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Articles

THE STANDARD OF CARE AND PROOF OF NEGLIGENCE IN MEDICAL PROFESSION – A SHIFT FROM *BOLAM* TO *BOLITHO*

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I. INTRODUCTION

Medicine heals, but this fact does not hold true for every patient. According to World Health Organization one in 10 hospital admissions leads to an adverse event and one in 300 admissions in death. Unintended medical errors have become a big threat to patient safety and WHO lists it among the top 10 killers in the world.

Right to life enshrined in article 21 of the Constitution of india includes right to health. Every medical professional whe ther at a government hospital or otherwise has the professional obligation to extent his services with due expertise for protecting life. However, medical professionals, despite prudence and care, commits errors in their day to day medical practice such as incorrect diagnosis, wrong treatment and lack of consent. This inherent fallibility in the medical profession is directly related to legal action. Previously, medical professionals were mainly worried about failing to save the life of a patient or providing satisfactory treatment to a sick person. Now, they are also worried about the legal consequences of their failure.

Ever since medical professionals have been brought within the ambit of the Consumer Protection Act 1986,[1] there has been a drastic increase in the number of cases filed against doctors. A good number of patients and their relatives take serious view of medical negligence. Day-by day, more and more medical negligence cases are registered against doctors and surgeons in Consumer Forum. However, it is a great mistake to think that doctors and hospitals are easy targets for dissatisfied patients. They are not liable for everything that goes wrong with the patients. They are only required to exercise reasonable care and skill in their treatment of patients. They will be held guilty of negligence only if they fall short of the standard of a reasonably skillful medical practitioner.

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[1] *Indian Medical Association* v. *V.P. Shanta*, AIR 1996 SC 550.

In a case against a doctor, the onus is upon the claimant to prove that the doctor was negligent and that his negligence caused the injury of which the complaint is made. It is he who has to prove that the doctor falls short of the standard of a reasonably skillful medical man. This has to be supported by expert evidence or medical literature on the subject. If the initial burden of negligence is discharged by the claimant, it would be for the doctors to substantiate their defence that there was no negligence. The aim of this paper is to explain how the law of medical negligence operates in India, taking into account the rising doctor-patient conflict and legal intervention.

II. Negligence: Duties And Liabilities Of Medical Professionals

A. Types of liabilities

If a doctor is negligent in the performance of his duties, he is open to both criminal and civil liability. The liability may arise under the Indian Medical Council Act 1956 (professional misconduct), under the Indian Penal Code 1860 (criminal liability) or under the Indian Contract Act 1872 or under the law of tort (civil liability). Medical practitioners are accountable to their own colleagues in the profession in case of violations of the code of medical ethics, to the society for criminal negligence and to the victims for tort and breach of contract.

Negligence is treated as a tort as well as a crime. As a tort it is actionable under the civil law and as a crime under the criminal law. Actions for damages in tort are filed in civil courts and after the coming into force of the Consumer Protection Act 1986, in consumer courts also. Criminal complaints are filed under the Indian Penal Code alleging rashness or negligence. In civil law only damages can be awarded by the court for the loss suffered by the complainant. However, in criminal law the doctor can also be sent to jail, apart from the damages imposed by the civil court or by the consumer forum.

B. Negligence

In common parlance negligence means carelessness, lack of proper care and attention. In law, negligence becomes actionable when it results in injury or damage. Negligence is the breach of a duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affair would

do. or doing something which a prudent and reasonable man would not do.[2] It is the omission to do what the law requires, or the failure to do anything in a manner prescribed by law.

To constitute negligence one has to prove a duty to take care, breach of that duty and the resulting damage. Therefore, the essential components of negligence are:

1. The existence of a duty to take care which the defendant owes to the plaintiff;
2. The breach of that duty towards the plaintiff; and
3. Damage or injury to the complainant as a result of such breach.

C. Medical Negligence

Medical negligence is the failure of a medical practitioner to provide proper care and attention and exercise those skills which a prudent, qualified person would do under similar circumstances. It is a commission or omission of an act by a medical professional which deviates from the accepted standards of practice of the medical community, leading to an injury to the patient. It may be defined as a lack of reasonable care and skill on the part of a medical professional with respect to the patient, be it his history taking, clinical examination, investigation, diagnosis, and treatment that has resulted in injury, death, or an unfavorable outcome. Failure to act in accordance with the medical standards in vogue and failure to exercise due care and diligence are generally deemed to constitute medical negligence.

III. Medical Negligence Under Civil Law

A. Extent of duty of care

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 tests and investigations, making a proper diagnosis, and carrying out careful treatment.

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[2] *Blyth* v. *Birmingham Waterworks Company*, (1856) EWHC exch J 65.

In 1969, the Supreme Court in *Laxman Balkrishna Joshi* v. *Trimbak Babu Godbole*[3] held:

> A person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for that purpose. He owes a duty of care in deciding whether to undertake the case, he owes a duty of care in deciding what treatment to give and, he owes a duty of care in the administration of that treatment. A breach of any of these duties gives a right of action for negligence to the patient.

This means that when a medical professional, who possesses a certain degree of skill and knowledge, decides to treat a patient, he is duty bound to treat him with a reasonable degree of skill, care and knowledge. If he falls below this, he will be held liable for negligence.

The Supreme Court has deprecated the practice of doctors and certain government hospitals to refuse even primary medical aid to the patients and referring them to other hospitals simply because they are medico legal cases[4]. The Court declared that every doctor whether at a government hospital or otherwise has the professional obligation to extend his service with due expertise for protecting life. The Court also directed that the decision should be given wide publicity so that every doctor wherever he be within the territory of India should forthwith be aware of this position.

B. Standard of Care in Medical Profession

A person who holds himself out ready to give medical advice and treatment, impliedly undertakes that he is possessed of skill and knowledge for the purpose and bring to exercise that skill and competence with reasonable care and diligence. He can be held liable on one of the two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. He should possess a certain degree of competence and should exercise reasonable care in discharge of his duties.[5]

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[3] AIR 1969 SC 128.

[4] *Pt. Parmanand Katara.* v. *Union of India*, AIR 1989 SC 2039.

[5] *Supra* n. 1.

Medical practitioners operate in spheres where success cannot be achieved in every case and very often success or failure depends upon factors beyond their control. In fact, even the most experienced medical practitioners may fail to detect the true nature of a disease or a condition. The courts consider this while determining the accountability of a medical practitioner when a case against a doctor arises. Consequently a doctor can only be held liable if his mistake was a result of absence of reasonable skill, knowledge and care expected on his part. The standard to be applied for judging ,whether a person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession.[6] The standard is that of a reasonable average.

In *Halsbury's Laws of England* the degree of skill and care required by a medical practitioner is stated as follows:

> The practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence, judged in the light of the particular circumstances of each case, is what the law requires, and a person is not liable in negligence because someone else of greater skill and knowledge would have prescribed different treatment or operated in a different way; nor is he 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 art, even though a body of adverse opinion also existed among medical men.
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> Deviation from normal practices is not necessarily evidence of negligence. To establish liability on that basis it must be shown (1) that there is a usual and normal practice; (2) that the defendant has not adopted it; and (3) that the course in fact adopted is one no professional man of ordinary skill would have taken had he been acting with ordinary care.[7]

A doctor has a legal duty to take care of his patient. Whenever a patient visits a doctor for treatment there is a contract by implication that the doctor will take reasonable care to treat him. If there is a breach of

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[6] *Jacob Mathew* v. *State of Punjab,* (2005)6 SCC 1.

[7] HALSBURY'S LAWS OF ENGLAND (4th edn.) vol.30, para 35.

that duty and if it results in injury or damage, the doctor will be held liable. The doctor must exercise a reasonable degree of care and skill in his treatment; but at the same time he does not and cannot guarantee cure. In other words, a doctor is only required to ensure due care in treating the patient. Liability in case of medical negligence arises not when the patient has suffered an injury but when the injury has resulted due to the conduct of the doctor which has fallen below the standard of reasonable care. The skill of medical practitioners may differ from one doctor to another. There may be more than one course of treatment which may be given for treating a particular disease. Medical opinion may differ with regard to the course of action to be taken for treating a patient. As long as the doctor acts in a manner which is acceptable to the medical profession and treats the patient with due care and skill, the doctor will not be guilty of negligence even if the patient does not survive or suffers a permanent ailment.

The law does not condemn the doctor when he only does that which many a wise and reasonable doctor so placed would do. He is not guilty of negligence if he acts in accordance with the practice accepted as proper by a responsible body of medical men skilled in that particular task. It only condemns him when he falls short of the accepted standards of that great profession. Courts would indeed be slow in attributing negligence on the part of a doctor if he has performed his duties to the best of his abilities and with due care and caution.[8] The doctor has a discretion in choosing treatment which he proposes to give to the patient and such discretion is relatively ampler in cases of emergency.[9] Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires.

There is however, a difference between standard of care on the one hand and degree of care on the other. In the case of a doctor, the standard of care expected of him remains the same in all cases, but the degree of care will be different in different circumstances. Thus, while the same standard of care is expected from a generalist and a specialist, the degree of care would be different. A higher degree of skill is expected from a specialist when compared to that of a generalist.

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[8] *Achutrao Haribhau Khodwa* v. *State of Maharashtra*, AIR 1996 SC 2377.
[9] *A.S.Mittal* v. *State*, AIR 1989 SC 1570.

What amounts to reasonable care changes with the advancement of science and technology. A doctor has to constantly update his knowledge in tune with the changing time with a view to improve the standard expected of him. At the same time, it may not be necessary for the doctor to know all the developments that have taken place in the field as he is supposed to have only reasonable knowledge.[10]

(i) Bolam Test

The basic principle relating to medical negligence is known as the *Bolam rule* . This was laid down by Justice McNair in *Bolam* v. *Friern Hospital Management Committee*[11] as follows:

> Where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill. It is well-established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art. In case of medical men, negligence means failure to act in accordance with the standards of reasonably competent medical men at the time. There may be one or more perfectly proper standards and if he confirms with one of these proper standards, then he is not negligent.

As per this case the test for determining medical negligence is the standard of the ordinary skilled man exercising and professing to have that special skill. But the core dispute in medical negligence cases which are defended often centers on just what does constitute proper practice or ordinary competence in relation to the procedure in dispute. The profession itself need not agree whether or not a particular practice amounts to adequate care of the patient's interest. In such cases McNair J. held:

> A doctor is not guilty of negligence if he has acted in accordance with the practice accepted as proper by a responsible body of medical men skilled in that particular art...Putting it the other way

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[10] *Supra* n.6.

[11] [1957] 2 All ER 118.

round, a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view.[12]

This statement shows that if a medical practice is supported by a responsible body of peers, then the *Bolam test* is satisfied and the practitioner has met the required standard of care in law. The test has been applied on numerous occasions in cases of medical litigation. A strong endorsement of this test was provided in the House of Lords by Lord Scarman in the case of *Maynard* v. *West Midlands Regional Health Authority*.[13] His Lordship stated:

> A judge's preference for one body of distinguished professional opinion to another also professionally distinguished is not sufficient to establish negligence in a practitioner whose actions have received the seal of approval of those whose opinions, truthfully expressed and honestly held, were not preferred. ...For in the realm of diagnosis and treatment negligence is not established by preferring one respectable body of professional opinion to another.

The *Bolam test* allows medical practitioners to set for themselves the legal standard by eliciting the support of 'a responsible body of medical men'. This test has been interpreted to mean that a doctor is not negligent if he has acted in accordance with a practice accepted as proper by a body of medical men who possess similar skills. It is immaterial that there exist another body of opinion that would not have adopted the approach taken by the said doctor. As long as there exist a "responsible body of medical opinion" that approves the actions of the doctor, the doctor escapes liability. In other words, the *test* allows doctors to escape liability by calling experts to testify that procedure adopted was consistent with practices accepted by a responsible body of medical opinion.

Bolam's test has been approved by full bench of the Supreme Court in *Jacob Mathew's* case in these words:

> 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

[12] *Ibid.*

[13] (1984)1 WLR 634 (HL).

> received by every shore it has touched as neat, clean and a well condensed one.[14]

The classical statement of law in *Bolam* case has been widely accepted as decisive of the standard of care required both of professional men generally and medical practitioners in particular. It has been invariably cited with approval before courts in India and applied to as touchstone to test the pleas of medical negligence. In tort, it is enough for the defendant to show that the standard of care and skill attained was that of the ordinary competent medical practitioner exercising an ordinary degree of professional skill. The fact that a defendant charged with negligence acted in accord with the general and approved practice is enough to clear him of the charge. Two things are pertinent to be noted. First, the standard of care, when assessing the practice as adopted, is judged in the light of knowledge available at the time (of the incident), and not at the date of trial. Secondly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that point of time on which it is suggested as should have been used.

(ii) Bolitho Case

In *Bolitho* v. *City and Hackney Health Authority*,[15] a two year old child, suffered catastrophic brain damage as a result of cardiac arrest due to respiratory failure. The senior pediatric registrar did not attend the child, as she ascribed to a school of thought that medical intervention, under those particular circumstances, would have made no difference to the end result. Liability was denied on the ground that even if she had attended, she would not have done anything that would have materially affected the outcome. This view was supported by an impressive and responsible body of medical opinion. Lord Wilkinson observed;

> The Court is not bound to hold that a defendant doctor escapes liability for negligent treatment or diagnosis just because he leads evidence from a number of medical experts who are genuinely of the opinion that the defendant's treatment or diagnosis accorded with sound medical practice. The use of these adjectives – responsible, reasonable and respectable – all show that the Court

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[14] *Supra* n. 6, para 20.
[15] (1997) 4 All ER 771 (HL).

has to be satisfied that the exponents of the body of opinion relied upon can demonstrate that such opinion has a logical basis. In particular in cases involving the weighing of risks against benefits, the Judge before accepting a body of opinion as being responsible, reasonable and respectable, will need to be satisfied that in forming their views the experts have directed their minds to the question of comparative risks and benefits, and have reached a defensible conclusion on the matter.

Lord Browne-Wilkinson speaks of cases and emphasizes later in his judgment that it will 'very seldom' be right for a judge to reach a conclusion that views genuinely held by competent experts are unreasonable. On the facts of the claim before him he concluded that there was no basis for dismissing the defendants' expert evidence as illogical. There were sound reasons not to intubate. However, the case laid down that it is not enough for the doctor charged with negligence to prove that he acted in accord with the approved practice to clear him. The practice he followed must has a logical basis so as to be responsible, reasonable and respectable. Thus even though there exists a body of professional opinion sanctioning the defendant's conduct, the defendant can still be held negligent if the judge is not satisfied that the opinion is reasonable or responsible. Ultimately the courts, and only the courts, are the arbiters of what constitute reasonable care. Doctors cannot be judges in their own cause. This is likely to shift the *Bolam's* "accepted practice" approach to one whereby the standard of care is set by the court on the basis of "expected practice."

Recently, Justice S.B.Sinha in *Malay Kumar Ganguly* v. *Dr. Sukumar Mukherjee*[16] case has preferred *Bolitho test* to *Bolam test*. The Supreme Court redefined medical negligence saying that the quality of care to be expected of a medical establishment should be in tune with and directly proportional to its reputation. The Court extended the ambit of medical negligence cases to include overdose of medicines, not informing patients about the side effects of drugs, not taking extra care in case of diseases having high mortality rate and hospitals not providing fundamental amenities to the patient. The decision also says that the court should take into account patient's legitimate expectations from the hospital or the concerned specialist doctor.

In this case the patient, a lady aged about 36 years, developed fever along with skin rashes. A doctor was contacted, who after examination of the patient assured of a quick recovery and advised her to take rest but did not prescribe any medicine. As the skin rashes reappeared more aggressively, the doctor was again contacted who diagnosed that she was suffering from Anglo- Neurotic Oedema with allergic vasculitis and prescribed long acting steroid, depomedrol injection 80 mg twice daily for three days and wysolone which is also a steroid having the composition of Methyl predinosolone. As the condition of the patient deteriorated rapidly from bad to worse despite the administration of the said medicines, she was admitted to the hospital wherein it was found by the attending doctors that the patient has been suffering from Toxic Epidermal Necrolysis (TEN). Doctors in the hospital prescribed a quick acting steroid prednisolone at 40 mg three times daily. The condition of the patient continued to deteriorate further. She was shifted to Breach Candy Hospital, Mumbai wherein she breathed her last after 10 days. The cause of the death was found to be septicemia which happened as a result of profound immuno-suppression, caused by over use of steroid and lack of supportive therapy and care on the part of attending doctors.

Complainant, the husband of the deceased, apart from filing criminal case and lodging a complaint in the West Bengal Medical Council, filed a complaint against the doctors and hospital in the National Consumer Dispute Redressal Commission (NCDRC) claiming a total compensation of more that Rs. 77 crores. The NCDRC dismissed the complaint. Aggrieved complainant came in appeal to the Supreme Court.

He pleaded that Doctors from the very beginning should have referred the deceased to a Dermatologist as she had skin rashes all over her body. Doctors had made a wrong diagnosis of the deceased's illness and prescribing a long acting corticosteroid depomedrol injection at dose of 80 mg twice daily was wrong which led to her death. He also asserted that no supportive therapy which is imperative in TEN cases was given in the hospital. Doctor's on the other hand, alleged that there had been no negligence or deficiency in service on their part as they prescribed medicines as per the treatment protocol noted in the text books.

After a protected trial and hearing and on consideration of the evidence and material produced on record, the Supreme Court decided

that doctors and hospital were negligent in treating the patient. The court found that there is cleavage of opinion on the medical protocol for treating TEN patients. The cleavage of opinion is between pro-steroid and anti-steroid group. The court, in view of difference of opinion amongst experts, proceed on the assumption that steroid can be administered to the TEN patients. However, treatment of the patient was not found to be in accordance with the medical protocol of pro-steroid group. The treatment line followed by the doctor in administering 80 mg of Depomedrol injection twice daily is not supported by any school of though. Those who support steroid for TEN treatment do not recommend long acting steroid which Depomedrol is. The proper dose as per the manufacturer of Depomedrol is 40-120 mg once in 1-4 week interval – 80 mg twice daily is highly excessive.

The court is not bound to hold that a doctor escape liability for negligent treatment or diagnosis just because he leads evidence from a number of medical experts who are genuinely of opinion that his treatment or diagnosis accorded with sound medical practice. The court has to be satisfied that the exponents of the body of opinion relied upon can demonstrate that such opinion has a logical basis. The judge before accepting a body of opinion as being responsible, reasonable and respectable, will need to be satisfied that, in forming their views, the experts have directed their minds to the question of comparative risks and benefits and have reached a defensible conclusion on the matter.

It was observed that the law on medical negligence also has to keep up with the advances in the medical science as to treatment as also diagnostics. Doctors increasingly must engage with patient during treatment especially when the line of treatment is a contested one and hazards are involved. Standard of care in such cases will involve duty to disclose to patients about the risks of serious side effects or about alternative treatment. The standard of duty to care in medical services depends on the position and stature of the doctors concerned as also the hospital. The premium stature of services raises a legitimate expectation. If representation is made by a doctor that he is a specialist and ultimately it turns out that he is not, deficiency in medical services would be presumed.

The court found the doctors to be negligent and deficient in providing medical services as:

(1) Patient had rashes all over her body, the doctor should have referred her to a dermatologist.

(2) Doctor wrongly diagnosed the disease as vasculitis.

(3) The doctor prescribed "Depomedrol" 80 mg twice a day for three days which is certainly a higher dose in case of a TEN patient and the maximum recommended usage by the drug manufacturer has also been exceeded. This is a wrongful act on his part. The immediate adverse effect of overuse of this steroid is immunosupression and chance of infection.

(4) According to general practice, long acting steroids are not advisable in any clinical condition. Instead of prescribing a quick acting steroid, the prescription of a long acting steroid without foreseeing its implications is an act of negligence on their part without exercising any care or caution.

(5) After prescribing a steroid, the effect of immunosuppression caused due to it, ought to have been foreseen. The doctors fail to take notice of said consequences.

(6) The doctors in hospital, after taking over the treatment of the patient did not take any remedial measure against the excessive amount of Depomedrol that was already stuck in the patient's body. On the other hand, they prescribed an excessive dose of quick acting steroid.

(7) Aggressive supportive therapy that is necessary for TEN patients was not provided in the hospital.

(8) The hospital is liable to prevent nosocomial infections specially in the cases where the patient has high risk of infection due to the nature of the disease suffered or immunosupression caused due to use of steroids.

In the opinion of Court for the death of the patient although doctors and the hospital were negligent, it cannot be said that they should be held guilty for criminal negligence. For an act to amount to criminal negligence, the degree of negligence must be of a gross or a very high degree. A negligence which is not of such a high degree may provide ground for action in civil law but cannot form the basis of prosecution.

The court remitted the case back to the NCDRC for the purpose of determination of quantum of compensation. NCDRC finally awarded a compensation of Rs. 1,55,58,750 to be paid by the doctors and the hospital.

In *V.Kishan Rao* v. *Nikhil Super Speciality Hospital*[17] the Supreme Court expressed the opinion that *Bolam test* needs to be reconsidered in India in view of Article 21, which guarantees right to medical treatment and care. However, the Court expressed its inability because of the binding precedent of *Jacob Mathew*[18] which approved the test.

In *Kusum Sharma* v. *Batra Hospital and Medical Research Centre*,[19] the apex court reiterated the legal position after taking survey of catena of case law. In the context of issue pertaining to criminal liability of a medical practitioner, Hon'ble Mr. Justice Dalveer Bhandari speaking for the Bench, laid down that the prosecution of a medical practitioner would be liable to be quashed if the evidence on record does not project substratum enough to infer gross or excessive degree of negligence on his/her part.

In this case appellant's husband was admitted to the respondent hospital. He was diagnosed to be having tumor in the left adrenal which was suspected to be malignant. Surgery was performed by adopting anterior approach and left adrenal was removed. During the surgery, the body of the pancreas was damaged which was treated and a drain was fixed to drain out the fluids. He was discharged from the hospital with an advice to follow up and for change of the dressing. He did not visit the respondent hospital for follow up. Instead, he took treatment from other hospitals. After few months, he died on account of pyogenic meningitis. After his death, appellant filed a complaint before the National Commission claiming compensation attributing medical negligence in the treatment by the doctors at respondent hospital. Her main plea was that the anterior approach adopted at the time of first surgery was not the correct approach, surgery should have been done by adopting 'posterior' approach for removal of left adrenal tumor. National commission found no merit in the claim of the appellant taking into consideration the medical literature and evidence of

[17] (2010) 5 SCC 513.
[18] *Supra* n. 6.
[19] (2010) 3 SCC 480.

eminent doctors of AIIMS confirming adoption of 'anterior' approach in view of inherent advantages of the approach. Against that order the appellant came in appeal to the Supreme Court.

Dismissing the appeal, the court held that in the instant case, the doctors who performed the surgery had reasonable degree of skill and knowledge and they in good faith and within medical bounds adopted the procedure which in their opinion was in the best interest of patient. Doctors could not be held to be negligent where no cogent evidence to prove medical negligence was produced by the appellant. The medical texts speak of both the approaches for adrenalectomy as adopted in the present case. Nowhere has the appellant been able to support her contention that posterior approach was the only possible and proper approach and respondent was negligent in adopting the anterior approach.

(iii) Consent: Disclosure of Information

The legal precedent for consent arises from the case *Schloendorff* v. *Society of New York Hospital*[20] in 1914 in New York state, in which a surgeon failed to take consent for hysterectomy. Benjamin Cardoza, J. observed:

> Every human being of adult years and sound mind has a right to determine what shall be done with his own body and the surgeon who performs operation without his (patient's) consent commits assault for which he is liable in damages.

It is a moral obligation of medical professionals to disclose the necessary information to their patients, though the nature and extent of the disclosure and the legal obligation varies from one jurisdiction to another and from one country to another. A legally valid consent requires the patient to be provided with adequate information by the physician about the proposed course of treatment, its probable complications, possible alternatives and their consequences, and so on.

Various criteria have been proposed as both legal and moral standards for adequate disclosure of information, like the reasonable doctor standard(what a reasonable doctor thinks that a patient should know), the reasonable man standard (what a reasonable man under similar

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[20] 105 NE 92 (1914).

circumstances would like to know), and the subjective standard (what a particular patient, rather than a hypothetical reasonable person, considers adequate information).[21] *Natanson* v. *Kline*,[22] held that it was the amount of information that a reasonable doctor would provide. *Canterbury* v. *Spence*,[23] held it was that amount of information which a reasonable patient would need to make a medical decision. The court observed that;

> A risk is...material when a reasonable person, in what the physician knows or should know to be the patient's position, would be likely to attach significance to the risk or cluster of risks, in deciding whether or not to forego the proposed therapy. The doctor, therefore, is required to communicate all inherent and potential hazards of the proposed treatment, the alternative to that treatment, if any, and the likely effect if the patient remained untreated. This stringent standard of disclosure was subjected to only two exceptions:
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> (i) Where there was a genuine emergency, e.g. the patient was unconscious; and
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> (ii) Where the information would be harmful to the patient, e.g. where it might cause psychological damage, or where the patient would become so emotionally distraught as to prevent a rational decision.

The English law regarding disclosure of risk follows the *Bolam* principle. In *Sidaway* v. *Board of Governors of the Bethlem Royal Hospital and the Mandsley Hospital*,[24] the House of Lords adopted the *Bolam test* and followed the reasonable doctor standard regarding the duty of disclosure of risk of proposed treatment. It was considered that full disclosure of risk according to the principles of informed consent is not an appropriate test for liability for negligence. The *Canterbury* doctrine was rejected as it was thought to be impractical and meaningless because it did not give sufficient value to the realities of the doctor-patient relationship. Lord Bridge, however, made it clear that it is the duty of the doctor to answer correctly and fully all the queries of the patient. He further held that remote risk of damage (referred to as risk at 1 or 2 per

[21] T.L. Beanchamp and J.F. Childress, PRINCIPLES OF BIOMEDICAL ETHICS (5th ed., New York, 2001) p. 81.
[22] (1960) 186 Kan. 393, 350 p. 2d 1093.
[23] (1972) 464 F 2d. 772.
[24] (1985) 1 All ER 643.

cent) need not be disclosed. However, if the risk of damage is substantial (referred to as 10 per cent risk), it may have to be disclosed. However, Lord Woolf, in *Pearce* v. *United Bristol Healthcare NHS Trust,*[25] accepted the 'reasonable patient test' and the 'doctrine of informed consent' into the English law. Citing both *Sidaway* and *Bolitho*, it was observed that:

> If there is a significant risk which would affect the judgment of a reasonable patient, then in the normal course it is the responsibility of doctor to inform the patient of the significant risk, if the information is needed so that the patient can determine for him or herself as to what course he or she should adopt.

The Apex Court of Australia has also started moving away from the *Bolam test* and has started accepting the concept of informed consent. It observed, in *Rogers* v. *Whitaker,*[26] that the question whether the patient has been given all relevant information to choose between undergoing and not undergoing the treatment does not depend on medical standard or practices. This is a question for the court to decide and the duty of deciding it cannot be delegated to any professional or group in the community. The Canadian courts are also following the reasonable patient approach.[27]

It was well establish that consent which is not properly informed, is not real consent. Once the patient had been informed, in broad terms, of the nature of intended treatment/procedure and had given his consent, the patient cannot state that there was a lack of real consent.[28]

Recently, a three judges 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.[29] The question before the court was whether a surgeon can legally perform one operation after taking consent for another. It was alleged that the patient was admitted to a private hospital for 'diagnostic and operative laparoscopy, but instead a 'hysterectomy (removal of uterus) and bilateral salpingo-oopherectomy'(removal of fallopian tubes) was performed, rendering her incapable of bearing any children in the future.

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[25] (1998) 48 BMLR 118.
[26] (1992) 109 ALR 625.
[27] *White* v. *Turner*, (1981) 120 DLR (3d) 269.
[28] *Chatterton* v. *Gerson*, (1981) QB432.
[29] *Samira Kohli* v. *Prabha Manchanda*, (2008) 2 SCC 1.

Completely forbidding additional surgery without consent from the patient, the Court summarized the various aspects of consent in the following words:

(1) 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 he is consenting to.

(2) The 'adequate information" to be furnished by the doctor (or a member of his team) who treats the patient, should enable the patient to make a balanced judgment as to whether he should submit himself to the particular treatment or not. This means that the doctor should disclose (a) nature and procedure of the treatment and its purpose, benefits and effect; (b) alternatives if any available; (c) an outline of the substantial risks; and (d) adverse consequences of refusing treatment. But there is no need to explain remote or theoretical risks involved, which may frighten or confuse a patient and result in refusal of consent for the necessary treatment. Similarly, there is no need to explain the remote or theoretical risks of refusal to take treatment which may persuade a patient to undergo a fanciful or unnecessary treatment. A balence should be achieved between the need for disclosing necessary and adequate information and at the same time avoid the possibility of the patient being deterred from agreeing to a necessary treatment or offering to undergo an unnecessary treatment.

(3) 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.

(4) There can be a common consent for diagnostic and operative procedures where they are contemplated. There can also be a common consent for a particular surgical procedure and an additional or further procedure that may become necessary during the course of surgery.

(5) 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* 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.

(iv) Error of judgment

Error of judgment on the part of a doctor (e.g. wrongful diagnosis, wrong treatment) would tantamount to negligence if it is an error which would not have been made by a reasonably competent professional medical man acting with ordinary care. Very often, in a claim for compensation arising out of medical negligence, a plea is taken that it is a case of bona fide mistake. This may be excusable under certain circumstances but a mistake which would tantamount to negligence will not be pardoned.

In the case of *Whitehouse* v. *Jordan*[30] an obstetrician had pulled too hard in a trial of forceps delivery and had thereby caused the plaintiff's head to become wedged with consequent asphyxia and brain damage. The House of Lords held that the obstetrician was guilty of negligence. The court observed:

> The true position is that an error of judgment may or may not be negligent; it depends on the nature of the error. If it is the one that

would not have been made by a reasonably competent professional man professing to have the standard and type of skill that the defendant holds himself out as having and acting with ordinary care then it is negligence. If on the other hand, it is an error that such a man, acting with ordinary care might have made then it is not negligence.

In *M/S Spring Meadows Hospital* v. *Harjot Ahluwalia*[31] the Supreme Court observed that gross medical mistake would always result in a finding of negligence. Use of wrong drug or wrong gas during the course of aneasthetic will frequently lead to the imposition of liability and in some situations even the principle of *res ipsa loquitur* can be applied. Even delegation of responsibility to another may amount to negligence in certain circumstances. A consultant can be negligent where he delegates the responsibility to his junior with the knowledge that the junior was incapable of performing his duties properly.

In *Achutrao Haribhau Khodwa* v. *State of Maharashtra*[32] a mop was left inside the lady patient's abdomen during an operation. Peritonitis developed which led to a second surgery being performed on her, but she could not survive. Liability for negligence was fastened on the surgeon because no valid explanation was forthcoming for the mop having been left inside the abdomen of the lady.

In *Laxman Balkrishna Joshi's*[33] case the death of the patient was caused due to shock resulting from reduction of the fracture attempted by the doctor without taking the elementary precaution of giving anaesthesia to the patient. The doctor was held guilty of negligence and liable to pay damages.

In *Vinitha Ashok* v. *Lakshmi Hospital*[34] removal of pregnancy was done without ultrasonography and uterus of the patient had to be removed. There was expert evidence to indicate that ultrasonography would not have established ectopic pregnancy but some text books indicated otherwise. The general practice in the area in which the doctor practiced

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[31] AIR 1998 SC 1801.
[32] AIR 1996 SC 2377.
[33] *Supra* n. 3.
[34] AIR 2001 SC 3914.

was not to have ultrasonography done. Therefore no negligence was attributed on this ground even if two views could be possible.

In *Dr. P.N. Rao* v. *G. Jayaprakasu*[35] a very promising young boy of 17 was admitted in a government hospital for removal of tonsils. As a result of the negligence in the administration of anaesthesia during the operation, the patient became victim of cerebral anoxia making him dependant on his parents. The anesthetist, the surgeon and the government were all held liable for damages to the plaintiff.

When an injection meant for intramuscular use was administered as an injection intravenous in a government hospital resulting in death of the patient, the government was held liable in public law for damages under Article 226 of the constitution[36].

In *Nizam's Institute of Medical Sciences* v. *Prasanth S. Dhananka*[37], the complainant who was then an engineering student suffered from recurring fever. The X ray examination revealed a tumour in left hemithorax with erosion of ribs and vertebra. Even then without having MRI or Myelography done, cardiothoracic surgeon excised the tumour and found vertebral body eroded. Operation resulted in acute paraplegia of the complainant. MRI or Myelography at the pre-operation stage would have shown necessity of a neurosurgeon at the time of operation and the paraplegia perhaps avoided. Consent was not taken for removal of tumour but only for excision biopsy. The hospital and the surgeon were held liable for negligence.

Thus, a doctor who is charged with negligence can absolve himself from liability if he can prove that he acted in accordance with the general and approved practice. He will be held liable only if the judgment is so palpably wrong as to imply an absence of reasonable skill and care on his part.

D. Consumer Protection Act, 1986

Civil courts have been entertaining complaints of medical negligence from patients or their representatives and have been awarding compensation/

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[35] AIR 1990 AP 207.
[36] *Bholi Devi* v. *State of J&K*, AIR 2002 SC 65.
[37] (2009) 6 SCC 1.

damages to them for the injury suffered by them. However, the procedure in civil proceedings is tardy, expensive and time-consuming. Because of this, many of the aggrieved consumers stayed away from the ordinary courts and suffered in silence. Complainants who went to the courts for relief generally had to wait for years to get justice and that too after spending heavily on advocates and towards court fees. The procedure is also cumbersome and time-consuming making litigation costly and troublesome for ordinary person who constitute the majority of the population. The Consumer Protection Act, 1986 was enacted to remedy this situation by providing a simple, inexpensive and expeditious mechanism for redressing the genuine grievances of consumers of goods and services.

After the Consumer Protection Act, 1986 came into force, some of the consumer courts in various states started receiving complaints from patients or their representatives regarding deficiency in service on the part of hospitals and doctors. The complainants generally argued, *inter alia*, that: (i) the patients who paid for the services of doctors/hospitals/ nursing home are consumers as defined in the Act; (ii) the definition of the expression 'service' under the Act that "service means service of any description which is made available to potential users" is wide enough to cover services rendered by hospitals and doctors also; and (iii) the Act provides for payment of compensation to the consumers (patients) for the injury suffered by the consumer due to the negligence of the opposite party (doctors/hospitals).

The doctors/hospitals on the other hand argued, *inter alia*, that: (i) the services rendered by the medical professionals are specifically excluded from the purview of the Act as the exclusive part of the definition specifically excludes 'the service rendered under a contract of personal service' and that the services rendered by them are under a contract of personal service; and (ii) the consumer courts (the District Forum, the State and National Commission) are not competent to judge the issue of negligence in connection with medical services as they are not a body of professionals having expertise in medical services.

These arguments along with a lot of other issues were taken up before the apex court by the Indian Medical Association for a final decision. The Supreme Court in a landmark judgment delivered in *Indian Medical*

Association v. *V.P. Shantha*[38] clarified the various points raised before it. The court upheld the constitutional validity of the Consumer Protection Act and held that doctors/hospitals and nursing homes fell within the scope of the Act as the services rendered by them including the rendering of consultation, diagnosis and treatment – both medical and surgical – would come under the definition of service under the Act. However, where a doctor or hospital renders service free of charge to every patient or under a contract of personal service, a patient availing of such free services will not be a consumer.

The landmark judgment of Apex Court in *Laxman Thamappa Kotgiri* v. *G.M. Central Railway*[39] has given the railway employees the right of consumers while availing treatment in a railway hospital free of cost. Similarly, the beneficiaries of ESI Corporation[40] and CGHS[41] were also received the right to sue the doctors working in ESI hospital and CGHS approved hospitals and dispensaries even if the treatment is free of cost. This is in stark contrast to earlier judgments wherein free treatment was considered outside the purview of Consumer Protection Act.

IV. CRIMINAL LIABILITY FOR MEDICAL NEGLIGENCE

A criminal liability arises when it is proved that the doctor has committed an act or made omission that is grossly rash or grossly negligent which is the proximate, direct or substantive cause of patient's death. Under Section 304 A of the Indian Penal Code, a doctor is punishable for criminal negligence[42]. This offence is cognizable, bailable and non-compoundable. It is cognizable in the sense that the offender can be arrested by a police officer without warrant. However, the police officer cannot act unreasonably as he is required to take an objective decision on the basis of either reasonable suspicion or credible information. It is a bailable offence and as such the doctor who is arrested is entitled to be released on bail as a matter of right. It is non-compoundable in the sense that the offence can not be compounded by compromise between the suspected

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[38] *Supra* n. 1.

[39] (2007) 4 SCC 596.

[40] *Kishore Lal* v. *Chairman*, ESIC, (2007) 4 SCC 579.

[41] *Jagdish Kumar Bajpai* v. *Union of India*, 2007 MLR 175 (NC).

[42] Under this section, "whoever causes the death of any person by doing any rash or negligent act amounting to culpable homicide is punishable with imprisonment for a term that may extend up to two years or with fine or with both."

offender and the victim or his representative. Other provisions in the Indian Penal Code which may be invoked are Section 337 (rash or negligent act resulting in simple hurt) and Section 338 (rash or negligent act resulting in grievous hurt).

Criminal liability may also arise under a number of other statutes such as the Indian Medical Council Act, 1956, the Dentists Act, 1948, the Medical Termination of Pregnancy Act, 1971, the Preconception and Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, the Transplantation of Human Organs Act, 1994 and other penal laws enacted by the Parliament and State legislatures from time to time.

However, criminal law has invariably placed the medical professionals on a pedestal different from ordinary mortals. The Indian Penal Code sets out a few vocal examples. Section 88 in the Chapter on General Exceptions provides exemption for acts not intended to cause death, done by consent in good faith for person's benefit. Section 92 provides for exemption for acts done in good faith for the benefit of a person without his consent though the acts cause harm to a person and that person has not consented to suffer such harm. Section 93 saves from criminality certain communications made in good faith.

The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of *mens rea* must be shown to exist. 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.[43]

The law relating to criminal negligence was laid down by Straight J., in the case of *Reg* v. *Idu Beg*,[44] where the court said that criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which having regard

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[43] *Supra* n. 6.

[44] 1881 (1) 3 All 776.

to all the circumstances of the case out of which the charge has arisen, it was the imperative duty of the accused person to have adopted.

The court in *R.* v. *Prentice & Sullman*[45] and *R.* v. *Adomoko*[46] has settled the law as to how to determine criminal negligence in medical practice as :

a) Indifference to an obvious risk of injury to health;

b) Actual foresight of the risk coupled with the determination nevertheless to run it;

c) An appreciation of the risk coupled with an intention to avoid it, but the attempted avoidance involves a very high degree of negligence;

d) Inattention to a serious risk which goes beyond "mere inadvertence" in respect of an obvious and important matter which the doctor's duty demanded, he should address.

In *John Oni Akirele* v. *King*[47] case a duly qualified medical practitioner gave to his patient the injection of sobita which consisted of Sodium Bismuth Tartrate as given in the British Pharmacopeia. However, what was administered was an overdose of Sobita. The patient died. The doctor was accused of manslaughter, reckless and negligent act. He was convicted. Their Lordships quashed the conviction on a review of judicial opinion and an illuminating discussion on criminal negligence. What their Lordships have held can be summed up as under:

(i) That a doctor is not criminally responsible for a patient's death unless his negligence or incompetence went beyond a mere matter of compensation between subjects and showed such disregard for life and safety of others as to amount to a crime against the state;

(ii) That the degree of negligence required is that it should be gross, and that neither a jury nor a court can transform negligence of a lesser degree into gross negligence merely by giving it that appellation.

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[45] (1993) 4 Med LR 304.
[46] (1994) 3 All ER 79 (HL).
[47] AIR 1943 PC 72.

There is a difference in kind between the negligence which gives the right to compensation and the negligence which is a crime.

(iii) It is impossible to define culpable or criminal negligence, and it is not possible to make the distinction between actionable negligence and criminal negligence intelligible except by means of illustrations drawn from actual judicial opinion. The most favourable view of the conduct of an accused medical man has to be taken, for it would be most fatal to the efficiency of the medical profession if no one could administer medicine without a halter round his neck.

Their Lordships refused to accept the view that criminal negligence was proved merely because a number of persons were made gravely ill after receiving an injection of Sobita from the appellant coupled with a finding that a high degree of care was not exercised. Their Lordships also refused to agree with the thought that merely because too strong a mixture was dispensed once and a number of persons were made gravely ill, criminal degree of negligence was proved.

In *Dr. Krishna Prasad* v. *State of Karnataka*[48] case the patient was admitted for a delivery in a nursing home. The doctor decided caesarian operation under spinal anesthesia. The blood pressure began to fall soon after administering spinal anesthesia and ultimately the patient died. The criminal proceeding against the anesthetist was started on the allegation that he was not an anesthetic expert and that the test dose of spinal xylocaine injection was not given to the patient. The Court quashed the criminal proceeding on the ground that the doctor holding degrees like MBBS, FRCs and DGO is qualified to administer anesthesia and that the omission to give test dose does not amount to rashness or negligence.

Where a Kaviraj who was not a qualified surgeon cut the internal piles of a patient by an ordinary knife in consequence of which the patient died of haemorrhage, Kaviraj was convicted under section 304A IPC for his rash and negligent act. His plea for the benefit of Section 88 IPC saying that what he did was in good faith and he had obtained the consent of the patient and in the past had performed several operations of the same type was unacceptable to the court.[49]

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[48] (1970) 3 SCC 904.

[49] *Sukaroo Kaviraj* v. *Emperor*, ILR (1887) Cal 566.

Another similar case is that of *Dr. Khusal Das Pamman Das* v. *State of M.P.*[50] where it was held that the fact that a person totally ignorant of science of medicine or practice of surgery undertakes a treatment or performs an operation is very material in showing his gross ignorance from which an inference about his gross rashness and negligence in undertaking the treatment can be inferred. In this case the accused, a Hakim, not educated in allopathic treatment and having no idea about the precautions to be taken before administering the injection and effects of the procane penicillin injection, gave it to the deceased. This act was taken to be clearly rash and negligent within the meaning of Section 304A of IPC 1860.

In *Jaggankhan* v. *State of M.P.*[51], a homeopathic doctor gave to his patient who was suffering from guinea worms, twenty-four drops of stramonium and a leaf of datura without contemplating the reaction such a medicine could cause, resulting in the death of the patient. The doctor was held guilty of criminal negligence.

In *Poonam Verma* v. *Ashwin Patel*[52] a registered medical practitioner in homeopathy was held guilty of negligence *per se* for prescribing allopathic medicines to a patient resulting in her death, the court ordered the Medical Council of India and the State Medical Council to consider the feasibility of initiating appropriate action under Section 15(3) of the Indian Medical Council Act, 1956 for practicing allopathic system of medicine without possessing the requisite qualifications.

The Supreme Court in *Dr. Suresh Gupta* v. *Govt. of NCT*[53] has declared that for fixing criminal liability on a doctor or surgeon, the standard of negligence required to be proved should be so high as can be described as "gross negligence" or "recklessness." The court, in this case, held:

> Where a patient dies due to the negligent medical treatment of the doctor, the doctor can be made liable in civil law for paying compensation and damages in tort and at the same time, if the degree of negligence is so gross and his act was so reckless as to

[50] AIR 1960 MP 50.
[51] (1965) 1 SCR 14.
[52] (1996) 4 SCC 332.
[53] (2004) 6 SCC 422.

endanger the life of the patient, he would also be made criminally liable for offence under Section 304-A IPC.

In this case, the patient was operated by the appellant plastic surgeon for removing his nasal deformity resulting in the death of the patient. It was alleged that the death was due to 'asphyxia resulting blockage of respiratory passage by aspirated blood consequent upon surgically incised margin of nasal septum'. The cause of the death was found to be not introducing a cuffed endo-tracheal tube of proper size so as to prevent aspiration of blood from the wound in the respiratory passage. The court held that the carelessness or want of due attention and skill alleged in this case cannot be described to be so reckless or grossly negligent as to attract criminal liability.

The principle laid down in *Dr. Suresh Gupta* has been upheld in *Jacob Mathew* v. *State of Punjab*[54], where the court observed:

> 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.

As an illustration, the court said that a doctor who administers a medicine known to or used in a particular branch of medical profession impliedly declares that he has knowledge of that branch of science and if he does not, in fact, posses that knowledge, he is *prima facie* acting with rashness and negligence.

In this case, it was contended by the complainant that the death of his father has occurred due to the carelessness of doctors and nurses and non-availability of oxygen cylinder and also because of the fixing up of an empty cylinder on his mouth due to which his breathing had totally stopped.

Rejecting the charge of criminal negligence, the court held that the averments made in the complaint, even if held to be proved, did not

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[54] *Supra* n. 6.

make out a case of criminal rashness or negligence on the part of the accused appellant. The court further observed:

> It is not the case of the complainant that the accused appellant was not a doctor qualified to treat the patient whom he agreed to treat. It is a case of non-availability of oxygen cylinder either because of the hospital having failed to keep available a gas cylinder or because of the gas cylinder being found empty. Then, probably the hospital may be liable in civil law or may be not, but the accused-appellant cannot be proceeded against under S. 304-A IPC.[55]

The Court issued the following guidelines which should govern the prosecution of doctors in future:

(i) A private complaint may not be entertained unless the complainant has produced prima facie evidence before the court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor.

(ii) The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission obtain an independent and competent medical opinion preferably from a doctor in government service, qualified in that branch of medical practice who can normally be expected to give an impartial and unbiased opinion applying the *Bolam test* to the facts collected in the investigation.

