance of a man over a woman through sexual domination and derogatory sexual abuses. Trafficking is nothing, but another expression of this patriarchy that the world has been trying to fight since time immemorial now.

Human Trafficking: the 21st Century Slavery and the Indian Scenario

Human trafficking can even be referred as the modern form of slavery which affects people of every age, race and sex. But majorly, it is women and female children who are the prey of this practice. It is undoubtedly a form of slavery owing to the inhuman and degrading treatment that the trafficked persons face. They are often beaten and ill-treated. Most of the time, the women and young girls are repeatedly raped before they are put to solicit the customers. Physical violence, force, coercion, threat of harm or even death, is the primary means to compel them into the sex industry. They are often induced with drugs so that they can better entertain their buyers under the state of intoxication. It is the sad picture of the society where the buyer men often derive sadistic pleasure by hurting and maltreating these women. It is one of the largest criminal activities in the world, together with arms and drugs, and the fastest growing crime. Huge profits can be made quickly and over a long period of time from the same human commodities, unlike drugs that can be used only once. Despite its criminal nature, the risk of prosecution is usually negligible as there are insufficient penalties against traffickers.

28 Report of the Preparatory Commission for the International Criminal Court, Finalized Draft Text of the Elements of the Crimes, UN Doc PCNICC/2000/INF/3/Add 2 11 (6 July 2000)

Both human trafficking and child trafficking are major concerns in India. While speaking of the legal framework, the most important provision is Article 23 of the Indian Constitution. This Fundamental Rights provides for prohibition of trafficking in human beings and forced labor. Apart from this, the Indian Legal system also has the Immoral Traffic (Prevention) Act, 1956 which has been legislated specially to prevent the trafficking in women in India. This law was legislated in order to bring in force the provisions of the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others To which India became a party on 9 May, 1950.

Apart from these legislations, a very important and landmark judgment in this regard is that in the case of *Gaurav Jain v. Union of India*[29], where the Legal issue of the case was regarding prostitution in India and the poor condition of prostitutes, fallen women and their children, and whether they are entitled to be rehabilitated and treated as other human beings of the society. The discussion in the court was based on the V.C. Mahajan committee reports which suggested that the children of prostitutes also have the right to equality, equal opportunity, dignity, care, protection and rehabilitation so as to be part of mainstream of social life without any pre-stigma attached on them. The Court gave a number of references of national and international law and then issued a number of directions for the Central Government, State Governments and NGOs for protection and rehabilitation of the children of prostitutes.

Conclusion

The major contributing factor that has increased the scale of trafficking and made it so rampant can be enumerated as, globalization, poverty, lack of information and other legal, social, economic and cultural situations. Further, the widespread facility of internet and mobile phones helps their communication, making it difficult to detect them. Racism, sexism and the disregard for the fundamental human values shared by all cultures and peoples play a large part in such crimes. Moreover, the lack of law enforcement machineries aids the continuation of such offences. Another factor that further contributes to this is the extensive corruption among officials in the police and at border controls is also cited. Although poverty is stated as one of the major causes leading to trafficking, it, in fact, only creates the necessary conditions. Trafficking will appear when criminal elements take advantage of people‘s desire to

29 1998 (4) SCC 270

emigrate to improve their standard of living. Women are the first to suffer when there is economic or societal collapse, hence the term feminization of poverty.[30]

Another cause of trafficking for sexual exploitation is the phenomenal growth in the sex industry. In many countries, the economic growth has resulted in the rise of a large middle class. Men with disposable income have a greater capacity and apparently a greater incentive to buy sexual services. Unfortunately, in spite of this evil existing in the society since time immemorial, the present so called advanced, modernized, 21st century society continues to be tolerant towards it. Like any industry, prostitution is based on supply and demand. In this gendered system of supply and demand, little or no attention is paid to the legitimacy of the demand. The ultimate consumers of trafficked and prostituted women are men who use them for entertainment, sexual gratification, and acts of violence.[31] It is truly regrettable that the demand side of sex trafficking remains the least visible and the least mentioned. Thus it often goes unnoticed that the reason behind trafficking is not the traffickers, but rather the buyers. And it is this demand that makes the trafficking trade so widespread and lucrative.

There lies no doubt that trafficking is indeed a scar on the very existence of the human civilization. It should be a great concern across the globe to develop an outlook which takes into consideration the protection of human life and the dignity of life. The gross inhumanity and degradation that a trafficked person faces, poses certain basic questions on humanity and human existence itself.

30 Síle Nic Gabhan ,*Human Trafficking: A Twenty-First Century Slavery*, 57 The Furrow 528-537 (Oct 2006)

31 Donna M. Hughes, '*The "Natasha Trade": The Transnational Shadow Market of Trafficking in Women*'. (Special issue)53 Journal of International Affairs. 624-65(Spring 2000)

RIGHT TO EDUCATION IN KERALA PRIOR TO 1956

*Dr Sheeba Pillai**

Kerala's development experience has been applauded, as it has been distinct from other States in the country. While the rest of the country is grappling with problems of high maternal and infant mortality rate, illiteracy, increasing birth rate, Kerala has been able to tackle these problems with sufficient success.

Kerala's achievement in the field of education has been looked up with much appreciation. In terms of enrolment, retention, accessibility, literacy level, the State outshines others by fairly good margin .Right to education was not achieved overnight. The reason for this phenomenal success goes back to history. To understand how and evolve a strategy for better development, it is essential to study the past and understand the factors that triggered off this trend of achievements in the educational arena .This article makes a study on the development and progress of this right in the period prior to the reorganisation of Kerala State which was responsible for the status, education, and particularly primary education, has gained post 1956.