(iii) A doctor accused of rashness or negligence, may not be arrested in a routine manner (simply because a charge has been levelled against him). Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigating officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld.[56]

In *Dr. Saroja Dharampal Patil* v. *State of Maharashtra*[57], a pregnant woman was taken to the hospital of the applicant where she

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[55] *Id.*, para 53.
[56] *Id.*, para 52.
[57] Manu/MH/1263/2010.

delivered a child by a normal delivery through vertex. The applicant noticed that patient was bleeding profusely after the placenta had come out. Since, inspite of immediate treatment, the bleeding could not be stopped, she was shifted to another hospital. There also the prognosis continued and the flow of bleeding could not be controlled inspite of medical treatment. She died ultimately due to inversion of the uterus. The father of the deceased gave statement to the police that he had no grievance against anyone about the death of his daughter. After two day, however, he lodged an FIR alleging that deceased died as a result of negligence of the applicant while treating her. The applicant sought quashing of the chargesheet filed in pursuance of the said FIR.

The investigating officer obtained the opinion of the independent medical authority which purports to show that the applicant was duly trained for conducting delivery and, therefore, was competent to undertake the work of conducting delivery of deceased, gave necessary treatment to the patient while conducting the delivery, medicines administered to the patient were proper and correct treatment was given and there was no undue delay committed by the applicant in referring the patient to obtain treatment at the higher centre when the haemorrhagic flow could not be stopped inspite of immediate treatment. The court after stating the general principles relating to medical negligence as laid down in *Jacob Mathew* v. *State of Punjab,*[58] and reiterated in *Kusum Sharma* v. *Batra Hospital and Medical Research Centre*[59] explained the rule for holding medical practitioner liable and held that no medical negligence was committed by the applicant.

In *Dr. Renu Jain* v. *Savitri Devi,*[60] the complainant became pregnant after six years of sterilization operation. She alleged that the applicant assured the complainant that latest technologies were available in her Nursing Home and she was specialist of surgery of sterilization. Taking cognizance of her complaint, the applicant was summoned under Sections 337, 420, 467, 471 of IPC. Applicant approached the court for quashing that proceeding. She pleaded that it might be a case of failure of the operation but since there was no material to show that there was any

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[58] *Supra* n. 6.
[59] *Supra* n. 19.
[60] Manu/UP/1242/2010.

negligence on her part in conducting the surgery for which she was qualified, she cannot be blamed. Further that there was no evidence of cheating or any false assurance. The court held that the applicant is not liable for prosecution as no evidence or expert opinion by any other competent doctor was produced against her, which was made mandatory by the Supreme Court in *Jacob Mathew's* case.

In *Dr. Shivanand Doddamani* v. *State of Karnataka*[61], a complaint was filed against the doctors of the District Hospital Dharwad. Complainant pleaded that his brother sustained injuries to his thigh in a road mishap and was admitted to the District Hospital. Doctors failed to provide any treatment to him which resulted in his death after four days. Magistrate issued summons and charged the doctors for the offence under section 304-A of Indian Penal Code. The impugned order was assailed by the doctors before the High Court mainly on the ground that the statement in the complaint did not make out any *prima facie* case to show that the doctors were guilty of negligence of higher degree as laid down by the Apex Court in the case of *Jacob Mathew* and the guidelines laid down in that case for initiating action against the medical officer were totally flauted by the Magistrate. Dismissing the claim of the doctors, the Court held that guidelines of the Apex Court when applied to the facts in question will make out a *prima facie* case. The allegation was that the patient died due to treatment not been provided by the doctors. The doctors had 'duty' to treat the patient who was admitted to the hospital, not treating him is 'breach of duty' and 'death' being the ultimate result due to breach of duty, negligence of higher degree is noticeable.

The Supreme Court has been pragmatic and considerate in dealing with the criminal liability of the medical practitioners for medical negligence, but not in the least lenient as some of the medical practitioners might like to believe. In its latest judgments the Hon'ble Supreme Court has not only erected safeguards against indiscriminate prosecution of physicians but has also impressed upon the need for taking certain precautions by the physicians/Hospitals while treating patients. The physicians must also rise to the occasion by assuming greater responsibility and imbibing greater public confidence.

V. PROOF OF NEGLIGENCE

Medical negligence is easy to allege, but extremely difficult to prove. The general rule is that the burden of proving negligence as a cause of the accident lies on the party who alleges it. For establishing negligence or deficiency in service there must be sufficient evidence that a doctor or hospital has not taken reasonable care while treating the patient. Reasonable care in discharge of duties by the hospital and doctors varies from case to case, and expertise expected on the subject, which a doctor or a hospital has undertaken. Courts would be slow in attributing negligence on the part of the doctor if he has performed his duties to the best of his ability with due care and caution. It is the duty of the redressal agencies to safeguard the interests of the patients against malpractices by medical professionals but at the same time, the inexpensive nature of consumer jurisdiction should not be allowed to become a vicious weapon in the hands of unscrupulous patient to harass the medical professionals without good and adequate cause.

A. Burden of Proof

It is for the patient complainant to establish his claim against the medical man and not for the medical man to prove that he acted with sufficient care and skill. If the initial burden of negligence is discharged by the claimant, it would be for the hospital and the doctor concerned to substantiate their defence that there was no negligence.

The complainant must allege specific act of negligence and prove how that amounts to negligence. He has to allege which action of the opposite parties was not as per accepted medical practices. This has to be supported by expert evidence or medical literature on the subject. Mere allegation of negligence will not make out a case of negligence, unless it is proved by reliable evidence and is supported by expert evidence.[62]

B. The Requirement of Expert Testimony

Serious questions of medical negligence against professionals cannot be decided by suspicion or discrepancies. In the absence of expert evidence supporting the allegations of the complainant, the complaint is liable to be dismissed.

...bal): *K.S. Bhatia v.*

The plaintiff in a medical negligence action is ordinarily required to produce, in support of his claim, the testimony of qualified medical experts. This is true, because the technical aspects of his claim will ordinarily be far beyond the competence of the judges. The plaintiff, himself a layman in most instances, is not free simply to enter the courtroom, announce under oath that the defendant surgeon amputated his leg instead of saving it, and then request the court to find the surgeon negligent. The judges possessing no special expertise in the relevant field, are incapable of judging whether the facts described by the plaintiff, even assuming an accurate narration by him, add upto negligent conduct. And the plaintiff himself is incompetent to supply guidance; he too lacks the training and experience that would qualify him to characterize the defendant's conduct.

A charge of negligence affects the professional status and reputation of a doctor. Therefore the burden of proof on the part of the complainant alleging negligence of the doctor is correspondingly greater. A finding not based on any expert evidence cannot be sustained.

A complaint alleging negligence by mishandling of needle biopsy as the needle pierce the blood vessel of the patient resulting in death, is dismissed by the National Commission on the grounds that the complainant neither filed any report of a doctor to substantiate the averments made in the complaint nor produced any medical literature in support of the allegations. Thus, there was no evidence on record of any negligence in the procedure adopted for needle biopsy except the bald allegations of the complainants.[63]

The Supreme Court in *Indian Medical Association* v. *V.P. Shantha*[64] observed that medical negligence on the part of doctor is to be proved as a fact by leading evidence which may be of an expert. In *Dr. S Gurunathan v. Vijaya Health Centry*[65], National Commission held that in the absence of expert evidence on behalf of the complainant, the commission is held justified in relying upon the affidavit filed by the doctors on behalf of the hospital in a case of medical negligence. In *Amar Singh v. Frances Newton Hospital*[66], it was held that all medical negligence

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[63] *O. Aisha B* v. *J.R. Danial,* 2004 CTJ 31 (CP) (NC).
[64] *Supra* n. 1.
[65] (2003) I CPR 222.
[66] (2000) I CPJ 8.

cases concern various questions of fact, when the burden of proving negligence lies on the complainant, it means he has the task of convincing the court that his version of the facts is the correct one.[67]

In a medical negligence lawsuit the plaintiff must put qualified medical experts on the witness stand to testify (1) that plaintiff suffered an injury that produced the disability and other ill effects claimed by him; (2) that the cause of this injury, or at least a significant contributing cause of it, was the professional services rendered by the (defendant) doctor; (3) that the standard methods, procedures, and treatments in cases such as plaintiff's were such and such; and (4) that defendant's professional conduct towards plaintiff fell below or otherwise unjustifiably departed from the described standard.

(i) Relevance of Expert Evidence

The role of the expert medical witness is to inform the judge so as to guide him to the correct conclusions. It must be for the judge to guess the weight and usefulness of such assistance as he is given and to reach his own conclusions accordingly.

An expert witness in a given case normally discharges two functions. The first duty of an expert is to explain technical issues as clearly as possible so that it can be understood by a common man. The other function is to assist the Court in deciding whether the acts or omissions of medical practitioners or the hospital constitute negligence. In doing so, the expert can throw considerable light on the current state of knowledge in medical science at the time when the patient was treated. In most of the cases, the question whether a medical practitioner or hospital is negligent or not, is a mixed question of fact and law and the Courts are not bound in every case to accept the opinion of expert witness. Although in many cases the opinion of the expert witness may assist the Court to decide the controversy one way or the other.

The real function of the expert is to put before the court all the materials, together with reasons which induce him to came to the conclusion,

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[67] *G. Sampanti* v. *Hindustan Aeronautics Limited & Anr.*, 2005 (3) CPJ 369 (Kar); *O. Aisha B.* v. *Prof. JR Danial*, 2004 CTJ 31 (CP) (NC); *Indian Medical Association* v. *V.P. Shantha, supra* n.1.

so that the court, although not an expert, may form its own judgment by its own observation of those materials. An expert is not a witness of fact and his evidence is really of an advisory character.

(ii) Criteria for condemning expert evidence

The principle of law enunciated by the House of Lords[68] is that a doctor could be liable for negligence in respect of diagnosis and treatment despite a body of professional opinion sanctioning his conduct where it had not been demonstrated to the judge's satisfaction that the body of opinion relied on was reasonable or responsible. In the vast majority of cases the fact that distinguished experts in the field were of a particular opinion would demonstrate the reasonableness of that opinion. However, in a rare case, if it could be demonstrated that the professional opinion was not capable of withstanding logical analysis, the judge would be entitled to hold that the body of opinion was not reasonable or responsible. The judge has the right to come to the conclusion that the views genuinely held by a competent medical expert are unreasonable when he is satisfied that the body of expert opinion cannot be logically supported at all and that such opinion will not provide the bench mark by reference to which the defendant doctor's conduct falls to be assessed. Recently, the Supreme Court has also expressed the same view in *Malay Kumar Ganguly* v. *Sukumar Mukherjee*.[69]

(iii) Conflicting expert evidence – duty of court

In cases of conflicting expert evidence what the judge has to decide is which of the two explanations (of the experts) is to be preferred. That is a question of fact which the judge has to determine on the ordinary basis on a balance of probability. It is a question for the judge to weigh up the evidence of both sides, and he is entitled in a situation to prefer the evidence of one experts witness to that of the other. Judge is the expert of all experts.

In a large number of cases complaints were dismissed as the complainants could not adduce expert evidence to prove medical negligence.

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[68] *Bolitho* v. *City and Hackney Health Authority*, (1994) 4 All ER 771 (HL).
[69] *Supra* n. 16.

(iv) *Is expert opinion essential in every case*

Ever since medical professionals have been brought under the ambit of Consumer Protection Act, there is a rise in the number of unnecessary, frivolous and even malicious litigation harming medical fraternity.

In the light of this, the Supreme Court in *Martin F D'Souza* v. *Mohd. Ishfaq*[70] has directed the consumer forum to first seek an expert opinion from a panel of doctors whether any *prima facie* case is made out against the doctor or not, and only thereafter send notice to the medical practitioner. This was thought necessary to avoid harassment to doctors who may not be ultimately found to be negligent. However, recently Supreme Court in *V. Kishan Rao* v. *Nikhil Super Speciality Hospital*[71] held that expert opinion of *prima facie* negligence is not a precondition for consumer forum to proceed with the case. Expert opinion is required only when a case is complicated enough warranting expert opinion, or facts of a case are such that forum cannot resolve an issue without expert assistance. It was further held that direction given in *Jacob Mathew*[72], for consulting another doctor before proceeding with criminal investigation was confined only in cases of criminal complain and not in respect of cases before the consumer forum.[73]

In *V. Kishan Rao* v. *Nikhil Super Speciality Hospital*,[74] the appellant got his wife admitted to Respondent 1 Hospital on 20-7-2002 as the wife was complaining of intermittent fever and chills. The wife did not respond to the treatment given by Respondent 1 Hospital for typhoid, rather her condition deteriorated. On 24-7-2002, when her condition became extremely critical (no pulse, no BP and pupils dilated), she was removed to Yashoda Hospital where certain tests were conducted and efforts were made to revive her but she expired on 24-7-2002 itself. It was alleged that when the patient was admitted in the Yashoda hospital, the copy of the hematology report dated 24-7-2002 disclosed blood smear for malaria parasite whereas Widal test showed negative. Respondent 1 Hospital has not given any treatment for malaria. The appellate filed a

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[70] (2009) 3 SCC 1.
[71] *Supra* n. 17.
[72] *Supra* n. 6.
[73] *Supra* n. 17.
[74] *Ibid.*

case for medical negligence against Respondent 1 Hospital. The District Consumer Forum without seeking help of an expert, on the fact of the case itself, awarded compensation of Rs. 2 lakhs plus refund of Rs. 10,000. The State Commission allowed the appeal of Respondent 1 Hospital saying that in the fact and circumstances in the case complainant failed to establish any negligence on the part of the Hospital and there is also no expert opinion to state that the line of treatment adopted by the Hospital is wrong or is negligent. The National Commission dismissed the appellant's appeal. The appellant then approached the Supreme Court.

Allowing the appeal, the Supreme Court held that expert evidence was not necessary to prove medical negligence in every case. Expert opinion is required only when a case is complicated enough warranting expert opinion, or facts of a case are such that forum cannot resolve an issue without expert's assistance. Each case has to be judged on it's own facts. The Court held that the purpose of the Consumer Protection Act is to provide a forum for speedy and simple redressal of consumer disputes. Such legislative purpose cannot be defeated or diluted by superimposing requirement of having expert evidence in cases of civil medical negligence, regardless of factual position of a case. If that is done efficacy of Act would be curtailed and in many cases remedy would become illusory for common man.

On the facts it was held that where a patient who was suffering from intermittent fever and chills, was wrongly treated for typhoid instead of malaria for four days, which resulted in her death, was an apparent case of medical negligence. It was not necessary to obtain expert opinion in the first instance before District Forum could award compensation. As investigation conducted by another Hospital where the patient was removed in a critical condition showed that Widal Test for Typhoid was negative whereas test for malaria was positive, it was sufficient for District Forum to conclude that it was a case of wrong treatment.

The Court observed that before forming an opinion that expert evidence is necessary, the forum under the Act must come to a conclusion that the case is complicated enough to require opinion of an expert or that facts of the case are such that it cannot be resolved by members of the forum without the assistance of expert opinion. Each case has to be judged on its own facts. If a decision is taken that in all cases medical negligence has to be proved on the basis of expert evidence, in that event,

efficacy of remedy provided under the Consumer Protection Act will be unnecessarily burdened and in many cases such remedy would be illusory. If any of the parties before the Consumer Forum wants to adduce expert evidence, members of the forum by applying their mind to the facts and circumstances of the case and materials on record can allow the parties to adduce such evidence if it is appropriate to do so in the facts of the case. The discretion in this matter is left to the members of the forum and there cannot be a mechanical or straitjacket approach that each and every case must be referred to experts for evidence.

The Court is of the opinion that the present case is not a case of complicated surgery or a case of transplant of limbs and organs in human body. It is a case of wrong treatment in as much as the patient was not treated for malaria even when the complaint was of intermittent fever and chill.

C. *Res ipsa loquitor*

Res ipsa loquitor is no more than a convenient label to describe situations where, notwithstanding the plaintiff's inability to establish the exact cause of the accident, the fact of the accident by itself is sufficient, in the absence of an explanation, to justify the conclusion that most probably the defendant was negligent and that his negligence caused the injury. The general purport of the words *res ipsa loquitor* is that the accident speaks for itself or tells its own story. The normal rule is that it is for the plaintiff to prove negligence, but in some cases considerable hardship is caused to the plaintiff as the true cause of the accident is not known to him, but is solely within the knowledge of the defendant who caused it, the plaintiff can prove the accident but cannot prove how it happened to establish negligence on the part of the defendant. This hardship is sought to be avoided by invoking the principle of *res ipsa loquitor*[75]. Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.

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[75] *Pushpabai Parshottam Udeshi* v. *M/s Ranjit Ginning & Pressing Co. Pvt. Ltd.*, AIR 1977 SC 1735.

The maxim comes into operation : (a) on proof of the happening of an unexplained occurrence ; (b) when the occurrence is one, which would not have happened in the ordinary course of things without negligence on the part of somebody other than the plaintiff, and (c) the circumstances point to the negligence in question being that of the defendant, rather than that of any other person.

Some of the examples are amputation of wrong limb or wrong digit at operation, burning of skin caused by strong antiseptic solution, leaving swabs or surgical instrument inside the patient after the operation.

The onus lies on the doctors in the operation theatre to explain events and the ultimate outcome, i.e., the death of the patient[76]. When keratotomy operation was performed on left eye of a teenager in violation of accepted professional practice, resulting in loss of his eyesight, the burden of proof is on the doctor to establish that he was not in breach of any duty in giving treatment to the minor patient.[77]. The onus of proof shifts upon the attending doctors to prove that there was no negligence in performance of operation when the patient died within 10 hours of admission in the operation theatre in mysterious circumstances[78]. Where the complainant is not aware of what took place inside the operation theatre, the onus of proof lies on the doctor to establish that there was no negligence on his part resulting in permanent disability of the patient[79].

In *Bhanupal* v. *Dr. Prakash Padode*[80] it was observed that the patient's relatives must prove positive act of omission but they need not produce evidence to establish the standard of care if the entire operative procedure was carried out in the absence of any of the patient's relatives. Naturally, when all such medical or surgical procedure was carried out inside the operation theatre when nobody on behalf of the patient was present, the patient's relatives were unable to see any kind of medical / surgical procedure or what exactly happened inside the operation theatre. Therefore, the opposite parties and the staff attending inside only had

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[76] *Arunaben D. Kothari* v. *Navdeep Clinic,* 1996 (3) CPR 20 (Guj).
[77] *Adarsh Bararia* v. *Dr. P.S. Hardias,* 2002(2) CPR 188 (Bhopal).
[78] *Bhanupal* v. *Dr. Prakash Padode,* II(2002) CPJ 384 (Bhopal).
[79] *S.A. Qureshi* v. *Padode Memorial Hospital and Research Hospital,* II (2000) CPJ 463 (Bhopal).
[80] *Supra* n. 78.

special knowledge of what happened inside the operation theatre and the complainant is not in a position to exactly state the factual aspects of whatever took place inside. Therefore, it was a duty cast upon the surgeon to prove the fact that no sort of negligence took place inside the operation theatre. Thus, the onus of proof shifts upon the opposite parties to substantiate the fact that there was no negligence on their part.

In *Nadiya* v. *Proprietor, Fathima Hospital*[81] the complainant approached the opposite party hospital for surgery for increasing the height. She underwent Corticotomy with external fixator. However, after the surgery, her left leg remained 1 ½ inch shorter than the right leg. She needed the aid of walker as she had to lean on the left. It was contended by the hospital that the complications suffered by the complainant resulted due to her failure to adhere to the instructions of the doctors. It was held that the burden shifted to the opposite parties to substantiate their case.

In *Mahon* v. *Osberne*[82] a majority of the court of appeal considered that the doctrine of *res ipsa loquitor* applied. Goddard L.J. said :

> The surgeon is in command of the operation, it's for him to decide what instruments, swabs and the like are to be used, and it's he who used them. The patient, or, if he dies his representatives, can know nothing about this matter.
>
> There can be no possible question but that neither swabs nor instruments are ordinarily left in the patient's body and no one would venture to say that it's proper, although in particular circumstances it may be excusable, so to leave them.
>
> If, therefore a swab is left in the patient's body after an operation, it seems to be clear that the surgeon is called for an explanation.

The Supreme Court applied the doctrine of *res ipsa loquitor* in *Achutrao's* case[83] where the patient had to undergo second operation in critical condition for removal of a mop (towel) left inside the peritoneal cavity of the patient during sterilization operation in a Government hospital. The High Court of Rajasthan[84] also invoked the doctrine of *res ipsa loquitor*

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[81] (2001) II CPJ 93.
[82] (1939) 2 KB 14.
[83] *Achutrao Haribhau Khodwa* v. *State of Maharashtra*, (1996)2 SCC 634.
[84] *Rajmal* v. *State of Rajasthan*, 1996 ACJ 1166.

to hold the State Government liable for the death of a patient during laparoscopic tubectomy operation in the Government hospital. The State Commission, Karnataka[85] held the dental surgeon liable in negligence for slipping of needle into the stomach of the patient at the time of irrigation the mouth after extraction of right molar teeth of the patient by applying the principle of *res ipsa loquitor,* as the surgeon could not explain as to why the needle was detached from the syringe while irrigation the mouth of the patient.

The Supreme Court in *Savita Garg* v. *The Director, National Heart Institute*[86] held that once evidence is placed by the complainant to satisfy that the patient admitted for treatment after taking him to intensive care unit developed jaundice and died because of lack of proper care and negligence, then the burden shifts to the hospital and the doctor who treated the patient to satisfy that there was no negligence on the part of doctor or hospital. It would be too much of a burden on the patient or the family members to undertake search enquiry from the hospital to ascertain the names of treating doctors or the staff and to show who was responsible for the death. The hospital is in better position to disclose what care was taken or what medicine was administered to the patient.

Recently, the Supreme Court held that in a case where negligence is evident the principle of *res ipsa loquitor* operates and the complainant does not have to prove anything as the thing (res) proves itself. In such a case it is for the respondent to prove that he has taken care and done his duty to repel the charge of negligence.[87]

However, mere failure of sterilization operation, without proof of negligence, in itself is not actionable by invoking the principle of *res ipsa loquitor* as the methods of sterilization so far known to medical science which are most prevalent and popular are not 100 percent safe and secure.[88]

VI. Conclusion

Medicine is a science which has many probabilities and possibilities. The human body is not a laboratory to produce the same result every

time. Diseases also vary in their course and complications. There is a growing awareness among people in the recent years about medical negligence. In view of this a number of complaints (both civil and criminal) have been filed against the medical practitioners and hospital managements. A survey of cases in the area of medical negligence reveals the conflicting views expressed by the judiciary while defining the standard of medical care to be followed by the doctors and hospitals in the treatment of patients.

Under the *Bolam test* determining the standard was seen by the courts as essentially a matter for the medical profession, to be resolved by expert testimony with minimal court scrutiny. In recent years, courts have become more willing to probe such testimony and challenge the credibility of medical expert, although they would very rarely override clinical judgments. *Bolitho* may be constructed as inviting courts to reach their own conclusions on the reasonableness of clinical conduct, along standard risk-benefit lines, after having made their own assessment of the expert opinion.

Medical negligence litigation is related to errors in medical practice which should never occur if the basic rules of clinical management are followed, clinical information is accurately recorded and analyzed, and there is appropriate communication with patients. Informed consent is a process which depends absolutely on the communication between the doctor and the patient. A well informed patient is less likely to sue a medical professional in case of unfavourable outcome as compared to a less informed one.

Medical practice has always had a place of honour in society. The reality today, however, is that the doctor-patient relationship has deteriorated to a great extend and the number of medical negligence lawsuits is increasing very fast. Consumerism in the medical field is well established in India. Medical indemnity insurance premium is rising at a rapid rate and the cost is ultimately passed on to the patients. Besides this, defensive medicine is very well established in India. Currently the balance between service and business is shifting disturbingly towards business and this calls for improved and effective regulation whether internal or external. There is need for introspection by doctors individually and collectively. They must rise to the occasion and enforce discipline and high standards in the profession by assuring an active role.

Medical practitioners need to have sympathy for patients, take care of the sick and show concern for their suffering; otherwise, the profession will lose its respect. They need to remember the ethical imperatives propounded by Hippocrates, Father of medicine, choosing the least costly route and the least troublesome investigations, always keeping patient welfare in mind.

The doctors should learn all the legal aspects of their profession. It should be the duty of both the medical and legal fraternity to teach and update medical professionals on law that governs the issues related to medical negligence. The law of medical negligence is indispensable if the right to life is not to be a fleeting breath imperilled by a physician's flaw, surgeon's knife, anaesthetist's indifference or equipment inadequacy.[89]

[89] V.R. Krishna Iyer, *Book Review* of R.K. Bag, LAW OF MEDICAL NEGLIGENCE AND COMPENSATION (2nd ed., 2001).

FEMALE FOETICIDE AND INFANTICIDE: JURISPRUDENTIAL AND LEGAL EXEGESIS

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I. INTRODUCTION

The essence of patriarchy lies in continued male dominance and subordination of women. The Indian society is an epitome of patriarchy and the religion, customs and social institutions provide adequate impetus thereby institutionalising gender discriminatory norms and practices and devised various modes and mechanisms, throughout human history, to oppress, exploit, and subjugate women. Female infanticide is one such abominable practice which reflects the devalued status accorded to women.

In most parts of the country female infanticide has been replaced by female foeticide and it has prevalence into those areas also where traditionally there were no instances of female infanticide. India is a land where the age old preference for sons is motivated by economic, religious, social and emotional desires and norms that favour males and make females less desirable. Parents expect sons to provide financial and emotional care, especially in their old age. Sons are believed to add wealth and property to family while daughters seem to drain it through dowries; sons continue the family lineage while daughters are married away to another household; sons perform important religious roles and defend or exercise the family's power while daughters have to be defended and protected, creating a perceived burden on the household. This stereo-type notion of women as "burden" is one of the main reasons behind female foeticide and infanticide.

This problem has assumed alarming proportion in India. It is evident from a report of United Nations Population Fund that up to 50 million girls and women are missing from population as a result of systematic gender discrimination in India. The problem of foeticide is increasing with no sign, so far, of reversing course.[1]

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[1] REPORT ON SEX RATIO IMBALANCE IN INDIA, UNFPA, 2007.

This Article examines the reason why parents clandestinely opt for female infanticide or foeticide, legal provisions to deal with this problem, lacunae in the existing legal provisions and judicial response towards this problem. An attempt is made to suggest some reform in the existing social and legal scenario.

Before discussing the legal provisions to deal with this issue let us have a peep into the existing male female ratio in the different region according to their religion and age group. This will help to understand the gravity of the problem. It has long been accepted by demographers that a link exists between female foeticide, infanticide and the widening sex ratio. In international demographic terms, a "high sex-ratio" society is defined as one that has disproportionately more males, and a "low sex-ratio" society that has disproportionately less females. The declining sex-ratio in India indicates that the number of females is getting disproportionately less.

II. CENSUS INFORMATION 2011[2]

POPULATION	**Persons**	**1,21,01,93,422**	
	Males	62,37,24,248	
	Females	58,64,69,174	
DECADAL POPULATION GROWTH 2001-2011		Absolute	Percentage
	Persons	**18,14,55,986**	**17.64**
	Males	9,15,01,158	17.19
	Females	8,99,54,828	18.12
DENSITY OF POPULATION (per sq. km.)		**382**	
SEX RATIO (females per 1000 males)		**940**	
POPULATION IN THE AGE GROUP 0-6		Absolute	Percentage to total population
	Persons	**15,87,89,287**	**13.12**
	Males	8,29,52,135	13.30
	Females	7,58,37,152	12.93
LITERATES		Absolute	Literacy rate
	Persons	**77,84,54,120**	**74.04**
	Males	44,42,03,762	82.14
	Females	33,42,50,358	65.46

[2] CENSUS OF INDIA: CENSUS DATA 2011: INDIA AT A GLANCE, RELIGIOUS COMPOSITION, Office of the Registrar General and Census Commissioner, India, Retrieved November 3, 2011.

III. Legal Mechanism

Before 1971 the Indian Penal Code, 1860 was the only legislation which allowed the 'legal abortion' without criminal intent and in good faith for the express purpose of saving the life of the mother.[3] Abortions were considered illegal in our country and in fact, the same could be punishable under the Indian Penal Code.

The reason behind the liberalisation of abortion law is rooted in the idea of equality among the sexes. Liberalisation of abortion laws was also advocated as one of the measures of population control. This equality extends to total being of both men and women, together with the power over their mind and body. This right was bestowed upon her by the Medical Termination of Pregnancy Act, 1971(MTP).[4] This law was conceived as a tool to let the pregnant women decide on the number and frequency of children. The MTP Act is an enabling statute which aims to improve the maternal health scenario by preventing large number of unsafe abortions and consequent high incidence of maternal mortality and morbidity, legalizes abortion, promotes access to safe abortion services to women, de-criminalizes the abortion seeker and to offer protection to medical practitioners who otherwise would be penalized under the Indian Penal

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[3] Section 312, I.P.C, 1860 deals with the law regarding miscarriage: "whoever causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the women, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and if the woman quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

[4] Deficiency in the I.P.C as regarding termination of pregnancy or abortion was noticed in the Statement of Objects and Reasons of MTP in the following words: "The provisions regarding the termination of pregnancy in the I.P.C. which were enacted a century ago were drawn up in keeping with the then British law on the subject. Abortion was made a crime for which the mother as well as the abortionist could be punished except where it had to be induced in order to save the life of the mother."

Code (sections 315-316).[5] The MTP Act (hereinafter the Act) was passed to provide for the termination of certain pregnancies by registered medical practitioners (as defined under the MTP Act). Thus it is clear that abortion is not provided for in all cases of pregnancy but only in case of certain pregnancies. Under the Act, termination of pregnancy is possible where:

- the length of the pregnancy does not exceed twelve weeks;
- if the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, the opinion of two registered medical practitioners in favour of the termination of the pregnancy is essential[6]: (i) if the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health[7]; or (ii) if there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.[8]

It has been clarified under the Act that where the pregnancy is alleged to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.[9] Thus, pregnancy due to rape can be validly terminated.

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[5] Section 315, I.P.C, 1860 deals with the Act done with intent to prevent child being born alive or to cause it to die after birth. "Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth, and does by such prevent that child from being born alive, or causes it to die after its birth, shall, if such act be not caused in good faith for the purpose of saving the life of the mother, be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both"; Section 316 deals with Causing death of quick unborn child by act amounting to culpable homicide: "Whoever does any act under such circumstances, that if he thereby caused death he would be guilty of culpable homicide, and does by such act cause the death of a quick unborn child, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

[6] MTP Act, section 3(a) & (b).

[7] *Id.*, section 3 (i).

[8] *Id.*, section 3 (ii).

[9] *Id.*, explanation 1 to Section 3.

Further, where the pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.[10] Thus, failure of methods of family planning could also give rise to a ground for termination of the pregnancy. While considering whether the continuance of pregnancy would involve risk or injury to the health of the pregnant woman, account may be taken of the pregnant woman's actual or reasonable foreseeable environment.[11]

There is another provision under which the pregnancy can be terminated validly irrespective of the length of the pregnancy on the opinion of two registered medical practitioners. In this case, the registered medical practitioner should be of the opinion, formed in good faith that the termination of the pregnancy is immediately necessary to save the life of the pregnant woman.[12]The opinion of the registered medical practitioners should be formed in good faith. Such opinion has to be certified in Form I under the MTP Regulations, 1975 framed under the Act[13]. In this Form, the reasons for forming the opinion also have to be stated. Further, every registered medical practitioner who terminates any pregnancy is required within three hours from the termination of the pregnancy to certify such termination in the said Form[14] where again the reason for terminating the pregnancy has to be specified.

This enactment has been hailed as a major landmark in social legislation and a far-reaching measure assuring the women in India freedom from undesirable and unwanted pregnancies. It recognises the exclusive right of a woman to take decisions about her body. The consent of the pregnant woman is sufficient for the medical termination of the pregnancy. Her husband's consent is not required.[15] The Legislators, however, never dreamt that the provisions enacted for the welfare of women would be

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[10] *Id.*, explanation 2 to Section 3.
[11] *Ibid.*
[12] *Id.*, section 5.
[13] Regulation 3 (1) under the MTP Regulations.
[14] *Id.*, Regulation 3 (2).
[15] MTP Act, section 4(b).

used for the violation of their right only. These good intentioned steps were being used to force women to abort the female child. These provisions have been used to such an extent that equilibrium of the nature has been at the stake. Sex –determination has become the preferred application of the modern technology. Depending on the expertise of ultrasonologist chances of a correct prediction are 95-96%, with greater accuracy as the pregnancy advances. If the foetus is female, a second trimester, even a third trimester abortion is carried out either by a doctor or a quack.

The three chief pre-natal diagnostic tests that are being used to determine the sex of a foetus are amniocentesis, chronic villi biopsy (CVB) and ultrasonography. Amniocentesis is meant to be used in high-risk pregnancies, on women over 35 years. This embryonic pre-natal test requires the removal of 15-20 ml of amniotic fluid. The cells have to be cultured for three weeks, or else there is an inaccuracy rate of 10-20%. CVB is meant to diagnose inherited diseases like thalassaemia, cystic fibrosis and muscular dystrophy. Ultrasonography is the most commonly used technique. It is non-invasive and can identify up to 50% of abnormalities related to the central nervous system of the foetus.

The increase in female foeticide has seen the proportionate decrease in female sex ratio, especially in the 0-6 age group and if this decline is not checked, the very delicate equilibrium of nature will be permanently destroyed. With the female-male ratio having already declined to 933 per 1000 males, we are sitting on a virtual time bomb, which can spell social disaster. Whilst the earlier primitive methods of female foeticide were still relatively confined to a limited section of the population, however, by using the modem scientific and relatively covert methods, sex selection has become a rampant phenomenon which has affected every strata of society.

This compelled the legislators to do away with lacunae inherent in previous legislation. After intensive public debate all over India the Parliament enacted the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act on 20th September 1994 (hereinafter referred to as the PNDT) for the purpose of: the use of pre-natal diagnostic techniques for the purpose of detecting genetic or metabolic disorders or chromosomal abnormalities or certain congenital mal-formations or sex linked disorders; for the prevention of the misuse of such techniques for the purpose of

pre-natal sex determination leading to female foeticide; and for matters connected there with or incidental thereto.

The Act prohibited determination of sex of the foetus and stated punishment for the violation of the provisions. It also provided for mandatory registration of genetic counseling centres, clinics, hospitals, nursing homes, etc.

No pre-natal diagnostic techniques shall be conducted except for the purposes of detection of any of the following abnormalities, namely chromosomal abnormalities; genetic metabolic diseases; haemoglobinopathies; sex-linked genetic diseases; congenital anomalies and any other abnormalities or diseases as may be specified by the Central Supervisory Board. These techniques can be used at the registered place only by registered medical practitioner having prescribed qualification after the satisfaction that any of the following conditions are fulfilled, namely:—

(i) age of the pregnant woman is above thirty-five years;

(ii) the pregnant woman has undergone of two or more spontaneous abortions or foetal loss;

(iii) the pregnant woman had been exposed to potentially teratogenic agents such as drugs, radiation, infection or chemicals;

(iv) the pregnant woman has a family history of mental retardation or physical deformities such as spasticity or any other genetic disease;

(v) any other condition as may be specified by the Central Supervisory Board;

Once the person conducting the test is satisfied, he has to take the consent of the pregnant woman in writing explaining all known side and after effects of such procedures to the pregnant woman concerned in the language which she understands. A copy of her written consent obtained under clause (b) should be given to the pregnant woman.

These techniques cannot be used by any clinic or person for the determination of the sex of the foetus. No person, being a relative or the husband of the pregnant woman shall seek or encourage the conduct of any pre-natal diagnostic techniques on her. The person conducting pre-natal diagnostic procedures shall not communicate to the pregnant woman concerned or her relatives the sex of the foetus by words, signs or in any

other manner. Registration of Genetic Counseling Centres, Genetic Laboratories or Genetic Clinics is must and it can be cancelled or suspended by the appropriate authority after giving a reasonable hearing to these centres, if they violate the provisions of the Act.[16]

If any person acts contrary to the provisions of the Act, he will be liable to be punished with the imprisonment which may extend to 3 years and fine which may extend to Rs.10,000/- to 50,0000/.[17] Any subsequent conviction entails imprisonment which may extend to 5 years and fine which may extend to Rs.50,000/-. to Rs. 1,00,000/.[18] The offences under the Act shall be cognizable, non-bailable and non-compoundable.

Thus, both these laws were meant to protect the child-bearing right of the women and legitimize the purpose for which pre-natal tests and abortions could be carried out. In practice, however, we find that these provisions have been misused and are going against the interest of females. Technology is moving faster than the law. Inventions of new technology make it possible to decide about the sex before conception. To meet with the challenge created by these inventions an amendment was made in the year 2003 and the word pre-conception was added to the existing PNDT Act. It is true and admitted fact that law cannot remain constant but does it mean that with each and every new invention, a new Act or amendment is required to deal with a social problem or an attempt should be made to deal with the root cause of the problem? The need of the hour is effective implementation of existing provisions than that of new laws. For this along with the executive commitments, the active involvement of judiciary and non-governmental organisations is also required. To certain extent judiciary is performing its responsibility. The following judgments will explain the attitude of the judiciary towards this social problem.

IV. JUDICIAL RESPONSE

The right to life is the most important of all the rights as we can enjoy other rights only when right to life is served. The right to life has not only been a core issue among human rights but also a constitutional guarantee

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[16] PNDT Act, section 20.
[17] *Id.*, sections 22 (3), 23 (1) and 23 (3).
[18] *Id.*, section 23 (1).

in the Constitution of India under Article 21. Although the Article itself does not speak much in concrete terms yet the Indian judiciary has played pivotal role in adding much to this article by expanding its scope to all the possible areas including the rights of women.

While deciding the constitutionality of the PCPNDT Act on the ground that this Act violates Article 21 of the Constitution, the Bombay High Court in *Vinod Soni* v. *Union of India*[19] held that the PCPNDT Act does not violate but expand the scope of Article 21. It is a right of every child to full development. A child conceived is, therefore, entitled to under Article 21, to full development whatever be the sex of that child. The determination whether at pre conception stage or otherwise is the denial of a child, the right to expansion, or if it can be so expanded right to come into existence. Apart from that, the present legislation is confined only to prohibit selection of sex of the child before or after conception.

On the argument that the personal liberty of a citizen of India includes the liberty of choosing the sex of the offspring, it was observed that the right to life or personal liberty cannot be expanded to mean that the right of personal liberty includes the personal liberty to determine the sex of a child which may come into existence. The conception is a physical phenomenon. It need not take place on copulation of every capable male and female. Even if both are competent and healthy to give birth to a child, conception need not necessarily follow. That is a factual medical position. But the claim to choose the sex of a child which has to come into existence as a right is to do or not to do something which cannot be called a right. The right to personal liberty cannot expand by any stretch of imagination, to liberty to prohibit coming into existence of a female foetus or male foetus which shall be for the Nature to decide. Right to bring into existence a life in future with a choice to determine the sex of that life cannot in itself is a right.

It is further observed that the enactment proposes to control and ban the use of this selection technique both prior to conception as well as its misuse after conception and it does not totally ban these procedures or tests. Sub section 2 says that no prenatal diagnostic techniques can be conducted except for the purposes of detection of any of the (1)

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[19] 2005 Cr L J 3408.

chromosomal abnormalities, (2) genetic metabolic diseases, (3) heamoglobinopathies, (4) sex-linked genetic diseases, (5) congenital anomalies and (6) any other abnormalities or diseases as may be specified by the Central Supervisory Board. Thus, the enactment permits such tests if they are necessary to avoid abnormal child coming into existence. Apart from that such cases are permitted as mentioned in sub clause 3 of section 4 where certain dangers to the pregnant woman are noticed. A perusal of these conditions makes it clear that the enactment does not bring about total prohibition of any such tests. It intends to thus prohibit user and indiscriminate user of such tests to determine the sex at preconception stage or post conception stage.

In *Vijay Sharma* v. *Union of India*[20] it was held that the provisions of the PCPNDT Act are clear, unambiguous and in tune with their avowed object. There is no uncertainty in any of the provisions as alleged in the petition.

The object of the Medical Termination of Pregnency Act was discussed in detail in *Nand Kishore Sharma* v. *Union of India*[21]. It was held in this case that the object of the Act is to save the life of the pregnant woman or relieve her of any injury to her physical and mental health, and no other thing. It would appear that the Act is rather in consonance with Article 21 of the Constitution of India. There can not be two opinion that where continuance of pregnancy is likely to involve risk to the life of the pregnant woman or cause grave injury to her physical and mental health, it would be in her interest to terminate the pregnancy.

It was also held that the Act does not give a carte blanche to any person, even a medical practitioner, to cause termination of pregnancy. Section 3 of the Act provides the guidelines or limitations within which the pregnancy could be terminated by a registered medical practitioner.

In *Center for Enquiry into Health and Allied Themes (CEHAT)* v. *Union of India*[22] the Supreme Court issued remarkable directions, if followed would bring a sea change in the mind set of the society at large. In this case non-governmental organisations approached the Court for implementation of the Pre-natal Diagnostic Techniques (Regulation and

[20] AIR 2008 Bom 31.
[21] AIR 2006 Raj 166.
[22] AIR 2003 SC 3309.

Prevention of Misuse) Act, 1994 renamed after amendment as the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act (hereinafter referred to as 'the PNDT Act') which is the normal function of the Executive. In this petition, it was *inter alia* prayed that as the Pre-natal Diagnostic Techniques contravene the provisions of the PNDT Act, the Central Government and the State Governments be directed to implement the provisions of the PNDT Act (a) by appointing appropriate authorities at State and District levels and the Advisory Committees; (b) the Central Government be directed to ensure that Central Supervisory Board meets every 6 months as provided under the PNDT Act; and (c) for banning of all advertisements of pre-natal sex selection including all other sex determination techniques which can be abused to selectively produce only boys either before or during pregnancy. The Court passed the following order:-

> It is unfortunate that for one reason or the other, the practice of female infanticides still prevails despite the fact that gentle touch of a daughter and her voice has soothing effect on the parents. One of the reasons may be the marriage problems faced by the parents coupled with the dowry demand by the so-called educated and/or rich persons who are well placed in the society. The traditional system of female infanticide whereby female baby was done away with after birth by poisoning or letting her choke on husk continues in a different form by taking advantage of advance medical techniques. Unfortunately, developed medical science is misused to get rid of a girl child before birth. Knowing fully well that it is immoral and unethical as well as it may amount to an offence, foetus of a girl child is aborted by qualified and unqualified doctors or compounders. This has affected overall sex ratio in various States where female infanticide is prevailing without any hindrance.

With this observation that *prima facie* it appears that despite the PNDT Act being enacted by the Parliament five years ago, neither the State Governments nor the Central Government has taken appropriate actions for its implementation, Court issued the directions to the central government, state government and the appropriate authority for the proper implementation of the PNDT Act.

On 19th September, 2001 the Supreme Court passed the order that at the outset, we may state that there is total slackness by the administration in implementing the Act. It was pointed out that even though the genetic counseling center, genetic laboratories or genetic clinics are not registered, no action is taken as provided under Section 23 of the Act, but only a warning is issued. In view of the Court, those centers which are not registered are required to be prosecuted by the authorities under the provisions of the Act and there is no question of issue of warning and to permit them to continue their illegal activities. It was further ordered that appropriate authorities are not only empowered to take criminal action, but to search and seize documents, records, objects etc. of unregistered bodies under Section 30 of the Act.

The Central Government/State Governments and Union Territories are further directed that for effective implementation of the Act, information should be published by way of advertisements as well as on electronic media. This process should be continued till there is awareness in public that there should not be any discrimination between male and female child.

Here a story of Sunita Aralikar can be an eye-opener. Sunita was buried alive by her illiterate father when she was just 16 days old in the village Latur, Mahrashtra. It was her fortune that her maternal grandfather pulled her out of the grave just in time and now she is an author and a well-known social activist in Latur, passionately fighting against evils such as female infanticide to which she nearly fell victim.[23] Female foeticide in Maharashtra has become a major concern. The political parties have come together to revolt against female foeticide as it shows no signs of abatement in the absence of stringent laws.[24]

In *Dr. Pradeep Ohri* v. *State Of Punjab,*[25] it has been clearly observed that if the statute fixes criminal liability for contravention of the prohibition or the command which is made applicable to transactions which have taken place before the date of its enactment, the protection of Article 20(1) of the Constitution may be attracted, but Section 25-

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[23] Vijay Singh, *"Buried as a baby, she fights for Girls"*, THE TIMES OF INDIA, March 8, 2011 at 1.

[24] Available at http://www.radianceweekly.com, web edition (21.03.2010) visited on 02.03.2011.

[25] AIR 2008 P&H 108.

FFF (1) neither imposes a prohibition nor a command. In the instant case sub-section (2) of Section 23 of the PNDT Act clearly imposes a penalty of removal of the name of a medical practitioner from the State Medical Register in case he is convicted for violating the provisions of the PNDT Act. Therefore, it attracts the rigour of Article 20(1) of the Constitution of India.

V. SUGGESTIONS FOR SOCIAL AND LEGAL CHANGES

Female foeticide is one of the most despicable crimes on this earth. Despite the spread of education, economic and technological development, plethora of social legislations and the commitment of the judiciary, the secondary status and subjugation of female could not be changed. The most abominable element that is attached with this social crime is that the people who commit crime mostly belong to the educated class. Gross misuse of reproductive technology in a society characterised by a strong bias against the female child is increasing day by day despite national and international concern. Techniques like Pre-implantation Genetic Diagnosis (PGD) have widened the gap in the already skewed sex ratio. New reproductive technologies are unleashing havoc in an already gender-biased system. The argument that sex selection be given as a choice does not hold good as the majority of people, especially women, have little choice in any matter that relates to the sex selection of their child.