I. Introduction

Before the reorganization of the State in 1956, there were three divisions of Kerala, namely Travancore, Cochin and Malabar. Among the princely States of India, Travancore was the Southern most - Travancore or `Srivalumkode' or the abode of prosperity. It was bounded, in the North by the princely States of Cochin and British districts of Coimbatore, in the East by district of Madurai, Tirunelveli in the South and in the West by the Arabian Sea .[1]

The history of education in Kerala goes back to very ancient days. The Sangam literature suggests that all people irrespective of sectarian and sex consideration were

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Travancore Almanac and Directory for the year 1922, Published by the order of the Government.

entitled to get benefit of full education. [2]

Even communities later considered low in caste hierarchy such as Kuravas, Parayas, Panas, Vedas had during the Sangam period held a status superior to that of the Brahmin of the day, in cultural and intellectual accomplishments. The great Sangam poets Pannanar and Kapilar belonged to the Pana community.[3] Female education received great attention. Owing to high level of female literacy, the Sangam age produced many gifted poetesses. Thus education was popular and universal in ancient India.

Process of Arayanisation and rising hold of caste system brought about a decline in the level of education. Women and low caste were deprived of the right to education. Education was monopoly of higher castes in Hindu society.[4] The high caste Hindus (Brahmins) who had ownership of land appropriated most of educational opportunities. The `*Vedapadashalas*' and `*Sabhamutts*' exclusively meant for caste Hindu received support from rulers in the form of land grants and other gifts.[5] There were other institutions for popular education, which catered to non-Brahmins. This was known as `*Pallikudams*' or `*Kudipallikudams*' or even `*Ezhuthapallies*' or `pial' schools. These schools were nurtured essentially by local initiative.[6]

As a reply to the sectarian Vedic mutts of the Brahmins, the Buddhists and Jain monks influenced the origin of primary schools for the masses. In these schools, which evolved out of tradition they had no permanent locale, no uniform curricular and did not receive much support from the royalty or the Government of the time, but were maintained mainly by resources within the village itself.

The Maktabs and Madarassa were institutions of higher learning for Muslims. There was no fee in the modern sense. Teachers were paid in kind. The main defect of the system of education was exclusion of girls and lower caste pupils, lack of training or sound education among teachers, narrow and limited curriculum and severe forms of punishment.[7] This was the condition of education just prior to the eighteenth century.

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2 Agur C.M., *History of Travancore* 373 (SPS Press 1903)
3 Ibid
4 Menon Sredhara, *A Survey of Kerala History* 160 (National Book Stall 1960).
5 Tharakan Michael P.K., *Socio – economic factors in educational development – the case of 19th Century Travancore*, Working Paper No.190, 8 (CDS 1984).
6 Hebzi Joy R.J. *History and Development of Education of Women in Kerala*, (PhD. Thesis, Kerala University, 1989).
7 Id

Thus what was a 'right' in ancient India, gradually became a privilege of a few in the later period. This was particularly so in the Hindu society. The interest of Syrian Christians were protected largely by the Christian Missionaries and British agents, in Travancore. As for Muslims, they stood low in education.[8]

The educational status that Kerala enjoyed at a later stage was mainly due to enlightened policies followed by the rulers.[9] A variety of other enabling socio- economic and institutional factors acted as change agents both on supply and demand side. The role of private sector in the development which Kerala has achieved is substantial.[10] This, combined with the ardent devotion of social reformers like Narayana Guru, Ayyankali and active endeavors by Christian Missionaries cut through the legacy of the caste ridden society to bring about positive changes in leaps and bounds.[11] These reformers again sought to raise the status of education to a basic right which must be made available to each and every person irrespective of his background.

The pioneer of English education was the Christian Missionaries. Their role in the progress of education is conspicuous. Their main aim was proselytisation and they worked among the castes and fishermen communities.[12] The northern half of the State of Travancore was suffering from complete neglect of education and this was only natural as the area was newly conquered and annexed to Travancore. The people, particularly, the rural population of north of Quilon were in an economically deplorable condition. So poor were they that they could not afford to pay the Schoolmasters.[13] The educational level of Puthencoor Syrian in particular and of women in general was low'[14] All these reasons together caught the attention of missionary work in Kerala. The beginning of work of Protestant missionary in Travancore, Cochin and Malabar was closely connected with the expansion of British supremacy of these areas. Macaulay and Munro strongly supported missionary work. The Protestant Missionaries concentrated their activities on two sections of population – lower castes and Syrian Christians – on the former for concessions and latter for correction.[15]

The successful working of LMS English School at Nagercoil attracted attention of

8 Mathew Samuel Rev., *Native Life in Travancore* 148(Travancore Government Press 1893)
9 Pillai Kunjan, *Studies in Kerala History*5 (NBS Publications 1979)
10 Salim Abdul et al., *Educational Development in India. The Kerala Experience since 1800* 62(Anmol Publications Pvt. Ltd. 2002)
11 Id
12 Ferroli, *The Jesuits in Malabar*, l. Religion.408 (1939)
13 *Report of Administration of Education in Travancore (1929-30)* 2 (Government Press 1930)
14 Cheriyan P, *The Malabar Syrian and Church Missionary Society (1816 – 1840)* 68(CMS Press 1935)
15 Hebzi Joy R.J. *History and Development of Education of Women in Kerala*

Maharaja Swati Tirunal who insisted its Headmaster Robert to open the first English school in Thiruvananthapuram.[16] Most of the other educational institutions opened by LMS were located in Tamil speaking area of erstwhile State of Travancore.[17] The growth of Mission schools from 1838 to 1879 was remarkable. After this period we find that the Government intervention increased and introduction of changed educational patterns, education codes, began to affect the existence of these schools. Why education spread among masses was because of special consideration that was conferred on the lower classes of society and making it accessible to all.

Now we go on study how the educational activity developed in the three regions namely Travancore, Malabar and Cochin and its repercussion on the educational pattern even today. More importantly it also helps to adopt particular strategy for universalizing elementary education, based on the lessons learnt from the past.

II Educational activity in Travancore

By the Pandaravaka Pattom proclamation (tenancy proclamation regarding Government land) of Travancore Government in 1865, the ryots were conferred ownership rights. Following this, there were several other tenancy reforms.[18] Restoration of ownership rights on cultivated land to tenants vastly changed their economic conditions and attitude towards life, changes which had their repecussion in other social and economic spheres as well. Education was one of the activities, which received great stimulus from this change.

It was against this scenario, we find the illustrious Government policies, the missionary endeavour and towards the end of 19th century and first quarter of 20th century, strong social reform movements. The caste associations endeavoured to improve status and influence their respective castes by increasing their participation in education – Government services and various professions. One such was Sree Narayana Dharma Paripalaya Yogam (SNDP) led by Sree Narayana. The Nair Service Society was another such association under its leader Mannathu Padmanabhan.[19] The Pulayas emulated the example set by Ezhavas, by starting the Sadhu Jana Paripalana Sabha under the leadership of Ayyan Kali. By the beginning of 20th century, Muslims also found an association by the name of South Indian

16 *History of the University College* 3 (University College Centenary Souveneirs, 1866 – 1966, 1966)

17 In course of their work, they were also converting sections of this vulnerable Society. In 1860s the LMS had converted 20000 and in 1880s 40000.

18 Pillai Velu T.K., *The Travancore State Manual, Vol. I – IV* 337-338(Government Press 1940)

19 Salim Abdul et al., *Educational Development in India. The Kerala Experience since 1800* at 10

Muhammadan Association and so the social reform reached a peak with education being considered as essential even by the lower caste.[20]

The northern part of the State, which was newly conquered and annexed to Travancore was suffering from neglect of education. Responding to the situation, direct involvement of the State in the field of education began in 1817 with Rani Gauri Parvati Bai issuing the Royal re-script declaring "*that the State in their effort to promote educational activities should defray the entire cost of education of the people in order that there might be no backwardness in the spread of enlightenment among them and that by diffusing education, they might become better subjects and public servants and the reputation of the State might be advanced thereby*".[21]

Educational system of Travancore consisted of three important branches – vernacular schools, English schools and colleges. Much emphasis was given to Sanskrit education.

Many schools were started between 1817 – 1827, however most of these schools could not be sustained and had to be closed down in 1830s.[22] Simultaneously many 'free schools' and 'district schools' also started only to be closed down. But we find that the enthusiasm for English education inspired the Government to start several English medium schools. With the extension of system of grant-in-aid to English medium schools, the number of aided English schools, which were only 5 in 1893/94 rose to 22 in 1893/94.[23] Besides direct involvement rulers also gave encouragement to Christian missionaries in their effort to promote educational activities.

The attitude of Travancore Government towards vernacular education was in conformity with that of British India under East India Company with the acceptance of the well known McCaulay's minutes by Lord William Bentick in 1835 and the demand for English medium education, from some sections of the middle and upper class Indians in Presidency Towns, indigenous education was largely neglected in British India.[24] The situation was more or less the same in Travancore.

It was under the administration of Dewan Sri T. Madhava Rao (1862 – 1872) that the Travancore Government stepped into the educational field significantly. The educational policy of Madhava Rao emphasized on four things – first, the Government undertook to establish schools of its own including a central vernacular school at the

20 Jeffrey Robin, *Politics, Women and Well being and how Kerala became a model* 52(Mc Millan 1992)
21 *University Committee Report* 12,13(Government Press 1924)
22 Salim Abdul et al., *Educational Development in India. The Kerala Experience since 1800 at*.39
23 Pillai Velu T.K., *The Travancore State Manual* at.709
24 Naik J.P. and Nurullah Syed, *A Student's History of Education in India, 1800 – 1973* 66 (Mc Millan 1974)

Capital, a school in each taluk of the State and a normal school for training of teachers; private agencies were to be encouraged to start schools through liberal grant-in-aid;[25] indigenous schools were to be upgraded and integrated into the formal system and the establishment of a Text Book Committee to translate and write books of all kinds.[26]

Community participation was introduced in 1871 by Madhava Rao who introduced 'proverti' or village schools. Under this scheme, people of a particular locality provided school buildings upon which Government undertook to pay 1 jenam per pupil.[27] The Government also agreed to provide one master for each school on a salary of Rs.7/- per month and one inspector for every 14 schools to supervise their proper workings with a salary of Rs.30/- per month. Local efforts was the mainstay in Kerala and subsequent success in the educational achievement was obtained mainly by encouraging local efforts .[28]

In 1894, the educational pattern of the State was sought to be changed and the whole education system was brought under one authority and all schools were brought under its control by giving them grants, and rules were framed for the management of aided and recognized schools.[29] In 1901, vernacular schools constituted 91% of total number of schools and pupils around 92%. Primary schools and vernacular education do help the spread of literacy more than secondary school and English education.[30]