The need of the hour is to make laws more effective. One mode to make law more effective was suggested by Austin. He propounded that law is the command of the sovereign backed by sanction. According to this theory law will be effective if backed by sanctions. But this is also not true in all the cases. PNDT is backed by the sanctions but still the compliance by the society at large is missing, an important essential for the success of any legislation. Then the question is how else we can make the law more effective.

There is no dearth of laws, rather plethora of laws have been made and implemented to elevate the status of women as well as to make the society feel that a girl child is equally important. The Laadli Yojna is a big step towards strengthening the war against female foeticide. But, unfortunately, the monetary consideration has played a bigger role than the respect for daughters.

One suggestion, therefore, to solve this social problem along with the legal mechanism and judicial activism, participation of the society is

obligatory. Without changing the mind set of the people, the object of the social legislation can never be achieved. The pernicious acts of female foeticide and insidious abortions can be stopped by changing the orthodox views regarding women. Long back Savigny propounded this view that legislation should conform to existing traditional law and popular consciousness, or it will be doomed. It is not that he was against the reforms in the existing social set up but at the same time he knew that reform, which went against the stream of a nation's consciousness, would be meaningless. He also warned that the legislators should look before they leap into reform. If we ignore the suggestions and warning given by Savigny, this legislation will have to face the same fate like other social legislations. The need of the hour is to change this popular consciousness i.e. the preference of a son over the daughter. Unfortunately, it is the woman who does not know the worth of self and she is the one who becomes instrumental in female foeticide. It becomes imperative that it is high time a woman should also realize her own worth. This is not an easy task as for this we have to find out the reasons for this desire and then make a try to eliminate it one by one. Among the various reasons one is dowry and dowry related tortures and deaths. To tackle this problem we have the Dowry Prohibition Act, 1961. Proviso ot Section 3 of Dowry Prohibition Act, 1961 should be amended and it should be added that no gift can be exchanged at the time of marriage or if the law wants to permit the exchange of the gifts at the time of marriage then upper limit according to the income of the family should be fixed. It can only be done if the societal conservative norms of exchanging gifts and having a lavish wedding reception are discarded.

Along with this a legal change in section 125 Cr.P.C.[26] is required to transform the social attitude. It should be added to the existing section that every female is not only bound to maintain her parents but also to pay a fix monthly sum to them in all the circumstances. All these changes would be helpful to improve the status of the women, if there is an active participation of the women in the decision making especially when it is to cater to the need and demand of the women as only the wearer knows where the shoe is pinching. Roscoe Pound also believes that sociological jurisprudence should ensure that the making, interpretation and application

[26] The Criminal Procedure Code, 1973, Section 125(1).

of law take account of social facts and developed the "social engineering" balancing the conflicting interests of the society. Towards achieving this end there should be:

(a) social investigation as preliminaries to legislation; in this investigation the observation, vision and mission of the woman organisations and NGOs should be considered.

(b) constant study of the means for making law more effective;

(c) allowance for the possibility of a just and reasonable solution of individual cases.

To find out the solution to tackle with the problem of foeticide and infanticide the following questions should be answered.

(i) What is the social fact?

(ii) Which type of social investigation is required to enact PNDT?

(iii) How the law can be more effective?

The pre-dominantly patriarchal, social, cultural and religious set up based on the foundation that the family line runs through a male has contributed extensively to the secondary status of women in India. This has led to strong desire to avoid the birth of a female child in the family resulting in decline in the child sex ratio at an alarming rate in some of the States and Union Territories.[27]

Social investigation will include that why this social fact becomes the popular consciousness. It will also include the reason behind the social fact and the consequences of the social fact on the society at large. The impact on society should not be underestimated. As per the 2001 Census of India, the ratio between male and female is 1000:933 and in Punjab only 1000:790. According to the research conducted by the UNFPA, a society with a preponderance of unmarried young men is prone to particular dangers. More women are likely to be exploited as sex workers.[28] Increase in cases of molestation and rape is an obvious result. The sharp rise in sex crimes in Delhi have been attributed to the unequal sex ratio.

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[27] ANNUAL REPORT ON IMPLEMENTATION OF THE PRE-CONCEPTION AND PRE-NATAL DIAGNOSTIC TECHNIQUES (PROHIBITION OF SEX SELECTION) ACT, PNDT Division, Ministry of Health and Family Welfare, Government of India, *New Delhi*, 2005.

[28] *Supra* n. 1.

Answer of the third question has already been given. Nothing but the change in the attitude and mindset can bring the desired change. Women's interests, identities and issues should be taken seriously; and recognize women's ways of being, thinking and doing, as valuable as those of men. People have to admit that if there is a clash between the public interest and private interest, priority should be given to public interest. Pound also propounded this view. According to him there are three types of interests

(i) private interests

(ii) public interests

(iii) social interests

PRIVATE INTEREST ⟶ PUBLIC AND SOCIAL INTEREST
(Desire to have son) (Protect the equilibrium of the nature)

It is true that every human being has a right to determine its family affairs and that includes deciding the number of children they want to have according to their wishes. They also have the freedom to know the sex or even to determine the sex of the child in the womb itself. But this private interest has a direct conflict with the social and public interest if the decision is taken after knowing the sex of the foetus only if it is the case of female. In this scenario the balance should be maintained by the legislators, judges and the advocates. The problem that is enfolded so firmly can be grappled not only with the enactment of one Act i.e. PCPNDT but can be tackled with the support of all legal and societal actors. The road ahead is tough and one alone does not have the capacity to march on. The cooperation of all the limbs of the government along with the active participation from all the societal actors is required to remove the black scar from the humanity. This social, cultural, religious and traditionally deep rooted problem can not be deracinated in day one or two. There is no magic wand. No law, no convention has the supreme power to do the miracle with the blink of the eye. Only the social campaign against this vicious problem with the help of strict and strong legal support can bring the desired result. This road is tough and full of thorns. But the journey can not be halted under this fear that in our life we could not see the light of the freedom. The march should be on for the fight that will be won after hundred or more years in the hope that we will be victorious one

day. This generation does something positive for the welfare of the future generations so that they can remember us for the healthy legacy and not for the skewed sex ratio.

VI. Conclusion

We often think that a heinous act like killing the girl child in the foetus might be the prerogative of the uneducated and poor masses. However, statistics prove that this is not the case. The well-educated and rich classes perpetrate this crime with equal aplomb. The basic problem is that, despite our worship of Goddess Durga or Kali, or claim that there were educated, erudite women like Maitri, in the Vedic period, we as a society hold no respect for women. This lack of respect often gets translated to the act which ensures no value on the life of a girl child. Besides issue like preference for a son – very common in upper class, educated Hindus, factors like dowry come into play when there are considerations regarding a girl child. For the economically downtrodden, dowry might be a factor, but for the others its mostly a rigid, narrow-minded, blinkered preference for a son – often stemming from religious considerations – that lead to female foeticide. For the poor, feeding or educating a girl child is an economic burden. The death knell comes in the form of dowry. The society as a whole does not really believe that girls and boys are equal, that an educated girl with a job is as good as a son and able to take up family responsibilities because of the 'paraya dhan' concept. It is accepted that the girl belongs to her husband's family and this deep-rooted social belief is the next most important factor, after religious preference for a son, which leads to the killing of the girl child.

Neither education nor economic progress or plethora of welfare legislations can change this phenomenon. This change can only be brought about if the deep-rooted social norms related to women and girls change. Equal treatment of boys and girls has to start at home. The clichéd, girls in the kitchens and boys in school or going to work concept has to be erased. The 'paraya dhan' concept has to be wiped out. Marriage should not be mandatory for girls - the society should evolve out of the mould where the herd-mentality believes that an unmarried girl is an oddity. Once the pressure of marriage on girls or their families ease off, the other things will fall into place. The moment a girl is considered as an equal earning member to the son, the whole foeticide, and dowry phenomena will stop being a threat.

Secondly, the onus is on the mothers to stop foeticide. Ninety nine per cent of the girls are killed with the connivance or the helplessness of their mothers who are too weak and insecure to take a stand to save their foetus because of the societal pressures or their husbands or in-laws. None of them feel confident about taking recourse to law because of the tangled legalities involved or their own dependent economic status. Only if the mother gathers the courage to protect her baby can the girl child survive in this country and the men should be taught as boys that the girls are in no way inferior to them, the grim picture of the society might change in future.

ADR'S IN MATRIMONIAL DISPUTES

*Kamaljit Kaur**

I. INTRODUCTION

The discontentment of people over the inordinate delay in dispensation of justice today makes it not only important but imperative to evolve new juristic principles for dispute resolution. The world has experienced that adversarial litigation is not the only means of resolving disputes. Congestion in court rooms, lack of manpower and resources in addition with delay, cost, and procedure speak out the need of better options, approaches and avenues. Alternative Dispute Resolution mechanism is a click to that option.

Alternative Dispute Resolution (ADR)[1] comprises various approaches for resolving disputes in a non-confrontational way, ranging from negotiation between the two parties, a multiparty negotiation, through mediation, consensus building, to arbitration and adjudication. Conflict is endemic to human society, among individuals and groups, and it is important to manage it.

Dealing with conflicts – "conflict management, "or "conflict resolution" as it has come to be called in professional circles – is as old as humanity itself. Stories of handling conflicts and the art of managing them are told at length throughout the history of every nation and ethnic group who share the same history.[2]

The field of "conflict resolution" has matured as a multidisciplinary field involving psychology, sociology, social studies, law, business, anthropology, gender studies, political sciences and international relations. The discipline is complex because it deals with conflicts at different stages of their existence, and also because it is a mix of theory and practice, and of art and science.[3] The "science" is the systematic analysis of problem solving, and the "art" is the skills, personal abilities, and wisdom.

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1 A procedure for settling a dispute by means other than litigation, such as arbitration or mediation, BLACK'S LAW DICTIONARY (8th Ed. 2004) 86.

2 Barrett, A HISTORY OF ALTERNATIVE DISPUTE RESOLUTION (Jossey-Bass San Francisco (2004) 7.

3 Howard Raiffa , THE ART AND SCIENCE OF NEGOTIATION (1982).

Alternative Dispute Resolution (ADR, sometimes also called "Appropriate Dispute Resolution") is a general term, used to define a set of approaches and techniques aimed to resolving disputes in a non-confrontational way. ADR has been accepted and is now regarded as respectable within the legal profession. The large number of lawyers having undertaken mediation and other ADR training is recognition of the changes that the profession has been grappling with.[4] Russian federation provides for courts called "arbitrazhnye study" for dispute resolutions in family cases.[5] It covers a broad spectrum of approaches, from party-to-party engagement in negotiations as the most direct way to reach a mutually accepted resolution, to arbitration and adjustification at the other end, where an external party imposes a solution. Somewhere along the axis of ADR approaches between these two extremes lies "mediation," a process by which a third party aids the disputants to reach a mutually agreed solution.

II. Negotiation, Mediation, Collaborative Law, Arbitration and Conciliation in General

ADR is generally classified into 5 types: Negotiation, Mediation, Collaborative law, Arbitration and Conciliation.

A. Negotiation

Goldberg, Sander, and Rogers define negotiation as "communication for the purpose of persuasion."[6] In negotiations there are three approaches to resolving the dispute, each with a different orientation and focus – interest-based, rights-based, and power-based-and they can result in different outcomes.[7]

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[4] J Pollard, *Collaborative law Gaining Momentum*, (45) 5 Law Society Journal 68-72 (Australian 2007).

[5] Bulletin, *General Overview of the Judicial System of the Russian federation* (BBH Legal, September 2006).

[6] Goldberg, Sander and Rogers, Dispute Resolution: Negotiation, Mediation and Other Processes (New York, 1992).

[7] Ury, W. Brett, J. and Goldberg, S. Getting Dispute Resolved (Harvard University Press, PON, 1993). Fisher, in Getting to yes (1991), define negotiation as : "a basic means of getting what you want from others. It is back and forth communication designed to reach an agreement when you and the other side have some interests that are shared and others that are opposed."

B. Mediation

Mediation is a process that employs a neutral/impartial person or persons to facilitate negotiation between the parties to a dispute in an effort to reach a mutually accepted resolution. Mediation is a process close in its premises to negotiation: "mediation is an assisted and facilitated negotiation carried out by a third party" [8]

In family law this is a process of negotiation between a couple, assisted by professionals who may be lawyers; it runs alongside the advice given by lawyers but offers a different way for couples to resolve themselves the issues they face. It is not to be confused with counseling. In orthodox mediation, the mediators can say if a proposed outcome is unlikely to be upheld by a court.

C. Arbitration

Arbitration can be defined as a method by which parties to a dispute get the same settled through the intervention of a third person. Parties can also settle their disputes through a permanent arbitral Institution like, Indian Council of Arbitration, Chamber of Commerce's, etc. This is a form of independent adjudication but outside the court system and with the opportunity to agree timetables, choice of arbitrator, procedures, location of hearings etc. It can be for all issues in a case or just a narrow point in dispute.

D. Collaborative Law

Collaborative Law, commonly known as collaborative practice because the service may involve other professional, is a dispute resolution method in which the clients and their lawyers agree by way of a limited retainer agreement to negotiate settlement without resort to the courts. Collaborative Law is very prevalent in other countries.[9] Collaborative lawyering is an emerging method of dispute resolution for separating or divorcing couples, where the parties and their lawyers agree to resolve the issues without litigation. The essence of the process is that the best interest of the spouses and their families is served by trying to resolve

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[8] *Supra* n. 6.

[9] Tesler, P, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION (American Bar Association, 2001).

these disputes in a non confrontational way. This is achieved by way of informal discussion with each party, ensuring their direct influence on the outcome. The ultimate aim is to avoid the use of court in family law cases.

The International Academy of Collaborative Professionals (IACP) is an international body promoting the practice of collaborative law internationally. It has 2,458 members drawn from 9 countries and sets out training standards for those involved in collaborative law.[10] Whilst the highest concentration of collaborative lawyers is in family law, the collaborative process is also used in other areas of law. For example, in Massachusetts it is used in resolving commercial disputes. Similarly, Texas is considering extending the practice of collaborative law into other areas of civil law.[11]

Although collaborative law is an emerging ADR process, it has a capacity to provide another method to assist the resolution of family disputes in certain circumstances. Given that it is a relatively new process, the need to ensure that those engaged in the process are trained in the collaborative process. This involves learning not only the collaborative model, but also the new skills needed to work with clients and the lawyer representing the other spouse to try and get the best result for both spouses and the family. At present the basic issues stemming from collaborative lawyering is the ethical and professional problems which may arise and whether the parties best interests are fully served by the solicitors.[12]

E. Conciliation

Conciliation is a process in which a third party brings together all sides of the conflict for discussion among themselves. Conciliators do not usually take an active role in resolving the dispute, but may help with agenda setting, record keeping, and other administrative concerns. A conciliator may act as a go between when parties do not meet directly, and act as a moderator when joint meetings are held. Japanese law makes extensive use of conciliation in civil disputes. The most common forms are civil conciliation and domestic conciliation. Civil conciliation is

[10] See www.collaborativepractice.com.

[11] Pirrie, *Collaborative divorce*, 156 NEW LAW JOURNAL 898 at 899 (2006).

[12] Fairman, *Ethics and Collaborative Lawyering: Why Put Old Hats on New Heads*, 18 OHIO ST J DIS RESOL 505 (2002).

a form of dispute resolution for small lawsuits, and provides a simpler and cheaper alternative to litigation. Domestic conciliation is most commonly used to handle contentious divorces, but may apply to other domestic disputes such as the annulment of a marriage or acknowledgment of paternity.

III. A Brief History Of ADR

The ADR "movement" started in the United States in the 1970s in response to the need to find more efficient and effective alternatives to litigation. Today, ADR is flourishing throughout the world because it has been proven itself, in multiple ways, to be a better way to resolve disputes.

The US Federal Civil Rights Act (1964) led to the formation of the CRS (Community Relations Service in the US Department of Justice), which was mandated to help "communities and persons therein in resolving disputes, disagreements, or difficulties relating to discriminatory practices based on race, color, or national origin".[13]

Internationally, the ADR movement has also taken off in both developed and developing countries. In the developing world, a number of countries are engaging in the ADR experiment, including Argentina, Bangladesh, Bolivia, Colombia, Ecuador, the Philippines, South Africa, Sri Lanka, Ukraine, and Uruguay. These countries are experiencing similar growth while continuing to develop new and creative ADR processes and applications. Canada, New Zealand, Australia, and the United Kingdom have become pioneers in the field. In the United Kingdom, the Advisory, Conciliation and Arbitration Service (ACAS) was set up in 1974 to deal with industrial disputes, and at the end of the 1980s commercial mediation services became available, corresponding to the lord Chancellor's statement in a television interview, "Mediation and other methods of resolving disputes earlier, without going to court, produce satisfactory results to both sides are, I think, very much to be encouraged"[14]. In response to the 1990 Civil Justice Reform Act requiring all U.S. federal district courts to develop a plan to reduce cost and delay in civil litigation, most district courts have authorized or established some form of ADR. Innovation in ADR models,

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[13] Moore, C., The Mediation Process: Practical Strategies for Resolving Conflicts (San Francisco, Jossey Bass, 1996).

[14] A.F. Acland, Managing Conflict Through Mediation (London, Hutchinson Business, 1995).

expansion of government-mandated, court-based ADR in state and federal systems and increased interest in ADR by disputants has made the United States the richest source of experience in court connected ADR. In 1976, the San Francisco Community Boards program was established to further such goals. In the 1980s, demand for ADR in the commercial sector began to grow as part of an effort to find more efficient and effective alternatives to litigation.[15]

In Sri Lanka, the courts are ineffective in resolving many local and small disputes because of high costs and long delays. The Mediation Boards there have evolved as a substitute for the courts, but enjoy the support of the judicial system. Bolivia, Haiti, Ecuador, and El Salvador are developing systems involving government support for independent, local, informal dispute resolution panels to serve parts of the population for whom the courts are ineffective.[16]

Many studies of developing country ADR systems offer evidence that the systems have been effective in processing cases quickly, at least relative to traditional court systems. The mediation Boards in Sri Lanka resolve 61% of cases within 30 days and 94% within 90 days. Studies of programs in China, India, Costa Rica, and Puerto Rico similarly indicate that ADR systems have been successful in handling large numbers of cases quickly and efficiently.[17] In India, the lok adalats were generally credited with resolving large number of cases efficiently and cheaply in the mid-1980s before the system was taken over by the government judiciary.

IV. ADR IN INDIA SPECIFICALLY WITH REGARD TO FAMILY LAW

Before formation of law Courts in India, people were settling the matters of dispute by themselves by mediation. The mediation was normally headed by a person of higher status and respect among the village people

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[15] *Supra* n. 6 and Elizabeth Plapinger and Donna Stienstra, ADR AND SETTLEMENTS IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES AND LAWYERS (Federal Judicial Center and CPR Institute for Dispute Resolution 1996).

[16] William, Davis, and Madeleine Crohn, , *Lessons Learned: Experiences with Alternative Dispute Resolution*, Prepared for Judicial Roundtable II. Wlliamsburg, VA: National Center for State Courts, May 1996.

[17] Harry Blair, and Gary Hansen, *Weighing in on the Scales for Justice: Strategies Approaches for Donor-Supported Rule of Law Programs*, USAID PROGRAM AND OPERATIONS ASSESSMENT REPORT No. 7, 1994.

and such mediation was called in olden days "Panchayath". The Indian Contract Act, 1872 and the Specific Relief Act, 1878 recognised the settlement of disputes by arbitration. Even Industrial Disputes Act, 1947 provides the provision both for conciliation and arbitration for the purpose of settlement of disputes.

The arbitration was originally governed by the provisions of the Indian Arbitration Act, 1940 which has now been replaced by the Arbitration and Conciliation Act, 1996. The scope of interference of the award passed by an arbitration was dealt with by the Apex Court in *Food Corporation of India* v. *Joginderlal Mohindarpal*[18] as:

> Arbitration as a mode for settlement of disputes between the parties has a tradition in India. It has a social purpose to fulfill today. It has a great urgency today when there has been an explosion of litigation in the Courts of law established by the sovereign power. However in proceedings of arbitration, there must be adherence to justice, equality of law and fair play in action. The proceedings of arbitration must adhere to the principles of natural justice and must be in consonance with such practice and procedure, which will lead to a proper resolution of the dispute and create confidence of the people, for whose benefit these procedures are resorted to. It is therefore, the function of the Court of law to oversee that the arbitrator acts within the norms of Justice. Once they do so and the award is clear, just and fair, the Court should as far as possible give effect to the award of the parties and make the parties compel to adhere to and obey the decision of their chosen adjudicator. It is in this perspective that one should view the scope and limit of corrections by the Court of an award made by the arbitrator. The law of arbitration must be made simple, less technical and more responsible to the actual realities of the situation but must be responsible to the canon of justice and fair play. The arbitrator should be made to adhere to such process and norms which will create confidence not only by doing justice between parties but by creating a sense that justice appears to have been done.

[18] (1989) 2 SCC 347.

Reference to the village panchayat without court intervention, was one of the natural ways for Hindus to resolve disputes. Hindu civilization expressly encouraged dispute resolution by tribunals chosen by the parties.

A study of the Muslim law during the Muslim rule and judicial administrators under Arabs, Sultans, Mughals, Vijyanagar Empire and Marathas give useful information about the dispute resolution practices prevalent during that epoch.[19]

In present scenario, family disputes are becoming very common. Individualization, modernization, western culture and decline of joint family systems are the main causes behind family disputes. The sensitiveness involved in the family matters makes the family disputes different from others. Family disputes are difficult to settle as they are linked with emotions arising out of a relationship. It is hard to handle situation, so they enter into litigation losing their time, money and peace. In reality most of the family disputes can be solved amicably by adopting ADR.

Section 5 of the Family Courts Act, 1984 provides provision for the Government to require the association of Social Welfare Organization to help the Family Court to arrive at a settlement. Section 6 of the Act provides for appointment of permanent counselors to effect settlement in the family matters. Section 9 of the Act impose an obligation on the Court to make effort for settlement before taking evidence in the case. In fact the practice in Family Court shows that most of the cases are filed on sudden impulse between the members of the family, spouses and they are being settled in the conciliation itself. To this extent the alternate dispute resolution has not much recognition in the matter of settlement of family disputes. Similar provision has been made in Order XXXII A of Code of Civil Procedure which deals with family matters. Order 32A of CPC lays down the provision relating to "suits relating to matter concerning the family". It was felt that ordinary judicial procedure is not ideally suited to the sensitive area of personal relationships. Litigations involving affairs of the family seem to require special approach in view of the serious emotional aspects involved. Therefore, Order 32A seeks to highlight the need for adopting a different approach where matters concerning the family are at issue, including the need for effort to bring about amicable settlement.[20]

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[19] R.D. Rajan, A PREMIER ON ALTERNATIVE DISPUTE RESOLUTION (2005) 515.

[20] The provisions of this Order applies to all proceedings relating to family, like guardianship, custody of minor, maintenance, wills, succession etc.,

ADR programs cannot be a substitute for a formal judicial system. ADR programs are instruments for the application of equity, rather than the rule of law, and as such cannot be expected to establish legal precedent or implement changes in legal and social norms. However, ADR programs can complement and support judicial reforms.

When courts are systematically biased against women, ADR may be able to improve women's access to justice, especially when discrimination against women inherent in local norms or traditional dispute resolution mechanisms can be overcome in the new ADR mechanism.

By amendment of the Code of Civil Procedure in the year 2002, Section 89 has been included in the Code, which give importance to mediation, conciliation and arbitration.[21] This section casts an obligation on the part of the Court to refer the matter for settlement either before the Lok Adalat or other methods enumerated in that section itself.[22]

Order 23 Rule 3 of CPC is a provision for making a decree on any lawful agreement or compromise between the parties during the pendency of the suit by which claim is satisfied or adjusted. The scheme of Rule 3 of Order 23 provides that if the court is satisfied that a suit has been adjusted wholly or partly by lawful agreement or compromise, the court shall pass a decree in accordance to that. Order 27 Rule 5B confers a duty on court in suit against the government or a public officer to assist in arriving at a settlement.

The other legislation, which has given more emphasis on the alternate dispute resolution, is the Legal Service Authorities Act, 1987.[23] Though settlements were effected by conducting Lok Nyayalayas prior to this Act, the same has not been given any statutory recognition. Now under the new Act, a settlement arrived at in the Lok Adalat has been given the

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[21] *K.A.Abdul Jalees* v. *T.A. Sahida*, (2003) 4 SCC 166.

[22] Section 89, coupled with Order X Rules IA, IB, IC of the CPC and allied laws, affords the judiciary the opportunity to offer the parties an array of avenues to resolve their issues in a timely and amicable manner and, in the process, reduce its backlog.

[23] As per sub-section (2) of Section 89, when a dispute is referred to arbitration and conciliations, the provisions of Arbitration and Conciliation Act will apply. When the Court refers the dispute to Lok Adalats for settlement by an institution or person, the Legal Services Authorities Act 1987 alone shall apply.

force of a decree which can be executed through court as if it is a decree passed by a competent court. Power has been given to the Lok Adalat constituted under the Act, to decide the dispute referred to them, to effect settlement by mediation and if settlement is arrived at between parties to draw a decree on the basis of compromise and the same will be signed by the members of the Adalat which consist of a judicial officer working or retired, a lawyer and a person of social welfare association preferably women and a copy of the same will be given to the parties free of costs. This has really reduced delay in getting copy of the decree by the parties. Lok Adalats have acquired wide acceptance among the public as the results are quick, less expensive and no appeal will lie against the award passed in a Lok Adalat.[24]

Realizing that in some countries trial within a reasonable time is a part of the human right legislation and in our country, it is a constitutional obligation in terms of Article 14 and 21 of the Constitution, the Delhi High Court mediation and conciliation centre SAMADHAN was established in May 2006. In 1995 the International Centre for Alternative Dispute Resolution (ICADR) was inaugurated by Shri P.V. Narasimha Rao the then Prime Minister.[25]

Section 23(2) of the Hindu Marriage Act, 1955 mandates the duty on the court that before granting relief under this Act, the Court shall in the first instance, make an endeavor to bring about a reconciliation between the parties, where it is possible according to nature and circumstances of the case.

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[24] Section 19(1) of the Legal Services Authorities Act 1987 defines that every State Authority or District Authority or the Supreme Court Legal Services Committee or every High Court Legal Services committee or, as the case may be, Taluk Legal Services Committee may organize Lok Adalats at such intervals and places and for exercising such jurisdiction and for such areas as it thinks fit. As amended vide Act No. 37 of 2002.

[25] The Prime Minister observed: "While reforms in the judicial sector should be undertaken with necessary speed, it does not appear that courts and tribunals will be in a position to hear the entire burden of the justice system. it is incumbent on government to provide at reasonable cost as many modes of settlements of disputes as are necessary to cover the variety of disputes that arise. Litigants should be encouraged to resort to alternative dispute resolution so that the court system proper would be left with a smaller number of important disputes that demand judicial attention."

In *Salem Bar Association* v. *Union of India*[26] the Supreme Court has requested to prepare model rules for ADR and also draft rules of mediation under section 89(2)(d) of Code of Civil Procedure, 1908. The rules are framed as "Alternative Dispute Resolution and Mediation Rules, 2003".

The new law, which came into effect in July 2002, was seen to be adopted with differing enthusiasm across the nation. Some State High Courts had already put in place a panel of trained mediators, who were being referred cases for mediation on a regular basis, and had also adopted the earlier version of the aforesaid Model Rules (recommended in an earlier order of the Supreme Court in the same case) with or without modifications. Whereas other States high Courts had either only held "Awareness Campaigns" with little or no follow up action or were in the process of providing mediation training and creating a panel of trained mediators. These ADR developments in the respective States depended largely on the inclination of their respective High Court's Chief Justice towards ADR. This not only led to uneven introduction of ADR services in the different States but also led to the implementation of the ADR system gaining and losing momentum with the change of guard in each High Court, which on an average one can expect to happen every other year. Now, after the second Order of the Supreme Court in the *Salem Bar's case*, it is to be presumed that all High Courts shall be implementing the ADR system by adopting the aforesaid Model Rules in such form as they choose. They will be providing mediator's training to the legal fraternity and such others as they choose, and setting up Panels of trained mediators and providing the list to the judges, lawyers and parties for consideration whilst appointing mediators. On successful completion of the mediation process, they will take the mediated agreements on record and dispose of the cases on the basis thereof.

Rule 4 of the Alternative Dispute Resolution and Mediation Rules, 2003 lays down that the Court has to give guidance to parties (when parties are opting for any mode of ADR) by drawing their attention to the relevant factors which parties will have to take into account, before they exercise their opinion as to the particular mode of settlement, namely;

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[26] (2005) 6 SCC 344

(i) It will be to the advantage of the parties, so far as time and expense are concerned, to opt for one of these modes of settlement rather than seek a trial on the disputes arising in the suit;

(ii) Where there is no relation between the parties which requires to be preserved it will be in the interest of the parties to seek reference of the matter to arbitration as envisaged in clause (1) of sub-section (1) of sec. 89.

(iii) Where there is a relationships between the parties which requires to be preserved, it will be in the interests of the parties to seek reference of the matter to conciliation or mediation, as envisaged in clauses (b) or (d) of sub-section (1) of sec. 89.

The rule also says that disputes arising in matrimonial, maintenance and child custody matters shall, among others, be treated as cases where a relationship between the parties has to be preserved.

(iv) Where parties are interested in a final settlement which may lead to a compromise, it will be in the interest of the parties to seek reference of the matter to judicial settlement including Lok Adalat as envisaged in clause (c) of sub-section 89.

According to Rule 8, the provisions of these Rules may be applied to proceedings before the courts, including Family courts constituted under the Family Courts Act 1984, while dealing with matrimonial, and child custody disputes.

The National legal Services Authority (NALSA), a statutory body constituted under the Act, is responsible for providing free legal assistance to poor. There is a need to make the masses legal literate and for this NALSA is doing a yeomen service.[27]

In terms of Section 7(hb) of the Notaries Act, 1952 one of the functions of a notary is to act as an arbitrator, conciliator, if so required.

V. Family Mediation (Global Scenario)

Therapeutic mediation is an assessment and treatment approach that assists families in dealing with emotional issues in high conflict separation and divorce. The focus is on the parties themselves as opposed to the dispute.[28] Proponents of family mediation argue that the traditional adversarial

[27] R.C. Lahoti, "Envisioning Justice in 21st Century" keynote address delivered at conference of chief ministers of state and chief justices of high courts. Vigyan Bhavan, New Delhi on September 18, 2004: (2004) 7 SCC (J) 13.

[28] Irving and Benjamin, Therapeutic Family Mediation: Helping Families Resolve Conflict (Sage Publications, 2002).

litigation system is unable to adapt to the needs unique to family breakdown. Where human relationships are strained, the adversarial approach may actually increase rather than reduce conflict.[29]

In Australia, the Family Law Act 1975 as amended by the Family Law Reform Act 1995 put a greater emphasis on the child's best interest in the process of dispute resolution. An Australian study found that only 4% of mediators had ever consulted school age children. Following this, a four month pilot project was launched into child consultation. The result of this study reported that over 80% of parents whose children were consulted as part of the mediation process felt that they had benefited a great deal from it.[30]

According to the American Model Standards for Family and Divorce Mediation – except in extraordinary circumstances, the children should not participate in the process without the consent of both parents and the children's court appointed representative. The use of the phrase "extraordinary circumstances" in the Model Standards sets a deliberately high barrier, and does not force a parent to involve a child if that parent is opposed to it and a child's participation is a matter for parents to decide after proper consultation and discussion".[31]

In England and Wales in *Al-Khatin* v. *Masry*[32], Thrope LJ stated that mediation should be considered at each level of court proceedings, even at Court of Appeal Level, because - … there was no family case, however conflicted, that was not potentially open to successful mediation, even if mediation had not been attempted or had failed during the trial process. There are approximately 150,000 divorces per year in England and Wales and approximately 50,000 applications concerning children. Furthermore, 3 in every 5 marriages are estimated to end in divorce, 1 in 4 children under 16 will experience their parents' divorce and over 150,000

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[29] Alberta Law Reform Institute, RESEARCH PAPER ON COURT-CONNECTED FAMILY MEDIATION PROGRAMS IN CANADA (No. 20 1994) at 1.

[30] McIntosh, *Child–Inclusive Divorce Mediation: Report on a Qualitative Research Study*, 18 MEDIATION QUARTERLY 2 (2000); and LEGAL AID AND MEDIATION FOR PEOPLE INVOLVED IN FAMILY BREAKDOWN (National Audit Office, Legal Services Commission, March 2007) 26.

[31] Schoffer, *Bringing Children to the Mediation Table: Defining a Child's Best Interest in Divorce Mediation*, 43 FAMILY COURT REVIEW 326 (2005).

[32] 2004 EWCA Civ 1353.

children are affected by divorce every year.[33] With 15,000 publicly funded mediations plus approximately 5,000 private mediations, this indicates a mediation population of around 20,000. Thus it would appear that there are 10% of the divorcing and separating population who use mediation.[34] For many years, there was little official support and funding for family mediation in England and Wales. However, stemming from the recommendations of the Law Commission's 1990 Report[35], family mediation was allotted a central role in the reform of divorce introduced by the Family Law Act 1996.

In a study conducted in 2001, it was noted that 38 states in the United States had legislation that regulate family mediation.[36] Most agreements reached through mediation were not binding until approved by the court. If no agreement was reached, generally, it was found that the cases go to trial but now these are mandatory. It was also pointed out that such mandatory mediation statutes send a clear public policy message that where possible, the first level of intervention for family law disputes should be in non-adversarial processes, before proceeding to more conflict-escalating adversarial interventions.[37]

Australia has a long tradition of promoting ADR for family disputes. The Federal government issued a - Justice statement in May 1995 in which it committed itself to make dispute resolution services more widely available. Funding was allocated to 24 family mediation services throughout Australia over a four-year programme. Funding was also allocated to expand community based family mediation services. A National Alternative Dispute Resolution Advisory Council (NADRAC) was established in November 1995 to develop a comprehensive policy framework for the

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[33] Divorcing or Separating? National Family Mediation, 2006.

[34] Sayers, FAMILY MEDIATION IN ENGLAND AND WALES, Presentation to the Committee on Legal Affairs Presidency of the Council of the European Union – Mediation: Pushing the Boundaries, October 2007. INFORMATION MEETING AND ASSOCIATED PROVISIONS WITHIN THE FAMILY LAW ACT 1996: SUMMARY OF THE FINAL EVALUATION REPORT (Lord Chancellor's Department, London, 2001).

[35] LAW COMMISSION OF ENGLAND AND WALES REPORT ON FAMILY LAW: THE GROUND FOR DIVORCE (Law Com. No. 192, 1990).

[36] Tondo, et al, *Mediation Trends, A Survey of the States*, 39 FAM CT REV 431 (2001).

[37] Kelly, The United States experience, keynote address at the Proceedings of the International Forum on Family Relationship in Transition Legislative, Practical and Policy Responses, December 2005.

expansion of alternative dispute resolution.[38] Section 10f of the Family Law Act 1975 as amended by the Family Law Amendment (Shared Parental Responsibility) Act 2006, defines a family dispute resolution as a process (other than a judicial process). It also provides for Family Consultants and Family Relationship Centres.[39]

In Canada, mediation has been connected with the formal legal process for 30 years. The first court-connected family mediation service in Canada was launched in 1972 with the establishment of the Edmonton Family Court Conciliation Project. Since then, mediation services offering various programmes have been introduced in all 10 Canadian provinces.[40]

In several Canadian jurisdictions, the role of mediation in assisting to resolve family law matters is recognised in legislation, Federally, the Divorce Act 1985 provision that every lawyer who acts in a divorce case has the duty to inform the spouse of mediation facilities that might be able to assist the spouse in negotiating the matters that may be the subject of a support order or a custody order.[41] In Ontario,[42] Newfoundland,[43] and the Yukon[44] legislation expressly authorizes the court to appoint a mediator to deal with any matter that the court specifies.

Judicial mediation conferences are available in New Zealand for parties under the Family Proceedings Act 1980 where a party has applied for a separation or maintenance order, or for a custody or access order. Mediation conferences may also be convened under section 170 of the Children, Young Persons, and their Families Act 1989. In response to the New Zealand's Law Reform Commission Report on Dispute Resolution in the Family Court recommendation that non-judge-led mediation be

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[38] www.nadrac.gov.au.

[39] Nicholls, *The New Family Dispute Resolution System: Reform Under the Family Law Amendment (Shared Parental Responsibility) Act 2006,* 3 (1) BOND UNIVERSITY STUDENT LAW REVIEW 6 (2007).

[40] Alberta Law Reform Institute Research Paper on Court-Connected Family Mediation Programs in Canada, ALBERTA LAW REFORM INSTITUTE RESEARCH PAPER No. 20, 1994 at 4.

[41] R.S.C. 1985, 2nd Supp., c.3, s. 9(2).

[42] Children's Law Reform Act, R.S.O. 1990, C.C. 12, S.31; Family Law Act, R.S.O. 1990, C.F.S. S.3.

[43] Children's Law Act, R.S. Nfld. 1990, C.C-13, S. 37, 41; Family Law Act, R.S. Nfld. 1990, c.F-2, s.4.

[44] Children's Act, R.S.Y. 1986, c. 22, s.42

sonography, etc. was evolved for detection of genetic or chromosomal disorders, congenital malformations or sex linked disorders. These tests, although were meant to detect foetal abnormalities soon began to be used for purposes of determining the sex of the baby. Ultrasound scanning[5] being a non-invasive technique quickly gained popularity as a safe method of testing the sex of the foetus. Those involved in testing could also make money by charging high fees and easily evade the law by saying that they had checked only for detection of abnormalities and not for sex determination. The records could also be easily manipulated, moreover radiologists could keep portable machines and thereby continue this nefarious activity without anyone coming to know about it.

Now new technologies have evolved which ensure child of desired sex. X and Y chromosome separation, Ericsson method[6], Pre-conception gender selection (PGS), Pre-implantational genetic diagnosis (PGD) and in-vitro fertilization ensure the birth of baby of desired sex without undergoing abortions. The method of PGS was evolved to check and reduce the incidence of diseases related to the X chromosome which are more likely to manifest in case of boys than in girls but the technique is being misused to avoid the birth of girls.

As per Medical Termination of Pregnancy Act,1971, abortion is legal but only in certain prescribed circumstances. So far the only available methods of abortion were surgical. Surgical abortions are effective and safe only in trained hands under sterile and well equipped conditions. If performed improperly it may lead to infection, infertility, rupture of uterus and even death. Some years back two new pills[7] have been launched which allow a female to have an abortion with her privacy intact and without her body being invaded. It doesn't require any anaesthesia or hospital stay. The pill RU-486 was approved as a prescription drug in India in October 2002, but even pills are not entirely risk free as they

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[5] Ultrasound of foetus is recommended medically for detection of birth defects such as cleft lip,club foot or heart disease and to ascertain the proper growth of the baby.

[6] The Ericcson Albumin method was pioneered and patented by Dr. Ronald Ericsson in the mid-1970's .In this the father's semen sample is processed for gender selection and then used to inseminate the mother by intra uterine or intra cervical insemination.

[7] RU-486 or Mifepristone and Misoprostol.

may lead to severe bleeding and if the action remains incomplete then unless it is completed surgically it may have serious repurcussions. Although there are remote chances of misuse of this pill for female foeticide as sex of child is usually detected by abdominal ultrasound at 14 weeks or by trans vaginal sonography at 12 or 13 weeks, still chances of its misuse cannot be totally ruled out as there are some tests such as amniocentesis[8] that could be used to determine the child's sex earlier. Although companies supplying the pills have tried to check its misuse by providing for a consent form to be signed by women seeking abortion, but in reality the pills are freely available over chemist's shops even without the doctors prescription.

The last 30 years have witnessed a sharp decline in the sex ratio and the number of women has been rapidly declining. During this period sex determination clinics have mushroomed in virtually every nook and corner of the country. Surveys have shown that maximum number of abortions involve female foetuses. This declining sex ratio is precipitating a catastrophe in the form of severe imbalance in the male- female ratio.

III. Legislative Control of Female Foeticide

The earliest law on this problem is Regulation VI of 1802 followed by the Female Infanticide Act, 1864 passed by the Britishers to curb the then prevalent practice of infanticide[9] by declaring it equivalent to willful murder. Today female foeticide has appeared in place of female infanticide thereby hastening the pace of the death of a female child from the born to the unborn stage.

In 1860, the Indian Penal Code was enacted which contains provisions for control of abortions. Section 312 of the Act[10] states that, 'whoever voluntarily causes a woman to miscarry, where the miscarriage is not caused in good faith for the purpose of saving the life of the woman shall be punished with imprisonment upto seven years'. This section also covers a woman who causes herself to miscarry. Causing miscarriage without woman's consent[11] and causing death with the intention of causing miscarriage[12] are also made punishable under the Act. Under the Act,

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[8] *Supra* n. 4.

[9] Infanticide is the killing of infants immediately after birth by choking them, feeding them with poisoned milk or burying them alive.

[10] The Indian Penal Code, 1860 hereinafter referred to as the Act.

[11] *Id.*, Section 313.

[12] *Id.*, Section 314.

whoever before the birth of any child does any act with the intention of thereby preventing the child from being born alive or causing it to die after it is born and by such act prevents the child from being born alive or cause it to die after its birth shall be punished with imprisonment upto ten years except in cases where such act was committed in good faith to save the life of the mother[13]. Sections 312 to 318 comprehensively cover offences of causing miscarriage, preventing the child from being born, causing death of unborn[14], abandoning the new born,[15] concealing the body or secretly disposing it off[16]. Though the words feoticide or infanticide have not been specifically used, nevertheless these sections cover both of them.

The gender neutral terms employed in these sections ensures the application of these provisions to foetuses as well as infants of either sex, however male foeticide or infanticide are unheard of in India. In Indian society where obsession for son is a structural and cultural affliction, a woman faces extreme social and psychological pressure to give birth to a male offspring. These provisions fail to address the more important issues wherein women suffer numerous pregnancies and consequent abortions under the tremendous social pressure on them.

In 1964 the Ministry of Health set up a committee[17] to look into the Human Rights issue of reproductive rights of women wherein they were claiming legalization of abortions. In the year 1971, the Parliament enacted the Medical Termination of Pregnancy Act,1971, which came into force from 1st April,1972 and was subsequently revised in 1975 and 2002 by the Medical Termination of Pregnancy Amendment Act (no.64 of 2002) ,with an objective to avoid the misuse of induced abortions[18].

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[13] *Id.*, Section 315.
[14] *Id.*, Section 316.
[15] *Id.*, Section 317.
[16] *Id.*, Section 318.
[17] The name of the committee set up by Ministry of health in 1964 was "Shantilal Shah Committee"
[18] An abortion is the termination of a pregnancy by the removal or expulsion from the uterus of a foetus or embryo resulting in or caused by its death. An abortion can occur spontaneously due to complications during pregnancy or can be induced. An abortion induced to preserve the health of the pregnant female is termed a therapeutic abortion, while an abortion induced for any other reason is termed an elective abortion. The term abortion most commonly refers to the induced abortion of a pregnancy, while spontaneous abortions are usually termed miscarriages.

The MTP Act[19] is a small legislation with only eight sections. This Act recognizes a woman's right to privacy, her right to limit pregnancies, her right to produce healthy babies and gives her the freedom to take decisions with respect to her own body, but this right is being misused by unscrupulous people to selectively get female foetuses aborted.

The MTP Act, lays down the conditions under which pregnancy can be terminated[20], the persons[21] as well as the place[22] to perform it. As per this Act the reasons for which medical termination of pregnancy is permissible are:

(1) Where a pregnant woman has a serious medical disease and continuation of pregnancy could endanger her life like:

(a) Heart disease,

(b) Severe rise in blood pressure,

(c) Uncontrolled vomiting during pregnancy,

(d) Cervical/ Breast cancer,

(e) Diabetes mellitus with eye complication (retinopathy),

(f) Epilepsy,

(g) Psychiatric illness.

(2) Where the continuation of pregnancy could lead to substantial risk to the new-born leading to serious physical/ mental handicaps such as in case of:

(a) Chromosomal abnormalities,

(b) Rubella viral infection to mother in first three months,

(c) If previous children have congenital abnormalities,

(d) Rh incompatibility related risks,

(e) Exposure of foetus to radiation beyond prescribed limits.

(3) Where the pregnancy has resulted due to rape of the woman[23],

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[19] The Medical Termination of Pregnancy Act, 1971.
[20] *Id.*, Section 3.
[21] *Id.*, Registered medical practitioner has been defined in section 2(d).
[22] *Id.*, Section 4.
[23] *Id.*, Explanation 1 to Section 3.

introduced into the Family Court as part of a new conciliation service, the Government established a family mediation pilot. Family mediation was piloted in North Shore, Hamilton, Porirua and Christchurch Family Courts between March 2005 and June 2006.[45]

VI. Conclusion

Litigation is a fight unto death, with severe economic, psychological and spiritual harm done to the parties: ADR compliments compromise embedded in moral and spiritual principles.[46]

It is recommended that there should be a Family Court Information Centre as in other countries and where proceedings for judicial separation have been instituted, the parties should be required within two weeks to attend the proposed Family Court Information Centre, if they had not already done so, to receive information as appropriate concerning the various family support services available, including welfare service and to receive information and advice concerning the availability and purpose of mediation.

This should not be compulsory, but the court would be obliged to consider at the beginning of the hearing whether to adjourn proceedings, if appropriate, to require the parties to attend the proposed Information Centre to receive the relevant information and advice. The Court should not, however, adjourn proceedings for this purpose unless satisfied that no additional risks would be involved in respect of any family members whose safety or welfare was in issue. Where the appropriate certificate of attendance or waiver has not been obtained, the Court would have the right, at its discretion, to adjourn the case until the parties had attended the proposed Information Centre. When one or both of the parties still refused to attend, the court would proceed with the hearing, but written information would be sent to the parties.