It was in the 20th century that we find a greater emphasis was given to free and compulsory education, equality of opportunity or accessibility and to a smaller extent, quality. From 1902, the common primary school served as a base of entire education structure. Thus the English medium primary schools went out of existence. The responsibility of State in giving free primary education to all was officially accepted in 1904. Many reforms were introduced – one which emphasized on improvement in the method of teaching and attainment of higher standards of

25 A crucial step was taken in 1869 A.D., wherein a system of grant in aid was sanctioned to private schools. On the following conditions (a) the course of instruction followed was to be same as that of Government schools (b) the text books prescribed by the Government were to be used in private schools. (c) properly qualified teachers were to be appointed. The Director of Vernacular education, Sankarasubbiah devised the scheme.

26 Nagau v. Aiya, *Travancore State Manual, Vol. I and II*,443,444 (Government Press 1906).

27 Pillai Velu T.K., *The Travancore State Manual at* 704

28 In a period of 3 decades, Travancore attained a stage of development in which there was one vernacular school per 3 – 7 square miles and 11415 persons in Madras Presidency.Salim Abdul et al., *Educational Development in India. The Kerala Experience since 1800* at 43

29 Pillai Velu T.K., *The Travancore State Manual* at.714

30 Salim Abdul et al., *Educational Development in India. The Kerala Experience since 1800* at 52

learning.[31] At the end of the century, Cochin and Travancore held the first and second position in the order of literacy among States and provinces in India.

One of the defects, which still remained was the existence of a large number of unrecognized schools, which were not subject to any departmental supervision and control. The Education Code of 1910 or Mitchell Code – was a comprehensive measure dealing with classification, management and accommodation of schools.[32] The observance of religious neutrality and recognition of equal rights for all classes of people were two pleasing features of the Code.[33] Because of many regulating provisions, a number of private unrecognized schools went out of existence.[34]

The second stage from 1915/16 to 1918/19 marked a shift in Government policy. The chief feature of this period was adoption of new policy for promoting education by encouragement of local efforts.[35] Several recommendations made by Education Expenditure Committee 1920 and accepted by the Government were directed towards universalizing primary education as quickly as funds permitted. "No fees were levied in lower grade elementary schools. Government helped the poor parents with liberal grants to provide them the means of educating their children."[36] Mid-day meals to needy children were another incentive offered.[37]

Though compulsory primary education was sought to be introduced by Elementary Education Bill in 1914, it was not passed.[38] The Education Reorganisation Committee, 1945 recommended the introduction of compulsory primary education. It suggested that such education must be of 5 years duration and in order to make it

31 These reforms included (a) withdrawal of Government English schools from places where private schools were found to be thriving (b) appointment of Director of Public instruction to organize and direct various educational activities in the State and (c) raising the minimum monthly pay of teachers in vernacular schools from Rs.5/- to Rs.7/-. See *Report of Education Expenditure Committee* 10 (Government Press,1920).

32 Pillai Sivadasan K., *Curriculum and Standards* 42(Kalaniketan 1972)

33 *The Travancore and Cochin Diocesan Record, 1910*, Vol. XX, 24(CMS Press 1910)

34 Pillai Velu T.K., *The Travancore State Manual,* Vol III at714 – 715

35 The Director of Public Instruction, *Administration Report, 1915 – 16.*

36 *Administration Report of the Education Department, 1921 – 22.*

37 In 1944/45, more than 9000 children attending about 200 schools were fed everyday by the Fund. See Travancore Administration Report, 1944 – 45, p.32. Milk was also supplied under Milk Canteen Committees. In 1947/48, 11000 children were benefited by the scheme. See Travancore Administration Report, 1947 – 48at.23.

38 In 1922, the Government accepted universal primary education as its goal and decided to implement it as much as funds permitted. In 1931, it was observed that contrary to what had been claimed earlier, many children of school going age never went to school of whom 99% belonged to the poor and depressed sections of the society. See Proceedings of Travancore, Sree Moolam Popular Assembly 63(Government Press, Thiruvananthapuram, 1924); 1926, at.89-90; 1927 at104-105. The issue of compulsion came under heated discussion within and outside the Assembly during the 1940s.

effective, all uneconomic and incomplete schools must be abolished. Adjustment of school timing, recasting of school curriculum, introduction of shift system, free supply of books, clothing, mid-day meals were recommended.[39] Thus in 1946 a scheme of compulsory primary education was introduced in two Southern Taluks of Thovala and Agastheeswaram and in the city of Thiruvananthapuram.[40] However, the attempts made by Government to bring under its control the entire primary education of the State and to expand the system of compulsion to all Taluks in the State were unfortunately thwarted by political developments.

Female education received a special impetus only when the Government took direct responsibility of starting and maintaining schools for girls, fee concessions were given,[41] abolition of fees and setting up of vernacular schools for girls.[42] Similarly the backward communities which were the other vulnerable sections of the society also benefited substantially from Government intervention.[43] The Education Code of 1909 rendered education more accessible to non-caste Hindus by removing restrictions on their admissions into public schools and made it more popular among all classes of elementary schools.[44] However, the prejudice set in against the backward classes could only be changed by genuine efforts from social reformers like Ayyan Kali, Kumaran Aasan etc. Government was encouraged to grant half-fee concession, stipend scholarship, boarding grants etc.[45]

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39 See Report of Resource Commission, 1945, at.10 –1 5. The Committee also suggested the introduction of compulsion by stages consistent with availability of funds, accommodation and teachers

40 Travancore Administration Report,14 (1950 –51). In about 4 years, since the establishment of Primary Education Act, the number of schools surrendered in 5 taluks in which compulsion was introduced, reached 1000. Scheme extended to 2 more taluks in 1947 – 48. See Travancore Administration Report, 1947 – 48.

41 In 1930 all girls enjoyed half fee concession irrespective of their economic status. See Travancore Administration Report,215 (1930 – 31).

42 Female literacy increased from 31% in 1900 – 01 to 38% in 1951 in Travancore. Pillai Velu T.K., *The Travancore State Manual,695*(Government Press 1940)

43 In 1894 –95, the Travancore Education Rules and grant-in-aid Code made provision whereby 15 schools were established for backward classes Nagau v. Aiya, *Travancore State Manual* Vol. II, at.481 – 82. The Government instituted 185 scholarships to the backward class pupils who appeared for the vernacular elementary education

44 One of the dynamic changes initiated in1911-12 was the removal of restriction on the admission of Pulaya boys and girls in Government schools. Pillai Velu T.K., *The Travancore State Manual, Vol. I – IV at* .736.

45 Proceedings of Sri Moolam Popular Assembly of Travancore 1914, p.78. in 1908, the Government had opened its 370 schools to all castes. By 1922 all the Government schools except 24 were opened to all. See Travancore Administration Report, 1923 – 24 at 100 – 07

III. Cochin

The educational traditions of the Cochin State were the same as those of Travancore and Malabar. Further the pattern and pace of educational development during 19th century was similar to that of Travancore.

Prior to the administration of Col. Munro the Government did not at any time directly participate in the education of the people.[46] The education of the common man received the direct attention of the Cochin Government only as late as 1890 when the State intervention towards vernacular education became active. In that year it opened ten vernacular schools for boys and 2 for girls in village and 36 indigenous vernacular schools were brought into the aided list.[47] Special schools for educationally vulnerable sections of society were also started. The literacy rate of Cochin became even higher than that of Travancore during the period of 1891 – 1901. The educational development in Cochin may be attributed among other factors to, the existence of a large body of peasant properties, growth of Cochin as an important overseas trading center, the use of a trading community from among Ezhavas and the Syrian Catholic who had more interest in education than the other communities had.

For the first time in 1908, education was made free for girls and backward classes. Free scholarship and stipend were instituted for pupils of backward communities[48] and an increased scale of pay was sanctioned to teachers of primary school.

Education Code of 1911[49] was revised in 1921 to introduce important changes towards universalizing primary education – like exemption of fees to children of depressed classes and half fee concession to Muslims, Ezhava and other backward classes in English schools, enlarging scholarship rules to include Muslims, backward and depressed classes.[50] Female education received special attention.[51] The Education Code was again revised in 1944. Primary school course was completely overhauled and extended to 5 years. Differences between English primary and Malayalam

46 Menon Achutha, *Cochin State Manual* 290 (Government Press, Ernakulam, 1911)
47 Cochin Administration Report, 1890 – 91at.47 – 48.
48 Cochin Administration Report, 1908 – 09 at.4.
49 The promulgation of the Education Code in 1911 helped to systematize educational activities and boosted aided agencies and led to rapid and all round expansion of education in Cochin. All educational institutions in the State were divided into 2 broad classes – Vernacular and Anglo – Vernacular. The liberal grants allowed by the Code stimulated the growth of aided schools. See Thresia Kochu K.M., *History of Education, Cochin, 1800–1949* 14 (Kerala University, 1962).
50 Menon Krishna T.K., *Progress of Cochin* 182(Cochin Government Press 1932).
51 Id.The number of girls receiving education rose from 13, 824 in 1915 to 49463 in 1939 – an increase of 66.4%.

primary schools was put to an end – instruction would be in Malayalam in the first 3 classes and English would be introduced in the 4th class.[52]

Schools were opened exclusively for girls.[53] Even with respect to backward classes special effort taken – fee concession, special schools for them, scholarship offered – free meals, clothes, books and stationery – even half working day system was introduced in some schools.[54] By the end of the third decade all recognized educational institutions in the State except 3 schools were open to these communities.[55]

The main defects of primary education as commented by the Elementary Vernacular Committee in 1934 were unhealthy curriculum, methods of teaching and want of well-qualified teachers. At the time when Travancore was actively introducing primary education in many taluks, Cochin could not do anything in that direction. Cochin, which was much advanced at the beginning of 20th century progressed more slowly towards the late 1940s. In 1949 Cochin was integrated with Travancore.

IV. Malabar

At the time of Independence, Malabar was one of the most underdeveloped and educationally backward regions in Kerala. Five out of 6 districts – which have a literacy rate below State average are in Malabar region. While one of them – Kozhikode – had been able to come on par with the State average, others too are not far behind.