It also recommended that each proposed regional family courts should have an information office providing information on all options available for the resolution of family law disputes, mediation facilities, an office of the Legal Aid Board, and family support and child assessment services.

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[45] Barwick and Gray, Family Mediation – Evaluation of the Pilot: Report for the Ministry of Justice (Ministry of Justice, 2007).

[46] Joseph Allegretti, *A Christian Perspective on ADR*,28 Fordham urb LJ 997 and 1001 (2001).

We should give recognition to Parenting After Separation (PAS), a carefully devised schedule which lays out how to share time with the children, how to manage responsibilities, and how to make decisions about the children. School arrangements, child care, holidays, and pocket money can all be part of a parenting plan. It is a plan that is individual to each family and takes into account everyone's needs and interests.[47] Australia[48] and New Zealand recognize it.

In British Colombia it is a free three-hour information session for separating parents sponsored by the Ministry of the Attorney General.[49] The purpose of the sessions is to help parents make informed choices about separation and conflict, taking into account the best interest of their children. Information is presented in lectures, videos, handouts and interaction with participants in three key area: the impact of separation on children and adults, and how parents can best help their children through this difficult time; the full range of dispute resolution options available in the justice system, including mediation and the court process; how the child support guidelines work; and how to find out more about them. Both the person making an application to court and the other parent must attend a PAS session before their first court appearance.

Research on parent education programmes in the United States, and parental response to these programmes, suggests that well-designed divorce education programs should be mandatory and early in the divorce process for all parents disputing custody or access issues as they bring children's needs and voices sharply into focus for parents in a completely non adversarial manner, and at relatively low cost.[50] When parents separate, children often experience distress, and their adjustment post-separation may be adversely affected when the relationship with one of their parents is severed, so there is a need for PAS.

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[47] What is a Parenting Plan? Family Mediation Service.

[48] Section 63B of the Family Law Act 1975, as amended by the Family Law Reform Act 1995.

[49] See http://www.ag.gov.bc.ca/family-justice/help/pas/index.htm. see also Kruk, *Promoting Co-operative Parenting After Separation: A Therapeutic/interventionist Model of Family Mediation*, 15 JOURNAL OF FAMILY THERAPY 235 (1993).

[50] Kelly, *Psychological and Legal Interventions for Parents and Children Custody and Access Disputes: Current Research and Practice*, 10 VA J SOC POL'Y & L 129 at 133-136 (2002).

FEMALE FOETICIDE: A MEDICO-LEGAL ANALYSIS

*Vageshwari Deswal**

I. INTRODUCTION

In the tradition bound Indian society, women have been physically, socially, psychologically and sexually exploited from times immemorial, sometimes in the name of religion, sometimes on the pretext of the writings in the scriptures and sometimes by the social sanctions. Inspite of our 65 years of independence, majority of Indians are still enslaved to their own mental makeup which refuses to acknowledge women as equivalent to men. A woman in our society is relegated to the status of an enigma. She is worshipped as goddess in temples, she is attributed mysterious powers of annihilation (kali) and construction (maa). But, unfortunately this mythological existence remains only in temples and scriptures.

Observing, studying and depicting women in poetry, writing, painting and sculpture is a very old business. In fact the woman has been a sort of obsession for all the philosophers, authors, thinkers and artists. Woman as an entity has been the focal point of all of them. Irony of the situation is that, despite all the importance attached to women they were never given their due share or status in life and society.[1] In fact the very institutions that proclaim to safeguard their lives and interests, such as family and marriage etc have laid a siege on them. The forms of oppression may vary but the content is same .The Indian society condemns the life of a woman who is unable to bear children more specifically a male child.

It is an admitted fact that in Indian society, discrimination against girl child still prevails, may be because of prevailing uncontrolled dowry system despite the Dowry Prohibition Act, as there is no change in the mind-set or also because of insufficient education and/or tradition of women being confined to household activities. Sex selection/sex determination further adds to this adversity. The misuse of modern science and technology by preventing the birth of girl child by sex determination before birth and thereafter abortion is evident from the 2001 Census figures which reveal

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[1] Afsar Bano, INDIAN WOMAN:THE CHANGING FACE, Preface (Delhi, 2003).

greater decline in sex ratio in the 0-6 age group in States like Haryana, Punjab, Maharashtra and Gujarat, which are economically better off.[2]

II. Female Foeticide

Female foeticide means and implies expulsion of the female foetus from the mothers womb. Foetus has been defined as, "a human organism during the period of its development beginning on the fifty-seventh day following fertilization or creation and ending at birth".[3]

Female foeticide is the most nefarious crime committed against humanity in general and womanhood in particular. The craving for a male offspring coupled with the family planning programme's insistence on small family norm and the evil of dowry system have all created a situation wherein the birth of a daughter is sought to be avoided at all costs, thereby leading people to commit the most heinous of all crimes wherein a girl child is murdered in her mother's womb. It raises a lot of issues involving violation of human rights, ethics of use and abuse of scientific techniques and gender discrimination which are always left unanswered by the perpetrators themselves. The impact of large scale female foeticide in the past three decades is already manifesting itself in the form of a skewed sex ratio and lack of brides for boys of marriageable age. More generally, demographers warn that in the next twenty years as the number of marriageable women declines, men would tend to marry younger women, leading to a rise in fertility rates and thus a high rate of population growth. The abduction of girls is an associated phenomenon. A society with a preponderance of unmarried young men is prone to particular dangers. More women are likely to be exploited as sex workers. Increases in molestations and rape are an obvious result. The sharp rise in sex crimes in the last two decades have been attributed to the unequal sex ratio.

The possibility of diagnosing genetic defects initiated research on pre-natal sex determination and ultrasound scans, amniocentesis[4],

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[2] *CEHAT* v. *UOI*, (2003) 8 SCC 398.

[3] The Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002, Section 4 (1) (bc).

[4] Amniocentesis is a pre-natal test in which a small amount of amniotic fluid is removed from the sac surrounding the foetus by a fine needle inserted into the uterus through the abdomen under ultrasound guidance. This is used to detect certain types of birth defects such as Down's syndrome, Sickle cell disease, Cystic fibroids and Muscular dystrophy.

determination services are no longer being provided in their respective States.[33]

The ministry of health and family welfare had proposed a series of amendments to the 1994 Act. These were finally given parliamentary approval and the PNDT Act was finally amended in December 2002 with a view to overcome lacunae in existing law and to check the illegal practice of female foeticide. The Act was subsequently titled as The Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act 1994. Thereafter the Ministry of Health and Family Welfare notified the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Rules, 2003 thereby substituting the 1996 Rules with the new rules on 14th February, 2003.

The Parliament passed this Act with the following objectives:

(i) To ban the pre-conception sex selection techniques;
(ii) To prohibit the misuse of pre-natal diagnostic techniques for sex-selective abortions;
(iii) To regulate the pre-natal diagnostic techniques for the appropriate scientific use for which they are intended; and
(iv) To ensure the effective implementation of the Act at all levels.[34]

This Act has made registration of all diagnostic laboratories compulsory with a direction to the manufacturers of ultrasound equipment to sell their products only to registered laboratories. Accordingly, no person including manufacturer, importer, dealer or supplier of Ultrasound machines, Imaging machines, Scanner or any other equipment, capable of detecting sex of foetus as also no organization including a commercial organization should sell, distribute, supply, rent, allow or authorize the use of such machines or equipment ,whether on payment or otherwise to any Genetic counseling centre, Genetic Laboratory, Genetic Clinic, Ultrasound Clinic, Imaging Centre or any other body or person not registered under the Act.[35] The registration certificate in Form-B has to be displayed publically.[36]

The provider of such machine/ equipment to any person or body registered under the Act has to send to appropriate authority of the concerned

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[33] Pamela Philipose, *Women versus Girls*, INDIAN EXPRESS, April 5, 2006.
[34] PC & PNDT Act, 1994.
[35] *Id.*, Section 3B read with Rule 3A of the Rules.
[36] PNDT Rules, Rule 4(i)(ii),Rule 6(2), 6(5)&8(2).

State, Union Territory and to the Central Government, once in three months, a list of those to whom the machine/ equipment has been provided, and take an affidavit from such body or person purchasing or getting authorization for using such machine/ equipment that it shall not be used for detection of sex of the foetus.

The use of Pre-natal diagnostic techniques is permitted only when:

1. age of the pregnant woman is above thirty-five years;
2. the pregnant woman has undergone two or more spontaneous abortions or foetal loss;
3. the pregnant woman has been exposed to potentially tetratogenic agents such as, drugs, radiation, infection or chemicals;
4. the pregnant woman or her spouse has a family history of mental retardation or physical deformities such as, spasticity or any other genetic disease; or
5. any other condition as may be specified by the board.[37]

All Genetic counseling centres, Genetic labs, Genetic clinics and Ultrasound clinics conducting any scan, test or procedure on any pregnant woman shall now have to keep complete records of such tests indicating name, husband's name as well as name and address of the referring medical practitioner and the reasons requiring such test, scan or procedure as specified in Form F.[38]

Whenever any pregnant woman undergoes prenatal diagnostic technique for any other than the permitted purposes it shall be presumed that she was compelled by her husband or any other relative to undergo the procedure and they shall be held liable for the same unless the contrary is proved.[39]

The following acts can be complained against under the various provisions of this Act:

(a) Publication of an advertisement to provide the services of any kind of sex selection or pre-determination[40];

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[37] PC&PNDT Act, Section 4.
[38] PNDT Rules, Rule 9(4).
[39] PC&PNDT Act, Section 24.
[40] *Id.*, Section 22.

(b) Non-registration of the Clinic indulging in pre-conception or pre-natal diagnostic techniques or not displaying of such registration certificate at a conspicuous area within the clinic or establishment[41];
(c) Getting sex determined of the unborn child;
(d) Compelling a pregnant woman to undergo sex determination:
(e) Assisting or facilitating the process of sex-selection[42];
(f) Communication by the medical professional in any manner of the sex of the unborn child to the pregnant lady or any other person;[43]
(g) Non-maintenance of the mandatory records by a clinic registered under the PC&PNDT Act.[44]

IV. Implementation of the Pre-Conception and Pre-natal Diagnostic Techniques Act 1994

To monitor and review the implementation of the provisions of this Act, it is proposed to set up State level supervisory bodies. These bodies shall create public awareness against the practice of pre-conception sex selection and pre-natal determination of sex of foetus. It will review activities of appropriate authorities functioning in the state and take action against them if they fail to perform their duties. These bodies will also keep track of various activities carried out under the provisions of this Act and its Rules and will prepare and send consolidated reports to the Central Supervisory Board and the Central Government.[45]

A complainant desirous of lodging complaint can approach the designated appropriate authority who at the State level is a high ranking health department official above the rank of Joint Director of Health and Family Welfare. At the district level the appropriate authority is the Civil Surgeon or the Chief Medical Officer and in a city the Chief Health Officer or the Ward Health Officer or the Medical Superintendent of a Government Hospital. A complaint has to be made in writing to the appropriate authority who has to acknowledge the receipt of the same. If the appropriate authority

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[41] *Supra* n. 35 &36.
[42] PC&PNDT Act, Section 4(4) and Section 23.
[43] *Id.*, Section 5(2).
[44] *Id.*, Section (4).
[45] *Id.*, Section 16A(1).

fails to take action within 15 days, the complainant can go to the Court of competent jurisdiction with the acknowledgement receipt.

Any violation of this Act including running unlicensed laboratories will lead to seizure of equipments. The appropriate authority may seal as well as seize the equipment.[46] The fine, for those who indulge in sex-selection procedure has been doubled from Rs.50,000 to Rs. 1 lakh, with additional provisions for the suspension and cancellation of the Registration of those medical practitioners who are found guilty of the above offences.[47]

According to statistics submitted by Action Aid, a Non Governmental Organization, who conducted a nation wide survey on the dwindling sex ratio in our country, the number of cases of foeticide registered during 2003, 2004, and 2005 were 57, 86 and 86 respectively. In the year 2005 out of total 86 cases registered, 21 were in Chhattisgarh, 12 in Madhya Pradesh, 12 in Punjab, 10 in Rajasthan, 8 in Haryana, 4 in Gujarat and Maharashtra.[48]

In 2005, the Punjab Government launched a unique 'Integrated Monitoring system' as a pilot project in Ludhiana to check the misuse of technology for female foeticide.[49] Through this software suspected cases of female foeticide would be detected. The Government will maintain computerized database of the centres, machines, inspections and court cases. Any woman in the age group of 15 to 45 going in for an Ultrasound would have to fill up a form (Form F) for personal details and another form (Form G) for her consent in accordance with the PNDT Rules. The Ultrasound centres would undergo surprise and regular checks. According to the latest available reports there are 1347 registered ultra-sound centres in Punjab out of which the registration of 311 centres had been subjected to cancellation or suspension from time to time. FIR's against 103 centres had been lodged and 14 centres had been convicted by courts for PNDT Act violations[50].

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[46] PNDT Rules, Rule 11(2).
[47] PC&PNDT Act, Section 23(3).
[48] Punjabnewsline.com, Posted on Friday,July 25,2008.
[49] THE HINDU, February 2,2006.
[50] www.theindiapost.com june3,2009

(4) Where the socio-economic status of the mother would hamper the progress of a healthy pregnancy and the birth of a healthy child, and

(5) Failure of the contraceptive device irrespective of the method employed.[24]

The opinion of a qualified gynecologist is a prerequisite for any abortion to be done and in case the pregnancy exceeds 12 weeks but is below 20 weeks then opinion of two doctors is necessary[25]. For getting the foetus aborted a lady has to give her consent in writing in the prescribed format. The consent should be free and based on the above considerations only. Consent of husband is not required. For girls below 18 years of age, and those who are mentally unstable, the consent of guardian is required[26]. The consent assures the medical practitioner performing the abortion that she has chosen to undergo the abortion of her free will after having been counseled about the procedure, risks involved and precautions to be taken after that.

This Act also prescribes the qualifications required for a medical practitioner to be able to perform abortions and in only those institutions which have been licensed by the Government to perform abortions. Such institutions have to display the certificate issued by the Government at some conspicuous place in the institution where it is easily visible to persons visiting that place.

The provisions of this Act are aimed at reducing the incidence of illegal abortions which involve great risk to the life and health of girls who often fall into untrained hands of quacks and to liberalise abortions to give women greater control over her body and overall well being, but the Act is outdated as it fails to address the issue of conflicts which arise in view of the legal rights conferred upon the unborn child by the criminal as well as property laws. Today a child born with defects can sue for injuries suffered while in womb for negligence under the law of torts.

In 1980's large scale female foeticide was detected in Maharashtra so the State Government banned Amniocentesis by the Maharashtra

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[24] *Id.*, Explanation 2 to Section 3.
[25] *Id.*, Section 2 (a) and (b).
[26] *Id.*, Section 3(4)(a) and (b).

Regulation of Use of Pre-Natal Diagnostic Techniques Act in 1987.The total population of the country increased by 24.7% between 1981 and 1991. On the other hand the percentage of females which was 48.3% in 1981 declined to 48.1% in 1991 due to a fall in the sex-ratio from 934 to 927 per 1000 males during the same period.[27] This dwindling sex-ratio bears eloquent testimony of violence against women even in the safety of mother's womb. The alarming fall in sex ratio according to the 1991 census figures brought a ghastly picture to the fore which was the presence of only 927 women per 1000 men as compared to the figure of 972 per 1000 in 1961. Madhya Pradesh, Haryana, Rajasthan and Uttar Pradesh, showed a drastic fall in sex ratio to 850 women for every 1000 men. In certain communities of Bihar and Rajasthan the situation was even more alarming where the ratio was mere 600 females per 1000 males.[28] This was the position in 1990 which was designated by the United Nations as the International Year of the Girl Child.

The Vienna declaration on the Elimination of All Forms of Discrimination Against Women, (CEDAW), was ratified by the UNO on December 18, 1979. The Government of India which was an active participant to CEDAW ratified it on June 19, 1993. The preamble of CEDAW reiterates that discrimination against women violates the principles of equality of right and respect for human dignity. By operation of the relevant articles of CEDAW, the State should take all appropriate measures including legislation to modify or abolish gender based discrimination in the existing laws, regulations, customs and practices.

Article 21 of the Constitution of India reinforces " Right to Life".Article 51A(e) also provide for renouncing of practices derogatory to the status of women. In the light of all these the Parliament of India enacted the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act 1994 for preventing misuse of technology to determine pre natal sex leading to female foeticide, but the enforcement machinery was not put into place. Non maintenance of adequate records by clinics made it difficult to identify the purpose for which ultrasound tests were conducted. Even the police authorities failed to register any case under

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[27] CENSUS OF INDIA, 1991, New Delhi, Office of the Registrar General of India.

[28] *Ibid.* Also see, REPORT ON CRIMES IN INDIA, Ministry of Home Affairs, Govt. of India,1994.

this Act owing to lack of social sanction. Non compliance by the medical practitioners who mutely exploited the situation to their monetary advantage and emerging techniques of sex selection at pre-conception stage such as X and Y chromosome separation, PGS etc rendered this Act ineffective in combating the situation.

In response to a Public Interest Litigation[29] filed by Centre for Enquiry into Health and Allied Themes [CEHAT] which is a research center of Anusandhan Trust based in Pune and Mumbai, Mahila Sarvangeen Utkarsh Mandal [MASUM] based in Pune and Maharashtra and Dr. Sabu M. George who is having experience and technical knowledge in the field, urging effective implementation of the Act[30], the Supreme Court passed an order on 4th may, 2001 directing the authorities to ensure implementation of the Act[31] and plug its loopholes. The same petitioners again filed a writ petition (civil) no. 301 of 2000. In this petition, it was, *inter alia,* prayed that as the Pre-natal Diagnostic Techniques contravene the provisions of the PNDT Act, the Central Government and the State Governments be directed to implement the provisions of the PNDT Act by appointing appropriate authorities at State and District levels and the Advisory Committees; the Central Government be directed to ensure that Central Supervisory Board meets every 6 months as provided under the PNDT Act; and for banning of all advertisements of pre-natal sex selection including all other sex determination techniques which can be abused to selectively produce only boys either before or during pregnancy.

On September 10, 2003, Justices MB Shah and Ashok Bhan of the Supreme Court while delivering their judgment on the above issue observed:

> It is unfortunate that for one reason or the other, the practice of female infanticide still prevails despite the fact that gentle touch of a daughter and her voice has soothing effect on the parents. One of the reasons may be the marriage problems faced by the parents coupled with the dowry demand by the so-called educated and/or rich persons who are well placed in the society. The traditional

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[29] AIR 2001 SC 2007.

[30] Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994.

[31] It is noteworthy here that till 2001, not a single conviction was recorded under this Act.

system of female infanticide whereby female baby was done away with after birth by poisoning or letting her choke on husk continues in a different form by taking advantage of advance medical techniques. Unfortunately, developed medical science is misused to get rid of a girl child before birth. Knowing fully well that it is immoral and unethical as well as it may amount to an offence, foetus of a girl child is aborted by qualified and unqualified doctors or compounders. This has affected overall sex ratio in various States where female infanticide is prevailing without any hindrance.[32]

The Court also directed the Central Supervisory Boards to examine the necessity of amending this act in order to remove difficulties in its implementation and make it more equipped to deal with present and future technological advancements. Directions stated that appropriate authorities should be appointed at District and Sub-District levels and the list of members appointed should be published in the print and the electronic media. These authorities were required to send quarterly reports to the Central Supervisory Boards and in general directions were given to spread awareness against the practice of Pre-natal sex determination and the hazards associated with it .The Supreme Court directed the State governments to take further steps to enforce the law and the Department of family welfare was directed to file an affidavit indicating the status of actions taken. Supreme Court directed 9 companies to supply the information of the machines sold to various clinics in the last 5 years. Details of about 11,200 machines from all these companies were collected and fed into a common data base. Addresses received from the manufacturers were also sent to concerned States to launch prosecution against those bodies who were using ultrasound machines without getting themselves registered under the Act. The court directed that the ultrasound machines/scanners be sealed and seized if they were being used without registration. The Indian Medical Association [IMA], Indian Radiologist Association [IRA], and the Federation of Obstetricians and Gynecologists Societies of India [FOGSI] were asked to furnish details of members using these machines. State governments have communicated to the Central government in writing that according to the official reports received, they are satisfied that sex

[32] *CEHAT* v. *UOI*, (2003) 8 SCC 398.

The Times of India, New Delhi edition had carried a report on 23rd June 2009, on how PNDT cases were falling flat because of the failure on part of State Governments to usher in the law. Taking cognizance of the same the Punjab and Haryana High Court had demanded information on the status of notification for PNDT Act in the State of Haryana. Following the court orders, the Director Health, Haryana, recently submitted before the bench that the Government had only recently found out that the notification had not been published in gazette because of a technical glitch. To make amends, he added, it would either issue a fresh notification or an ordinance to give the Act a retrospective effect in the state from October 24, 1997. He also told the court that so far the State has convicted 13 people under the Act and that it was the first one in the country to do so.

After recording the submissions, the bench coming down heavily on the Haryana Government and said that the Government appeared apathetic to the implementation of such an important legislation. It also directed the State Government to implement the Act at the earliest to ensure that no person involved in such inhumane acts walks free. In response to another Public Interest Litigation filed by a local lawyer Gaurav Goyal, who apprised the court of a raid in June 2007 on a hospital run by a quack, seven months after a complaint about foeticide cases in which around 250 foetuses were recovered from that hospital tank in Pataudi village of Gurgaon District of Haryana. The High Court had earlier in response to a complaint, ordered an inquiry by the Commissioner and it was found that four doctors had neglected to take action against that racket operating in their jurisdiction despite complaints The Bench also ordered strict action against those four doctors.[51]

In Gujarat also the State Health department has filed cases against 79 doctors for violation of the provisions of the PNDT Act. Recently a doctor has been held guilty for failing to submit details of the sonography tests done by him to the concerned official of the Health department within the first five days of every month. Accordingly, the accused in the above case, Dr. Paresh Seth from the Shah-e -Alam area of Ahmedabad has been sentenced to imprisonment and also ordered to pay a fine of Rs.1000.[52]

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[51] http://timesofindia.indiatimes.com, TNN 8 July 2009.
[52] Indianexpress.com Feb 4, 2009.

V. Conclusion and Suggestions

The Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex-Selection) Act as amended in 2002 is a well drafted and timely taken bold step which is proving effective in checking female foeticide to some extent. This Act has also brought the recently developed techniques of sex-selection at time of conception like Ericsson method (X and Y Chromosome separation), and Pre-implantational Genetic Diagnosis (PGD) under the ambit of law. The Act is backed by a stringent enforcement mechanism in the States so as to ensure its effective implementation. But, as has been proven time and again, its difficult to eradicate social evils with the help of legislation alone. Prejudices against the womankind in general and the girl child in particular are deep rooted in our society. There are practices abound which, despite all legislative measures are still thriving owing to the general misconception of male supremacy. There is an urgent need to sensitise the general public in order to curb the practices discriminatory against and derogatory to the dignity of women.

The dwindling sex ratio needs to be balanced and this can be done only when the State, media, journalists, non-governmental organisations, medical practitioners, women groups and the public themselves take concerted steps to ensure that provisions of anti female foeticide law are implemented fully and effectively. It is only by a combination of monitoring, education campaigns, and effective legal implementation that the deep-seated attitudes and practices against women and girls can be eroded. In this religious leaders should play a pro-active role. They should clear the misinterpretations associated with our scriptures and encourage people to have a scientific, rational, and humanitarian approach. Traditionally the task of performing last rituals which vests only with the son should be extended to daughters as well.

Many States have launched schemes for the girl child such as cash incentive for parents on birth of girl child, free education upto graduation, some policies which offer staggered payments and finally mature at the time of marriage and so on. The local panchayats should also take steps to control female foeticide at grassroot level. The local leaders should engage educated people from their villages to create awareness, educate the masses so as to empower people and involve women as forerunners

in the campaign against female foeticide. Prizes should be declared for informers and incentives for decoys. There should be wide publicization in the media of the scale and seriousness of this malpractice. NGOs should take a key role in educating the public on this matter. The National Commission for Women, NGO's, Ministry of Health and Family welfare should come up with better schemes for proper implementation of the existing laws and undertake campaigns for spreading awareness on a massive scale with the help of newspapers, radio, television, internet and also sms'es via mobiles.

The medical fraternity including the medical profession and its associations like Indian Medical Association, Radiologist Association and Forum for Obstetricians and Gynaecologists should give up their petty interests in the larger interests of humanity. There is need to inculcate a strong ethical code of conduct among medical professionals. The Indian Medical Council Act, 1956 and The Medical Council's Code of Ethics, should be amended to harmonise with present day laws and most importantly the womenfolk who are the bearers of children should free themselves from the imposed responsibility of producing sons at any cost. A child whether it's a boy or a girl has a right to be born healthy and it's the duty of parents to provide them a safe, caring and protected environment conducive to their development. The removal of this practice in Indian society is a serious challenge. It must involve the empowerment of women and a strengthening of women's rights through campaigning against practices such as dowry, and ensuring strict implementation of existing legislation. We have to create a feminine movement so that women feel a sisterhood towards each other and stand up for other woman in distress. All women whether mothers or mothers in law should vehemently oppose any illtreatment towards their own kind. We need to bring up our daughters as sons and make them equally successful and discard the old notions that a girl's education is in order to better her marriage prospects. Education is a tool to empower them in order to face this world. An educated female class which is more aware of their rights will do wonders for the feminist movement.

LAISSEZ FAIRE OR CONTROL – STRIKING A BALANCE: FOREIGN COURTS IN GRANTING ENFORCEMENT TO AWARDS SET ASIDE AT THE SEAT OF ARBITRATION

*Amrita Bahri**

I. INTRODUCTION

International Arbitration is today serving as a crown for the obstacle-free and smooth development of international trade and commerce. The precious and unique gems embedded in the tailor made nature of the international arbitration as a crown have proved immensely useful for the international business fraternity. Providing as a universally accepted alternative to the ancient judicial system showing its ageing symptoms, it offers a speedy and binding resolution of disputes.

In a successful arbitration, there is always a winner and a loser. If the loser voluntarily enforces the award in favour of the winner, the need to get that award enforced through foreign courts does not arise. But when it is not done voluntarily, the winner requests the foreign court to give recognition and enforcement to that international arbitral award. The advantage of the arbitration for the successful party is the production of a binding decision on the dispute, so as to be performed without any delay. The parties of the arbitration should carry out the award impliedly, especially considering that they have agreed into the arbitration procedure.

A landmark Convention which brought a wave of revolution in the concept of International Commercial Arbitration is known as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. Also known as the New York Convention 1958 (NYC), it was adopted by a United Nations diplomatic conference on 10 June 1958 and was enforced on 7 June 1959.[1] The Convention has been universally accepted as an instrument to strengthen the foundations of international

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[1] For more details, see<www.uncitral.org/uncitral/en/.../NYConvention.html>

commercial arbitration by establishing the rules on recognition and enforcement of international arbitral awards. Widely considered as the foundational instrument for international arbitration, it is applicable on awards which are not considered as domestic awards in the state where recognition and enforcement is sought. But this universal Convention is not free from loopholes, which calls for the need to discuss one of the uncertainties that the Convention has given rise to.

Before going into the controversy which has arisen from the ambiguous provisions of New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958,[2] the concepts of recognition and enforcement should be clarified. Recognition is the source of giving effect to the arbitral award. An award can be recognized and still not be enforced. The recognition is often a defensive procedure. It will usually arrive as a remedy used by the courts when a dispute has already been solved through an arbitral process. The party in whose favor the award has been made will object to any relief sought pertaining to the dispute that has already been determined and then will ask the court to recognize it as valid and binding award between the parties. Whereas, the enforcement is not only to recognize the fact that the award has legal force and effect, but to also ensure that it is carried out, as per its terms. Recognition is needed for the enforcement. Also, the enforcement occurs normally in a country different from the place of arbitration, usually where the assets of the unsuccessful party are established.

II. THE CONTROVERSY

A situation of conflict and uncertainty arises when an international arbitral award has been set aside by the court at the seat of arbitration. Recognizing the fifth ground of Article 5(1) New York Convention 1958, some courts refuse enforcement, whereas, relying on more favourable provision in Article 7(1) New York Convention 1958 and the permissive language of Article 5(1) New York Convention 1958, some courts go ahead with the enforcement of such awards set aside by the courts at the seat of arbitration.

[2] Further details on the Convention can be found online at <www.newyorkconvention.org>

The New York Convention 1958 provides in its Article 5 (1) (e): If the award has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made, the recognition and enforcement of this award may be refused.

The wording of this provision is controversial, mainly because of its permissive language.[3] Moreover, the wording of Article 7 of the NYC 1958 establishes the so called 'more favorable rule', providing that a party seeking recognition and enforcement may make use of a more favorable provision in the local law or in another international treaty. These contradictory provisions lead to different approaches being adopted by courts in different countries where the recognition and enforcement is sought.

In contrast to NYC 1958, Article IX of the European Convention on International Commercial Arbitration 1961 provides for specific reasons for setting aside the arbitral award and the setting aside shall only constitute a ground for refusal of recognition and enforcement, when made for one of these reasons.[4] The reasons enumerated in the said Convention are as follows:

(a) The parties to the arbitration agreement were under the law applicable to them, under some incapacity or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made, or
(b) The party requesting the setting aside of the award was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration need not be set aside; or

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[3] The controversy arises out of this provision because the wordings are that the recognition and enforcement "may" be refused, and not "shall" be refused.

[4] For further details, see <http://treaties.un.org/doc/Treaties/1964/01/19640107%2002-01%20AM/Ch_XXII_02p.pdf> Accessed on 15th October 2010.

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, with the provisions of Article IV of the European Convention.

These reasons are, in principle, the same as the reasons for the refusal of recognition and enforcement of international arbitral awards under Article 5 (1) (a) to (d) of the NYC 1958. The European Convention 1961, by laying down the grounds for setting aside the award, has contributed in bringing clarity to the grounds on which the enforcement of award can be refused by the foreign courts in case of the award being set aside by the courts at the seat of arbitration.

Because of the lack of the grounds to set aside the award at the seat of arbitration, unlike the European Convention 1961, and the ambiguous use of language in the provisions of NYC 1958, various courts in different countries have been taking divergent views on this issue which has led to a great deal of controversy, uncertainty and forum shopping. This situation of conflict and application of domestic standards to international awards has beautifully been framed in the words of former Secretary-General of the ICC courts as:

> a hitherto rock-solid rampart against the true internationalisation of arbitration because in the award's country of origin all means of recourse and all grounds of nullity applicable to purely domestic awards may be used to oppose recognition abroad…[5]

There are primarily and significantly *three basic reasons* which have given rise to this conflicting situation. *Firstly*, the use of the word 'may' and not 'must' in Article 5(1) NYC 1958 makes the language of the provision absolutely permissive, rather than mandatory, giving a discretionary power in the hands of enforcing courts to grant enforcement or to refuse it, even if the award has been set aside by court at the seat of arbitration. *Secondly*, NYC only lays down the grounds for refusing recognition and enforcement in Article 5, but it does not in any way restrict

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[5] Jan Paulsson, *Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment* (LSA), 9 ICC BULL. 14, 19(No. 1, 1998) (quoting Yves Derains, Foreword, in Homage à FrédéricEisemann (Liber Amicorum) 5, 13 (1978)).

the grounds for setting aside the international arbitral awards by the competent courts[6]. This lack of internationally uniform grounds for setting aside the award compels the state courts to apply their domestic and local laws on international arbitral awards, which, many a times may not be recognized by the other foreign states. *Thirdly and lastly*, the more favourable provision of Article 7(1) NYC 1958 which makes an allowance for overriding the provisions of NYC 1958 and provides for the application of more favourable national laws and conventions towards enforcement present in the state where enforcement is sought enhances the discretionary power of the enforcing courts. Hence, this express and bold allowance for application of local requirements of enforcing state has given a wide discretionary power to the state courts where enforcement is sought.

With this background of reasons, the paper will now analyze the two conflicting views taken by the foreign enforcing courts separately.

One view which has been taken by foreign courts is the refusal of enforcement of an award which has been set aside by the competent court. The arguments advanced by the courts taking this view have been numerous. The first argument taken by the courts in favour of this view is that the courts at the seat of arbitration should have some control over the arbitration proceedings happening on their territory, in order to guard against lack of due process, fraud, corruption or other improper conduct on the part of arbitral tribunal. The philosophy behind this view is that these courts seem to have a primary jurisdiction over these proceedings and awards. Secondly, the argument goes behind the real command of Article 5(1) New York Convention 1958 which intends to expressly lay down the grounds for refusal of enforcement. Thirdly, the most undisputable fact about arbitration is the supremacy of the intention of the parties. When the parties have intentionally and wilfully selected a country as the seat of arbitration, they also have intended to apply the laws of that country on the arbitration proceedings and award, unless specified otherwise. Hence, neglecting the command of the courts at the seat of arbitration would in a way violate the intention of the parties to arbitration. Lastly, this view protects the principle of international comity, wherein each state court respects the decision of the other foreign courts.

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[6] The competent court for setting aside an international arbitral award is only the court at the seat of the arbitration.

Another view which has been frequently taken by the courts, especially in France and is popularly known as *'French Exception'* is *to enforce the international arbitral awards notwithstanding their being set aside by the courts at the seat of arbitration*. The courts have been supporting this view with various arguments. The permissive language of Article 5 (1) and the more favourable provisions of Article 7 (1) of NYC 1958 render arguments in the favour of this view.

The landmark decisions from French courts have expressly decided that an international arbitral award is not integrated in the legal system of that state, and it remains in existence even if it has been set aside or annulled by the court at the seat of arbitration. This argument avoids the localization of the spirit of internationalization of arbitral awards and also protects the spirit of international trade and commerce.

These two contradicting views arising from the ambiguity in the New York Convention 1958 in the matter of recognition and enforcement of international arbitral awards set aside abroad allows for different approaches and wide interpretation by various national courts, which causes problematic and uncertain outcomes.

There are some negative consequences emerging from this state of uncertainty. Few of the unpleasant results which may arise from this situation are as follows:

(1) The state of disorder caused by the lack of harmonization[7]

(2) The possibility of biased decisions of enforcement[8]

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[7] The New York Convention 1958 does not provide the contracting States with a harmonic system of recognition and enforcement of awards. There is a minimum ground for coordination where the referred Convention establishes the exclusive jurisdiction of the courts of the place of arbitration to set aside the awards. However, this minor coordination is put at risk when vacated awards are enforced in other jurisdictions. In addition, an individualistic attitude by the countries is not compatible with the development of the commercial relations between individuals of different countries. It can be interpreted as the return to the application of the principle of absolute territorialism.

[8] Although the occurrence of biased decisions must not be considered a presumption, it is reasonable to point out the risk of corruption or to the use of favoritism by the courts particularly sensitive to their national interests. It is clear that courts do not have the powers of an economic regulatory authority. However, the issue subject to arbitration may be related to the national interest, as these issues are commercial relations that can be significant to a country.

[9] The parties are free to choose the seat of arbitration. Thus, when the court of the seat of arbitration annuls the awards and other jurisdiction decides to enforce the award set aside, it can be construed as a restriction of the parties' free will to choose the seat of arbitration.

(3) Violation of the will of the parties[9]
(4) The problem of forum shopping[10]
(5) The unreliability of the international commercial arbitration[11]

These symptoms may cause obstacles in the operation of the international arbitration, since they bring about instability and unreliability, and may also jeopardize the true spirit of arbitration as an effective means of final and binding dispute resolution mechanism. Even though arbitration is a dispute resolution system used since ancient times, the reputation and reliability of arbitration's modern structure is still being constructed. In this sense, the impact that the arbitral decisions may have on the international relations and economy must not be disregarded. Undermining the system may be harmful to international businesses, which involve not only private parties, but also indirectly involves States in matters of great sensitivity.

The *emergent questions* which arise out of these two conflicting views can be as follows:

- How to harmonise and reconcile these contradictory views?
- Where to strike a balance between control by the competent courts and the laissez-faire approach by the foreign courts where enforcement is sought?
- How far shall we allow this control by the competent courts to go in the wake of safeguard against lack of due process and corruption?
- How far can we allow the laissez-faire approach to be followed by the foreign state courts in the wake of upholding international justice?

III. Proposed Solutions

Even though the New York Convention was considered to be a milestone for the facilitation of the procedure of recognition and enforcement of international arbitral awards, it has been caught by its own shortcomings. Following are the few solutions which can be resorted to for overcoming this stigma of uncertainty:

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[10] The parties to arbitration agreement choose the foreign courts of enforcement which have demonstrated pro-enforcement views, such as France.

[11] The flaws in the attempt of coordination by the New York Convention regarding the enforcement of awards set aside bring about some instability and insecurity to the environment of arbitration.

1. Harmonization through a model law

The idea of harmonization through a model law aims at the synchronization of the laws relating to international commercial arbitration. Each state would apply the model law as the base of its own law, with fewer and harmless modifications. But the idea of harmonization seems unrealistic, considering the cultural, economic, legal and political differences among states.

2. Exclusion of annulment proceedings against international awards.

This proposition was made by Professor Fouchard[12], another exponent of the international community of commercial arbitration. He militates for a more autonomous arbitration by combating archaic and biased annulment decisions which could be accomplished by the exclusion of annulment proceedings in the national arbitration law. This has already been happening in Belgian law, but, as popularly known, choosing Belgium as the seat of arbitration is rarely a real choice for companies or states. But the problem attached with this proposition is the lack of universally accepted definition of what is an international award. Other than the definitional aspect, an award is not a contract. It is a private party act with the effect of *res judicata*.

3. Establishment of a supra-national court of control

Similar to the ICSID system, this solution consists in the creation of a supra-national court that would be able to control the arbitral awards: its compliance, its annulment, its revision. This was proposed by Howard Holtzmann[13].This court would confer more autonomy for arbitration, without any influence of the national courts. With the unification of the laws, by the establishment of the new multi-lateral Convention, the application and interpretation performed by an exclusive supra-national court will become possible and effective. For that, there will be no contradictory decisions, because only one court would have the jurisdiction to handle annulment and enforcement. Universal acceptance of a single unified world court having jurisdiction over the international arbitral awards is again a major challenge which has to be encountered.

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[12] Hamid G. Gharavi, *The International Effectiveness of the Annulment of an Arbitral Award*, KLUWER LAW INTERNATIONAL 151 (2002).

[13] Howard M. Holtzmann and Donald Francis Danovan, ICCA INTERNATIONAL HANDBOOK OF COMMERCIAL ARBITRATION (United State, 1999) 23.

4. *Elaboration of a new multilateral Convention*

Following the path of the New York Convention, this new multilateral Convention would be established so as to overcome the problems which have arisen from the New York Convention. The new Convention would be responsible for determining the grounds for annulment of awards, the jurisdiction over the annulment of the award, and the annulment/enforcement control. The major problem of having this new multilateral Convention is the trouble of persuading the majority of states in the world to abide to this new instrument. Different from the way the New York Convention treats the matter, the new Convention would have to establish the exclusivity of the courts of the place of arbitration as the competent courts to analyze the request for annulment of the final and binding decision. It would be important as well to determine a more international approach of the grounds for annulment, aiming to avoid any sort of parochial annulment decisions.

IV. CONCLUSION

In fact, the most workable and efficient solution to this problem is to follow the approach of the European Convention on International Commercial Arbitration 1961 which restricts the grounds for setting aside the international arbitral awards in Article 9(2). This restricting approach has also been followed by the Hypothetical Draft Convention on International Enforcement of Arbitration Agreements and Awards 2008, as summarised by Prof Van Den Berg, in Article 5(3) (g) which says[14]:

> The award has been set aside by the court in the country where the award was made on the grounds equivalent to grounds (a) to (e) of Article 5(3) of this proposed convention.

Accordingly the refusal of enforcement is limited to cases where the award has been set aside on grounds equivalent to grounds (a) to (e) of Article 5(3) of the Draft Convention. (Corresponding to general grounds of setting aside as in Article 34(2)(a) of the UNCITRAL Model Law). Hence, Article 5(3)(g) offers a sound and efficient solution to the conflict arisen from the mandate of NYC 1958. This Hypothetical Draft Convention further resolves the conflict and ambiguity with Article 5(1) limiting the

[14] For Proposed Draft Convention 2008, see<http://www.arbitration-icca.org/media/0/12133699771230/ny_conv_and_hypo_conv_ajb_rev06.pdf>

grounds for refusal of enforcement to this list only, 5(2) further limiting the refusal of enforcement in manifest cases only, and Article 5(3) making the language further unambiguous by using the word '*shall*' and not '*may*'.

The purpose behind these conventions in force and proposed convention as discussed, is to lay down uniform international standard of grounds for the competent courts to set aside the international arbitral awards, so that the award is freed from the application of local requirements and does not remain integrated and embedded in the domestic legal system of the courts at the seat of arbitration. Both the extreme views emerging out of this controversy cannot be accepted in totality and should ideally be reconciled and harmonized in the manner argued above to avoid the problem of uncertainty and forum shopping. It is important to solve this conflict emerging out from a widely accepted Convention to protect the integrity and spirit of international commerce and trade.

N.R.I MARRIAGE: NUANCES AND INTRICACIES

*Sanjiv Jain**

I. INTRODUCTION

Plight of women and their exploitation both inside and outside the house socially and economically is ancient. Mass of literature has been written to elevate their status. But a new social evil is surfacing in the cases of N.R.I. marriages, which raises an important issue as how to protect the right and interest of women who are deserted by non-resident Indians on decree of annulment obtained from foreign courts[1]

'NRI marriages', as generally understood, are between an Indian woman from India and an Indian man residing in another country (thus NRI – non-resident Indian), either as Indian citizen (when he would legally be an 'NRI') or as citizen of that other country (when he would legally be a PIO – person of Indian origin).

Any matrimonial column of any newspaper or magazine would carry a column that a NRI seeks Indian bride without any demand. The attraction of getting a groom and that too serving or earning abroad without dowry, lures many specially from middle class. Even otherwise parental insistence for Indian bride in the hope that his son is not lost for ever is not uncommon. Result, at times, is matrimonial alliance by a reluctant husband to assuage the sentiments of his parent. Victim is the helpless, poor, educated girl, normally, of a middle class family with dreams of foreign land.

In the eagerness not to let go of such lucrative marriage offer, the families totally ignores even the common cautions that are observed in traditional matchmaking. They also ignore that in case of things going wrong in an NRI marriage, the woman's recourse to justice is greatly constrained and complex. The aggravated risk in such marriage is the woman is being 'isolated' far away from home in an alien land, facing language constraints, communication problems, lack of proper information about the local criminal justice, police and legal system. The situation is

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* Delhi Higher Judicial Services.

1 *Neeraja Saraph* v. *Jayant V. Saraph*, (1994) 6 SCC 461.

worsened by lack of support network of friends and family and monetary constraints which leaves the deserted wife completely helpless and stranded.[2]

II. Common Issues In N.R.I. Marriages

Following are some of the typical instances of the issues that could arise in NRI marriages

1. Woman married to an NRI who is abandoned even before being taken by her husband to the foreign country of his residence.
2. Woman brutally battered, assaulted, abused both mentally and physically, malnourished, confined and ill treated and forced to flee or was forcibly sent back.
3. A quick engagement, followed by a massive wedding, a huge dowry and a honeymoon, after which the NRI husband flies out of India while the wife waits for her visa. The menace of 'honeymoon brides' is a big problem to deal with as over 20,000 brides have not seen their husbands after their honeymoon.
4. In some cases, the children were abducted or forcibly taken away from the woman.
5. Woman who reached the foreign country of her husband's residence and waited at the international airport there only to find that her husband would not turn up at all.
6. Abandoned in the foreign country with absolutely no support or means of sustenance or escape and without even the legal permission to stay on in that country.
7. NRI husband was already married in the other country to another woman
8. Husband had given false information on any or all of the following: his job, immigration status, earning, property, marital status and other material particulars, to con her into the marriage.
9. Husband, taking advantage of more lenient divorce grounds in other legal systems, obtained ex-parte decree of divorce in the foreign country through fraudulent representations and/or behind her back, without her knowledge

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[2] See, Report on 'Problems relating to NRI Marriages', National Commission for Women and Marriages To Overseas Indian, Ministry of Overseas Indian Affairs, Government of India, New Delhi.

10. Woman was denied maintenance in India on the pretext that the marriage had already been dissolved by the court in another country.
11. Woman who approached the court, either in India or in the other country, for maintenance or divorce but repeatedly encountered technical legal obstacles related to jurisdiction of courts, service of notices or orders, or enforcement of orders or learnt of the husband commencing simultaneous retaliatory legal proceeding in the other country.[3]

II. Are Indian Courts Bound To Give Recognition To Divorce Decrees Granted By Foreign Courts[4]

The answer to the question as regards the recognition to be accorded to the foreign decree of divorce must depend principally on the rules of our Private International Law. It is a well-recognized principle that "Private international law is not the same in all countries. There is no system of Private international law which can claim universal recognition and that explains why Cheshire, for example, says that his book is concerned solely with that system which obtains in England, that is to say, with the rules that guide an English court whenever it is seized of a case that contains some foreign element. The same emphasis can be seen in the works of other celebrated writers like Graveson, Dicey & Morris, and Martin Wolff. Speaking of the "English conflict of laws" Graveson says: "Almost every country in the modern world has not only its own system of municipal law differing materially from those of its neighbors, but also its own system of conflict of laws...." According to Dicey & Morris, "The conflict of laws exists because there are different systems of domestic law. But systems of the conflict of laws also differ". Martin Wolf advocates the same point of view thus: "Today undoubtedly Private International Law is National law. There exists an English private international law as distinct from a French, a German, an Italian private international law. The rules on the conflict of laws in the various countries differ nearly as much from each other as do those on internal (municipal) law". It is thus a truism to say that whether it is a problem of municipal law or of conflict of laws, every case which comes before an Indian court must be decided in accordance with Indian law. It is another matter that the Indian conflict of laws may

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[3] *Ibid.*

[4] *Satya* v. *Teja Singh*, AIR 1975 SC 105.

require that the law of a foreign country ought to be applied in a given situation for deciding a case which contains a foreign element. Such a recognition is accorded not as an act of courtesy but on considerations of justice. It is implicit in that process, that the foreign law must not offend against our public policy.