The reason for Malabar's backwardness can be traced back to growing socio-economic unrest, immerisation of the tenants and agricultural labourers and increasing animosity between Muslim population and the British. The Mapillas kept themselves out of schools and colleges established by the British and boycotted their military and civil services.[56] Because of their privileges and pre-eminence in Malabar society for a long time, the Nambudiris considered English education an anathema – thanks to their false notions of aristocracy and social rank. But the Nairs had a positive attitude towards English education which opened to them the doors to British bureaucracy in Malabar.[57] Malabar did not give birth to any major reform

52 Cochin Administration Report, 1945-46 at.47.

53 The number of girls enrolled rose form 13824 in 1915 to 49463 in 1929 and the percentage rose from 20% and 66.4% during 1915-29. Menon Krishna T.K., *Progress of Cochin* at. 89-90

54 Cochin Administration Report, 1923 – 24.

55 During 1921 – 41, literacy rates more than doubled among Nair and Christians, more than trebled among Ezhavas and increased by more than ten times among Pulayas

56 Nagau v. Aiya, *Travancore State Manual, Vol. I and II* at.264.

57 Radhakrishnan P, *Peasant struggles, Land Reforms and Social Change in Malabar, 1936 – 82* ,76(Sage

movements during the 19th century and early 20th century. Unlike Travancore and Cochin, the work of Christian missionaries were also limited in Malabar.[58]

Government did very little to promote education in the first and second half of 19th century. The system of giving grants to schools was started very early for encouraging vernacular schools. In 1864 – 65, the Government started the `Rate' schools. The funds required for running these schools were collected from local people and no fees charged on students.[59] Many schools were established. 'Result' grant system was introduced in Malabar in 1867. According to this system, grant was given on the basis of school attendance of pupils (at least 15 per month). However the quality of education did not improve. Since quality depended on several factors other than mere attendance.

The educational policy followed by British in Malabar and also elsewhere in British India was patterned after the recommendation of McCaulay's minutes in 1835 which envisaged the propagation of Western science and literature in India through medium of English. Up to 1921, the British educational policy was top heavy. It emphasized the promotion of secondary and higher education (leaving primary education to local board and private agencies), which cater to the elitist and urban sections of the society.[60]

A problem unique to Malabar was that majority of student population was from Muslim community and the Mapillas were indifferent to secular education. Though some Mapilla children attended school, they did not complete even the most elementary level of education. The Mapillas and Cherumas who together constituted 73% of population remained illiterate. While literacy rate doubled in Travancore and Cochin during 1930 – 31, Malabar recorded a growth rate of only 4.3%.

Compulsory education was first introduced in Tellicherry and Kozhikode Municipality, British Cochin and in selected areas of Ernad, Wallavanad and Ponnani Taluks in the year 1920 in pursuance to the Madras Elementary Education Act of 1920. It provided for creation in each district of District Education Council, having several functions.[61]

Publications 1989)

58 It was the Basil Mission, which opened the first English school in Malabar at Kallayi (Calicut) in 1848.

59 In 1870 – 71, there were 23 rate schools with 1551 children in addition to six Government schools and 147 aided schools. See Report on Public Instructions in Madras Presidency 4 (Government Press, Thiruvananthapuram, 1870 – 71).

60 Nair P.R.G., *Education and Socio Economic Change in Kerala*, IV Social Scientist 31`(1976).

61 Boag G.T., *Madras Presidency, 1881 – 1931* 110 (Government Press 1933). The principal functions were (a) to prepare schemes for extension and improvement of elementary education with the help of private

The District Municipality Act and local boards of 1920 afforded a greater elasticity to local bodies in the matter of finance. By these Acts, elementary education was removed from the purview of District Boards and placed under the Taluk Boards and Municipalities as well as private agencies. Further a few elementary schools for girls in Malabar were handed over to the local bodies, the Government undertaking to pay the annual subsidy for maintenance.[62] Thus unlike Travancore and Cochin, in Malabar the Government started withdrawing from direct control of elementary schools. Serious attention of the Government in the promotion of vernacular education began only after the Mapilla Rebellion of 1921.

Female education did not get adequate attention till the end of the British period, barring some minor reforms. Subsidies were given for starting schools, poor girls in classes upto the end of the middle schools were exempted from payment of fees.[63]

The Government neglected the education of depressed sections till 1921. In that year the Madras Education rules were amended to make grant of half fee concession in public and aided schools compulsory for pupils belonging to backward classes. During 1930s, schools were thrown open to Scheduled Caste. A Department of Harijan Welfare was soon started, measures such as scholarship, boarding grants, grants for examination fees, stipends for training of teachers, financial assistance to private bodies for maintenance of schools and hostels – paved way for quelioration of their condition.[64]

The princely states of Tranvancore and Cochin were integrated into a single State (1949), soon after the attainment of Independence of India. Later in 1956, consequent to the reorganization of State on legislative basis, Malabar which had been part of Madras State was added on to and a few taluks at the Southern extreme were taken away from Travancore – Cochin to form the present state of Kerala. In 1951, there were about 10,711 institutions consisting of 834 high schools, 8803 primary schools, besides other institutions for special education. Of these, 3671 were managed by the Government and remaining 7040 by private agencies. The private management in general and the Catholic hierarchy in particular who controlled 60 – 70% of the schools in Kerala, had been running these schools as their private profitable business

bodies, with a view to its ultimately becoming universal. (b) to assess and disburse all grants – in – aid to private elementary schools from provincial funds and (c) to advise the Department of Education on all matters connected with elementary education including the provision of trained elementary school teachers

62 Report on Public Instructions, Madras Presidency, 1922 – 23.

63 Report on Public Instructions, Madras Presidency, 1901 – 02.

64 Salim Abdul et al., *Educational Development in India. The Kerala Experience since 1800* at 140

concerns.[65] Such was their power that even the most powerful and strong figure like Sir C.P. Ramaswamy Aiyar could not do anything much as he wanted. They failed to come within the grasp of the Government agenda and hence started proving a problem. It was to curb these menace that the Kerala Education Bill was introduced in 1957.