We cannot therefore adopt mechanically the rules of Private International Law evolved by other countries. These principles vary greatly and are molded by the distinctive social, political and economic conditions obtaining in these countries. Questions relating to the personal status of a party depend in England and North America upon the law of his domicile, but in France, Italy, Spain and most of the other European countries upon the law of his nationality. Principles governing matters within the divorce jurisdiction are so conflicting in different countries that not unoften a man and a woman are husband and wife in one jurisdiction but treated as divorced in another jurisdiction.

In determining whether a divorce decree will be recognized in another jurisdiction as a matter of comity, public policy and good morals may be considered. No country is bound by comity to give effect in its courts to divorce laws of another country which are repugnant to its own laws and public policy. A spouse who goes to a State or country other than that of the matrimonial domicile for the sole purpose of obtaining a divorce perpetrates a fraud, and the judgment is not binding on the courts of other States.

The English law on the subject has grown out of a maze of domiciliary wilderness but English courts have, by and large, come to adopt the same criteria as the American courts for denying validity to foreign decrees of divorce. Recent legislative changes have weakened the authority of some of the archaic rules of English law like the one by which the wife's domicile follows that of the husband; a rule described by Lord Denning M. R.[5] as "the last barbarous relic of a wife's servitude". The High Court has leaned on that rule heavily but in the view which we are disposed to take, the rule will have not relevance. The wife's choice of a domicile may be fettered by the husband's domicile but that means by a real, not a feigned domicile.

[5] *Formosa* v. *Formosa,* [1962] (3) ALL ER 419.

Such decisions caused great hardship to deserted wives for they had to seek the husband in his domicile to obtain against him a decree of divorce recognizable in England. During something like a game of chess between the judiciary and the legislature, the rigor of the rule regarding the dominance of domicile was reduced by frequent legislative interventions

These principles of the American and English conflict of laws are not to be adopted blindly by Indian courts. Our notions of a genuine divorce and of substantial justice and the distinctive principles of our public policy must determine the rules of our Private International Law. But an awareness of foreign law in a parallel jurisdiction would be a useful guideline in determining these rules. We are sovereign with our territory but "it is no derogation of sovereignty to take account of foreign law" and as said by Cardozo J. "We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home"; and we shall not brush aside foreign judicial processes unless doing so "would violate some fundamental principle of justice, some prevalent conception of good morals, some deep rooted tradition of the common weal.[6]

Our legislature ought to find a solution to such schizoid situations as the British Parliament has, to a large extent, done by passing the Recognition of Divorces and Legal Separations Act, 1971. Perhaps, the International Hague Convention of 1970 which contains a comprehensive scheme for relieving the confusion caused by differing systems of conflict of laws may serve as a model. But any such law shall have to provide for the non-recognition of foreign decrees procured by fraud bearing on jurisdictional facts as also for the non-recognition of decrees, the recognition of which would be contrary to our public policy. Until then the courts shall have to exercise a residual discretion to avoid flagrant injustice for, no rule of private international law could compel a wife to submit to a decree procured by the husband by trickery. Such decrees offend against our notions of substantial justice.

IV. Conclusion

Although it is a problem of private international law and is not easy to be resolved, but with change in social structure and rise of marriages with NRI the Union of India may consider enacting a law

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[6] *Loucks* v. *Standard Oil Cg. of New York*, (1918) 224 NY 99.

like the Foreign Judgments (Reciprocal Enforcement) Act, 1933 enacted by the British Parliament under Section 1 in pursuance of which the Government of United Kingdom issued Reciprocal Enforcement of Judgments (India) Order, 1958. Apart from it there are other enactments such as Indian and Colonial Divorce Jurisdiction Act, 1940 which safeguard the interest so far United Kingdom is concerned. But the rule of domicile replacing the nationality rule in most of the countries for assumption of jurisdiction and granting relief in matrimonial matters has resulted in conflict of laws. What this domicile rule is not necessary to be gone into. But feasibility of a legislation safeguarding interest of women may be examined by incorporating such provisions as:

(1) no marriage between a NRI and an Indian woman which has taken place in India may be annulled by a foreign court;

(2) provision may be made for adequate alimony to the wife in the property of the husband both in India and abroad.

(3) the decree granted by Indian courts may be made executable in foreign courts both on principle of comity and by entering into reciprocal agreements like Section 44A of the Civil Procedure Code which makes a foreign decree executable as it would have been a decree passed by that court.[7]

However, it is advisable for a concerned person to check the NRI groom's personal information particulars such as :

1. Marital status: if he is single, divorced, separated; Employment details : qualification and post, salary, address of office, employer and their credentials; Immigration status: type of visa, eligibility to take spouse to the other country
2. Financial status, Properties said to be owned by him in India, residence address, family background, Visa, passport, Voter or alien registration card, Social security number.
3. Have regular and meaningful communication with the man and his family over a period. Make sure that the two persons to be married meet personally and interact freely and frankly in comfortable atmosphere to make up their minds.
4. Insist on a registered marriage along with the religious marriage to be solemnized in India with adequate proof like photographs etc.

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[7] *Supra* n. 1.

5. Insist on keeping in touch with the bride even after the marriage on phone and e-mail and through local friends and relatives and get alert if at any point there is any reluctance or difficulty in this.
6. Equip the woman with knowledge of the laws of the foreign country and the rights she enjoys there, especially against any form of abuse or neglect, including domestic violence and if she can get residence permit and other protections as a victim of domestic violence or abuse.
7. Inform people you trust if you face domestic violence in any form - physical, emotional, financial, and sexual. Keep a log of all acts of violence you face.
8. Have a bank account in your exclusive name near your residence that you can use in case of any emergency.
9. Keep a list of contact details of neighbors, friends, relatives, husband's employer, police, ambulance, and the Indian embassy or high commission, if abroad.
10. Leave photocopies of all important documents including your passport, visa, bank and property documents, marriage certificate and other essential papers and phone numbers with parents or other trustworthy people in India or abroad. In case they are lost/forcibly taken away/mutilated/destroyed by or at the instance of spouse or in-laws, the copies will come in handy; if possible, keep a scanned soft copy with you and any person you trust so that the same can be retrieved if necessary.
11. Try to keep a photocopy of husband's personal details including passport, visa, property details, license number, social security number, voter or alien registration card, among others.[8]

Similarly, it is advisable for the concerned person to take following precautions by not doing the following mentioned things:-

1. Do not take any decision in haste and do not get pressurized to do so for any reason whatsoever.
2. Do not make matrimony a passage to greener pastures abroad by falling prey to lucrative schemes to migrate to another country or promises of getting green card through marriage.
3. Do not finalize marriage matters, without meeting the family or over long distance, on phone or through e-mails.

[8] *Supra* n. 2.

4. Do not get pressurized in taking impulsive decisions of marriage proposal with an NRI just because it appears too perfect to be true.
5. Do not negotiate your daughter's marriage via a bureau, agent or middleman or trust them blindly.
6. In case matrimonial negotiations takes place via matrimonial sites, verify the details and authenticity of particulars submitted about the groom.
7. Do not finalize matters in secrecy – publishing the proposal among the near and dear ones, friends and close relatives could help you in getting vital information which you may not be able to collect otherwise.
8. Do not agree on the marriage taking place in the foreign country.
9. Do not be coerced into acceding to dowry or any other unreasonable demand made by or on behalf of your husband in order to end your desertion. Inform officials immediately if being forced to do so.
10. Do not remain quiet, if faced with desertion or any other cruelty by husband and/or in-laws whether in India or abroad, approach the authorities.
11. Do not forge/fabricate papers or legal documents for somehow going abroad and do not become a party to illegal acts under pressure, allurement or instigation from anyone.
12. Do not be forced into participating in legal action in country of husband's residence. You can file a case in India and cannot be forced to defend a case filed against you by husband abroad - especially divorce. India has more women-friendly laws than many other countries.
13. Do not panic if your husband obtains divorce in the other country with or without your knowledge since it is not valid in India. Its valid in India only if you participate in that case.
14. Do not defame husband and/or in-laws without evidence as they may slap a defamation case against you. Speak only the facts at the right fora - before police/lawyer/social worker/court etc.
15. Do not be vindictive and take law in your hands. Never resort to violence or any illegal act to settle scores with deserter husband and/or in-laws. Approach government authorities in case of any problem in the marriage. Do not file false/frivolous complaint.[9]

[9] *Ibid.*

MARINE ENVIRONMENT: LEGISLATIVE POLICY AND JUDICIAL RESPONSE

*Jai S. Singh**

I. INTRODUCTION

Since the dawn of culture and civilization, man has tried to excel itself by conquering nature. He has done so for his protection, promotion, development or for the sake of enjoyment. For the fulfillment of his selfish interest, he has affected his surrounding environment very badly. It is generally considered that economic stability provides the basis for progress and development in other spheres of life. Economic development is attained through increase in agricultural and industrial productions. In this process, man causes disturbance in the biosphere, affects its composition without having regard to its replenishment. Consequently, the constitution of environment is badly affected. In the name of progress and development, man has done much damage to forests, wildlife, land surface, water resources and to atmosphere. Man has polluted marine environment too. It is significant to protect, preserve and conserve biosphere. Equally important is the protection, preservation and conservation of marine ecosystem. There is yet little knowledge about this ecosystem. However, it is in no way less significant.

Pollution of the world's oceans is quickly becoming a major problem on Earth. Marine pollution includes a range of threats including from land-based sources, oil spills, untreated sewage, heavy siltation, eutrophication (nutrient enrichment), invasive species, persistent organic pollutants (POP's), heavy metals from mine tailings and other sources, acidification, radioactive substances, marine litter, overfishing and destruction of coastal and marine habitats.

II. THE UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENT, 1972

Marine pollution was a concern during several United Nations Conferences on the Law of the Sea beginning in the 1950s. In the late

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1950s and early 1960s, there were several controversies about dumping radioactive waste off the coasts of the United States by companies licensed by the Atomic Energy Commission, into the Irish Sea from the British reprocessing facility at Windscale, and into the Mediterranean Sea by the French Commissariat a l'Energie Atomique. After the Mediterranean Sea controversy, for example, Jacques Cousteau became a worldwide figure in the campaign to stop marine pollution. Marine pollution made further international headlines after the 1967 crash of the oil tanker Torrery Canyon, and after the 1969 Santa Barbara oil spill off the coast of California. Marine pollution was a major area of discussion during the 1972 United Nations Conference on the Human Environment, held in Stockholm. That year also saw the signing of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, called the London Convention. The London Convention did not ban marine pollution, but it established black and gray lists for substances to be banned or regulated by national authorities. The London Convention applied only to waste dumped from ships, and thus did nothing to regulate waste discharged as liquids from pipelines.

To protect and promote environment at international level, a declaration was adopted in 1972. The Declaration adopted by the United Nations Conference on the Human Environment took place at Stockholm from 5th to 16th of June, 1972[1].

The proclamation contained certain common convictions of the participant nations and made certain recommendations on development and environment. The common convictions stated include the conviction that the discharge of toxic substances or of other substances and the release of heat in such quantities or concentrations as to exceed the capacity of environment to render them harmless must be halted in order to ensure that serious or irreversible damage is not inflicted upon eco systems. It also directs the States to take all possible steps to prevent pollution of the seas so that hazards to human health, harm to living resources and marine life, damage to the amenities or interference with other legitimate uses of seas is avoided.[2]

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[1] In this Proclamation, the Indian delegation led by the then Prime Minister of India, Mrs. Indira Gandhi took a leading role.

[2] Principle 7 of the Declaration.

III. Provisions Under The International Conventions On The Law Of Sea

The International law and International Conventions have made elaborate provisions for protection and preservation of the marine environment.[3] The Convention on the High Seas, 1958 has made provisions with the object of prevention of pollution of the seas.[4]

Article 24 directs every State to draw up regulations to prevent pollution of the seas by the discharge of oil from ships or pipelines or resulting from the exploitation and exploration of the seabed and its sub-soil, taking into account of existing treaty provisions on the subject.

Further, Article 1 of Convention on the Fishing and Conservation of the Living Resources of the High Seas, 1958 declared that all States had the duty to adopt, or cooperate with other States in adopting such measures as may be necessary for the conservation of the living resources of the High Seas.

The International Convention relating to Intervention on the High Seas in cases of Oil Pollution Casualties, signed in 1969 and in force as of June 1975, provides that the parties to the Convention may take such measures on the High Seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil, following upon a maritime casualty or acts related to such a casualty, which may reasonably be expected to result in major harmful consequences.

It may be stated that the "existing treaty provisions" in Article 24 of the High Seas Convention, 1958 and "generally accepted international standards" in Article 211 (2) of the International Convention on the Law of Sea, 1982 have reference to international conventions to prevent pollution from oil spillage in the sea and other source of pollution of the sea.

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[3] See, J. Barros and D.M. Johnston, THE INTERNATIONAL LAW OF POLLUTION (Macmillan, London, 1974) 299-293; D.M. Johnston (ed.), THE ENVIRONMENT LAW OF THE SEA (1981); J. W. Kindt, MARINE POLLUTION AND THE LAW OF THE SEA (1986); R. Soni, CONTROL OF MARINE POLLUTION IN INTERNATIONAL LAW (1985); R..A. Malviya, ENVIRONMENT POLLUTION AND ITS CONTROL UNDER INTERNATIONAL LAW (Chugh Publications, Allahabad, 1987).

[4] Convention on the High Seas, 1958, Articles 24 and 25.

This has obviously a reference to the International Convention for the Prevention of Pollution of the Sea by Oil, 1954, and two other conventions adopted at Brussels after the massive oil spillage from Liberian Tanker *Torry Canyon* in 1967, to deal with oil pollution causalities of *Torry Canyon genre:* the International Convention relating to Intervention on the High Seas in cases of Oil Pollution Casualties and the International Convention on Civil Liability for Oil Pollution Damage. The Intervention Convention was of limited scope, giving certain rights to State parties to take certain defensive measures against pollution or threatened pollution only by oil. The Liability Convention applied to pollutants and hazardous or injurious products other than oil, which may cause injury and harm to humans and marine resources, damage to amenities and interference with the use of the sea. It was subsequently supplemented by a Protocol relating to Intervention on the High Seas in Cases of Marine Pollution by Substances other than Oil, 1973.

Further, there are certain significant multilateral conventions on marine environment, viz,

(i) Oslo Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft, 1972, confined to North Sea and North East Atlantic;
(ii) London Convention on the Prevention of Marine pollution by Dumping of Wastes and other Matter, 1972;[5]
(iii) International Convention for the Prevention of Pollution from ships, 1973;
(iv) Paris Convention for the Prevention of Pollution from Land-based Sources, 1974 (related to Pollution of the sea from rivers, etc.);[6]
(v) The Convention for the protection of the Mediterranean Sea against Pollution, 1976.[7]

In 1978 *Amoco Cadiz*, a Liberian registered tanker owned by a United States company was wrecked on the Brittany coast. It had lost most of its 230,000 tons of cargo of crude oil. It made significant impact on the codification of provisions on marine pollution in the International Convention on the Law of Sea, 1982. [8]

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[5] 11 ILM 1291 (1972).
[6] 13 ILM 352 (1974).
[7] 15 ILM 290 (1976).
[8] S.K. Verma, AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW (New Delhi, 1998) 328-329.

The U.N. Convention on the Law of Sea, 1982 has made elaborate provisions in Part XII on the protection and preservation of the marine environment. It is one of the longest parts in the Convention, having Articles192-237. It lays down generally agreed provisions on this aspect. The Convention expressly states that the "States have the obligation to protect and preserve the marine environment" while pursuing their sovereign right to exploit their natural resources.[9] It is an obligation of the States to prevent, reduce, and control pollution of marine environment individually and jointly at a global, and, as appropriate, on regional levels.[10]

Article 195 provides that in taking measures to prevent, reduce and control pollution of the marine environment, States shall act so as not to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another. Article 196 deals with marine pollution resulting from the use of technologies or introduction of alien or new species to a particular part of the marine environment, which may cause significant and harmful changes.

Article 197 direct the States to cooperate on a global and regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features. Article 202 provides for scientific, educational and technical assistance to developing States for prevention, reduction and control of marine pollution.

Article 203 says that developing States shall, for the purposes of prevention, reduction and control of pollution of the marine environment or minimization of its effects, be granted preference by international organizations in the allocation of appropriate funds and technical assistance; and the utilization of their specialized services.

Thus, the Convention on the Law of Sea, 1982 has adopted a positive approach for protection and preservation of seas from pollution, advancement of human knowledge about the added value of sea for betterment of human life through marine research and for making all coastal

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[9] U.N. CONVENTION ON THE LAW OF SEA, 1982, Article 192.
[10] *Id.*, Article 193.

States and users of the sea to acquire international standards for keeping appropriate marine environment by easily acquiring marine technology for that purpose.[11]

IV. STATUTORY PROVISIONS TO PROTECT AND PRESERVE ENVIRONMENT.

A. The Water (Prevention and Control of Pollution) Act, 1974

Recognizing the importance of the prevention and control of pollution of water for human existence Parliament has enacted the Water (Prevention and Control of Pollution) Act, 1974.[12]

Section 2 of the Act defines "pollution" as such contamination of water or such alteration of the physical, chemical or biological properties of water or such discharge of any sewage or trade effluent or of any other liquid, gaseous or solid substance into water (whether directly or indirectly) as may or is likely to, create a nuisance or render such water harmful or injurious to public health or safety, or to domestic, commercial, industrial, agricultural or other legitimate uses, or to the life and health of animals or plants or of aquatic organisms.

B. The Environment (Protection) Act, 1986

In order to implement the result of the decisions taken at the United Nations Conference on the Human Environment held at Stockholm in June, 1972 in which India participated, Parliament has passed the Environment (Protection) Act, 1986. The Act was brought into force throughout India with effect from Nov. 19, 1986. Section 2 defines the expression 'environment" and other significant expressions which are as under:-

2. Definitions.-In this Act, unless the context otherwise requires:

(a) "environment" includes water, air andland and the inter-relationship which exists among and between water, air and land, and human beings, other living creatures, plants, icro-organism and property;

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[11] *Id.*, Articles 194-201.

[12] The object of the Water Act, 1974 is to provide for the establishment of Boards for the prevention and control of water pollution and the maintaining or restoring of wholesomeness of water.

(b) "environmental pollutant" means any solid, liquid or gaseous substance present in such concentration as may be, or tend to be, injurious to environment;

(c) "environmental pollution" means the presence in the environment of any environmental pollutant;

(e) "hazardous substance" means any substance or preparation which, by reason of its chemical or physico-chemical properties or handling, is liable to cause harm to human beings, other living creatures, plants, micro-organism, property or the environment.

Section 3 directs the Central Government to take measures to protect and improve environment. Section 7 and 8 make provisions for persons carrying on industry, operation, etc. which are as under:-

7. No person carrying on any industry, operation or process shall discharge or emit or permit to be discharged or emitted any environmental pollutant in excess of such standards as may be prescribed.

8. No person shall handle or cause to be handled any hazardous substance except in accordance with such procedure and after complying with such safeguards as may be prescribed.

Section 15 of the Act lays down that contravention of the provisions of the said Act shall be punishable with imprisonment for a term which may extend to five years or with fine which may extend to one lakh rupees or with both.

V. The Coastal Zone Management

Coastal States have a significant role in protecting and preserving their coastlines. With unique environmental characteristics, the coastal zone is a meeting point for land, sea and inland waters. Coastal zones are highly productive and biologically diverse ecosystems that offer crucial habitats for marine species and have an instrumental bearing over the economy of the nation. Integrated Coastal Zone Management (ICZM) is a globally accepted concept that aims at protection of coastal areas, coastal communities and promotion of sustainable development. It involves a process of participatory governance and consists of legal, policy and institutional framework necessary to integrate economic development,

environmental management and social goals. The UN Conference on Environment and Development, 1992 recognized the CZM approach and Chapter 17 of the Agenda 21 set out the policy for integrated management and sustainable development of coastal areas. The Convention on Biological Diversity 1992, and the Jakarta Mandate 1995 on Integrated Marine and Coastal Area Management (IMCAM) further strengthened the need for integrated coastal management based on sound scientific and ecological principles.

The Government of India has made efforts for the preservation, protection and promotion of coastal ecology. The Ministry of Environment and Forests undertook an exercise regarding the protection and development of the coastal areas. The legal regime of coastal management came into force in the year 1991. The Central Government issued the Coastal Regulation Zone (CRZ) Notification[13] by virtue of its power under Environment Protection Act, 1986, to take all such measures that are necessary and expedient for the purpose of protecting and improving the quality of the environment.[14] The CRZ Notification declares limits of, and prohibition in, coastal regulation zones. It provides the regulation of permitted activities. Further, it classifies the zones into four categories for the purpose of regulation.[15]

By this Notification, Government declared the coastal stretches of seas, bays, estuaries, creeks, rivers and backwaters which were influenced by tidal action (in the landward side) up to 500 meters from the High Tide Line and the land between Low Tide Line (LTL) and High Tide Line (HTL) as Regulation Zones. It imposed various restrictions on the setting up and expansion of industries, operation or processes etc. in the said Regulation Zones. It was specified that for the purposes of the main notification, high Tide Line (HTL) was defined as the line up to which the highest high tide reaches at spring times. The CRZ Notification was finalised in the year 1991, but amended several times afterwards. The recently notified Coastal Regulation Zone (CRZ) Notification, 2011 and Island Protection Zone (IPZ) Notification, 2011 strives to protect livelihoods of traditional fisherfolk communities, preservation of coastal ecology and promotion of economic activity that have necessarily to be located in coastal region.

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[13] SO 114 (E) issued by the Ministry of Environmental and Forests on 19 February, 1991.

[14] The Environment (Protection) Act, 1986, Section 3(1).

[15] *Supra* n. 13.

A. *Prohibited Activities: Para 2 of the CRZ Notification*

The general characteristic of the main Notification is that a number of activities are declared as prohibited in the Regulation Zones. The Notification provides not only certain prohibitions, but also exceptions to the prohibitions. Setting up of new industries and expansion of existing industries are prohibited.[16] However, projects of the Department of Atomic Energy and non-polluting industries in the field and other services in the Coastal Regulation Zone (CRZ) of special economic zone (SEZ) are not prohibited. Some other exceptions are salt harvesting by solar evaporation of sea-water, desalination plants and storage of non-hazardous cargo such as edible oil, fertilizers and food grain within notified ports. Manufacture or handling or storage or disposal of hazardous wastes and substances[17] also fall within the prohibition.[18]

Mechanisms for disposal of wastes and effluents into watercourse can be set up or expanded only with approval under the Water (Prevention and Control of Pollution) Act, 1974. Those industries which are directly related to water front or needing directly foreshore facilities are exempted. In *S. Jagannath* v. *Union of India,*[19] a Division Bench of the Supreme Court held that the aquaculture industry is not the one which is directly related to water front or which directly needs foreshore facilities.

All exempted activities are to be undertaken without adverse impact upon the ecology of the coastal zone. Prohibition against fish processing units does not extend to fish cultivation and natural fish drying in separate

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[16] *Id.*, para 2 (i). This includes fish processing units and their warehousing.

[17] *Id.*, para 2 (ii). There are separate notifications dealing with the substances. Activities specified in these Notifications were prohibited in CRZ. See, SO 594 (E) dated 28 July 1989; SO 966 (E) dated 27 November, 1989; and GSR 1037 (E) dated 5 December, 1989.

[18] It may be pointed out that transfer of hazardous substances from ships to ports, terminals and refineries and *vice versa* is permitted. Facilities for receipt of petroleum products and liquefied natural gas (LNG) and facilities for re-gasification may be permitted within areas other than CRZ I which consists of ecologically sensitive and important areas. This permission is subject to safety regulations and subject to further terms and conditions for implementing ameliorative and restorative measures in relation to the environment as may be stipulated by the Ministry of Environment and Forests.

[19] (1997) 2 SCC 87.

permitted areas or to their modernization. Therefore, conditional exemption is granted in these cases.[20]

Discharge of untreated wastes and effluents from industries, cities or towns and other human settlements and dumping of city or town wastes for the purpose of land filling, or otherwise is prohibited.[21] There is total prohibition on dumping of ash or any wastes from thermal power stations.[22] Land reclamation, bunding or disturbing the natural course of sea water with similar obstruction are allowed only for purposes of construction of ports, harbours, jetties, wharves, quays, bridges and sea links and for other facilities.[23] Other facilities include activities permissible under the notification for control of coastal erosion and maintenance or cleaning of waterways, channels and ports or for prevention of sand bars or for tidal regulators, storm water drains or for structures for prevention of salinity ingress and for sweet water recharge.

Further, reclamation for commercial purposes such as shopping and housing complex, hotels and entertainment activities is impermissible. Mining of sands, rocks and other substrata materials, except those rare minerals not available outside the CRZ, is within prohibitions.[24] Any construction activity is not allowed in an ecologically sensitive area or between the HTL and LTL. However, facilities shall be permitted between the Low Tide Line (LTL) and High Tide Line (HTL) for discharge of treated effluents or waste water discharges into the sea, for carrying sea water for cooling purposes, or for construction of oil, gas and similar pipelines.[25] Except those permitted under the CRZ Notification, dressing or altering of sand dunes, hills, natural features, including landscape changes for beautification, recreational and other purposes are prohibited.

Pollution and exhaustion of groundwater in coastal aquifers are potential hazards in the coast. Harvesting or drawing of groundwater and

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[20] SO 114 (E) dated 19 February, 1991, para 2 (iii), proviso.
[21] *Id.*, para 2 (v) and (vi).
[22] *Id.*, para 2 (vii).
[23] *Id.*, para 2 (viii).
[24] *Id.*, para 2 (ix). Under the proviso to para 2 (ix), mining of sands in Andaman and Nicobar islands was permitted subject to certain conditions in a regulated manner for the period up to 31 September, 2002.
[25] *Id.*, para 2 (xii).

construction of mechanism for such acts within 200 metres of HTL are prohibited.[26] However, if manually done, through ordinary wells, drawing of water for the purpose of drinking, horticulture, agriculture or fisheries is permitted in the zone between 200 metres to 500 metres. For drawing water for drinking and domestic purposes, the rigour of prohibition is relaxed to some extent.[27]

Where no other source of water is available and when done manually through ordinary wells and hand pumps, drawing of groundwater for drinking and domestic purposes is permitted. This permission is in the CRZs between 50 to 200 metres from HTL in cases of seas, bays and estuaries, and within 200 metres or CRZ, whichever is less from HTL, in case of rivers, creeks and backwaters, subject to restriction in areas affected by sea water intrusion.

B. *Regulation of Permissible Activities: Para 3 of the CRZ Notification*

Para 3 deals with regulation of permissible activities. It states that clearance shall be given for any activity within the Coastal Regulation Zone only if it requires water front and foreshore facilities. The assessment shall be completed within a period of ninety days from receipt of the requisite documents and data from the project authorities. The decision shall be conveyed within thirty days thereafter. Most of these activities require environmental clearance from the Ministry of Environment and Forest.

The coastal States and Union Territory Administrations were required to prepare, within a period of one year from the date of the Notification, Coastal Zone Management Plans identifying and classifying the CRZ areas within their respective territories in accordance with the guidelines given in Annexure-I and II of the Notification and obtain approval (with or without modifications) of the Central Government in the Ministry of Environment & Forests. Within the framework of such approved plans, all development and activities within the CRZ other than those covered in para 2 and para 3 (2) are to be regulated by the State Government, Union Territory Administration or the local authority as the case may be

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[26] *Id.*, para 2 (x).

[27] *Id.*, proviso to para 2 (x).

in accordance with the guidelines given in Annexures-I and II of the Notification.

The Ministry of Environment & Forests and the Government of State or Union Territory and such other authorities at the State or Union Territory levels, as may be designated for this purpose, are responsible for monitoring and enforcement of the provisions of this Notification within their respective jurisdictions.

C. *Annexure-I & II to the CRZ Notification*

Annexure I consists of para 6 (1) which relates to the classification of coastal regulation zone. The norms for regulation activities in the said zones are provided by para 6 (2) for regulating development activities. The coastal stretches within 500 metres of HTL of the landward side are classified under para 6 (1) into four categories.

Annexure II provides guidelines for development of beach resorts/ hotels in the designated areas of CRZ-III for temporary occupation of tourist/visitors, with prior approval of the ministry of environment & forests.

Para 7(1) states that construction of beach resorts/hotels with prior approval of Ministry of Environment & Forest in the designated areas of CRZ-III for temporary occupation of tourist/visitors are subject to the conditions. It provides that the project proponents can not undertake any construction (including temporary constructions and fencing or such other barriers) within 200 metres (in the landward side) from the High Tide Line and within the area between the Low Tide and High Tide Line.

Para 7(2) states that in ecologically sensitive areas (such as marine parks, mangroves, coral reefs, breeding and spawning grounds of fish, wildlife habitats and such other areas as may be notified by the Central/ State Government/Union Territories) construction of beach resorts/hotels shall not be permitted.

VI. Reports of the Central Board for the Prevention and Control of Water Pollution, 1982, 1986-87 and 1995

The Central Board for the Prevention and Control of Water Pollution has recommended that continuous monitoring of the coastal waters especially heavy metals and pesticides in the biota should be carried out

to detect possible biomagnifications of some toxic chemicals and to provide early warning.[28]

Again in 1986-87, the Central Pollution Control Board in its report sought preservation and protection of the ecologically fragile areas. It pointed out that the mangrove forest and the wildlife sanctuary in Coringa Island, the Pulicat Lake and the bird sanctuary at Nelapattu are the ecologically sensitive areas warranting special attention and protection. In these areas no industrial activity which may pose a danger to the ecosystem should be permitted.[29]

In its 1995 Report, Central Pollution Control Board pointed out that the effluents from aquaculture forms are discharged into the coastal waters practically without any treatment.[30]

VII. Report Of The FAO, 1995

The Food and Agriculture Organization published a Report in April, 1995 on a Regional study and workshop on the Environmental Assessment and Management of Aquaculture Development. India was one of the 16 countries who participated in the workshop. Dr. K. Alagarswami, Director, Central Institute of Brackish Water Aquaculture, Madras presented a paper titled "the current status of aquaculture in India, the present phase of development and future growth potential". It has been published as an Annexure to the workshop-report published by the Food and Agriculture Organization.

Para 5.1.2 of Alagarswami Report provides various types of technologies and the change in them adopted by the aquaculture industry in India. It was pointed out that the initial concept and practice was to develop tide-fed systems, this slowly gave way to pump-fed systems. Presently, the emphasis is on seawater based farming systems for P. monodon with a water intake system extending far into the sea with submerged pipelines, pier system and gravity flow. From sandy clay soils, the present coastal farms are located in sandy soils also with seepage control provisions.[31]

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[28] Report of the Central Board for the Prevention and Control of Water Pollution, "Coastal Pollution Control Series COPOCS/1/1982.
[29] *Id.*,COPOCS/5/1986-87.
[30] *Id.*, Pollution Potential of Industries in Coastal Areas of India, Nov. 1995.
[31] Para 5.1.2 of Alagarswami Report, published in the Food and Agriculture Organization Report, April, 1995.

Alagarswami report also highlighted various environmental and social problems created by the coastal aquiculture and suggested that protection of mangroves should receive attention. The agitations made by the environmentally conscious people of the coastal-areas against polluting aquaculture technologies has been pointed out by Alagarswamy report as:

> People in general have become aware of the environmental issues related to aquaculture. A current case in point is the agitation against a large commercial farm coming up in Chilka Lake (Orissa). People have demanded an EIA of the project. People in Nellore District in Andhra Pradesh have raised environmental issues and called for adoption of environmentally-friendly technologies and rejection of "imported" technologies from regions which have suffered environmental damage. Protests have been voiced by the local people in Tuticorin area in Tamil Nadu. Both print and visual media take up environmental issues with a great deal of zeal. This appears to augur well for regulating coastal shrimp farming with eco-friendliness.[32]

Alagarswamy report suggested future management strategies for farms and Government in resolving any conflicts or environmental problems.

Alagarswami's report identifies salinisation of land, salinisation of drinking water wells, obstruction of natural drainage of flood water, passage of access to sea by fishermen and public, self-pollution of ponds, pollution of source water, destruction of mangroves, land subsidence and pressure on wild seed resources and consequences thereof as environmental issues in shrimp culture.

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[32] *Ibid.* The intensive farming technique and the pollutants generated by such farming have been noticed by Alagarswamy which is as under:-

> In intensive farming, stocking densities are on the increase. In one instance, P. Indicus was stocked at 70 post larvae/m2, almost reaching the levels of Taiwan before the disease outbreak in 1988. This necessitates heavy inputs of high energy feeds, the use of drugs and chemicals and good water exchange. The organic load and accumulation of metabolites in the water drained into the sea should be very high as could be seen from the dark-brown colour and consistency of the drain water.

VIII. Report Of The United Nations Research Institute

The Report of the United Nations Research Institute for Social Development dated June, 1995[33] states the picture regarding polluted waters and depleted fisheries. The United Nations Report states that intensive ponds have a maximum life of only 5 to 10 years. Abandoned ponds can no longer be used for shrimp and there are few known alternative uses for them except some other types of aquaculture. Apparently they can seldom be economically rehabilitated for other uses such as crop land.

IX. Judicial Approach for Protection of Marine Environment

The Supreme Court has given landmark judgments for the protection, preservation and promotion of natural environment and marine environment. It has issued effective directions and laid down marvelous principles to protect and preserve environment.

In *Indian Council For Enviro-Legal Action case*[34], a three Judges Bench of the Supreme Court held that the Coastal Regulation Zone (CRZ) Notification, 1991 was issued under Sections (3) and 3(2) (v) of the Environment Protection Act, presumably after a lot of study had been undertaken by the Government. That such a study had taken place is evident from the bare perusal of Notification itself which shows how coastal areas have been classified into different zones and the activities which are prohibited or permitted to be carried out in certain areas with a view to preserve and maintain the ecological balance[35].

It was held that the newly added proviso in Annexure II in paragraph 7 in sub-paragraph (I) (Item i) which gives the Central Government arbitrary, uncanalized and unguided power, the exercise of which may result in serious ecological degradation and may make the NDZ ineffective is *ultra vires* and is hereby quashed. No suitable reason had been given which can persuade the court to hold that the enactment of such a proviso was necessary, in the larger public interest, and the exercise of power

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[33] The United Nations Research Institute for Social Development in collaboration with the World Wide Fund for Nature International has conducted a study and published a report dated June 19, 1995 called Some Ecological and Social Implications of Commercial Shrimp Farming in Asia. The report is prepared by Solon Barraclong and Andrea Finger - Stich (the UN Report).

[34] *Indian Council for Enviro-Legal Action* v. *Union of India*, (1996) 5 SCC 281.

[35] *Id.* at 295, para 32.

under the proviso will not result in large-scale ecological degradation and violation of Article 21 of the citizens living in those areas.[36]

The Court stated that violation of anti-pollution legislations adversely affects the existing quality of life. Further, the non-enforcement of the statutory provisions often results in ecological imbalance and degradation of environment. Consequently, its adverse effects will have to be borne by the future generations. The Court found that there is 6000 km long coastline in India. It is the responsibility of coastal states and Union Territories in which these stretches exists to see that both the notifications are complied with and enforced. Management Plans have to be prepared by the states and approved by the central government.[37]

S. Jagannath [38] is an important case decided by a division bench of the Supreme Court. Speaking on behalf of the Court, Kuldip Singh, J. stated that shrimp (prawn) culture industry is taking roots in India. Since long the fishermen in India have been following the traditional rice/shrimp rotating acquaculture system. Rice is grown during part of the year and shrimp and other fish species are cultured during the rest of the year. However, during the last decade the traditional system which, apart from producing rice, produced 140 kgs. of shrimp per hectare of land began to give way to more intensive methods of shrimp culture which could produce thousands of kilograms per hectare. A large number of private companies and multinational corporations have started investing in shrimp farms. In the last few years more than eighty thousand hectares of land have been converted to shrimp farming. More and more areas are being brought under semi-intensive and intensive modes of shrimp farming. The environmental impact of shrimp culture essentially depends on the mode of culture adopted in the shrimp farming. Indeed, the new trend of more intensified shrimp farming in certain parts of the country- without much control of feeds, seeds and other inputs and water management practices - has brought to the fore a serious threat to the environment and ecology.[39]

It was held that a shrimp farm on the coastal area by itself operates as a dyke or a band as it leaves no area for draining of the flood waters.

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[36] *Id.* at 298, para 38.
[37] *Id.* at 302, para 44.
[38] *S. Jagannath* v. *Union of India & ors.*, (1997) 2 SCC 87.
[39] *Id.* at 91, para 1.

The construction of the shrimp farms, therefore, was violative of clause (viii) of para 2 of the Coastal Regulation Zone Notification. It was held that such activity were also violative of Coastal Regulation Zone, 1991, issued under Rule 5(3) (d) of the Environment (Protection) Rules, 1986. Therefore, it could not be permitted to operate. The Apex Court pointed out that at universal level, coastal pollution is an emerging problem. India is already suffering from a serious environmental problem.

The Court issued a number of directions to be followed by the Government of India and Governments of Coastal States and directed that any violation or non-compliance of the directions of the Apex Court shall attract the provisions of the Contempt of Courts Act, 1971.

X. Coastal Regulation Zone (CRZ) Notification, 2011

The Ministry of Environment and Forests, the Central Government *vide* its notification number S.O.114 (E), dated 19th February, 1991 declared Coastal Regulation Zone. It imposed certain restrictions on the setting up and expansion of industries, operations and processes in the said Zones for its protection.

In compliance to the Orders of the Hon'ble Supreme Court, the coastal States and Union territory, prepared the Coastal Zone Management Plans which were approved with condition and modifications dated 27th September, 1996 by the Central Government.

The said notification was amended, from time to time, based on recommendations of various committees, judicial pronouncements, representations from State Governments, Ministries and Departments of the Central Government, and the general public, consistent with the basic objective of the said notification.

In exercise of powers conferred by clause (d) of sub rule (3) of Rule 5 of Environment (Protection) Rules, 1986 and all powers vesting in its behalf, the Central Government issued the Coastal Regulation Zone Notification 2011 and Island Protection Zone (IPZ) Notification 2011 which declared the following areas as CRZ and imposed with effect from the date of the Notification, restrictions on the setting up and expansion of industries, operations or processes etc., in the said CRZ: -

(i) The land area from High Tide Line (HTL) to 500 mts on the landward side along the sea front.

(ii) CRZ shall apply to the land area between HTL to 100 mts on the landward side along the tidal influenced water bodies that are connected to the sea. Tidal influenced water bodies means the water bodies influenced by tidal effects from sea. The distance up to which development along such tidal influenced water bodies is to be regulated shall be governed by the distance up to which the tidal effects are experienced which shall be determined based on salinity concentration of 5 parts per thousand (ppt) measured during the direst period of the yea and distance up to which tidal effects are experienced shall be clearly identified demarcated accordingly in the Coastal zone Management plans (CZMPs).

(iii) The land area falling between the hazard line and 500 mts from HTL on the landward side. Hazard line means the line demarcated by Ministry of Environment and Forests (MoEF) through Survey of India (Sol) taking into account tides, waves and sea level rise and shorelines changes.

(iv) Land area between HTL and Low Tide Line (LTL) which will be termed as the inter tidal Zone.

(v) The water area between the LTL to the territorial water limit (12 Nm) in case of sea and the water area between LTL to LTL in case of tidal influenced water bodies.

These Notifications strives to protect livelihood of traditional fisher folk communities, preservation of coastal ecology and promotion of economic activity that have necessarily to be located in coastal regions.

XI. Conclusion

In the 21st century, preservation and protection of marine environment are the most significant challenge before the international community. Recent studies show that degradation, particularly of shore line areas has accelerated drastically as industrial discharge and run off from farms and coastal cities has increased. The oceans around the world, today, are being used as garbage cans to dump all kind of wastes. These activities resulted in the degradation of wetlands, floodplains, sea grass beds and coral reeves. The land-based activities contribute a higher percentage of marine pollution than the pollution from sea-based activities. It is estimated that, at a global level, up to eighty percent of the total solid wastes found on beaches

had its origin at the nearest rivers, indicating that watersheds and nearby beaches are parts of a single, unified land-ocean system. But the international legal regime has more focused on pollution generated by sea-going vessels rather than land based sources. There are no comprehensive global norms to address this major source of pollution.

The International Law and International Conventions have made elaborate provisions for protection and preservation of marine environment. The Convention on the High Seas, 1958 has made provisions with the object of prevention of pollution of the seas. The International Convention on the Law of Sea, 1982 has made elaborate provisions in Part XII on the protection and preservation of the marine environment. Article 194 (1) specifically provides that States shall take individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities.

In India marine pollution due to spilling of oil exist mainly around the ports and harbours caused by ships plying near the coast by pumping the discharging oil due to leaks or wanton discharge of used crank-case and other oils. The management of marine pollution is regulated with the help of Coastal Regulation Zone Notification 2011.

Judiciary in various cases has issued directions for the protection of marine environment. The general public is becoming aware of the need to protect environment. With increasing threat to the environment degradation taking place in the different parts of the country, it may not be possible for any single authority to effectively control the same. Environment degradation is best protected by the people themselves. Without appropriate awareness of marine pollution, there may not be the necessary global will to effectively address the issue. Balanced information on the sources and harmful effect of marine pollution needs to become part of general public awareness and ongoing research is required to fully establish, and keep current, the scope of the issue.

REASONABLE ACCOMMODATION IN DISABILITY RIGHTS JURISPRUDENCE IN INDIA

Anand Gupta[*]

I. INTRODUCTION

Reasonable accommodation or inclusion means that the special needs arising out of the physical impairments of the persons with disabilities needs to be taken care of by the society so that they can enjoy the rights on the equal basis with others. This will come under non-discrimination measures. Without reasonable accommodation the right to equality or non discrimination is meaningless.

Reasonable accommodation is an adjustment made in a system to "accommodate" or make fair the same system for individual base a proven need. It can be religious, linguistic, cultural, educational or employment related. It is considered to be an integral part of the principle of non-discrimination because without it the enjoyment of the rights on equal basis with the majority becomes difficult for certain sections of the society. It is necessary to main-stream these sections of society while formulating laws and policies.

Persons with disabilities are one of those sections of the society who require adjustment or modification in the system so that they can enjoy the various Human rights on in equal basis with others and live a productive life and contribute to the society.

For example if the study material is not available in formats accessible to the persons with visual or hearing impairments, they will not be able to receive education. Similarly, the school building should be design in such a manner that the persons with locomotor impairments can access it without much difficulty. This paper is an attempt to analyse the concept of reasonable accommodation in the area of education and employment in India.

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II. Disability Convention

The United Nations Convention on the Rights of Persons with Disabilities[1] in para 4 of Article 2 define reasonable accommodation as under:-

> "Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

In *Ranjit Kumar Rajak* v. *State Bank of India,* the Bombay High Court[2] observed that in the absence of a Municipal law on the matter, the Convention can be read into Article 21 as it did not in any way conflict with the Municipal law. It found that in the absence of a statutory definition of reasonable accommodation, the reasonable accommodation as set out in the convention in the first instance could be considered.

Various Articles of the Convention guarantee this right. Article 9 deals with the accessibility of physical environment as well as the accessibility of information and communication. Article 24 which deals with education provide *inter alia* that the study material and the medium of instruction needs to be in accessible form. Article 27 which deals with work and employment provides, *inter alia*, for suitable modification of the work environment so that the persons with disabilities can enjoy this right on an equal basis with others. Article 29 and Article 30 which deal with the right to participate in public and political life and cultural life, recreation, leisure and sport provide *inter alia* for the suitable modification so that persons with disabilities can enjoy these right on an equal basis with others.

The only limitation on reasonable accommodation principle is that the accommodation does not impose undue hardship. According to the Americans with Disabilities Act, 1990 [ADA] undue hardship is defined as an action requiring significant difficulty or expense when considered in light of factors such as an employer's size, financial resources, and nature and structure of its operation.

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[1] UNCRPD 2006.

[2] Writ Petition No. 576 of 2008 (Bom HC) (discussed later).

III. Indian Position

In India, the most important legislation for this purpose is Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. This Act deals with various issues concerning persons with disabilities such as education, employment and accessibility. The office of Chief Commissioner for Persons with Disabilities [hereinafter CCPD or commission] was established under this Act.

Indian jurisprudence on reasonable accommodation has not developed to that extent as is the case with the other developed legal systems such as UK and USA. There are mainly three reasons for this.

Firstly, the definition of disability in the act is not as wide as that in these countries. Indian law gives an exhaustive enumeration of the types of disabilities and defines them whereas the UK, USA and other developed countries set out the criteria and any person meeting such criteria is covered under the definition of disability.

Secondly, as compare to the abovementioned legal systems, Indian law deals with very few issues of reasonable accommodation. These issues are mainly related to providing scribe to the persons with visual and other disabilities in exams, accessible and barrier free environment, identification and reservation of seats in employment and educational institutions etc. On the other hand, the other developed legal systems define disability in extenso. For example, according to the Americans with Disabilities Act, 1990 [ADA], reasonable accommodation may include, but is not limited to:

- Making existing facilities used by employees readily accessible to and usable by persons with disabilities.
- Job restructuring, modifying work schedules, reassignment to a vacant position;
- Acquiring or modifying equipment or devices, adjusting or modifying examinations, training materials, or policies, and providing qualified readers or interpreters.