V. A Critical Evaluation

On a perusal of the three units, we find a conspicuous difference in the educational levels attained by each. During the period since 1870, major social interventions were made in the three regions. The efforts brought about substantial increase in the number of schools during 1870 – 71 to 1946 – 47 (an increase of 21 times in Travancore, 117 times in Cochin and 26 times in Malabar), in respect of enrolment also the performance was outstanding (an increase of 108 times in Travancore, 385 times in Cochin and 64 times in Malabar) .[66] A comparison of literacy figure during the period from 1875 to 1951 shows that literacy rate (to total population) rose from 46.7% to 57% in Travancore, from 43.7% to 44% in Cochin and from 5.3% to 30.9% in Malabar. Even though the performance of Malabar looks lackluster in comparison with Travancore and Cochin, it was much better than that of all India and Madras Presidency.

The unique position, which Kerala has attained in the educational map of India is not the result of a sudden spirit of activity in the field of education in recent times, but the climax of enlightened policies followed by its rulers from very early days and the intellectual pursuits of people spread over several centuries.[67]

Educational experience from the past were not really taken as pointers in designing the educational plan/policy of the State. Thus the development has been rather unequal with few areas comprised in the erstwhile Malabar still lagging behind the State average. Whatever changes have come about in their educational status has been due to the amelioration of economic conditions, which has to a large extent changed the people's apathy toward education.

The role of private sector in the development which Kerala has achieved would not have been possible in the absence of vigorous efforts by community and social

65 Id
66 Report on Public Instruction, Madras Presidency, 1950 – 51
67 Menon Sreedhara A, *Cultural Heritage of Kerala – An introduction*, 160 (East West Publications Pvt. Ltd. 1978).

reform movements, of course, with the active support of the Government. However, in the end, having fulfilled its historical role, it seems to have turned into a powerful pressure group with strong vested interest, putting fetters on further educational development.[68]

The elementary education section is too important to be left to market forces alone and it should come under direct control and responsibility of the Government.[69] Whatever be the merits of NGOs, voluntary and private organization, they cannot be expected to replace Government investment in total in promoting institutional and infrastructural requirement for a major target like Education For All.[70] The ultimate responsibility will be that of the Government since in developing societies, the clientele of primary education come mostly from economically weaker sections, private activity guided by market signals alone cannot provide effective basis for its provider.[71]

From history, we find that Malabar was way behind Travancore and Cochin, one of the reasons being lack of Governmental support and active interest in the field of education. Where the Government has absolved itself of its duties, the result has been rather dismal as in Malabar region. In the region we find that rather than increasing its involvement, the Government was slowly distancing itself. In Malabar the elementary education was primarily left to local bodies and private agencies, but in Travancore and Cochin, both Government and private agencies took active interest. For example, to lessen the burden of provincial Government, the Local Fund Act was passed in 1871. In fact a major event in the educational history of Malabar was the delegation of the responsibility for financing elementary education to Local Boards.[72] Through this effort of decentralization, the Government was in fact shirking the responsibility of financing education, particularly elementary education of masses.[73] Likewise there are several illustrations of disinterest by the Government.

In Malabar, the educational policy followed by British did not have mass education in mind. The policy that it initiated was one, which was to cater to the elitist and urban sections of the society. Any educational pattern, which ignores the common masses, can be detrimental in the long run. Travancore – Cochin emphasized on

68 Salim Abdul et al., *Educational Development in India. The Kerala Experience since 1800 at.*2

69 Tharakan Michael P.K., Navanathan K, *Population projection and policy implication for education – A discussion with reference to Kerala*, W.P. 296, (Centre for Development Studies 1999).

70 Id at .7.

71 Id at.1

72 Report on Public Instruction in Madras Presidency, 1870/71, at.68-69.

73 Report on Public Instruction in Madras Presidency, 1875/76,at.52.

indigenous schools over English schools and primary education over secondary and higher education and hence the difference in educational expansion in the two regions. In Travancore, for example among the total number of schools, primary and vernacular schools had clear predominance. In 1901, vernacular schools constituted about 97% of total number of schools and pupils around 92%.[74]

The present trend in Kerala also seems to be ignoring the masses with greater participation of private sector and gradual withdrawal of the Government. The Government policy of shutting down uneconomic schools at the same time giving recognition to increasing number of private unaided schools has led to decreasing the accessibility for large number of children from the weaker sections of the society. Though total enrolment shows a sharp declining trend – enrolment in Government schools decreased from 18.69 lakhs in 1999 – 2000 to 17.08 lakhs in 2002 – 03. During the same period students enroled in private aided schools decreased from 31.39 lakhs to 30.29 lakhs. But students enrolled in private unaided schools increased from 2.41 lakhs to2.65lakhs.[75] This increase in enrolment is wholly from the urban and elitist community who can afford the exorbitant charges of such schools. Thus the State of Kerala instead of learning from the past mistakes seems poised to commit the same.

A unique policy initiative, which made an attempt at bridging the gulf between English medium schools and indigenous schools, was found in the Education Code of 1944. It introduced instruction in Malayalam in first three classes and English was to be introduced from fourth standard onwards. In such an approach, the child would have the benefit of instruction in the mother tongue in the early stages of education at the same time gain proficiency in English language too, thus putting them at par with other students studying in English medium schools. The present day situation reflects a widening gulf between State schools where the instruction is mostly in Malayalam and in other schools it is in English medium. This has led to an inferiority complex amongst the students studying in State schools who are largely from the weaker sections of society, as they are less conversant with English language, making them less proficient as compared to other students in tackling various competitive examinations, at a later stage. This can be changed, by adopting the pattern followed under the Education Code of 1944.