Thirdly, researcher has found that the judicial as well as quasi judicial bodies who adjudicate on disability matters are not fully conversant with the disability rights jurisprudence as evolved in the developed system

of the world. Indian judiciary has placed reliance on foreign judgments on various issues such as human rights, business laws, IPR laws etc. but in disability matters very few foreign judgments have been relied upon.

The CCPD is more conversant with the disability issues as compare to the judiciary. The reason of this may be that the Chief Commissioners and Deputy Commissioners appointed in the office are either from the disability sector or have developed a reasonably good understanding in disability issues during their tenure in the office. Infact the CCPD has broadly interpreted the provisions of the Act under which it is established.

IV. EDUCATION

A. Right of overage student to get admission

In *Umesh Kumar* v. *The Secretary, Department of Elementary Education & Literacy, Ministry of Human Resource Development, New Delhi*[3], the complainant, the father of a hearing impaired child filed a complaint regarding denial of admission to his son in class first due to overage. He submitted that his son was attending aural rehabilitation programme and has started communicating verbally in short sentences and writing in complete sentences which would qualify him to enter mainstream education.

CCPD in a letter to the Secretary, Department of Elementary Education & literacy, Ministry of Human Resource Development stated that the stand taken by Kendriya Vidyalaya Sangathan was not in line with the principle of Sarv Shiksha Abhiyan which encourages grade appropriate mainstreaming and it was also not in line with the disabilities Act and national education policy which mandate appropriate government and local authorities to provide appropriate intervention for education and mainstreaming of children with disabilities.

During hearing, the respondent submitted *inter alia* that the issue of overage with respect to the children with disabilities might be examined in the light of the letter of CCPD and the policy and inclusive education and the provisions of the Right to Education Act 2009 and a decision might be taken by the ministry within three months.

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[3] CCPD Case NO. 10315560 dt 15.09.2010.

B. Alternative question with equal weightage be provided in place of the question based on diagrams and figures

The case of *Ashwani Agarwal* v. *Secretary, Department of Education*[4] highlights the various difficulties faced by the blind students with regard to attempting questions based on diagrams and figures. The complainant alleged that the blind students while appearing for their class X examination faced certain limitation in the paper of mathematics which allows them to attempt only 60 percent of the paper as rest 40 percent was based on visual.

The complainant sought relief from the Chief Commissioner for Persons with Disabilities to advise the Ministry of Human Resource Development to issue instructions to various examination boards and agencies conducting class X and class XII examination, directing them to issue instructions to the paper setters to offer alternative questions in lieu of questions with diagrams and figures. The alternative questions should be of equal value to the question containing diagrams and figures. This will allow them to attain marks which they failed otherwise, as the questions were exclusively visual based.

The complainant also alleged that the blind students be provided with extra time @ 20 minutes per hour i.e. he/she should be provided with 60 minutes of extra time to attend a three hour paper in order to provide equal opportunity. The complaint was withdrawn because the relief sought was already given by the respondent.

C. Right of persons with visual disabilities to descriptive explanation of graphs etc.

In *Mohammed Asif Iqbal* v. *Indian Institute of Management, Calcutta*[5] ,complainant, a visually handicapped and a graduate in commerce, submitted that he appeared in Common Admission Test. He did not do well on data interpretation portions. He informed the Chairman, Admissions that orthopedic or hearing impaired can see the graphs but visually impaired had to rely on the scribe.

During the personal hearing, it was unanimously agreed that the guidelines/ instructions on the following lines should be framed and issued by Ministry of HRD.

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[4] 2001 CCD 244 Case no. 667 of 2001 – Decided on 20.09.2001.
[5] (2004) CCDJ 347 Case no. 2559 of 2003 – Decided on 15.10.2004.

i. Wherever possible, the visual graphs should be supplemented by descriptive explanation of the graphs for visually impaired candidates;

ii. The font size of the question paper should not be less than 20 for the benefit of low vision candidates. They should also be allowed to use optical/ electronic low vision aids such as magnifying glass;

iii. Since one of the important factors to do the question paper is stated to be the speed for which adequate practice is necessary, persons with blindness should be allowed to use the services of a scribe of their choice who should meet the conditions that may be prescribed by the examining authorities. If the scribe is provided by the examining authorities, it should be ensured that the scribe is adequately qualified to understand the questions and to explain them to the candidate. Scribe should be allowed to such other candidates also who cannot write themselves due to disability;

iv. Extra time of 20 minutes per hour of examination should be allowed by all the examining agencies.

v. The application form should have a column for the applicant to indicate whether he/she will use the services of own scribe or would require the examining authority to arrange for it. The qualifications/eligibility conditions of the scribe should also be clearly indicated.

vi. The application form should have a provision asking low vision persons to indicate the requirement of question paper in large print.

vii. All the IIMs and other management institutes/Universities should ensure that their placement cells counsel/guide the candidates with disabilities for choosing the streams/area of specialization keeping in view their employability after completion of the course. While doing so, the jobs identified for different disabilities should also be kept in view.

D. Right of Person with Cerebral Palsy to Extra time in Exam

In *Dhawal S. Chotai* v. *Union of India*[6],the petition was filed by a person who suffered from a disorder of movement and posture

[6] AIR 2003 Bom 316.

which is known as "Cerebral Palsy." In view of this difficulty, it affects the normal functioning of bones, muscles and joints and also the communication skills. The petitioner had completed his education up to graduation in commerce. After passing the examination for Foundation Course for the Chartered Accountant Examination, the petitioner wanted to appear for the Intermediate Examination known as "Professional Education-II."

While giving the examinations on earlier occasions, he had requested the authorities to give him extra time and when he wrote his B. Com. examination, the University of Mumbai had granted him three hours extra. He made a similar representation to respondent Institution, and the respondent has granted him relaxation only for half an hour. Petitioner prayed that the respondents be directed to permit the petitioner to write the papers for three extra hours.

The CCPD observed that in the facts of the present case, the petitioner has undoubtedly established that on earlier occasions he did require three hours. The petitioner would like to write the papers himself. This was because particularly the subject like Accounts would be better written if he writes himself instead of availing the facility of scribe. The CCPD agreed with the contention of the petitioner and directed respondent to permit the petitioner to write his examination and the future examinations for the Chartered Accountants Course for three hours any time a written examination is held. These three hours would be subsequent to the scheduled time in continuity on the same day.

E. Pool of scribes in different discipline and languages

In *Renu Gupta* v. *University Grants Commission*[7] , the complainant who was a visually impaired person appeared in NET examination held by UGC. She alleged that the exam coordinator provided a scribe who was not competent to read and write. She prayed to ensure provision of a competent scribe to visually impaired candidates in future. The respondent submitted *inter alia* that the scribe provided was chosen from discipline other than that of the candidate. The scribe provided to the candidate was graduate in English. The complainant in her rejoinder submitted that the scribe was slow and therefore could not complete the paper. Study of English as one of the subject in graduation is not an

[7] (2003) CCDJ 7 Case no. 2312 of 2002 – decided on 31.03.2003.

appropriate criterion for appointment of a person as writer. The exam coordinator should check the efficiency of a person before appointing him/her as scribe. She suggested that a junior student of the same discipline who is in practice of writing examination should be appointed as scribe because he/she would be familiar with the terms used in that discipline.

The CCPD held that in the light of the facts and circumstances of the case and considering that a larger issue of providing appropriate and competent scribes to the blind/disabled persons is involved, it is necessary that a pool of scribes in different disciplines, languages be created so that the blind/disabled persons needing the help of scribes do not suffer on account of the lack of knowledge or competence of the scribe. Alternatively, the examinees should be allowed to bring their own scribes of their choice.

F. Right of Persons whose disability is such that they can not or have difficulty in writing to get the services of scribe

In *Sunita Dogra* v. *Secretary, Department of Personnel and Training*[8], the complainant who had bilateral congenital hyperplasia in both her upper limbs with 90% disability, filed a complaint submitting that she requested the respondent UPSC for services of scribe to write Civil Services Examination. However the respondent informed her that as per the existing rules of Civil Services Examination all candidates other then those who were blind were to write the papers in their own hands. During personal hearing the complainant clarified that she could try but her speed was not enough to complete the paper within the prescribed time limit. She also had problem in continuously sitting for long duration in one posture.

The representative of respondent stated that an Expert Committee, of which Director, National Institute of Orthopaedically Handicapped and other experts from the disability sector were members, had recommended that Orthopaedically handicapped persons do not need the services of a scribe as they will be appointed in the posts that require them to read and write. In the advertisement for Civil Services Examination, the Commission had indicated reading and writing as the physical requirement for the services identified for both arms affected persons. As there was no provision to allow use of scribe and extra time to orthopaedically handicapped candidates

[8] (2006) CCDJ 202 Case no. 3221 of 2006- decided on 08.05.2006.

in the rules framed by Department of Personnel and Training, UPSC could not allow on its own.

The CCPD observed:

> That since the services have been identified for both arms affected persons without specifying the extent of impairment, such persons who can not write or whose speed of writing is inadequate, cannot be denied the help of a scribe to write the examination and extra time, if they request for it. The complainant also cannot be denied the benefit of a scribe due to impairment, which is a justified request, on the ground that many other similarly placed candidates have not been allowed the services of a scribe.

The CCPD advised the respondent to allow the complainant to use the services of the scribe and extra time as available to visually impaired persons and also advised the department of personnel and training to amend the relevant rules before the next advertisement and make provision to allow scribe to persons with locomotor disability, whose arms are affected and could not write by themselves or had inadequate speed and provide them the extra time also.

V. EMPLOYMENT

A. Employment cannot be denied on the ground of the medical history of the person

In *Ranjit Kumar Rajak* v. *State Bank of India*[9], the petitioner had applied for and was selected for the post of Probationary Officer. Subsequently, he was called for a medical examination and was informed that he was not eligible for the post of Probationary Officer in the bank due to a renal transplant he had undergone in 2004. He approached the court against the said action of the Bank and relied on medical reports to confirm his fitness and good health to work in the said post and contended that it was clear that denial of employment was on account of his medical history of renal transplant although his present medical profile did not interfere with his job responsibilities. He challenged the action of the respondent in refusing employment as irrational and discriminatory.

[9] Writ Petition No. 576 of 2008 (Bom HC).

The Bank submitted, *inter alia,* that the petitioner would require continuous medication and periodical check-up throughout his life, the cost of which would have to be borne by the bank. An officer of the bank may be posted anywhere in India including rural branches and that the petitioner, if appointed would request for posting at places where medical and check-up facilities were available and that such a request cannot be acceded to as a probationary officer was required to work anywhere in India including at rural branches.

The Court, after a detailed consideration of the provisions of the UN Convention on the Rights of Persons with Disabilities that India had ratified and the meaning of the term "reasonable accommodation" therein, concluded that in the absence of a Municipal law on the matter, the Convention can be read into Article 21 as it did not in any way conflict with the municipal law. It found that in the absence of a statutory definition of reasonable accommodation, the reasonable accommodation as set out in the protocol in the first instance could be considered. However, it would have to have a nexus with the financial burden on the institution and/or undertaking which will have to bear the burden and further the extent to which reasonable accommodation can be provided for. The court held that it would, therefore, no longer be open to the state merely on account of past or present medical problems if otherwise, a person is fit to work and can be reasonably accommodated without undue hardship, to deprive a person otherwise qualified and successful, the right to employment.

Reliance was placed on an order of the High Court in the case of a person with HIV who was denied employment on account of his condition, where the Court concluded that in every such case, the test of medical fitness prior to employment or even during employment has necessarily to be correlated with the person's ability to perform the normal job requirements and any risk of health hazard he may pose to others at the work place.

The court concluded that there is no material to show that the burden cast on the respondent for the medical expenses which were likely to be about Rs. 13,000 per month would result in an undue hardship to the respondents. Hence the petition was allowed and it was directed that the petitioner be offered employment within sixty days.

B. Rights of persons with hearing impairment during interview

In *Chandra Kishore Joshi* v. *Secretary, Union Public Service Commission,*[10] the respondent Union Public Service Commission issued an employment notice for recruitment of extra Assistant Director, Directorate of Coordination (Police wireless) in Ministry of Home Affairs in the category of physically handicapped (hearing impaired). Complainant alleged that during the interview, members of interview board neither provided questions in writing nor an interpreter and therefore he could not understand questions properly.

The CCPD observed that since the interview did not materialise as the interviewee could not comprehend the speech of interviewers hence the interview conducted could be termed as null and void. It was directed that the respondent should conduct a fresh interview, in which complainant should be provided with the necessary arrangement for example sign language interpreter, overhead projection to show written version or oral version. Since the complainant had the ability to speak in Hindi therefore he should be allowed to give answer in Hindi or mixture of Hindi and English orally.

C. Right of persons with visual impairment to write Civil Services exams either in braille or with the help of a scribe

In *National Federation of Blind* v. *Union Public Service Commission,*[11] a representative body of visually handicapped persons in India filed the petition under Article 32 of the Constitution of India seeking a writ in the nature of mandamus directing the Union of India and the Union Public Service Commission to permit the blind candidates to compete for the Indian Administrative Service and the Allied Services and further to provide them the facility of writing the civil services examination either in Braille-script or with the help of a scribe.

The court directed the respondent to provide such facility. The court said:

> If some of the posts in the Indian Administrative Service and other Allied Services, as identified, can be filled from amongst the visually

[10] 2001 CCDJ 323 Case no. 630 of 2000 – Decided on 03.05.2001.
[11] (1993)2 SCC 411.

handicapped persons then there should be no reason why they should not be permitted to sit and write the civil services examination.

D. Right of low vision candidate to get the question paper in bold print

In *Parminder Pal Singh* v. *Union of India,*[12] petitioner was a visually handicapped person with some degree of sight or vision. He could, with the aid of lenses, etc., read bold print. He and other similarly circumstanced persons were deprived from appearing in exams held by the respondent for the posts reserved for the visually disabled candidates as the respondent had decided to withdraw question papers printed in bold print. As a result, these candidates were compelled to take the paper in braille. Thus, the candidates who were visually handicapped but not totally blind and eligible to appear were deprived of taking examinations as they do not know Braille. The petitioner argued that the candidates who do not know Braille will not be eligible to take the examination. Besides, it also puts to disadvantage those visually handicapped persons who are not proficient in braille while taking the examination.

The court agreed with the contention of the petitioner and held that he and others like him should be provided with the question papers in bold print. Merely because the respondents suspect that certain persons obtain dubious and false certificates of being visually handicapped and may take advantage by taking the examination if the question paper is in bold print, is not sufficient reason to deprive those visually handicapped persons not knowing braille from taking the examination and, thus, depriving them of an opportunity to compete in an examination, where reservation has been made for them. It is for the respondents to devise ways and means to obviate or eliminate malpractices or to have further safeguards in that regard. Even at a post qualifying stage, if there are any doubts about certain candidates being visually handicapped or not, who have been successful on the basis of false medical certificates, the same can be eliminated as a result of a subsequent medical examination.

The court directed the respondents to re-consider their decision and examine the feasibility of holding a separate examination in respect of these vacancies, for those who fall within these categories of visually

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[12] (2005) 1 PDD (CC) 284.

handicapped persons but do not possess the knowledge of braille, by providing them an opportunity of taking the examination with the question paper in bold print. The holding of such an examination would also provide an opportunity to those entire visually handicapped person who might not have applied in response to the advertisement in question since it required taking up the examination in braille only.

E. Right of persons with colour blindness to appointment to the post where perfect vision is not required

In *Nand Kumar Narayanrao Ghodmare* v. *State of Maharashtra,*[13] the appellant was a person with colour blindness. He was selected by the Public Service Commission but appointment could not be made. The appellant filed an affidavit detailing that as per the information he has secured, there were 35 posts in the Department and only five posts required perfect vision without colour blindness.

The court observed that government should consider the case of appellant to be appointed to any of the post of Agriculture officer of class II service other than the 5 posts mentioned by him in his affidavit.

F. Right of person suffering disability of such a nature that the handling of equipments is risky to be posted to a clerical post and the condition of passing typing test can be relaxed

In *Narendra Kumar Chandla* v. *State of Haryana,*[14] the petitioner who was working as a sub-station attendant had to be operated for Chonrosarcoma and was treated in the hospital. During treatment, his right arm was completely amputated. Respondent absorbed him as carrier attendant in the pay scale lower then that which he was placed before the accident.

The Supreme Court directed the State Electricity Board to constitute a board of three doctors to examine the appellant whether he could discharged the duties of the sub-station attendant or any other equivalent post carrying the same pay scale. The medical board reported that the appellant was not able to discharge his duties as sub-station attendant. The medical board also felt that handling of equipment necessary for

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[13] (1995) 6 SCC 720.
[14] (1994) 4 SCC 460.

discharging his duties could be risky to the installation as well as to the person him self.

The medical board also attempted to find whether he could be posted to some other positions such as Sub-Station A.F.M,. Foreman, Grade III, Chargeman, Rigger, Crane Driver, Welder, etc and found him unfit for those jobs also. The Board however found that he had been able to write English and Hindi with his left hand and he could be considered for clerical or non-technical post subject to meeting educational /administrative requirements. Considering his qualification etc the court directed to place him as LDC for a clerk where typing generally is not a necessary condition. In view of the facts and circumstances of the case, the court directed the respondent board to relax his passing of typing test and to appoint him as LDC. The court further directed to protect his last drawn pay i.e. when he had that unfortunate operation.

G. Right of persons with disabilities to be posted near their native places

In *Ved Prakash* v. *Kendriya Vidyalaya Sangathan*[15], the complainant submitted that his daughter, a person with 70% locomotor disability was posted as PGT "Commerce" at the respondent Kendriya Vidyalaya. He requested that she be posted near her native place. The complainant stated *inter alia,* that she was directed not to write the state of domicile as the choice and therefore she did not fill Delhi (her native place) one of her choices. Subsequently, she received the memorandum withdrawing the offer of appointment as she failed to report for duty within the stipulated date. She submitted that in view of her disability, it would be difficult for her to manage affairs without the support of family members and requested to be posted at Delhi(her native place). The request of her was forwarded to the Commissioner, KVS, New Delhi by this Court for consideration.

The respondent forwarded a copy of Memorandum informing that her request for change of place of posting from Chandigarh Region to Delhi on provisional appointment on contract to the post had been considered sympathetically by the Competent Authority but could not be acceded to. Her offer of provisional appointment on contract basis to the post stood automatically withdrawn since she failed to join her duty by the stipulated date.

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[15] (2006) CCDJ 420 Case no. 3056 of 2005 – decided on 23.05.2006.

The CCPD observed that while deciding about the choices for posting no consideration appears to have been given to the needs of persons with disabilities in policy of Department of Personnel and Training, Govt, of India that persons with disabilities should be posted near their native places within the region and requests from them for transfer to or near their native places should also be given preference. It may not be practical for a person with disability who requires the assistance of other person for day-to-day needs, to accept a contractual job for a limited period far away from their native place.

In view of the above observations, the respondent was advised to change the policy to enable and facilitate persons with disabilities to opt for their state of domicile in consonance with the instructions of Department of Personnel and Training and consider them for posting to their home town accordingly. The CCPD further advised that those persons with disabilities, who were appointed but could not opt for posting in their state of domicile due to policy of KVS, be allowed to give fresh option for posting. Based on their options, the respondent should consider them against the available vacancies and transfer them accordingly.

VI. Conclusion

From the above analysis it can be concluded that the principle of reasonable accommodation is an evolving concept. New type of situations is coming for adjudication before the courts and CCPD. Considering the limitation discussed in the starting paras of this paper, the development of this concept in Indian disability rights jurisprudence can be treated as satisfactory however much needs to be done.

The Right of Persons with Disabilities Bill, 2011[16] for the first time defines the term, "Reasonable Accommodation" in specific terms. In the bill chapters dealing with education, employment etc. is drafted in broader terms as compared to the Disabilities Act of 1995. If this Bill is translated into the Act, it will definitely improve the situation and provide scope for further development of this principle.

Recently, a trend is visible in judicial pronouncements in which courts have started reading the Convention on the Rights of Persons with Disabilities into the fundamental rights enshrined in the Constitution of India. This is a welcome development and if the trend continues, will broaden the scope of fundamental right viz a viz persons with disabilities.

[16] Submitted by the committee on 30th June 2011, available on MSJE website.

SURROGACY AND PARENTAL ISSUES

*Pooja Singh**

I. INTRODUCTION

Surrogacy is a ray of hope to those couples, who are unable to bear their child. To be a mother is the best gift of God for a woman. Every society across the world has given primary importance to the institution of family as the most basic and fundamental unit of social relationship. When two individuals come together and enter into a matrimonial bond a new family is deemed complete with the birth of children. All traditional societies are pro-natal societies[1] and consider children as a necessity for continuation of the family lineage and consequently a source of happiness for parents. Such beliefs in the traditional societies create a pressure on married couples to bear a child. In such a situation the inability to have a child causes matrimonial breakdown and exposes the couples to social ridicule.[2] The inability to have children, in medical term, is known as 'infertility.'[3] The infertility is a global problem. According to WHO Report the incidence of infertility across the globe, including India is around 10-15 percent.[4] A family also demands an heir for its continuation and succession purpose. It is only possible when couples have their own child. Previous to the advancement of science of reproduction and surrogacy, the infertile couples have the only option that is adoption. But the act of adoption is not acceptable to all personal laws for example Muslim personal law does not recognize the adoption. After the advancement of science and technology, surrogacy has become a popular method for getting a child who desires so. This option is also a kind of boon for new trends of couples LG BT (lesbian, gay, bisexual, transsexual). Surrogacy has evolved by the medical science as a method of *'proxy womb.'*

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1 Ruby L. Lee, *New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation*, 20 HASTINGS WOMEN'S L.J. 275.

2 Imrana Qadeer, *Social and Ethical basis of Legislation on Surrogacy: Need for Debate*, VI: 1 INDIAN JOURNAL OF MEDICAL ETHICS 2009.

3 Assisted Reproductive Technology (Regulation) Bill 2008, Section 2(q) "Infertility" means the inability to conceive after at least one year of unprotected coitus."

4 ANNUAL REPORT 2008-2009 Ministry of Health and Family Welfare, Government of India available at http:// mohfw. nic.in.

India is witnessing a spurt in cases of surrogacy due to two factors: a medical tourism boom fuelled by low medical costs and a status conscious middle class seeking to fulfill its financial needs.[5]

In 2006, 290 surrogacy cases were reported compared to 158 in 2005. There were 50-odd cases, according to data collected from 116 fertility centers in a survey conducted by Federation of Obstetrics and Gynecological Societies of India (FOGSI) and, Indian Society for Assisted Reproduction.[6] It becomes more complicated when the traditional form of surrogacy has been opted by the intended parents; by which the surrogate mother becomes the both genetic and biological mother of the child.

The process of surrogacy has been entangled with multi facet medico, social and legal complicacies, throughout the world, from the *Baby M. case (U.S.)*[7] to recent controversy in India in *Baby Manji case.*[8] Conceptually, fundamentally and practically, there are various issues related to surrogacy.

II. SURROGACY: IT'S MEANING AND DEFINITIONS

The word, surrogate, has its origin in Latin, *surrogatus,* which refers *'surrogare'*, means '*a substitute*,' that is, a person *'appointed to act in place of another'*. Thus a surrogate mother is a woman, who bears a child on behalf of another woman, either from her own egg or from the implantation in her womb of a fertilized egg from another.[9]

Traditionally, surrogate motherhood referred to, 'an arrangement between a married couple who is unable to have a child because of the wife's infertility ,and a fertile woman who agrees to conceive the husband's child through artificial insemination ,carry it to term, then surrender all parental rights in the child'.[10]

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[5] Monica Chawala, *Surrogacy: A Need for New Law*, 45:4 CIVIL & MILITARY LAW JOURNAL 193.

[6] Alifiya Khan, *Surrogacy is soaring in India*, HINDUSTAN TIMES, 19th September 2008.

[7] 537 A.2d 1227, 396 (N.J. 02/03/1998).

[8] AIR 2009 SC 84.

[9] TWO HUNDRED TWENTY EIGHTH REPORT OF LAW COMMISSION OF INDIA, *Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy*, p.9.

[10] Kusum Jain, *Surrogate Motherhood; Some Legal and Moral Problems in Bio-Ethics*, 25 JILI 1546(1983).

According to the Black's Law Dictionary, surrogacy means the process of carrying and delivering a child for another person. The New Encyclopedia Britannica defines surrogate motherhood as the practice in which a woman bears a child for a couple unable to produce children in the usual way. The Report of the Committee of Inquiry into Human Fertilization and Embryology or the Warnock Report (1984) defines, surrogacy, as the practice whereby, one woman carries a child for another with the intention that, the child should be handed over after birth. According to Concise Law Dictionary, the role of a woman (a surrogate mother) who is commissioned to bear a child by a married couple unable to have children themselves.

The Assisted Reproductive techniques Bill 2008 defines surrogacy under section-2(t) as an arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or to her husband, with the intention to carry it to term and hand over the child to the person or persons for whom she is acting as a surrogate.

In this respect surrogacy is a method where-'a woman who bears a child for another person, often for payment whether through artificial insemination or carrying until birth another women's surgically implanted fertilized egg.'

In India the concept of surrogacy has been imbibed in the mythology itself. The concept of surrogate mothers is well known from ancient period. Dhritarastra was the proud father of hundred children, though he had no biological relation with Gandhari. At that time, the underlying idea behind surrogacy is a noble one as it is based on the altruistic principle of doing well to others i.e. one woman helping another woman. The religious texts of Hinduism and Christianity highlight the practice of surrogacy in ancient era. The Old Testament cites the example of Abraham's infertile wife, Sarah, commissioning her maid Hagar to bear a child by Abraham.[11]

The Bhagavata Purana narrates the story how by the blessings of Vishnu the embryo from Devaki's womb was transferred to the Rohini; another wife of Vasudev, so that the life of one of their sons is protected.

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[11] Genesis 16.

Rohini secretly gave birth to Balrama and raised him, while Devaki and Vasudev informed Kansa about the death of their son.

There is an increasing acceptance of surrogacy arrangement in certain jurisdiction around the world. The growth of infertility in modern society and the declining numbers of children for adoption had increased the need for a reproductive technology options to be made available.

III. Types Of Surrogacy

There are various categories of surrogacy. Different authors have categorized this act in different forms. Some are as given below:

(a) *Traditional Surrogacy*

This is also known as the straight method of surrogacy. In "traditional surrogacy" the surrogate is pregnant with her own biological child , but this child was conceived with the intention of relinquishment of the child to be raised by others; by the biological father and possibly his female spouse or partner, either male or female. The child may be conceived via artificial insemination using fresh or frozen sperm or impregnated via IUI (intrauterine insemination), or ICI (intra –cervical insemination) which is performed at a fertility clinic.[12]

In this respect when a surrogate mother is pregnant with child but the child is conceived with intention of handing it over to others or the biological father and his partner is called "traditional surrogacy".[13] Traditional surrogacy is an Assisted Reproduction method when the surrogate mother agrees to donate her eggs. The child that is conceived using IVF (in-vitro fertilization) or IUI (intra uterus insemination) is biologically related to the surrogate mother. It involves legal risk to intended parental rights because in this form of surrogacy, "traditional surrogate" carries her own biological child and may experience emotional attachment to the child.

The infamous *"Baby M"* case involved traditional surrogacy. The surrogate mother carried a biological child and later refused to relinquish her parental rights to the biological father. She fled from New York to Florida trying to escape the Judge's Order. *Baby M. case* attracted a lot

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[12] AIR 2009 SC 84.

[13] Suzane Griffiths & Logan Martin, *Assisted Reproduction and Colorado Law: Unanswered Questions and Future Challenges*, 35 Colo Law 39 (2006).

of publicity and caused the changes of New York and New Jersey laws on surrogacy.[14]

(b) *Gestational surrogacy*

This is also known as *'the Host method of surrogacy*. In the gestational surrogacy the surrogate becomes pregnant via embryo transfer with a child of which she is not the biological mother. She may have made an arrangement to relinquish it to the biological mother or father to raise, or to a parent who is unrelated to the child (e.g. because the child was conceived using egg donation, germ donation is the result of a donated embryo). The surrogate mother may be called the gestational carrier.[15] Gestational Surrogacy always involves using IVF (in-vitro fertilization). In the USA, high costs of IVF and lack of medical coverage for Assisted Reproduction prevent many families to seek surrogacy as family building options. At the same time, the USA remains the country where gestational surrogacy arrangements are not illegal in most of its states.

It is the most prevalent form of surrogacy, wherein the surrogate mother becomes pregnant via embryo transfer with a child of which she is not the biological mother and as per the agreement she is required to hand over the baby and relinquish all her rights to the commissioning parents.

Gestational surrogacy, with or without monetary incentive, is the most popular form of surrogacy as it enables the birth of child having the genes of the commissioning parents.[16] In such kind of surrogacy the surrogate mother is genetically unrelated to the child, hence has less legal claim on the child.[17] But the procedure of gestational surrogacy is highly complicated one and is accompanied with high risks and low success rates.[18] However the desire to have ones own children encourages couples to undertake the risks and complications of surrogacy.[19] In the gestational

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[14] *Baby M.*537 A2.D,1227,109 N.J. 396 (N.J. 02/1998).

[15] *Baby Manji Yamada* v. *Union of India & Another*, AIR 2009 SC 86.

[16] *Supra* n.2.

[17] Kevin Tuininga, *The Ethics of Surrogacy Contracts and Nebraska's Surrogacy Law*, 41 CREIGHTON L. REV 185.

[18] The IVF take home baby rate in India is documented to be around 25 percent and it varies with age.Available at http:// icmr. nic.in /bujunjulyoo.pdf.

[19] Pankaj Desai,*Why is Commercial Surrogacy a Contentious Issue?* http://www. expresshealthcaremgmt. Com/200703/stretegy05.shtml.

surrogacy embryo transfer takes place. The embryo is created from the gametes of the commissioning parents or from the gametes of the sperm or egg donor.[20]

During the course of surrogacy the commissioning parents generally bears the cost of medical care of the surrogate mother including her living costs, maternity clothes, transportation cost, loss of earning and other reasonable expenditure.

(c) *Altruistic surrogacy*

It is a situation where the surrogate receives no financial reward for her pregnancy or the relinquishment of the child (although usually all expenses related to the pregnancy and birth are paid by the intended parents such as medical expenses, maternity clothing, and other related expenses).[21]Thus when the surrogate mother agrees to carry on the pregnancy on behalf of the commissioning parents without demanding any consideration for the service rendered it is deemed to be an 'altruistic surrogacy'.

(d) Commercial Surrogacy

In commercial surrogacy, there is consideration in lieu of the act. Commercial surrogacy is a form of surrogacy in which a gestational carrier is paid to carry a child to maturity in her womb and is usually resorted to by well off infertile couples who can afford the cost involved or people. who save and borrow in order to complete their dreams of being parents This medical procedure is legal in India where due to excellent medical infrastructure ,high internal demand and ready availability of poor surrogates it is reaching industry proportion.[22]

IV. Judicial Approach Towards Surrogacy

In surrogate birth, there are three important entities – the intended mother, the biological mother and the genetic mother. The intending mother in this respect is the mother who wants the child, the biological mother is the one who gives birth to the child or provides her womb and the genetic

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[20] Jim Hopkins, *Egg Donor Business Booms on Campuses*, USAToday,Mar.15,2006, http://www.usatoday.com/money/industries/health/2006-03-15-egg-donors-usat-x.htm.

[21] *Supra* n. 15.

[22] *Ibid.*

mother is the one whose ovum is used. There may be an overlap between the three in certain cases. If the ovum of the intending mother is used, she herself is the genetic mother but if the biological mother uses her own ovum then she becomes the genetic mother. This is where the moral and legal question arise- that is out of three who should be the legal mother- the intended mother who wants the child and for whom the child is brought forth: the biological mother who carries the child for the gestation period; or the genetic mother who can be proved to be the mother through DNA tests.[23]

The phenomenon of surrogate birth may involve other legal complexities such as legality of surrogate contract, legitimacy of the child, right of surrogate mother over the child and the parenthood rights. In India, as there is no legislation regarding surrogate birth the position becomes even more complex. Even socially, the concept of surrogate birth is not accepted on a large scale.[24]

The moral issues, which are associated with surrogacy, are pretty obvious. This includes the critical aspect, which leads to commoditization of the child, breaks the bond between the mother and the child, interferes with nature and leads to exploitation of poor women in underdeveloped countries who sell their bodies for money. Sometimes, psychological problems also encountered in the act of surrogate agreements.

In recent years the arguments against commercial surrogacy has been heightened because medical practitioners in the countries like India using their technical expertise and easy availability of poor women have opened up new surrogacy market for childless couples across the world.[25]Women with limited economic means in India have readily accepted this method of earning quick money and fulfilling the needs of their family.[26]

To resolve this issue various countries have laid various legal angles. In UK, the surrogate mother is the legal mother (section 27(1) of the Human Fertilization and Embryology Act 1990). Section 30 of the said Act at the same time provides that if the surrogate mother consents to the child to be

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[23] Reetu and Basabdutta, *Surrogate Birth*, AIR July 2009, Journal Section, 109.

[24] *Ibid.*

[25] *Supra* n. 16.

[26] Orphen.com.*wombs for Rent: Journey to Parenthood*, available at http:// www.orphan .com/slideshow/world/globalissues /slideshow.

[27] *Supra* n. 9, p. 14.

treated as the child of the commissioning parents the court may make a parental order to that effect. This section also prohibits giving or taking of money or other benefit (other than expenses reasonably incurred) in consideration of the making of the order or handing over of the child.[27]

In India, according to the National Guidelines for Accreditation, Supervision and Regulation of ART Clinics, evolved in 2005 by the Indian Council of Medical Research (ICMR) and the National Academy of Medical Sciences (NAMS), the surrogate mother is not considered to be the legal mother. The birth certificate is made in the name of the genetic parents. The US position as per the Gestational Surrogacy Act 2004 is pretty similar to that of India.

Us Baby M. Case[28]

In 1984, a couple from New Jersey in US –William Stern and Elizabeth Stern contracted to pay Mary Beth Whitehead $10,000 to bear a child using artificial insemination of William Stern's sperm. The baby was born, but Whitehead decided to keep the child and refused the money. On this issue in the land mark *case of Baby M.*[29],New Jersey Supreme Court decided and defined the custody rights in the case of surrogate motherhood. The natural father was awarded custody of Baby M but the rights of adoptive mother were denied. The surrogate mother who conceived the child via artificial insemination was granted visitation rights. The New Jersey Supreme Court decision prohibited further surrogacy arrangements in the State unless, "the surrogate mother volunteers, without any payment, to act as a surrogate and is given the right to change her mind and to assert her parental rights." Seventeen other states have since adopted similar guidelines.[30]

California's Buzzanca Case[31]

In 1998 a California court ruling has fostered the favorable legal scenario for the surrogacy and egg donation agreements. The question before the court in the case of *In re Marriage of Buzzanca*[32], was whether

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[28] 537 A.2d 1227 ,109 N.J 396 (N.J. 396 N. J. 02/03/1998).
[29] *Supra* n. 15
[30] *Ibid.*
[31] 61 Cal. App. 4th 1410 (1998).
[32] *Ibid.*

a married couple, who used both anonymously donated sperm and egg and used a surrogate mother to carry the child, were the parents of the child born six days after the husband filed for divorce. The contention of the intended father was that since he was not the biological father of the child, therefore he was not the child's father and could not be forced to adopt. The court decided that 'both intended parents were the legal parents of the child.

CALIFORNIA'S JOHNSON V. CALVERT CASE[33]

The California court, in the case of *Johnson v. Calvert*[34], held that the gestational surrogate had no parental rights to a child born to her, as a gestational surrogacy contract was legal and enforceable. The court reasoned that the one who intended to, *"to bring about the birth of a child that she intended to raise as her own-is the natural mother under California law.*

JAPAN'S JUDICIAL POSITION

In Japan, the latest position is that the mother who gives birth to the child is the legal mother and the intended parents need to adopt the child to gain the legal status of the parents. This was upheld by the Ministry of Justice in a 2003 Supreme Court decision by reiterating the stand laid down in a 1962 decision by Supreme Court of Japan.[35]

BRISBANE STATE'S, IN RE EVELYN CASE

In Brisbane state, the Brisbane Family court decided the case of *Re Evelyn,* involving the dispute of parenthood rights of the child born out of surrogate contract. The court decided the surrogate contract to be invalid and the genetic parents to be the legal parents i.e. the surrogate mother and the intended father. And for the custodial rights it opined that the best interest of the child needs to be the prime consideration.

AUSTRALIAN KIRKMAN SISTERS'S CASE

In Australia *the case of Kirkman sisters* raised the societal eruption in Victoria. Linda Kirkman has entered into an agreement to

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[33] (1993)5 Cal.4th 84.

[34] *Ibid.*

[35] *Supra* n. 23.

gestate the genetic child of her older sister Maggie. The baby girl, called Alice, was handed over to Maggie and her husband at birth. This sparked much community and legal debates and soon Australian states attempted to settle the legal complications in surrogacy. Now in Australia commercial surrogacy is illegal, contracts in relation to surrogacy arrangements unenforceable and any payment for soliciting a surrogacy is illegal.[36]

JAYCEE B. V. SUPERIOR COURT[37]

How surrogacy can lead to an array of legal complexities regarding motherhood was shown by *Jaycee B. v. Superior Court.*[38] A child was born to a surrogate mother using sperm and eggs from anonymous donors because the infertile couple was unable to create their own embryo using the in vitro fertilization techniques. The couple chose to use anonymous donors rather than asking the surrogate to use her own eggs because of the *Baby M case*[39] in New Jersey in which the surrogate had eventually refused to hand over the baby saying that she was its biological mother and her right to raise the child pre-empted the commissioning parents'. The child thus had five people who could lay claim to parenthood – a genetic mother, a commissioning mother, a surrogate mother, a genetic father and a commissioning father. One month prior to the birth of the baby Jaycee the intended parents John and Luanne separated and John sought to rescind his obligations under the surrogacy contract so as to avoid having to pay child- support for Jaycee. Luanne sought both custody and support from her ex-husband. The court battle continued and for three years Jaycee did not have a legal parent. A Californian court granted temporary custody of the baby Jaycee to Luanne and ordered John to pay for child-support.

Indian *Baby M case* [40]concerned custody of a child Manji Yamada given birth by a surrogate mother in Anand, Gujarat under a surrogacy agreement with her entered into by Dr Yuki Yamada and Dr Ikufumi Yamada of Japan. The sperm had come from Dr Ikufumi Yamada, but egg from a donor, not from Dr Yuki Yamada. There were matrimonial discords between the commissioning parents. The genetic father *Dr Ikufumi Yamada* desired to

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[36] *Supra* n. 9, p. 13.
[37] 42 Cal. App. 4th 718 (1996).
[38] *Ibid.*.
[39] *Supra* n. 28.
[40] JT 2008, (11) SC 150.

take custody of the child, but he had to return to Japan due to expiration of his visa. The Municipality at Anand issued a birth certificate indicating the name of the genetic father. The child was born on 25.07 2008 and moved on 03.08.2008 to Arya Hospital in Jaipur following a law and order situation in Gujarat. The baby was provided with much needed care including being breastfed by a woman.

The grandmother of the baby Manji, Ms Emiko Yamada flew from Japan to take care of the child and filed a petition in the Supreme Court under Article 32 the Constitution of India. The Court relegated her to the National Commission for Protection of Child Rights constituted under the Commissions for Protection of Child Rights Act 2005. Ultimately, baby Manji left for Japan in the care of her genetic father and grandmother.[41]

In *Israeli Gay couples case*[42] a gay couple of Yonathan and Omer from Israel have come to Mumbai for a surrogate child, because in Israel they could not adopt a child or have a surrogate mother for the same. Yonathan donated his sperm. They selected a surrogate. Baby Evyatar was born. The gay couple took son Evyatar to Israel. Israeli government had required them to do a DNA test to prove their paternity before the baby's passport and other documents were prepared.[43]

A German couple Jan Balaz and Susan Lohle had surrogate twins in Anand Gujarat, in April 2008.Since Germany does not recognize surrogacy, Balaz moved in Gujarat High Court, which ruled that the children be given Indian citizenship. Later on the couple moved to UK but UK refused to give visas to those twins whose citizenship is undecided. Government opposed the order of High Court, which then asks for the identity papers so that twins can travel. The Supreme Court says, "Surrogacy must be examined in detail". A Bench comprising Justices G S Singhvi and A K Ganguly vented its anguish and said;

> Should we treat children born out of surrogacy as commodities? Statelessness cannot be clamped upon the children. There must be some mechanism to get citizenship of some country. Children

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[41] *Supra* n. 9,p.15.

[42] THE TIMES OF INDIA ,18 November 2008.

[43] *Ibid.*

should be allowed to leave the country after an assurance of their citizenship has been given.[44]

Thus the judiciary has tried to settle all the issues related to the legal complexities and social acceptance of the surrogacy. Supreme Court of India has also criticized the term 'industry', used in place of surrogacy by the Law Commission.

V. Legal Issues Attached With The Surrogacy And Parental Issues In India

There are the following legal mazes that have knotted with the surrogate arrangements

Firstly, whether surrogacy agreement between two parties is valid under section 25 of Indian contract Act 1872 or void under section 23 of the same Act.

Secondly, who will become the genetic and biological mother of the concerned child? This has changed the definition of the mother and there is the need to redefine the term mother in the context of the surrogate mother. This issue may get more complicated in regard to other familial relationships between siblings, property rights, inheritance etc.[45]

Thirdly, the legitimization of surrogate child is also a matter of great controversy under the legal parameter. Indian law recognizes relationship by blood and adoption or marriage. Children are said to be related to each other by full, half and uterine blood. The status of children in a family is established by reference to the marital status of their parents. They are legitimate when they are born out of wedlock, otherwise they are illegitimate. Surrogacy challenges both the principles. For the legal problems, paternity is a question based on generic aspects. Use of the husband's sperm for inseminating the wife either invirto or in utero fertilization does not pose any problem to the question of paternity of the offspring .However the use of donated sperm in AID inevitably creates conflict with social reality and genetic truth. In the absence of statutory intervention, the child is illegitimate, his rights being those enforceable against

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[44] The Times of India, 6th December, p.11.

[45] Shri Mahaveer Chand Bhadari Memorial Lecture, *The Advance of Science and the Need to Evolve Compatible Legal System* by MGK Menon ,(1995) 5SCC(Jour) 18 available at http:// www.ebc-india.com/lawyer/articles/96v5a4htm

his genetic father i.e. the anonymous donor, and his social father is a legal stranger to him. This state of affairs creates problems in his inheritance rights.[46]

In India, legitimacy issues are governed by section 112 of the Evidence Act, where under the child would be legitimate child of the woman and her husband ,and the artificially of the process (in its sexual aspect) would make no difference .This presumption is also rebuttable on the ground of access. Of course, if the marriage was not consummated in the usual sense, it would be a valid ground for a decree of nullity. [47]

VI. A Critical Appariasal Of The Assisted Reproduction Technology (Regulation) Bill 2008 And Recommendations Of Law Commission Of India

Surrogacy regulation may well be one of Hilbert's unsolvable problems. Only this is not mathematics and there are already many versions of the 'solution' in existence.[48] A detailed assessment of the Bill will definitely bring to light many more areas of contradictions. These are just a few examples. It seems that the bill has been proposed in a lot of haste, it assumes certain social trends have been accepted in India and strengthens certain traditionally held notions which have been systematically critiqued by feminists in India. Thus if at all we need a legal regulation, it needs to be much more well thought out, with more dialogue between the stake holders. This still seems to be the brain child of Indian Council for Medical Research.

1. 'surrogacy arrangement will continue to be governed by contract amongst parties, which will contain all the terms requiring consent of surrogate mother to bear child, agreement of her husband and other family members for the same, medical procedures of artificial insemination, reimbursement of all reasonable expenses for carrying child to full term, willingness to hand over the child born to the commissioning parent(s), etc. But such an arrangement should not be for commercial purposes.

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[46] *Supra* n. 23, p. 111.

[47] *Ibid.*

[48] http://www.thehindu.com/opinion/open-page/article532007.ece?service=mobile

2. Surrogacy arrangement should provide for financial support for surrogate child in the event of death of the commissioning couple, an individual before delivery of the child, or divorce between the intended parents and subsequent willingness of none to take delivery of the child.
3. A surrogacy contract should necessarily take care of life insurance cover for surrogate mother.
4. One of the intended parents should be a donor as well, because the bond of love and affection with a child primarily emanates from biological relationship. Also, the chances of various kinds of child-abuse, which have been noticed in cases of adoptions, will be reduced. In case the intended parent is single, he or she should be a donor to be able to have a surrogate child. Otherwise, adoption is the way to have a child which is resorted to if biological (natural) parents and adoptive parents are different.
5. Legislation itself should recognize a surrogate child to be the legitimate child of the commissioning parent(s) without there being any need for adoption or even declaration of guardian.
6. The birth certificate of the surrogate child should contain the name(s) of the commissioning parent(s) only.
7. Right to privacy of donor as well as surrogate mother should be protected.
8. Sex-selective surrogacy should be prohibited.
9. Cases of abortions should be governed by the Medical Termination of Pregnancy Act 1971 only.

The Report has come largely in support of the surrogacy in India, highlighting a proper way of operating surrogacy in Indian conditions.

VII. Amendment In The Draft Bill, 2010

Surrogacy is entangled with the multifaceted legal, moral and social complications. To elucidate these complication there are already many versions of the 'solution' in existence[49]. So far, there have been a set of draft guidelines (2002), the finalized guidelines (2005), the draft Bill 2008, the draft Bill 2010 and a Law Commission report (2009) — all with a

[49] Aastha Sharma, *Surrogacy: law's labour los*? Available at http://www.thehindu.com/opinion/open-page/article532007.ece?service=mobile

mix of contradicting, progressive, regressive, rights protecting and profit-protecting clauses. The draft Assisted Reproductive Technologies (Regulation) Bill and Rules 2010, the latest version, has not been made public yet, and only glimpses of some of its clauses can be caught through recent news reports.[50]

(i) The draft Bill 2008 was widely criticized by health and rights experts and civil society organizations mainly on the ground that it promoted and facilitated profit making by private doctors and compromised on the health and rights of the surrogates and the children born.