74 Salim Abdul et al., *Educational Development in India. The Kerala Experience since 1800* at .52.
75 GOK, *Economic Review, 2003* (State Planning Board 2004).

Educational achievement can only be attained and promoted on a massive scale by significant economic and social changes. This was quite prominent in Travancore where reforms such as Pandaravaka Pattom Proclamation in 1865 and Temple Entry Proclamation of 1937, which brought about far reaching changes. A classical example of social intervention at Governmental level, interventions, which took into consideration the reality of the situation and took particular care to assuage social, religious and caste feeling is illustrated below. There was a difficulty to find duly qualified teacher for schools meant exclusively for depressed and untouchables because upper caste teachers refused to teach students belonging to depressed castes. The Government responded to this situation by recruiting teachers from these communities itself, after imparting training to them. With this end in view, the Government instituted scholarship and other financial concessions to pupils from backward communities who appeared for training. Much later the Government also appointed women teachers to tide over the difficulty of drawing girls of these communities into the fold of education.[76] This kind of an exercise can be quite useful particularly in areas of Kasargod, Idukki, Wayanad, Malappuram, which are educationally backward and would require economic and social changes specific to the area and problems, to overcome this backwardness.

The role of community participation in advancing educational interest of the society has been proved in the historical development in Kerala. This was again prominent in the Travancore – Cochin areas. Involving the people of the locality in managing their own affairs had great results. But in Malabar this was totally absent. Community participation was part of policy initiatives earlier. But now it remains mainly scanty experiments carried out by non-Governmental organizations, parent – teacher associations etc. They were never made a part of serious policy initiatives. A recent study showed that schools in which the community participates on a regular basis are functioning better.[77]

'Right' based approach is what is required to universalize elementary education effectively. This has not been achieved so far, as can also be verified in the next chapter. The expansion that took place in Travancore and Cochin and even Malabar were largely due to very strong `right' based policy initiatives made by the Government. Free and compulsory education was encouraged from 1904 onwards. Orders were passed, Codes were enacted emphasizing this. For example, the Education Code of

76 Nagau v. Aiya, *Travancore State Manual, Vol. I and II* at 483

77 Report of the Joint Review Mission on Teacher Education in Kerala April 21-27, 2014 available athttp://www.teindia.nic.in/Files/jrm/2014-15/Kerala/JRM_Kerala.pdf (visited on 12-03-2015)

1909 made primary education free and compulsory in the State. The Code discouraged the existence of unaided schools. Fees were abolished in schools. Government also helped the parents by giving grants to provide the means of educating their children.[78] Even in Cochin, special incentives in the form of food, clothing, book, stationery, free meals were given. [79]Most importantly, the `grant-in-aid' system was used to implement various measures of universalisation in private schools also. Acts were also passed to implement free and compulsory education. The Kerala Education Act of 1958 passed after the formation of Kerala State did not make primary education free and compulsory.

The trend set by the earlier reformers, rulers, Government policies put Kerala way ahead of other States. Thus the Government after the formation of the State of Kerala really did not have to put in much extra efforts, to pull it along the same way. What were the drawbacks, in the earlier times still continued to be even later. For example, districts of the former Malabar region[80]are still lagging behind. Quality has been totally ignored

A law alone cannot make changes. The Central Government has enacted the Right to Education Act, 2009. All States are required to implement the same, keeping in mind the mandatory duty of the States to provide Free and Compulsory education for children below the age of 14 years underlined in Article 21A. A report on the status of implementation of the Act was released by the Ministry of Human Resource Development on the one year anniversary of the Act. The report admits that 8.1 million children in the age group six-14 remain out of school and there's a shortage of 508,000 teachers country-wide. [81]-

In Kerala the implementation of the right can be made effective only in the context of the lessons learnt from the past. However there have been no concrete efforts to symbolically adopt the measures of the past. Unplanned initiatives have made education a distant dream for several categories of children belonging to SC/ ST, disabled children etc. The universality concept has been eroded to a large extent. The schemes laid down have not been properly implemented and quality of education has deteriorated. State has the greatest duty/obligation to provide right to education to the masses. Where it has taken its role seriously, the results have been overwhelming. But with dwindling interests of State giving way to efforts by private agencies, there

78 Travancore Administration Report, 1921/22
79 Cochin Administration Report, 1917, at 94; 1920/21 at .46.
80 For example: Kannur, Kasargod, Malappuram, Palaghat.
81 See more at: http://righttoeducation.in/know-your-rte/about#sthash.cLbCz2Qp.dpuf

is an emergence of a plethora of problems that is maligning the educational system in Kerala. Quoting DISE (District Information System of Education) data, it says that Kerala, Tamil Nadu, Puducherry and Goa have more than 60% of private enrollment in primary schools. Andhra, Maharashtra and Karnataka are at 40 percent, while UP is at 50%. Ironically, the highest private sector enrollment is in Kerala, where successive governments claim commitment to welfare policies, particularly on education and health.[82] It is time for Kerala to rethink its strategy and learn from its past experiences and make right to education a reality for the present and the future generations.

82 G Pramod Kumar. Why the state of India's primary education is shocking ,available at http://www.firstpost.com/india/why-the-state-of-indias-primary-education-is-shocking-598011.html (visited on 12-02-2014)

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