(ii) The clause clearly demonstrating the pro-profit orientation of the 2008 Bill was the provision facilitating easy access to foreign couples to hire Indian surrogates, including appointing a local guardian for the surrogate. But the modified, new version of the Bill has made an amendment to this clause. It has been currently conveyed through the Bill that it will be mandatory for all foreign couples coming to India for surrogacy to submit documents from their home country certifying that they permit surrogacy in their country and that the child born will be granted citizenship. This is a revolutionary change and will, in some way at least, ensure that children born through surrogacy are not caught in legal conflicts and declared 'stateless.'

(iii) The other remarkable change in 2010 Bill is that unless gay and lesbian relationships are legalized in India, gay couples from other countries too would not be allowed to access these technologies. Recently, there has been a rise in the number of gay couples from various parts of the world to have a child through surrogacy in the Indian clinics. While the Delhi High Court[51] in July 2009 did decriminalize gay sex, gay relationships are yet to be legalized. There were a host of other objectionable clauses in the 2008 Bill, like allotting the task of sourcing gametes and surrogates to semen banks, allowing women to donate eggs six times with a gap of three months each, the absence of the basic rights to the surrogate, etc. What the 2010 Bill has to say about these and the rest of the clauses is yet to been seen, and cannot be known till it is made

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[50] *Ibid.*

[51] *Naz Foundation* v. *Govt. of NCT*, WP(C) No. 7455/2001 decided on July 2, 2009 by Delhi High Court.

public. Whether the 2010 Bill is trying to find a middle path between the 2008 Bill, the Law Commission report and the comments and feedback from civil society is hard to say. In any case, while the policymakers keep drafting, changing, redrafting and reversing rules on paper, the surrogacy market continues to proliferate.[52]

VIII. Conclusions And Suggestions

Surrogacy involves conflict of various interests and has inscrutable impact on the primary unit of society viz. family. Non-intervention of law in this knotty issue will not be proper at a time when law is to act as ardent defender of human liberty and an instrument of distribution of positive entitlements. At the same time, prohibition on vague moral grounds without a proper assessment of social ends and purposes which surrogacy can serve would be irrational. Active legislative intervention is required to facilitate correct uses of the new technology i.e. ART and relinquish the cocooned approach to legalization of surrogacy adopted hitherto. The need of the hour is to adopt a pragmatic approach by legalizing altruistic surrogacy arrangements and prohibit commercial ones.

In the year 1992 a public multi professional commission headed by Justice Aloni was setup to consider all the aspect of reproductive technologies in Israel and after their recommendations the surrogate motherhood agreement (approval of agreement and status of new born) law was passed in the year 1996. According to this law the entire act of surrogacy is deemed to be legal if the surrogacy agreement is approved by the committee which has made under this act comprising the seven members. In the same manner, in India the surrogacy agreement has to be regulated by a strong legislation. The proposed ART Bill 2008 and further the 2010 Amendment Bill thereof is a welcoming step towards the right direction to regularize and legalize the act of surrogacy and its annexure attempt to redefine the parental rights; but still is inadequate to deal with the complexity of the surrogacy. For this purpose personal laws should also be amended, to tackle with complex parental issues in surrogacy. This is the only solution to cope with the emerging dangers of revolutionized technology.

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[52] *Ibid.*

CONSTRUCTING DEMOCRACY IN THE ERA OF RIGHTS: MAKING SPACE FOR RULE AND RESISTANCE

*Deepa Kansra**

"A country does not have to be deemed fit for democracy, rather, it has to become fit through it."

...Amartya Sen

I. INTRODUCTION

The most notable feature of modern political theory is the express inclination of all States towards the acceptance and promotion of democracy. It is spoken as an accepted truth that the political force of democracy is inevitably linked to the desire of finding a solution to human miseries, and therefore must be established as a right of every society.

Democracy as a practical force has to ensure access to a healthy political structure, which is seemingly well coordinated and capable of delivering results. While being of both national and universal acceptance, there are none to question the varied forms it has taken or can take. When making an attempt to understand the modern attributes of democracy, some thought has to be given on what a democracy intends to achieve at a given time and place. The term 'democracy' is viewed as highly relative and clothed with ambiguities, in light of new developments and experiences world over. Critics make serious endeavours to answer questions pertaining to the workings and limitations of a democratic structure. The central focus is upon the institutional framework, broadly identified with the legislative, executive and judicial organ of the State, the results it must deliver to the people, the qualitative limitations, as well as the environment in which it operates.[1]

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[1] There are considerable issues and questions that are subject matter of deliberation. To name a few: (a) It is significantly highlighted that the current understanding of governance is absorbed in a myth of rights- 'that realization of rights by the courts is itself tantamount to meaningful change and gain'. There is considerable need to focus on practice and delivery, i.e. – to highlight the difference between

Looking into the wide ambit of democratic theory it is obvious that contemporary issues pertaining to rights, governance and constitutionalism are all within the spectrum of deliberation. The traditional understanding of democracy in terms of representation, check over power, procedural patterns etc only enables the identification of objective principles. A democratic set-up in terms of institutional mechanisms is one dimension of democracy. The expression 'formal democracy' is more so in reference to a political system that features regular fair elections, accountability, effective guarantees of freedom. However, the mere identification of democracy with the formal structural requirements is a faulty perception and must be disregarded. In the words of Maxwell Chibundu, "the legitimacy conferred by democracy flows not from its recognition of the ideal of embodiment of supreme and ultimate authority in the people…In particular democracy relies on periodic elections that are grounded on rationale deliberative processes rather than on haphazard assertions of power by the general populace."[2] The old age definition of democracy in terms of a procedural commitment does not stand today, making it even more necessary to get acquainted with the new ideas about democracy, its achievements, global/ national obstacles, and its significant role in ascertaining the sanctity of rights and conditions of governance. A few of the currently debated issues are (a) how the high ends of human rights protection, accountability, justice are dependent upon the strength and maturity of democracy, (b) whether the realization of rule of law is subject to the political environment, (c) what actions constitute realization of rights etc.

In the midst of growing legal and theoretical concerns, democracy as a political force in India and various other countries is showing marked signs of dynamism to satisfy the social demands in terms of social or economic needs. It can be expressed as 'democratic dynamism' that comes

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court's declaration of rights and actual political practice in furtherance of the said rights, the effect of judicial governance on the construction of social movements for democratic reforms. (b) What are the plausible channels opened by the state to enhance political deliberation? (c) What are the objective parameters to ascertain political performance? (d) What are the impediments to achieving global consensus on the meaning and values associated with democracy? etc.

[2] Maxwell O. Chibundu, *Political Ideology as a Religion: The Idolatry of Democracy*, Available at http://ssrn.com/abstract=10223718, 143 (2007).

with the growing popularity of democratic governance because of the vibrant role of the judiciary. A role identified as relevant because of the failures of legislative and executive initiatives to effectively deliver results. The fact of judicialization has swept the political functioning of various legal systems. It is therefore important to ascertain the viability of the strong role of democratic power (judicial) based on social attitude and demands, especially in the absence of any improvement in the overall democratic structure and the continuous utilization of the law by way of interpretation to legitimize action as well as pacify social frustration.

The popularity of democracy has unleashed or created a space for mechanisms to establish superiority by relying simply on social and political conditions and concerns. In the case of India, it becomes all the more important to analyse and reveal the increasing identification of democracy with the judicial institution in important matters relating to constitutional guarantees and governance, in the absence of much co-operation with or any negligible improvement in the workings of other institutions. The trend is widely popularized as the 'New Separation of Powers' in the modern times and can also be traced in many other countries, which are all deliberating upon the question as whether the enhanced judicial position is appropriate or healthy? In addition to the fact of judicial governance, there is also considerable emphasis on ascertaining how rights get affected with the manner of judicial governance. In other words, it is relevant to ascertain the sanctity of governance and rights as not only a constitutional ideal, but a political aspiration and eventually a social satisfaction.[3]

II. What Matters in a Democracy

Under a general theory, democracy has been referred to as the rule of people, or a form of government in which the 'demos'- the people, rule, with power in the hands of many rather than just a few or one. A

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[3] In modern times, there is widespread debate on testing the legitimacy of judicial power. In the course of defending equality and justice, there is a possibility that the judiciary has impressed upon the society that its pronouncements are to be treated as those of the Constitution. The increasing primacy of judicial interpretation is likely to insulate constitutional decisions from challenge. See Jane Pek, *Things Better Left Unwritten? Constitutional Text and the Rule of Law*, 83 New York University Law Review 1991(Dec 2008).

system characterized with the existence of a bureaucratic organization characterized by efficiency and hierarchy. However, what is open to deliberation is what constitutes 'rule', and the 'people'? "Does talk of the 'people' simply imply some homogeneous will amongst all members of a given community, capable of expression in universally agreed political decisions?"[4] In modern context, how is will of the people expressed? What all authorities hold the legitimate authority to take decisions on the issues of liberty and distribution? What are the mechanisms to question democratic decision making? What standards ascertain the legitimacy of democratic actions? What are the moral and legal standards governing the actions of decisions makers? etc are all pertinent questions.

Democracy as a functional institution is norm based as well as value based. Democracy is based on the values of liberty and equality. The crucial components of a functional democracy are- 'free speech, political equality, liberty, toleration, empathy, efficiency'[5]. At the level of functionality, the basic idea of democratic governance has evolved with time, and democracy still means different things to different people, depending upon the experience and aspirations. Even after years of experience with democracy, a lot of questions come to mind, that why is democracy preferable to other forms of government? Is voting a right or a duty? What is that we hope to achieve by resorting to democracy? Or how can we improve the quality of democratic discourse?

It is true that with the passage of time, man and society has come up to attach a significant meaning to democracy. In the words of T. Mathew the essential test of a democracy has been, "the belief that the source of political authority must be and remain in the people and not in the rulers. The people have the freedom to determine the nature and content of political power…it will be a government by the people, not as an unorganized mass, not even as an organized majority, but as a society of living selves. It will not rest on mere numbers or quantity, but on the ethical quality and value of social life which is at once its foundation and its product"[6] The basic underlying value of democracy has been that it does not identify with mere majority rule or with 'majoritarian politics'.

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[4] Jack Lively, DEMOCRACY (1975)9.

[5] Burt Neuborne, *Making the Law Safe for Democracy: A Review of the Law of Democracy Etc.*, 97 MICHIGAN LAW REVIEW 1578 (May 1999).

[6] T. Mathew, *A Socialist Society Cannot be Democratic*, in M.R. Pai (ed.), SOCIALISM IN INDIA: A COMMENTARY (1967) 64.

In broad and simple words, democracy refers to an institutional set-up which more generally will include a legislature, executive and a judiciary. The institutions are required to function and reflect the will of the people in their respective functional domains, because democracy is nothing but a government of the people. In traditional texts it has always been the legislature that is identified as the institution that reflects upon the will of the people. But if we trace the development in law, the powers of the executive and judiciaries have increased to the extent of deciding significant issues that affect individual lives. The growth in power has as a matter of fact necessitated a situation wherein democracy is required to express the will of the people. Even under the Indian Constitution, the three wings of the state: the legislature, the executive and the judiciary, are constitutional democratic institutions. The sanctity of a constitutional status is that democratic functioning must submit to the dictates of the Constitution.

It is obvious that the definition of democracy in terms of elections is a minimal definition.[7] There are a lot of factors that must reflect in the functioning of a guided democracy. Firstly, the continuance of a strong political democracy is largely dependent upon the recognition and respect for the principles of liberty and equality. To many people, the reference to equality, liberty, fraternity gives only an idealistic picture of democracy, because it is like a realist paradox that on the one hand liberty and equality strengthen and are essential to the democratic process, and on the other democratic process must ensure that the values flourish.

At a given point in time, the status of the Constitution and its people comes to be reflected in the face of the democracy. If democracy fails, it is automatically seen as the failure of the Constitution and its people. The task of representing the society has to be realized through the mechanism of democracy. Once that is done it will not be that any such law effectively was chosen only by the actions of any single one of the individuals who formally participate in the process.[8] Democracy not only has simple normative appeal, it does offer great advantage for the society.

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[7] Amy L. Chua, *Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development*, 108 YALE LAW JOURNAL 1(1998).

[8] Frank I. Michelman, *The Constitution, Social Rights and Liberal Political Justification*, 1:1 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 23 (2003).

The proposition finds support in the words of Amartya Sen, "democracy's claim to be valuable does not rest on just one particular merit. There is plurality of virtues here, including, first the intrinsic importance of political participation and freedom in human life; second, the intrinsic importance of political incentives in keeping governments responsible and accountable; and third the constructive role of democracy in the formation of values and in the understanding of needs, rights and duties".[9]

Political Democracy

The expression 'political democracy' reflects upon the 'freedom' of man. It recognizes the potential of man by recognizing his participation in the electoral process, as well as his participation in upholding the supremacy of the law. In addition, freedom must protect the individual from the arbitrary invasion of the State.

Social Democracy

The expression 'social democracy' reflects upon welfare activity, wherein government responds to its positive obligations of good governance and social benefits.

Economic Democracy

The expression 'economic democracy' reflects upon the values of planning and economic governance. The democratic set-up is carefully designed to ensure the mobilization of national resources for the ends of equality and redistribution. Even if private ownership is permitted, the State is obligated to prevent private players from abusing their powers.

International Democracy

The expression 'international democracy' has evolved with the increasing exchange and communication between the countries, wherein the world is coming to a consensus on resorting to democracy in order to equip and improve the conditions of all mankind. The international course of communication and co-operation do and must oppose rights violation and exploitation.

The results of a democratic set-up largely depend upon the character and will power of the democratic set up. Indeed, international theorists

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[9] Amartya Sen, *Democracy as a Universal Value*, 10.3 JOURNAL OF DEMOCRACY 9-17 (1999).

establish the significance of democracy on the premise that, a country does not have to be deemed fit for democracy, rather, it has to become fit through it.

With specific reference to India, in the words of Neera Chandhoke,

> The country holds an enviable record in institutionalizing democracy in the form of Constitutionalism, a competitive party system, regular elections, rule of law, codification of political and civil rights, and guarantees of free press and a vibrant civil society. But even as India satisfies conditions that permit it to claim the label of democracy with some justification; a majority of the people continue to suffer from unimagined hardship, with the most vulnerable among them- the poor among the scheduled castes and tribes... forest dwellers, tribals, and women at tremendous risk in matters of both lives and livelihoods.[10]

The results that appear in a democratic set-up are expressive of the following concerns: (a) that democratic functioning and performance depends on a variety of factors including relation and co-ordination between the various organs of the state, (b) the international trends in terms of governance do have a significant impact on the new methodologies adopted at the national level, (c) the pace at which the society is able to initiate legal reforms etc. These are a few factors to highlight the subjectivity of democratic functioning at a given point in time.

III. Rights and Deliberative Democracy: 'Vote Centric' to 'Talk Centric'

If democracy is defined as 'people's rule', rights must be entrenched in the legal framework provided, in order to enable individuals to decide and express for themselves and the society. The democratic process dedicated to the establishment of a just order is an evolutionary and ongoing process. In a purely theoretical construct, the increased recognition of individual access to the constitutional protections only deepens the process of constitutional socialization. With reference to the Indian Constitution,

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[10] Neera Chandhoke, *Democracy and Well Being in India* Available at http://www.unrisd.org/unrisd/website/document.nsf/(httpPublications)/AFA456B71A0BD335C1256FFF0052FE69?OpenDocument

the possession and exercise of basic rights enables citizens to mobilise and press the state to deliver on the promises embedded in the Constitution and in policy agendas. In addition to Article 32 and Article 226 of the Constitution of India, the recognition of Public Interest Litigation is another means to enable the people to socialize with the Constitution with the aid of the democratic apparatus. Arguably socialization leads to enhanced participation, and participation deepens democracy by emphasizing the prime legitimacy of the concept- that the Constitution belongs to the people. However, the textual construct of the basic values or the democratic output at a given point in time would reflect upon the conditions that facilitate socialization with the Constitution. In the words of Neera Chandhoke[11]

> The peculiar virtue of Indian democracy, howsoever formal and minimal our avatar of democracy may be, is that it is premised on the recognition of, the grant of, and the codification of basic rights: the right to freedom of expression, of assembly, of association, and more significantly the root right to demand other rights.

The essential facet of any rights discourse in a democracy has to be linked to the process of socialization, which is an ongoing process common to one generation after another. The success of a democracy must be ascertained in reference to how constructively it permits and responds towards the establishment of a social relation between the people rights and their Constitution. For instance, the success of social reforms must also establish a healthy relationship between the reform and the people. The deeper the process of socialization is, the greater will it confirm to the ideals of democratic governance.

Contemporary democratic theory highlights the deliberative character of democracy. Firstly, democratic legitimacy can be seen in terms of ability and opportunity to participate in effective deliberation on part of those subject to collective decisions. Deliberation now is understood to be the essence of democracy, much more than constitutional rights, electoral process, self government etc. Deliberation reflects upon preferences in a non-coercive fashion. Some view 'constitution making as a venue for democratic deliberation.'[12] The procedural versions of democracy focus

[11] *Ibid.*

[12] John Dryzek, DELIBERATIVE DEMOCRACY AND BEYOND: LIBERALS, CRITIQUES, CONTESTATIONS (Oxford University Press, New York, 2002).

on the 'formal properties of collective choice mechanisms, such as voting rule. There is a difference between 'democracy' and 'democratic participation'. Democracy involves popular control over political decisions and equality of rights in the exercise of such control. The extent of democracy depends upon the level of democratic participation. Elections are only the basic important tool of political participation. The central claim is that no voting system can ensure that democratic outcomes will not be irrational and arbitrary. Elections need not be thought to involve citizen choice about specific policies, but they do involve choice of specific political leaders. One feature of contemporary democratic theory is the deliberative character of democracy. The other versions include the rights oriented conception, judiciary oriented conception etc.' [13]

The 'existence of a social-democratic regime is said to be comprising of a widely-supported set of norms, procedural rules, and organizational arrangements that constrain a government (a) to remain subject to democratic control, and (b) actively to regulate market forces and otherwise intervene to enhance equity, social protection and social cohesion, in addition to productivity. The *rights* status is a significant parameter to ascertain the workings of a democracy. It becomes obligatory to address the practices of democracy, because inappropriate governance disturbs 'theory' as well as the expectations of the citizens. So does democratic theory provide space for ascertaining 'democratic harm'? There is a possibility that 'democratic harm' could still ensue despite democratic action in a given situation. For instance, if representative democracy reflects upon the needs of the people only after occurrence of violence and irreparable damage, harm must be reflected in the representative democracy. Also, harm may also be a result of 'reforms' that bring about no change in the social conditions of the people.

The more harms are introduced in the socio-political discourse, the perception of the state is under challenge and the more man is alienated from the structures of governance. To avoid such occurrence, there is a need to think deeper and travel beyond the vague conceptions of democracy. The constitutional conception of democracy requires that we respect

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[13] Richard Pildes, *Competitive, Deliberative, and Rights Oriented Democracy*, 1-2 http://ssrn.com/abstarct=559741 (Last visited 10.7.2009).

democratic conditions and democratic values. The value of democracy will be secure only if it upholds the supremacy of the people through its decisions.[14] The ignorance of democratic values of institutional co-operation and communication is one way of crushing the supremacy of the people. Only a sound theory of democracy that looks into the various avenues that may result in harm is capable of developing a response wherein the 'practice of democracy' will be compatible with its responsibilities. In the absence of an identifiable theory of democratic harm, democratic complexities will always be all time high, and mechanisms to counter problems of poverty, economic anxiety or class division that will be perceived as a greater harm. The need to address democratic harm will expose us to a whole new reality about rights, their existence and sanctity in the eyes of the people and the society.

In its true perspective, the ideal definition of a 'right' must first and foremost satisfy the living consciousness of the people, only then can its fulfillment satisfy the living conditions of the people. A similar concern was addressed at the Copenhagen Declaration on Social Development (1995). The Declaration proposed a 'rights' strategy to development, which "assumes that human rights norms that require and support democracy would provide the basis of political and social stability, and that social and economic rights would eliminate the worst consequences of poverty."[15] However, the very concept of 'rights' is the ideal form of building a constructive criticism of the mode of building a path to development. Eventually, the value of rights begins and ends with the satisfaction of

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[14] In the words of Fidel Castro, You who produce things, you who work, who sacrifice yourselves, who have been missing the pleasant things of life, you always were, are now, and will be tomorrow members of the majority of the people.... And yet, you did not run things...and others run things for you...They invented a very peculiar democracy for you who were the majority and yet were practically non-existent as a political element of our society...A real democracy is one in which you, peasant, get the land we have been recovering for you, after wrestling it from foreign hands. The speech was delivered on May Day, 1960. See Paul E. Sigmund, THE IDEOLOGIES OF THE DEVELOPING NATIONS (1964) 266 .

[15] Yash Ghai, *Human Rights and Social Development: Towards Democratization and Social Justice* Available at http://www.unrisd.org/ unrisd/website/document.nsf/ (httpPapersForProgrammeArea)/ECD0417EB1177C5280256B5E004BCAFA? OpenDocument

human needs, because- beyond their material wants, men need a belief in the meaningfulness of their lives, a faith in some higher cause to which they as individuals as well as the groups to which they belong can be devoted.[16] The trends that furnish the 'derivation of rights through philosophical arguments seem unlikely to capture the ways in which the non-ideal society develops and understands its commitments.'[17] New debates over rights and governance are nothing but old debates about justice, in terms of protection and fulfillment for all within the society. The position of modern pluralistic societies requires political and civic virtue of its own kind.

IV. Why Democracy Needs to Talk

A deliberative democracy satisfies the requirements of rule of law and constitutionalism. The values of constitutionalism and rule of law are also "integral to the implementation of rights."[18] Constitutionalism expresses restrained power. The Constitution codifies the rules and standards applicable to democratic structures and "constitutionalism creates an orderly framework that allows people to make political decisions.[19] First, constitutionalism seeks to limit the kinds of laws that can be created by legislative majorities,

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[16] Gwendolen Carter and John H. Herz, Government and Politics in the Twentieth Century (1965) 176.

[17] Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 Stanford Law Review 209 (2008).

[18] Randall Peerenboom, *Human Rights and the Rule of Law: What's the Relationship*, available at *http://ssrn.com/abstract=816024*

[19] "Constitutionalism as a concept is somewhat nebulous and amorphous. All manner of definitions have been attached to it at one time or another throughout the history of western political theory. The modern interpretation has significantly deviated from earlier forms. It has been frequently noted that modern constitutionalism derives in substantial part-from the crucible of enlightenment rationalism. The same sort of rationalist presumptions which maintained that there is, and ought to be, a formal system based on logic and necessity which accounts for the ordering of the natural world. Throughout the sixteenth and seventeenth centuries, as proponents of rationalist political theory began to construct more formalized and routinized notions of state ordering, up into the nineteenth century... Fundamental liberal notions such as the bureaucratic administration of the State, the notion of divided and limited government, the need for market (now global market) capitalism, the recognition of individual political liberties; representative democracy, and the acceptance of rights regimes (especially certain property ownership regimes) have all become important constituent tenets of the modern constitutionalism." See David ButleRitchie, *Critiquing Modern Constitutionalism*, 3:37 Appalachian Law Review 39 (2004).

a limit that is usually institutionalized through the adoption of judicial review of legislation. Second, and as part of a general concern with constitutional stability and supremacy, constitutionalism also places limits on the faculty of citizens to alter the fundamental law; it mandates a constitution that can only be altered with difficulty, usually by legislative supermajorities.[20]

The Constitution and the laws are designed to secure limitations on the exercise of governmental power and definiteness and certainty to the course of government action. The heart of the matter in a constitutional democracy is to check power, in whatever hands that power rests, and to limit the subjection of the constitutional imperatives to the interpretation of the state. Introducing democracy merely with the exercise of uncontrolled power will perhaps invoke a 'perception that the state's monopoly of lawful force makes it a power-source to be feared, a perception that incumbent state officials are exposed to a constant temptation to direct their special powers toward establishing and maintaining their own dominance over the country, a perception that subjecting persons and firms at large rights and obligations in their dealings with others can seriously burden both the efficiency of their operations and the liberties of individuals.'[21] A satisfactorily submitted democracy will always leave room for criticism and opposition, which alone will make it different from totalitarian regimes. The pursuit of totalitarian techniques of violence employed in a democratic set up is highly unconstitutional and against the very values of law and society.

Democracy is not exhausted in legislatures and daily governance, but that it extends to deliberating and deciding on the very content of the Constitution…It brings out two dimensions: democracy at the level of daily governance, and democracy at the level of fundamental laws.[22] Constitutional experts point that one significant change with time has been that democracy has evolved from being "vote-centric to "talk-centric." it is increasingly accepted that vote-centric democracy cannot fulfill norms of democratic legitimacy."[23] John Dryzeck refers to it as deliberative turn

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[20] Joel Colon-Rios, *The End of Constitutionalism- Democracy Debate*, 4 *http://ssrn.com/abstract=1330636* (2009).

[21] Frank Michelman, *Whither the Constitution*, 21 CARDOZO LAW REVIEW 1077 (2000).

[22] *Supra* n. 20.

[23] Will Kymlicka, CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION (2002) 290.

in democratic theory. A more deliberative democracy would bring greater benefits for the society at large as well as the groups within. The credit for expecting such results lies in the dynamism of constitutionalism. "Constitutionalism, most generally understood, provides for structures, forms, and apparatuses of governance and modes of legitimation of power. But constitutionalism is not all about governance; it also provides contested sites for ideas and practices concerning justice, rights, development, and individual associational autonomy. Constitutionalism provides narratives of both rule and resistance."[24]

Deliberative democracy satisfies the following essentials[25]:

- Reason Giving Requirement: It affirms the need to justify decisions made by citizens and their representatives. Both are expected to justify the laws they would impose on one another. In a democracy, leaders should therefore give reasons for their decisions, and respond to the reasons that citizens give in return. Deliberative democracy also makes room for many other forms of decision-making (including bargaining among groups, and secret operations ordered by executives), as long as the use of these forms themselves is justified at some point in a deliberative process. Its first and most important characteristic, then, is its *reason-giving* requirement.
- Mutual Respect: The moral basis for this reason-giving process satisfies that persons should be treated not merely as objects of legislation, as passive subjects to be ruled, but as autonomous agents who take part in the governance of their own society, directly or through their representatives. In deliberative democracy an important way these agents take part is by presenting and responding to reasons, or by demanding that their representatives do so, with the aim of justifying the laws under which they must live together. The reasons are meant both to produce a justifiable decision and to express the value of mutual respect. It is not enough that citizens assert their power through interest-group bargaining, or by voting in elections.[26]

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[24] Prabhakar Singh, *Constitutionalism in International Law during the Times of Globalization: A Sociological Appraisal*, INDIAN YEARBOOK OF INTERNATIONAL LAW AND POLICY 237 (2009).

[25] Amy Gutmann, Dennis Thompson, WHY DELIBERATIVE DEMOCRACY (2004) 3.

[26] *Id.* at 4.

There has always been an attempt at this exercise and "appropriate theories were (have) developed to explain and justify the legal system, suggesting that the law itself had purposes, because the formation of society had purposes, and that the law had inherent limits- formal limits (the consent of the people through their representatives) and substantive limits (fundamental rights)...Constitutionalism accompanied and made possible an idea of public realm, that is to say, a part of the social process in which legal powers are to be exercised only in the public interest."[27] Deliberation provides color to the process of constitutionalism. It established a healthy relation between the law and the society.

A Constitution can be a true embodiment of supremacy if it defines power, responsibility and privileges. Constitutionalism emerges as the central defining power because of the limitations it imposes on democratic choice, and holds peoples and institutions to their commitments. Constitutional legality or constitutionalism thus performs four critical functions. Firstly, 'it provides a framework of powers and limitations for the exercise of legislative competence. Secondly, legality ordains the protection of liberties of citizens always threatened by the dominating power of the few. Thirdly, constitutions provide for orderly changes in political structure through the politics of accountability, and fourthly, constitutions provide frameworks for state and non-state pursuit for economic activity and developments.'[28] In other words, the three essentials of modern constitutionalism are: "limiting the powers of government, adherence to the rule of law, and protection of fundamental rights. Thus, the rule of law must figure in constitutional democracy as an indispensable ingredient of constitutionalism."[29]

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[27] Phillip Allot, *The Concept of International Law*, 10 EUROPEAN JOURNAL OF INTERNATIONAL LAW 35 (1999).

[28] Upendra Baxi, *The Recovery of Fire: Nehru and Legitimation of Power in India*, January 13 ECONOMIC AND POLITICAL WEEKLY 108 (1990).

[29] Michel Rosenfeld, *The Rule of Law, and the Legitimacy of Constitutional Democracy*, available at *http://papers.ssrn.com/paper.taf?abstract_id=262350* (Last visited 17.7.2010).

[30] Neera Chandokhe, *The Taming of Civil Society*, Available at *http://www.lse.ac.uk/Depts/global/EventsPDFs/GCSWorkshop_Annenberg/Chandhoke.pdf*

V. Conclusion

Over the years man has come to accept the necessity of law for establishing a workable socio-political system. The law is valued and treated worthy of respect because of its commitment to certain ends or objectives. For that reason democracy has always exerted an overwhelming influence on our individual and collective lives.[30] The value of democracy excites the imagination and inspires the hopes of all peoples of the globe. For that very reason emphasis of politics in human affairs tends to exaggerate the role of the government and politics in improving the lives of the people. It is natural that theorists, judges and politicians consider politics the most important single element in human relations, and political or judicial remedies the most important answer to human troubles. However, "human nature and human problems are more intricate than politics, and "politics is only one approach- and not always the most penetrating one- among many others".[31] The identification of political dissatisfaction as a resultant only of the elected government does not solve the problem. The exhibition of ethical uncertainty to address the real problems towards political change can hinder the scope of any reconciliation or democratic dialogue. The true vision of reality should always look beyond the state, which has continued to disguise itself as the will of the people. The popular notions that come upon to symbolize the state as the 'will of the people' are possibly only distortions to reality. The identifiable signs of immaturity in the State decisions must not be ignored. "A greater proportion of policy development appears to be a direct ad hoc response to whoever happens, for the time being, to have the dominant influence, which is often highly contextual."[32]

The advancement in politicization obliges one to reconsider, and so to reinterpret the very foundations of law and society as they had previously been calculated, or delimited. There is not only the need to identify the new emerging dimensions of democratic behavior, but question or ascertain their viability as sound practices of democratic governance. It is important to "seek out and identify structures of authority, hierarchy, and domination in every aspect of life, and to challenge them; unless a

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[31] Ebenstein, Today's Isms: Communism, Fascism, Capitalism, Socialism (1970) 24.

[32] Colleen Dyble, Taming Leviathan: Waging the War of Ideas Around the World (2008) 161.

justification for them can be given, they are illegitimate, and should be dismantled, to increase the scope of human freedom.[33]

A few of the issues that have been discussed above are summed up as follows:

- A 'right' purely projected within the domain of the judiciary is primarily opposed to the idea of deliberative democracy. The first problem is that by imposing on the government as to the nature and character of basic rights, the courts discourage the elected representatives from debating upon the nature itself. "The elusive state of perfection in which human rights are fully respected and realized tells us, among other things, that both human rights and democracy are works in progress. They are projects that are essentially infinite, open ended and highly experimental in nature."[34] The principle of proportionality has become a central structural feature of adjudication. The principle of proportionality seems to require decision-makers to engage in complex policy arguments, assessing contested empirical questions and making controversial judgments about trade-offs in order to determine how an issue should be decided in a concrete context.[35]

- The international order is also significantly affecting the functioning of democracy. Looking at the impact of the international order, critics go on to expose the highly vulnerable character of democracy at a given point in time. The popular trends of neo-liberalism and globalization are a few dimensions that have affected the decision making process world over. The society is constantly alienated from the decision making process occurring under this phenomenon.

- The realm of theory also adds another feature to modern democracy- the role of civil society. A democratic set-up is also judged on how it can equip its citizens to question, react and play an active

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[33] Noam Chomsky, *Anarchism, Marxism and Hope for the Future* (1995). Available at *http://flag.blackened.net/revolt/rbr/noamrbr2.html* (Last visited 3.3.09).

[34] Makau Wa Mutua, *The Ideology of Human Rights*, 36:589 VIRGINIA JOURNAL OF INTERNATIONAL LAW 593 (1996).

[35] Mattias Kumm, *Democracy is not enough: Rights, Proportionality and the point of Judicial Review*, 2 *http://ssrn.com/abstract=1356793* (2009).

role in the satisfaction of wants. At the end of the day, a formal institutional framework may exist, "but there is no magic power in it...It is at once the weakness and strength of democracy, its danger and its glory, that the fate of its members lies largely in their own hands. It is the spirit of the people even with the increasing influence of the State that must be express and vibrant. It is "within the boundaries of formal democracy the civil society mobilises for the strengthening, the expansion, and the effective implementation of policies, that we can expect a transition from political to social democracy. But civil society interventions have their own limits, and it significantly depends upon the political process, its inherent dynamics, and its capacity to correct imbalances and institutional erosions, its basic thrust towards empowering people, even those found in underprivileged and oppressed social terrains."[36] The democratic set-up is highly valued in terms of how it creates a healthy working platform for the civil society to grow and function.

The continuous advancement in terms of democratic practice, institutional responsibility etc makes it all the more important for theorists or political scientists to renew or reconsider democracy as merely a procedural asset. The point of emphasis is subjective, fragile and relative concept of democracy. A 'formal democracy' as discussed is not necessarily a 'functional democracy'. The bright line between the two concepts is the very subject matter of contemporary theory, which is inclusive of the issue of rights, governance, deliberation, state coercion, international norms etc, and also the reason why democracy must be seen in terms of substance and not mere process.

[36] Rajni Kothari, RETHINKING DEMOCRACY (2005) 14.

LOK ADALAT SYSTEM IN INDIA

*Sumit Kumar**

I. INTRODUCTION

In every system of government, the effective administration of justice is a permanent and necessary condition of peace, order, civilization and governance of the country. Administration of justice means to adjudicate the rights and duties of the individuals on the basis of rules laid down by the State. State shall make efforts to provide the right to access to justice to all as access to justice from an independent and impartial agency in public law as well as in private law is a recognized human right[1]. But, rendering of justice to the people, rich or poor, is a question of fundamental character.[2] It becomes a sacred duty of the State to establish a judicial system where its people without any distinctions are enabled to vindicate their grievances and have justice without any delay on the part of the judiciary as it is an essential requisite for the survival of the State.

The architects of our Constitution emphasized to ensure justice to all even to the poorest of the poor through efficacious justice delivery mechanism. The framers of the Constitution prescribed the mandate for justice – social, economic and political, in its Preamble. The various provisions of the Constitution such as Articles 14, 21, 38 and 40 also lay down stress upon the right to equal and effective justice. In order to achieve the goal of justice, Article 39-A[3] has been enshrined in the Constitution with the purpose to provide free legal aid and to strengthen the justice delivery system. Keeping in view the philosophy of equality and justice, the Apex

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1 Article 10 of Universal Declaration of Human Rights, 1948 emphasize upon the right to a full equality to a fair and public hearing by an independent and impartial tribunal. Similarly, Article 14 of International Covenant on Civil and Political Rights, 1966 also says about the right to equality before the courts and tribunals; right to a fair and public hearing.

2 LAW COMMISSION OF INDIA, FOURTEENTH REPORT, *Reform of Judicial Administration*, 587 (1958).

3 Art. 39A read as under : "The State shall secure that the operation of the legal system promotes justice on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizens by reason of economic or other disabilities."

Court has also played a vital role through its catena of judgments[4] for the betterment of administration of justice. The court declared in these cases the right to free legal services and speedy trial as the fundamental rights which are included within the broad matrix of the principle of right to life and personal liberty in Article 21 and right to equality under Article 14.

However, in spite of these mandates of the Constitution and directions of the Apex Court, the desired goal of effective justice dispensing system has not been achieved. The Indian Judicial system has been affected by the problems of legal formalities, rigid procedural rules, delay in justice, corruption, expensive litigation, arrears of cases in all courts, inadequate number of courts, etc. In the light of these drawbacks in the justice delivery mechanism, the Alternative Dispute Resolution (ADR) system has been introduced in order to provide speedy and less expensive justice to all. ADR mechanism has various major methods such as Arbitration, Conciliation, Mediation and Lok Adalat.

II. Concept and Nature of Lok Adalat

The institution of Lok Adalat is a significant method of alternative dispute resolution system. The basic idea behind the scheme of Lok Adalat is to speed up clearance of pendency of huge arrears in courts and fulfil the constitutional goal of access to equal, fair and efficacious justice to all irrespective of religion, race, caste, sex, place of birth and socio-economic position. The vernacular meaning of Lok Adalat is people's court which is innovated in order to provide speedy and inexpensive justice at the door steps of poor and neglected section of the society. It is an expeditious mode of redressal of grievances of parties which avoid frequent adjournments, lengthy arguments and hierarchy of appeals.[5] The institution supplements but does not supplant the existing adjudicatory machinery. The procedure of Lok Adalat is simple, informal, flexible, non-controversial and without legal technicalities. It is a forum which aims at bringing about settlement

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[4] *Hussainara Khatoon* v. *State of Bihar*, AIR 1979 SC 1369; *Maneka Gandhi* v. *Union of India*, AIR 1978 SC 597; *M.H. Hoskot* v. *State of Maharashtra*, AIR 1978 SC 1548; *State of Haryana* v. *Darshana Devi*, AIR 1979 SC 855; *Sunil Batra* v. *Delhi Administration*, AIR 1980 SC 1579; *Khatri* v. *State of Bihar*, AIR 1981 SC 928; *Gopalanachari* v. *State of Kerala*, AIR 1981 SC 674; *Sheela Barse* v. *State of Maharashtra*, AIR 1983 SC 378; *Sukhdas* v. *Union Territory of Arunachal Pradesh*, AIR 1986 SC 991; and *A.R. Antulay* v. *R.S.Nayak*, (1992) SCC 225.

[5] Mark William, *Impression of a Lok Adalat*, The Lawyers 8 (1990).

through voluntary, convivial and persuasive efforts. The mechanism has been introduced for dispensation of justice in a manner compatible with the social, cultural, economic and administrative needs of India.

The forum of Lok Adalat follows democratic values and provides opportunities to disputants to reach at an amicable agreement without pressurizing them. A compromise through Lok Adalat is always based upon the free and mutual consent of disputing parties. The disputes are settled in the institution on the basis of principles of natural justice, equity, and fair play.[6] It ensures standards of fairness and the emphasis is more on natural justice than the rigours of law. The keynote of the system is justice rather than law. The Lok Adalat is a unique forum which not only renders justice to disputants but also strengthen the human relations. Therefore, when the justice is dispensed by Lok Adalats, there is neither victor, nor a vanquished but both the disputants are winners.[7] It is a participatory justice delivery mechanism in which judges, lawyers, litigants, social workers, law teachers and common people are actively involved in justice dispensing process.[8] Lok Adalat determines the disputes by discussions, counselling, negotiations, conciliation and by adopting commonsense and human approach to the problems of the disputants.

III. Genesis of Lok Adalat

The institution of Lok Adalat is not a modern concept it was in existence from time immemorial with different nomenculature. In ancient India, the system was called as people's court or popular court or panchayat system. Besides the State's courts, a large number of people's court also functioned with a view to provide justice to people at their doorsteps. The official courts were established and governed by the authorized officers of the State while the people's court used to deliver justice to all with the help of respectable persons of locality and community.[9] The people's court encouraged the principle of self government and reduced the burden

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[6] J.S. Bisht, *Lok Adalat: A Mechanism of Alternate Dispute Resolution*, 31 Indian Bar Review 165 at 179 (2004).

[7] S.S. Sharma, Legal Service, Public Interest Litigations and Para Legal Services (2003) 186.

[8] Prabha Bhargava, Lok Adalat: justice at the door-steps (1998) 5.

[9] P.B. Mukherji, *The Hindu Judicial System* in S.K. (ed)., The Cultural Heritage of India (Vol. II, 1969) 439-440.

of central administration. The courts had knowledge about the disputants, the witnesses and the facts of the dispute and it was easy for them to determine the dispute speedily and effectively. [10]

In ancient time, mainly three kinds of people's courts were existed,[11] viz. (i) Puga, (ii) Sreni and (iii) Kula. The Puga court consisted of members belonging to different castes and professions but staying in same village or town.[12] The Puga court as the highest court in the hierarchy of people's court enjoyed an appellate jurisdiction in all cases decided by the Sreni and Kula. The Sreni courts were consisted of persons of same trade, same professions, artisans or persons belonging to different tribes who were governed by principles of the same merchant guilds or trade or profession. These appeared to be industrial courts or courts of profession or courts of displinary bodies of different merchants guilds. The courts had jurisdiction to decide matters relating to their special trade or profession or occupation.[13] The Sreni courts had the appellate powers against the decision of Kula courts. The Kula court was the lowest people's court which comprised of agnates and cognates of the litigants. It was the informal body of relatives of disputing parties which investigated and decided their disputes.[14] It was considered as the lowest people's court in the hierarchy of popular courts. The people's courts had jurisdiction to settle civil cases and petty criminal offences.[15] The procedure adopted by these courts was simple, informal, systematic and based on traditions, usages and customary laws of land. The people's courts functioned under the indirect control and supervision of the king.

In medieval period, the Muslim rulers established their own legal system but they did not interfere in the functioning of people's courts. During the Muslim rule, the popular courts or Gram Panchayats as dispute resolution mechanism continued working with minor variations. The disputes at the local level were not resolved by the royal courts but by the people's

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[10] A.S. Altekar, STATE AND GOVERNMENT IN ANCIENT INDIA (1977) 254.
[11] S.D. Sharma, ADMINISTRATION OF JUSTICE IN ANCIENT INDIA (1988) 167.
[12] M.K. Sharan, COURT PROCEDURE IN ANCIENT INDIA (1978) 26; Birendra Nath, JUDICIAL ADMINISTRATION IN ANCIENT INDIA (1979) 76.
[13] M.K. Sharan, COURT PROCEDURE IN ANCIENT INDIA (1978) 27.
[14] *Ibid.*
[15] R.C. Majumdar, THE HISTORY AND CULTURE OF THE INDIAN PEOPLE: THE CLASSICAL AGE (VOL. III, 1970) 359-360.

courts of the caste, guilds, artisans and association of traders within which such dispute arose. These tribunals adjudicated the matters in accordance with the customs or usages of the family, caste, trade, locality or community.[16] The Panchayats were empowered to settle civil cases and petty criminal cases of local nature. These courts dispensed justice on the basis of customary laws and principles of natural justice. It is significant to mention here that the local courts in the form of Panchayats played an important role in administering of justice process during the Muslim rule.

The People's Court or Village Panchayats worked for a long time and existed even at the time of commencement of the British rule in India. The British rulers discouraged administering of justice through People's Courts or village Panchayats and established their own hierarchy of formal courts to render justice in civil and criminal matters. They moulded the ancient Indian legal system according to their vested interest with the result that the functioning of people's court withered away and became empty and suffocating with engulfing nothingness.[17] In this way, they gave a death blow to the functioning of people's courts.

IV. Lok Adalat in Post Independence Period

After Independence the institution of Lok Adalat as an alternative forum has come into existence as per the recommendations of Law Commission of India[18] and Legal Aid Committees[19]. In March, 1982, the first Lok Adalat was organized at village 'Una' in district of Junagarh of Gujarat. Thereafter, the institution of Lok Adalat was developed in many other States and Union Territories and gradually it had become very popular for providing speedy and inexpensive justice. The mechanism of Lok Adalat which was functioning on the informal basis, had got legal status under the Legal Services Authorities Act, 1987 which came into force on

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[16] Upendra Baxi and Marc Galanter; *Panchayat Justice: An Indian Experiment in Legal Access*, in M. Cappelletti (ed.), Access to Justice (Vol. III, 1979) 344.

[17] P. Parameswaran, *Dispensation of Justice : Problem of Cost, Quality and Delay*, AIR 1991 Jour 31.

[18] Law Commission of India, One hundred and Fourteenth Report , Gram Nyayalalaya (1986).

[19] Gujarat Legal Aid Committee (1971); The Report of Expert Committee on Legal Aid Processual Justice to the people (1973); Report on National Juridicare : Equal Justice – Social Justice (1977) and The Committee for Implementation of Legal Aid Scheme (1980).

November 9, 1995. The cherished object of the Act is to constitute legal services authorities to provide free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities, and to organize Lok Adalats to secure that operation of the legal system promotes justice on the basis of equal opportunity.

V. Statutory Lok Adalats

There are two kinds of Lok Adalats under the Legal Services Authorities Act namely Lok Adalat and Permanent Lok Adalat.

A. *Lok Adalat*

Under Section 19(1),[20] various legal services authorities and committees[21] are authorized to organize Lok Adalats settling various matters[22]. The Lok Adalat is constituted by a sitting or retired judicial officer as the chairman, with two other reputed and public spirited persons. A Lok Adalat has jurisdiction to arrive at a compromise between the parties with regard to any matter which may be pending before any court as well as matter which has not yet been formally instituted in any court or tribunal. Such matters may be civil, criminal or revenue in nature, but any matter relating to an offence not compoundable under any law cannot be settled by the Lok Adalat even if the parties involved therein agree to settle such matter.[23] In a given area, different and separate Lok Adalats can be constituted for dealing with specified types of matters. A Lok Adalat is also empowered to settle a dispute which a concerned regular competent court has jurisdiction to entertain and try the same, but which in fact has not been instituted before it.[24] It is not necessary that to confer power on a Lok Adalat, the dispute must be first filed before a Court.[25] However, criminal matters which are not compoundable have been kept

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[20] The Legal Services Authorities Act, 1987.

[21] Every State Legal Services Authority, District Legal Services Authority, the Supreme Court Legal Services Committee, every High Court Legal Services Committee and Taluk Legal Services Committee.

[22] Matrimonial cases, labour disputes, bank loan cases, electricity cases, insurance cases, family disputes, property disputes, forest cases, MACT cases, etc.

[23] *Supra* n. 20, Sec. 19.

[24] *A. Ahmed Pasha* v. *C. Gulnaz Jabeen,* AIR 2001 Kant 412.

[25] *Moni Mathai* v. *Federal Bank Ltd., Arakkunnam,* AIR 2003 Ker 164 at 169.

outside the purview of a Lok Adalat. Serious crimes, therefore, are beyond the ambit of a Lok Adalat but all other cases come within the sway of a Lok Adalat.[26] The Lok Adalat is not empowered to determine the anticipatory bail application.[27]

The disputes can be referred to Lok Adalat by mutual consent of parties or at the request of one or more parties where the court is *prima facie* satisfied that there are chances of settlements. In third way, the court can also refer the case on its own motion if it is satisfied that the matter is an appropriate one to be taken cognizance of by Lok Adalat. The purpose of such reference is to explore the possibility of conciliation. However, a reasonable opportunity needs to be provided to the parties to the dispute before a reference of dispute to Lok Adalat. Besides the Court, the authority or committee organizing the Lok Adalat, on receipt of an application of any one of the parties of any matter which is at the pre-litigation stage, can refer the same to a Lok Adalat. Reference in such cases is to be made only after providing reasonable opportunity of hearing to the parties by the concerned authority or committee. Pending cases are referred to Lok Adalat by the Courts whereas the pre-litigating matters are sent only by the concerned authority or committee. [28] The Civil Court even if *prima facie* is satisfied that there are chances of settlement in a case but it can not refer the case to Lok Adalat without providing a reasonable opportunity to the parties.[29] Therefore, the cases or disputes can not be sent to Lok Adalat by the court or authority or committee by pressurizing the parties and without their consent.

B. *Permanent Lok Adalat*

A Permanent Lok Adalat can be established for the settlement of disputes related to public utility services,[30] compoundable criminal offences

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[26] *Abdul Hasan* v. *Delhi Vidyut Board,* AIR 1999 Del 88.

[27] *Sreedharan T.* v. *Sub. Inspector of Police, Balussery Police Station,*2009 CriLJ 1249 (Ker).

[28] *Supra* n. 20, Sec. 20.

[29] *Commissioner, Karnataka State Public Instruction (Education), Bangalore* v. *Nirupadi Virbhadrappa Shiva Simpi,* AIR 2001 Kant 504; *Sau Pushpa Suresh Bhutada* v. *Subhash Bansilal Maheswari,* AIR 2002 Bom 126; *Shashi Prateek* v. *Charan Singh Verma,*AIR 2009 All 109.

[30] Public utility services include transport services for the carriage of passengers or goods by air, road or water; postal, telegraph or telephone services; supply of power, light or water to the public; system of public conservancy or sanitiation; services in hospital or dispensary and insurance service.

and the matters where the value of property in dispute does not exceed ten lakh rupees. Permanent Lok Adalat is presided over by a person who is or has been a district judge or additional district judge or higher judicial officer than that of a district judge, as the chairman and two other persons having adequate experience in public utility services. [31] For the determination of a dispute any party to a dispute may make an application to the Permanent Lok Adalat for settlement of dispute only at pre-litigation stage. When such an application is made to Permanent Lok Adalat by one party, the other party to dispute is not allowed to invoke the jurisdiction of any court in the same dispute.[32] It means when an application is made by either party to the Permanent Lok Adalat to settle a dispute at the pre-litigation stage, the Permanent Lok Adalat shall do so, and, the other party is precluded from approaching the civil court in such a case.[33]

Permanent Lok Adalat is not empowered to dispose of the matrimonial dispute being not a public utility service.[34] The matter pending before the Motor Accident Claims Tribunal can only be referred to the Lok Adalat and the same could not be referred to Permanent Lok Adalat.[35] The Permanent Lok Adalat has jurisdiction to dispose of matters related to public conservancy and sanitation since such matters come under the matrix of public utility services.[36] If in a case the determination before the Permanent Lok Adalat involves the question as to whether or not an offence, which is non-compoundable in nature, has indeed been committed, such case falls outside the jurisdiction of the Permanent Lok Adalat.[37] The public utility services do not include the imposition of tax, thus, the Permanent Lok Adalat can not interfere with the jurisdiction of Municipal Corporation in levying the tax. [38] It can not entertain and adjudicate any claim against a private individual like insured and driver. The claim should be against a public utility service.

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[31] *Supra n.* 20, Sec. 22B.
[32] *Id.*, Sec. 22C[1].
[33] *United India Insurance Co. Ltd.* v. *Ajay Sinha,* AIR 2008 SC 2398.
[34] *Rita Kumari* v. *Shyam Sunder,* AIR 2007 NOC 259 Cal.
[35] *Dinesh Kumar* v. *Balbir Singh,* AIR 2008 HP 59.
[36] *Municipal Council, Tonk* v. *Serv Seva Sansthan,* AIR 2004 Raj 96.
[37] *Supra n. 34.*
[38] *Ranchi Municipal Corporation* v. *Bhagwati Devi,* AIR 2011 Jhar 103.

C. Power and Procedure of Lok Adalats

The procedure followed at a Lok Adalat is very simple, flexible, informal and devoid of all legal formalism and rituals. Every Lok Adalat or Permanent Lok Adalat is free to formulate its own procedure for the purpose of conducting conciliation. The Lok Adalats or Permanent Lok Adalats shall be guided by the principles of natural justice, objectivity, fair play, equity and other principles of justice without being bound by the Code of Civil Procedure and the Indian Evidence Act. It has been conferred with all the indicia of a court since it shall be deemed to be a civil court. So, it enjoys the same powers as that of a civil court in summoning and enforcing the attendance of any witness; examining him on oath; reception of evidence on affidavits; requisition of any public record or document. All proceedings before a Lok Adalat or Permanent Lok Adalat are deemed to be judicial proceedings under Sections 193, 219 and 228 of IPC.[39] Every Lok Adalat or Permanent Lok Adalat is required to make sincere efforts to bring about a conciliatory settlement in every case put before it without any duress, threat or undue influence, allurement or misrepresentation. In a case if the Lok Adalat fails to make an award on the basis of compromise and settlement then such case will be returned by it to the court from which the same was received for further proceedings.[40] When the reference of a matter is made by an authority or committee to Lok Adalat and it has failed to pass an award, then it is required to advise the parties to seek remedy in a court of law.[41] It means if no compromise or settlement is or can be arrived at, no order can be passed by the Lok Adalat in such a case.[42] While, if disputes are not settled by Permanent Lok Adalat by way of conciliation, then the disputes can be decided on the basis of merit.[43] But, when the Permanent Lok Adalat disposes of the case on the failure of conciliation proceeding, a sufficient opportunity must be granted to the parties so that they may address the Adalat on their respective plea. The adjudicatory power of Permanent Lok Adalat is based upon

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[39] *Supra* n. 20, Sec. 22.
[40] *Id*, Sec. 20(5).
[41] *Id.*, Sec. 20(6).
[42] *Kishan Rao* v. *Bidar District Legal Services Authority*, AIR 2001 Kant 407; *State of Punjab* v. *Phulan Rani*, AIR 2004 SC 4105 ; *Union of India* v. *Ananto*, AIR 2007 SC 1561; *State of Punjab* v. *Jalour Singh*, AIR 2008 SC 1209.
[43] *Supra* n. 20, Sec. 22C.

the written consent of disputants. Unless such a written consent is given by the parties to the Permanent Lok Adalat, it shall have no power to decide the issues on merits.[44]

D. *Award of Lok Adalats*

Every award of Lok Adalat or Permanent Lok Adalat is final and binding on all the parties to the dispute and is deemed to be the decree of civil court.[45] The award of Lok Adalat is an order by the Lok Adalat with the consent of the parties, instead of by the process of arguments in court, therefore, there is no need either to reconsider or review the matter again and again, and no appeal can be filed against the award.[46] An award of Lok Adalat and/or Permanent Lok Adalat come under the writ jurisdictions of the High Court and the Supreme Court only when the award has been passed against the statutory provisions and principle of natural justice. It is necessary to provide this opportunity to aggrieved party against the miscarriage of justice, arbitrariness or illegalities by Lok Adalat or Permanent Lok Adalat.[47] The Act does not say anything regarding the manner of execution of the award of Lok Adalat. The award of Lok Adalat in pending case can be executed by such court which has referred the case to Lok Adalat for settlement while in pre-litigation matters, the award of Lok Adalat can be executed by such Court which has the jurisdiction to hear such matter but such matter has not been brought to it.[48] There is no court fee if the matter is referred to Lok Adalat at pre-litigation stage and if the court fee is already paid at the time of institution of the case such amount will be refunded to the concerned party if the dispute is resolved by the Lok Adalat.

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[44] *Sandip Ekka* v. *Selesta Kerketa,* AIR 2011 Jhar 130; *Deputy Divisional Manager, Shillong* v. *Jharna Ghosh,* AIR 2011 Gau 205; *Divisional Manager, New India Assurance Co. Ltd., Ranchi* v. *Urmila Devi,* AIR 2011 Jhar 133.

[45] *Supra* n. 20, Secs. 21 and 22E.

[46] *Punjab National Bank* v. *Lakshmi Chand Rai,* AIR 2000 MP 301; *P.T. Thomas* v. *Thomas Job,* AIR 2005 SC 3575; *State Bank of Indore* v. *Balaji Traders,* AIR 2003 MP 252; *Mahila Banwari Bai* v. *Kashmir Singh,* AIR 2009 MP 232.

[47] *Joti Sharma* v. *Rajinder Kumar,* AIR 2007 J&K 35; *State of Punjab* v. *Jalour Singh* AIR 2008 SC 1209; *Dinesh Kumar* v. *Balbir Singh,* AIR 2008 HP 59; *Shashi Prateek* v. *Charan Singh Verma,* AIR 2009 All 109 .

[48] *Valarmathi Oil Industries* v. *Saradhi Ginning Factory,* AIR 2009 Mad 180; *Thomas Job* v. *P.T. Thomas,* AIR 2004 Ker 47; *Thomas Anthony* v. *Florance George,* AIR 2007 Ker 31.

VI. Concluding Remarks

The Lok Adalat is a unique institution which dispenses informal ,expeditious, inexpensive and qualitative justice to all irrespective of their social, political and economic status. The performance of institution of Lok Adalat can be evaluated from the established fact that till June. 2010. a large number of 835305 of Lok Adalats have been organized within the country. In these Lok Adalats, total 29657376 cases have been settled which also include 1792062 MACT cases. In the MACT cases, total amount of Rs. 84,669,052,753 have been awarded as the compensation to the claimants.[49]

The chief beauty of this mechanism is the decimation of bitterness as compromise is the very soul of Lok Adalat justice. It settles the disputes by negotiation, conciliation, persuasion and by adopting principles of natural justice. The forum strives to develop the peace, order and harmony among the disputing parties and helps to further the social solidarity in the society. The basic objective of the institution is to develop litigation free society by ending the feudalistic approach. In order to improve and strengthen the Lok Adalat mechanism, some suggestions are as follows:-

1. The settlement of disputes through Lok Adalat system should be added as a Fundamental Duty under Article 51A of the Constitution.
2. Members of Lok Adalats should be experienced, dedicated, experts, talented and committed persons,therefore, the provision regarding training of members of Lok Adalats should be added in the Act and only trained persons should be appointed as members of Lok Adalats.
3. To increase the cooperation of the public in general and disputants in particular, the specific provision should be added in the Act to ensure the presence of parties during Lok Adalat proceedings for desired results of the system.
4. More matters should be brought under the jurisdiction of Lok Adalat like intellectual property disputes, environment matters, disputes relating to education system, cyber crimes, taxation matters, matters relating to Mahatama Gandhi National Rural Employment

[49] Nyaya Deep, July. 2010.

Guarantee Act (MGNREGA) and disputes relating to professional services.

5. The Lok Adalat should be empowered to decide the cases on the basis of merit as the Permanent Lok Adalat is authorized to decide if the conciliation process failed.
6. Where the case is decided by Lok Adalat or Permanent Lok Adalat on merit the limited right of one appeal to the High Court should be allowed.
7. A definite but simple procedure should be provided to execute the awards of the Lok Adalat by the Lok Adalat itself.
8. Video recording of proceedings of Lok Adalat should be done for advertisement and monitoring purposes.
9. The independent monitoring cells should be established at the district, division and State level to monitor the functioning of Lok Adalats as a watchdog in their respective areas.
10. The Lok Adalat law should be added as a compulsory subject in the curriculum of law courses.
11. There should be effective coordination among the legal services authorities, government departments, social organizations, etc. for strengthening the Lok Adalat mechanism.
12. The law teachers, students and other social workers should be encouraged to take active part in the process of the Lok Adalats.
13. The features and advantages of Lok Adalat system should be propagated by mass media to create awareness among people so that they may take benefits of this forum.

PROTECTION OF TRADITIONAL KNOWLEDGE : A BRIEF ANALYSIS

Ashutosh Mishra[*]

I. INTRODUCTION

India has a civilization of 5,000 years plus, with vastly divergent population spreads, ecological systems, geographical distinctions and cultural heritage. This centuries old living in harmony with nature, which is generally worshipped in its various Avatars has led to the development of various practices ranging from agricultural techniques, cultivation strategies, medicinal systems, culinary practices etc. But due to globalisation of production systems, increase in population, destruction of forests for agriculture and timber purposes, bio-diversity is declining at a rapid pace. Bio-diversity and associated traditional knowledge is also declining due to decreased motivation amongst the local communities to conserve and protect them. This is happening because of change in their life style as well as misappropriation of their resources and their knowledge. Misappropriation of traditional knowledge not only violates the rights of communities who conserved traditional knowledge but also adversely affects the conservation and sustainable use of the traditional knowledge and that of bio-diversity. The international community is debating the consequences of globalisation in its various dimensions in various forums. It is the responsibility of the same international community to debate the means of protecting and preserving traditional knowledge. In this regard, it is necessary to recognize and respect the rights of holders of traditional knowledge. Misappropriation of traditional knowledge and bio-piracy erode the rights of the traditional knowledge holders and adversely affect conservation and sustainable use of bio-diversity and associated traditional knowledge which stand as a glorious example of sweat, ingenuity and experimentation of previous generations of artisans, farmers, medicinal practitioners etc. The paper looks at the various aspects of law and policy issues as regards securing legal rights at community levels.

II. TRADITIONAL KNOWLEDGE (TK)

Traditional knowledge is a sum total of knowledge gained by application of generations of experience to survive in various lands and

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could be in the nature of cultural heritage, scientific knowledge and religious practices at the same time.[1]

However, there is a fine line of difference between scientific knowledge of indigenous communities and the ritualistic practices adopted which could lead to scientifically acceptable results without there being an empirical understanding of the process leading to the said result. For example turmeric has been known to have medicinal value and has been used in antiseptic and other medical applications for centuries with the effects well documented in ayurvedic texts but it was neither categorized as an antiseptic nor there was any effort to analyze the inherent properties. This, therefore could mean that the use of turmeric per se was only in the nature of general purpose based on effects as a curative herbal remedy and not specifically as a herbal product with determined curative values and dosage.[2] This in essence allowed various companies to use extracts from turmeric and mix it in various proportions and come up with new products with similar effects in the markets allowing them to commercially exploit the medicinal value while obtaining a monopolistic rights over the product by securing patents on the same. Such usage is very common in pharmaceutical industry wherein every year millions of dollars are saved

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[1] Mauro F, Hardison P.D., *Traditional Knowledge of Indigenous and Local Communities: International Debate and Policy Initiatives,* dated 7 September, 1999 published in website in Convention of Biological Diversity webpage https://www.cbd.int/doc/articles/2002-/A-00108.pdf retrieved Feb. 25, 2011.

[2] In 1995, two expatriate Indians at the University of Mississippi Medical Centre (Suman K. Das and Hari Har P. Cohly) were granted a US patent (no.5, 401,504) on use of turmeric in wound healing. The Council of Scientific & Industrial Research (CSIR), India, New Delhi filed a re-examination case with the USPTO challenging the patent on the grounds of existing of prior art. CSIR argued that turmeric has been used for thousands of years for healing wounds and rashes and therefore its medicinal use was not a novel invention. Their claim was supported by documentary evidence of traditional knowledge, including ancient Sanskrit text and a paper published in 1953 in the Journal of the Indian Medical Association. Despite an appeal by the patent holders, the USPTO upheld the CSIR objections and cancelled the patent. The turmeric case was a landmark case as it was for the first time that a patent based on the traditional knowledge of a developing country was successfully challenged. The US Patent Office revoked this patent in 1997, after ascertaining that there was no novelty; the findings by innovators having been known in India for centuries. Available on the Website http://www.tkdl.res.in/tkdl/langdefault/common/Biopiracy.asp?GL=Eng retrieved 27 Feb 2011.

by narrowing the scope of research by placing reliance on traditional knowledge acquired by Indigenous communities and possibly generating huge revenues for individual companies whereas the communities themselves could scarcely take benefit from the same.

III. SECURING TRADITIONAL KNOWLEDGE

The indigenous rights to customary law, social organization, land tenure, collective land ownership, and customary practices were recognized by the UN International Labor Organization (ILO) in 1957 by way of the ILO Convention 107.[3] However, these were conceived as individual rather than sovereign rights, and were promoted primarily to integrate indigenous peoples into the labor pools of the modern nation-state[4]. In his report titled "Study of the Problem of Discrimination against Indigenous Populations", Lepage has concluded that "...states should respect traditional laws and customs; indigenous peoples should have control over their own lands and resources, with the right to communal land ownership and to manage land according to their own traditions; and such ownership and rights should be protected by national and international laws."[5]

Traditional knowledge *per se* cannot be monetized like other intellectual property assets and therefore a feasible way of valuing the same cannot be conceived as the usage is diverse and transcends geographies and was developed over generations of trials and errors. Similarly, traditional knowledge is also closely linked to the local biodiversity and environmental conditions, hence it is important that in understanding the economics of traditional knowledge the most important factor will be the biodiversity from which it is derived. For instance, the global benefits from coral reefs including tourism, fisheries and coastal protection are estimated at some US $ 30 billion per year; insect pollination of over 40 commercial crops in US alone at US $30 billion per year, whereas the market for herbal drugs amounted to US $47 billion in 2000.[6]

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[3] Refer the International Labor Organization webpage titled "Convention No. 107' posted on its official website at webpage titled http://www.ilo.org/indigenous/Conventions/no107/lang—en/index.htm retrieved 25 Feb2011.

[4] Lepage, *Indigenous peoples and the evolution of international standards: A short history*, in M. Léger (ed.), ABORIGINAL PEOPLES: TOWARDS SELF-GOVERNMENT (Black Rose Books, Montréal, Québec, Canada, 1994) 1-24.

[5] *Ibid.*

[6] Convention on Biodiversity website on webpage titled '*Economics, Trade and Incentive Measures*' available on http://www.cbd.int/incentives/ retrieved on 27 Feb 2011.

There is an intimate connection between traditional knowledge and the rights of the indigenous communities as they are the most vulnerable to any exploitation of resources as may be required during the application of the traditional knowledge to the commercial activities. The need to provide protection for these communities was recognized by the United Nations based on which they formulated the 'United Nations Declaration on the Rights of Indigenous Peoples'[7] also sought to affirm the community rights, protection of diversity of civilizations and cultures, protection from discrimination of any kind, and to respect and promote political, economic and social structures and their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources.

IV. LEGAL AND POLICY FRAMEWORK

India has a rich cultural heritage, wide geographical multitudes and diverse climatic conditions and a genetically vibrant flora and fauna. All this is a valuable resource and should be respected as the same. But the legal framework has been pathetically obsolete and redundant in regard to the protection afforded to the said classes of assets. Even the most important heritages have only cursory references in the various legislative enactments. Lack of a strong framework and statutory enactments or enforcement mechanisms further contribute to the degeneration of the various facets of the traditional knowledge and lead to the indiscriminate commercial exploitation of the same at the hands of both private entities or multi-national corporations, without any passing of the benefits to the originators.

There is separate realms of traditional knowledge and patents, a segregation which finds explicit mention in section 3 and 25 of Patents Act, 1970. Sec 3 (p) of the Patent Act 1970 for instance maintains inter alia that an invention which in effect and essence, is a traditional knowledge or which is and imply an aggregation or duplication of known properties of traditionally known component shall not qualify as an invention, under the Act and hence shall not be eligible for protection thereunder.

In the same vein section 25 (2) of the Patent Act 1970, which pertains to the various grounds for post grant opposition of a patent, specifically mentions that any interested person may, so oppose a patent

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[7] Adopted by the General Assembly vide the General Assembly Resolution 61/295 on 13th of Sep. 2007.

(i.e. even after being granted) on the ground that the invention claimed was anticipated having regard to the knowledge, oral or otherwise, available within any local or indigenous community in India or elsewhere.

Emergence of traditional knowledge digital library provides information on traditional knowledge existing in the country, in languages and format understandable by patent examiners at International Patent Offices (IPOs'), so as to prevent the grant of wrong patents. Traditional Knowledge digital library thus, acts as a bridge between the traditional knowledge information existing in local languages and the patent examiners at IPOs.

India fought successfully for the revocation of turmeric and basmati patents granted by USPTO and neem patent granted by EPO. As a sequal to this, in 1999, the Department of Ayurveda, Yoga and Naturopathy, Unani, Siddha and Homeopathy (AYUSH) erstwhile Department of Indian System of Medicine and Homeopathy (ISM & H) constituted an inter-disciplinary Task Force, for creating an approach paper on establishing a Traditional Knowledge Digital Library.

V. COMPARISON OF TRADITIONAL KNOWLEDGE & INTELLECTUAL PROPERTY RIGHTS

Traditional knowledge is different from other forms of intellectual property because IPR secures rights for a person (which could be an individual or a corporate entity), traditional knowledge secures such rights for a community.

Some of the differences between traditional knowledge and IPR (in general) happens to be are enumerated hereunder:

1) IPRs in general are distinguishable from traditional knowledge in the sense that they have to register (barring a few exceptions) with some authority, and they lapse after a period of time based on the governing laws, whereas traditional knowledge is inherent and continues for generations.

2) IPRs are generally specific and can be boiled down to particular usages, goods or such other forms of commercially viable products, whereas traditional knowledge is basically more sublime in the

sense that it is basically derived from generations of experimentation, and could be understood as mere common-sense by the communities.

3) IPRs also identify the beneficiaries in clear ways based on the person who actually files, whereas the definition of the community will identify the scope of the beneficiary.

4) IPRs can be crystallized in strict pecuniary terms, whereas the scope is much wider as far as traditional knowledge is concerned as for many communities it may be their only means of subsistence.

5) IPRs grant monopoly rights for usage of knowledge whereas traditional knowledge grants community rights over knowledge.

VI. ECONOMIC DIMENSIONS

Traditional knowledge is enabling in nature, in the sense that it secures economic rights as regards usage at community levels. Commercially viable traditional knowledge can alleviate poverty; bring about community development while contributing to the GDP. It may build viable sustainable development at grass-root levels; lead to major discoveries in medicine and foods; and aid in ecological conservation drives. It is the best way of targeting the bottom of the pyramid users. New products may be developed, basically herbal/vegetable origin which might still be unknown/undiscovered. It can harmoniously integrate industry with community, and create a mutually viable symbiotic relation. The TRIPs Agreement[8] should be used not only to reward the inventions but also the local communities who have conserved and developed knowledge which provides valuable base for such inventions. Bio-piracy and patenting of indigenous knowledge is a double-theft because first it allows theft of creativity and innovation and secondly the exclusive rights are established by patents which preclude benefit sharing with the indigenous communities and monopolizes the benefit to the owner of the patent.

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[8] Text of the Agreement available on the World Trade Organization webpage at http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm retrieved on 27 Feb 2011.

VII. PROTECTING TRADITIONAL KNOWLEDGE – INTERNATIONAL DIMENSIONS

Due to the globalization of trade and increase in population, destruction of forests for agriculture and timber, bio-diversity is declining at a rapid rate. Along with biodiversity, associated traditional knowledge is also declining due to the lack of understanding as regards the importance of the protection of traditional knowledge amongst the local communities to conserve and protect them. Misappropriation of traditional knowledge not only violates the rights of communities who conserve traditional knowledge but also adversely affects the conservation and sustainable use of traditional knowledge and that of biodiversity. In order to address this present problem traditional knowledge is being discussed in various international forums. Foremost among these are those related to the conservation and sustainable use of biodiversity, namely the International Undertaking on Plant Genetic Resources for Food and Agriculture (now the FAO International Treaty) and the Convention on Biological Diversity (CBD). Fair and equitable sharing of the benefits arising out of the utilization of genetic resources is one of the primary objectives of the Convention on Biological Diversity. The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity[9] is an international agreement which aims at sharing the benefits arising from the utilization of genetic resources in a fair and equitable way, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding, thereby contributing to the conservation of biological diversity and the sustainable use of its components. It was adopted by the Conference of the Parties to the Convention on Biological Diversity at its tenth meeting on 29 October 2010 in Nagoya, Japan.

The problem of conservation and sustainable use of traditional knowledge is also addressed in arenas related to the rights of indigenous peoples (International Labour Organization, United Nations Commission

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[9] The text of the Convention is available at the official website of Convention on Biological Diversity at http://www.cbd.int/cop/cop-10/doc/advance-final-unedited-texts/advance-unedited-version-ABS-Protocol footnote-en.doc retrieved on 27 Feb 2011.

on Human Rights, United Nations Permanent Forum on Indigenous Issues), intellectual property (World Intellectual Property Organization, WIPO) and culture (United Nations Educational, Scientific and Cultural Organization). To take one such instance, the UN Commission on Human Rights has established the Working Group on Indigenous Populations (WGIP). The WGIP reviews the evolution of standards concerning the rights of indigenous peoples, provides a forum where they can express grievances, and promotes the protection of their rights. More recently, traditional knowledge has become a topic of discussion in trade-related forums such as the World Trade Organization (WTO) and the United Nations Conference on Trade and Development (UNCTAD).

As traditional knowledge is a very complex issue, each forum allows focus on a particular facet. However, there are some risks of confusion or lack of coordination among forums and agencies. Developing country governments in particular may find that they cannot be fully engaged in all forums and thus must focus on one or two where they think the pay off will be the greatest. While many consider the CBD to be the forum most sympathetic to their perspective, WIPO has technical expertise on intellectual property rights (IPRs) and WTO with its dispute settlement mechanism "has teeth". One thing that has come out of the internationalization of the whole issue is that nowadays violation of traditional knowledge has renewed the debate to protect rights of indigenous communities regarding the protection and preservation of their rights.

VIII. CONCLUSIONS

There is a need for implementation mechanism to prevent instances of bio-piracy. Local and indigenous communities should be called upon to exchange information on national system to protect traditional knowledge and to explore minimum standard for an internationally recognized sui generis system for traditional knowledge protection. The following suggestions may be considered for the aforesaid sui generis system:

- Policy implementation efforts for securing traditional knowledge by creating a viable mechanism.
- CBD an excellent example of underused policy, which should be used as a background for the development of statutory provisions for protection of traditional knowledge at national levels.

- Bureaucratic inaction is a major hurdle in securing and understanding the vast amount of traditional knowledge levels. A committed mechanism to ensure the specific needs of the traditional knowledge is required to proactively approach the various regions and to syndicate the traditional knowledge into a coherent available database.
- Traditional knowledge syndication efforts should be localized and integrated at national levels.
- Strong need for credible commitment to share the benefit by strengthening incentives to improve informed settlement, build infrastructure, business and lessen conflict.

SAME SEX MARRIAGES : THE LEGAL QUESTIONS

*Serman Rawat**

I. INTRODUCTION

The issue of gay and lesbian legal "equality" remains unresolved and highly contested.[1] In recent years, both due to liberal attitudes and the need to control HIV/AIDS several NGOs and state agencies have all demanded legislation or at least decriminalization of homosexuality and acceptance, tolerance and equality for gay men, lesbians and bisexuals.[2] However, the question remains 'Are we ready for it?' We all know that the present laws in almost all parts of the world permit marriages between a man and a woman. The family arena is one in which it has been particularly difficult for lesbians and gay men to gain equal footing with heterosexuals.[3] The mixed-sex requirement for civil marriage seriously disadvantages same-sex couples and distorts public discourse.[4] Here in India, a marriage is believed to be an institution which is sacred and forms a part of every religion. So, the question that needs an answer is 'Can the current laws governing this sacred institution of marriage, govern homosexual marriages?' The reason why so much of debate has taken place on the topic of homosexual marriage is that "marriage is ... the issue most likely to lead ultimately to a world free from discrimination against lesbians and gay men."[5] With the increasing number of lesbian and gay couples in India, the day is not far when such couples would demand to have families and raise children. This paper is an attempt to answer the possible legal

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1 See generally, Evan Gerstmann, THE CONSTITUTIONAL UNDERCLASS: GAYS, LESBIANS AND THE FAILURE OF CLASS BASED EQUAL PROTECTION (1999) 3-39.

2 Subhash Chandra, HOMOSEXUALITY AND THE LAW: A POLICY OF CONTROL AND CONTAINMENT.

3 Marla J. Hollandsworth, *Gay Men Creating Families Through Sarro-Gay Arrangements: A Paradigm for Reproductive Freedom*, 3 AM UJ GENDER & L. 183 (1995).

4 David B. Cruz, *Just Don't Call it Marriage: The First Amendment and Marriage as an Expressive Resource* 74 S. CAL L REV 925.

5 Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, in Suzzanne Shermah (ed.), LESBIAN AND GAY MARRIAGE (1992) 13, 14-16.

questions that surround the current laws on homosexual relationships and also to answer the possible legal questions that may arise, especially in reference to family laws, if at all homosexuals are allowed to enter into a marriage.

II. Why Can't Homosexuals Have A Right To Family?

Article 21 of the Constitution of India guarantees the right to life and personal liberty to every person. Right to life includes many incidental rights which are not specifically given under the Constitution. There can be no doubt that an individual has a right to family. Also, sex is an integral part of the life of any animal, including humans. So, when we say that all human beings have a right to family and right to sex, would it be wise to suggest that homosexuals do not have a right to family. Merely on the grounds of sexual orientation, a person should not be discriminated. So, it would not be wrong to suggest that homosexuals too should have a right to family. Why do we have to interpret marriage to mean only a heterosexual union? A marriage can be a homosexual union as well. After all a few would disagree that the operative word in the phrase "heterosexual union" is "union". Marriage is, above all, a union.[6] So, why can't such a union be a "homosexual union"?

Moreover, apart from our Constitution, there are other international instruments on human rights which provide for the right to marry as a fundamental human right. An example of such an instrument is the International Covenant on Civil and Political Rights. Although, the International Covenant on Civil and Political Rights does not expressly protect homosexual marriage as a fundamental human right, the instrument does contain provisions on both the right to marry and equal protection.[7] Therefore, in the light of the ICCPR also, homosexuals have a right to marry and therefore have a right to family.

One of the most common arguments against same-sex marriage is that traditionally the essential purpose of marriage is to procreate. John Quinn, the Archbishop of San Francisco has stated, "The permanent

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[6] Anne M. Burton, *Gay Marriage- A Modern Proposal: Applying Baehr v. Lewin to the International Covenant on Civil And Political Rights*, 3 Ind J Global Legal Stud 177.

[7] *Ibid.*

commitment of husband and wife in marriage is intrinsically tied to the procreation and raising of children."[8]

Procreation is only one of many reasons that people choose to marry. Today, people marry for a variety of reasons including emotional companionship and the security of a dual income. Homer Clark writes:

> Recently, marriage has come to resume some of its importance as a producing economic unit... providing the benefits of two sources of income for the maintenance of a single home. But the fact is that the most significant function of marriage today seems to be that it furnishes emotional satisfactions to be found in no other relationships. For many people it is a refuge from the coldness and impersonality of contemporary existence.[9]

III. If Homosexuals Have A Right To Family Then..?

Once we say that homosexuals too should have a right to family there are various legal questions that would arise. What would be the legal status of a homosexual couple? Would they be considered as a single entity in the eyes of law as an ordinary couple or should they be given a different status? Of equal importance to the establishment of the same-sex family as a legal entity are cases concerning the right of lesbians and gays to adopt, to engage in second-parent adoption, and to establish custodial and visitation rights following the termination of long term gay relationships.[10] Should the lesbians and gays be allowed to exercise the right to adoption? And in case of separation of such a homosexual couple, how would the court decide as to who should be given the custody of the child so adopted and who would be given the visitation rights? While deciding upon these questions one should always keep in mind that society does not extend to homosexuals, the same adoption opportunities that it extends to heterosexuals.[11] Even in the west, parenthood for gay men and lesbians has always been an issue of societal condemnation, social

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[8] Isaacson Walter, *Should Gays Have Marriage Rights?*, Time Nov. 20, 1989.

[9] Homer H. Clark, The Law of Domestic Relations in the United States (2nd ed. 1988) 22.

[10] Timothy Lin, *Social Norms And Judicial Decision making: Examining The Role of Narratives in Same Sex Adoption Cases*, 99 CLMLR 739.

[11] David P. Russman, *Alternative Families: In Whose Best Interest?*, 27 Suffolk UL Rev 31 (1993).

discomfort, and repudiation and this societal bias makes the process of family building for homosexual couples problematic.[12] It is usually seen that lesbians and gay men who wish to raise children often confront prejudice and misconceptions about their sexual orientation that "turn judges, legislators, professionals, and the public against them, frequently resulting in negative outcomes such as loss of physical custody, restrictions on visitation, and prohibitions against adoption."[13] Another obstacle for homosexuals is the popular belief that a family is based on the union of man and woman, and therefore most of the people believe that homosexual households are incapable of providing balanced role modeling for several relationships that are crucial to the formation of healthy, stable families.[14] At times we also find people arguing that homosexuality is a mental disorder, one of the early reasons of which is Sigmund Freud's work on child development and sexual preference which led to the categorization of homosexuality as a mental illness.[15] However, such beliefs are not new. Homosexuality has also been called "a sin, an illness, a way of life, a normal variant of sexual behavior, a behavior disturbance, and a crime."[16] However, such arguments, especially in the light of scientific research and the changing society, do not hold much ground.

Many people also believe that homosexual parents would encourage their adopted children to become homosexuals. But, the question here is, would these homosexual parents like to do anything like this? And one can find an answer to this question by analyzing how the homosexuals are treated in the society. It is highly improbable that homosexual people, who themselves face a great deal of prejudice, would consciously choose a similarly difficult life for their children to lead.[17]

However, the most rational question that has ever been raised so far about the homosexual marriages pertains to the life of the child of a

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[12] *Supra* n. 4.

[13] Charlotte J. Petterson, *Lesbian and Gay Parenting: A Resource for Psychologists,* as cited in Lin Timothy, *Social Norms and Judicial Decision making: Examining the Role of Narratives in same Sex Adoption Cases*, 99 CLMLR 739.

[14] *Supra* n. 11.

[15] *Ibid.*

[16] Gayle S. Rubin, *Thinking Sex: Notes For a Radical Theory of the Politics of Sexuality*, in Carole S. Vance (ed.), PLEASURE AND DANGER (1984).

[17] *Supra* n. 11.

homosexual couple. Would the child of a homosexual couple suffer harassment and dejection from the society? Recently, a court found that "living daily under conditions stemming from active lesbianism practiced in the home may impose a burden upon a child by reason of the 'social condemnation' attached to such an arrangement, which will inevitably afflict the child's relationship with its peers and with the community at large."[18] However, there is a research which shows that such a fear of stigmatization is far in excess of the actual incidence of stigmatization.[19] Furthermore, the studies have shown that children from homosexual parents are liked more by their peers as compared to children from heterosexual parents.[20]

Further, a very important question is also that why the homosexual couples should be denied the legal rights and privileges that other heterosexual couples enjoy? Legal system around the world grant legal spouses with many social and economic benefits. It is no wonder that homosexual people have pushed to have their relationships legally recognized. Homosexual couples in Denmark,[21] Norway,[22] and Sweden[23] already enjoy most marital rights under the registered partnership laws of their respective countries.[24] For Indian homosexual couples, however, the struggle has yet to produce any progress.

IV. What Would Be The Rights And Duties Of A Homosexual In A Homosexual Marriage?

If the homosexual couples are allowed to marry legally, then many legal questions will arise as to the rights and duties of a homosexual towards

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[18] *Bottoms* v. *Bottoms,* 457 SE 2d at 108.

[19] Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND LJ 623 at 652.

[20] Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and other Non-traditional Families*, 78 GEO LJ 459.

[21] Denmark's partnership law was passed in 1989.

[22] Norway's version passed the Odelsting chamber of the Norwegian Parliament on Mar. 29, 1993.

[23] Sweden's law became effective on Jan. 1, 1995; Parliament legalized gay marriage on June 7, 1994.

[24] Registered partnership legislation is pending in many countries, including Finland, Iceland, the Czech Republic, and Slovenia.

his/her partner in a homosexual marriage. One must analyze this aspect by considering what are the general rights and duties of a person towards his/her marital partner.

(a) *Conjugal Rights*

A valid and subsisting marriage confers the rights, and perhaps the duty to cohabit – to live together in a conjugal relationship. During cohabitation, the spouses have a mutual obligation of financial support, and an individual obligation of financial support. One aspect of cohabitation is the expectation of a sexual relationship. A persistent and unjustified refusal of sexual relations by one spouse may constitute "cruelty" as a basis for divorce.[25]

(b) *Economic Benefits & Financial Obligations*

The married couples have rights to share in the estate after the death of the other, whether or not the deceased left a will. In India, under apparently all the succession laws the spouse and children have been conferred the status of class-I heirs. The couples also have specific rights as conferred by the various statutes. For instance, they may treat each other as dependants for tax purposes and take the deductions on the same. They can insure each other's lives and qualify for pension benefits.

(c) *Divorce & Maintenance*

In the case of divorce or separation, it is generally the duty of the husband to maintain the wife and provide her with alimony. However, in case of same-sex couples, the question arises as to who shall maintain whom? If we say, in case of 'Fault-based divorce' the defaulting party shall do the same – like adultery, cruelty or desertion, what shall be the position in case of 'no-fault divorce' or divorce based on mutual consent? The space and scheme for maintenance and alimony for a homosexual couple has to be carved out by the legislative mechanism of the states.

(d) *Issues with respect to the 'child'*

(i) *The usage of Surrogacy and Donor insemination Techniques*

Advance in reproductive medicine requires us to rethink the notions of parenthood. On the one hand, it has always been possible to distinguish

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[25] Kronby Malcolm C., *Marriage* (Chapter-I), in CANADIAN FAMILY LAW (9th edn. 2006) 4.

between the biological aspect of being a parent, or reproduction, and the social component, or rearing, on the other.[26] In such cases, a child can have as many as six parents: the genetic father, who provides the sperm; the genetic mother, who provides the egg; surrogate who is not genetically related to the child she carries and bears; and the intended rearing parents who have no biological connection to the child. Such multiplication of parents also results in custody disputes, and courts have had to decide who the 'real' parents are. In a very recent case, the San Francisco Court of Appeals ruled that the genetic mother of twins born to her lesbian partner has no parental rights because she signed a waiver of parental rights at the time of donating her eggs. E.G. and K.M. began living together in March 1994 and registered as domestic partners in San Francisco in October 1994.[27] The couple planned to have a child of their own. Hence, E.G asked K.M. to donate her eggs, provided that K.M. would be a 'real donor' and E.G. would be the only legal mother. The possibility of a future adoption by K.M. was discussed, but the women agreed that this should not happen for at least five years when the relationship was proven stable and permanent. For the next five years, the couple with their twins lived as a family unit, with both women caring for and raising the girls. The couple however separated in March 2001 and E.G. filed a notice of termination of the domestic partnership. In February 2002, K.M filed a new petition to establish a parental relationship. She also sought joint custody. In response, E.G. filed a motion to quash and dismiss the petition on the ground that K.M. lacked standing to assert parentage. The Court of Appeals upheld the contention of E.G. and stated that K.M. lacked standing to bring the action to determine parentage under the Uniform Parentage Act (UPA). As the genetic mother, K.M. qualified as an 'interested party' for purposes of obtaining a judicial declaration of her status as a parent. However, K.M.'s claim to be a legal parent was rejected. Following this principle, the court said that when there are two biological mothers, the legal mother is the one who 'from the outset intended to be the child's mother'.[28] In subsequent cases, the courts have construed this test to mean that the intent to be the parent is the 'tie-breaker' when two women have equal claims. The courts in California generally take the path of

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[26] *Id.* at 312.
[27] *Ibid.*
[28] *Ibid.*

'initial parenting intention', not the parental role, not the best interests of the child as laid down in the *Johnson* case.[29] The courts have rejected the best interest standards on parentage as that would implicate governmental interference in matters of parentage and custody and also put at risk the rights of any natural parent who entered into a relationship and-encouraged the formation of parental bonds between the children and the new partner. The courts have however not addressed the issue as to what if both women or men had intended to raise the children together? If such a situation arises, which is quite likely, the courts might have to recognize both as legal parents.

(ii) *De facto Parenthood & Parenthood by Estoppel*

The homosexual rights movement has also restructured the established child rearing roles of "parents". In such cases, the definition of parent becomes highly significant. A parent is either a legal parent, a parent by estoppels, or a de facto parent.[30] A "legal parent" could be identified as a parent from the state law, such as adoptive or biological parent. A "parent by estoppels" is a person who, though not classified as a parent under traditional legal principles, assumed "full and permanent responsibilities as a parent" with the acquiescence of the child's legal parents. Finally, a "de facto parent" is an individual who, with the legal parents' acquiescence or spurred by their complete failure or inability to parent, lived with the child and performed caretaking functions equal to those of the child's legal parents for two years or longer.[31] Under the notions of child's best interests, it is the "parents by estoppels" that should be accorded a parenting status fully equivalent to that held by traditional parents. Till now, none of the countries have formally adopted such expansive definitions of parenthood; several of them have begun to move tentatively in that direction. The American Institute of Family Law recommendations

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[29] (1993) 5 Cal. 4th 84, 19 Cal Rptr. 2d 494. In *Johnson* v. *Calvert,* an embryo was created with the gametes of a husband and wife was implanted and gestated in a third party (a surrogate), the Supreme Court of California held, when the surrogate refused to hand over the child after its birth, that the genetic parents were parents for all legal purposes and that the surrogate had no parental rights over the child.

[30] Margaret F. Brinig, *Domestic Partnership*, JOURNAL OF LAW & FAMILY STUDIES 19-20 (2002).

[31] David D. Meyer, PARTNERS, CARE GIVERS AND CONSTITUTIONAL SUBSTANCE OF PARENTHOOD (Cambridge, 2006) 63.

have also drawn the possibility and plausibility that a child might have three or more parents all at the same time. No cap is however imposed on the number of parents that a child might have, although some limits are placed on the extent to which parenting responsibilities may be divided up among these parents. Several courts have positively interpreted the definition of "de facto parenthood" in justifying custodial awards to long time care givers who lacked formal legal ties to a child.[32]

Of equal significance, courts in slightly more states have begun interpreting legal parenthood in nontraditional ways and, specifically, designating as parents adults who have no biological or adoptive ties to the child. This innovation occurs often in the context of new reproductive technologies, where courts have emphasized parenting intentions over genetic or biological contributions in deciding legal parentage.[33] In *Marriage of Buzzanca*,[34] the California Court of Appeals held that a couple was the legal parents of the child born to a surrogate because they intended to create the child as parents, even though they don't share a biological relation with the child. This trend is equally discernible outside the reproductive technologies context as well. In a few cases, women agreeing to co-parent children born to their same sex partners have been deemed legal parents without any formal adoption proceeding.[35] This willingness to recognize legal parentage based solely upon the assumption of a parental role with the agreement of the child's biological parents shares a basic premise principle that parenthood is essentially and predominantly a functional status, rather than one derived from biology or legal entitlement.

(iii) *The place of parenthood in Existing Custody Law*

The law of custody and guardianship generally emerges when the family (parents) is either disintegrating or the child has to be assisted to

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[32] See, e.g., *C.E.W.* v. *D.E.W.*, 845 A. 2d 1146, 1152 &n. 13 2004 (recognizing former lesbian partner of parent as a "de facto parent" entitled to seek an allocation of parenting responsibility).

[33] See *Johnson* v. *Calvert*, 510 13.8.874 (1993).

[34] 72 Cal. Rptr. 2d 280 (Ct. App. 1998).

[35] See *Elisa B.* v. *Superior Court*, 117 P. 3d 660 (Cal. 2005). In this case, the couple contested parentage after breaking up. It was held that "when two women involved in a domestic relationship agree to bear and raise a child together by artificial insemination of one of the partners with donor semen, both women are the legal parents of the resulting child.

find a guardianship. Child custody law has always made it essential to identify clearly a child's parents. The "tender years doctrine" favoring mother custody, and earlier law recognizing a custody entitlement for fathers, assumed knowledge of the child's mother and father. Although courts today use the more indeterminate "best interests of the child" standard to allocate custodial rights, status as a parent remains nearly as determinative as under the older gender-specific presumptions. Threshold determinations of parentage are vitally important because the law in every state strongly prefers, in some fashion, parents over non parents in deciding child custody. In many states, for instance, a parent is entitled to custody in a contest with a non-parent unless the parent is affirmatively "unfit" to parent. Even in the rare cases in which courts nominally employ "best interests" standard, status as a parent remains "a strong factor for consideration."[36] This preference for parent custody has led courts to deny continuing custodial rights even to care givers who had assumed major parenting roles with the acquiescence of the legal parent.[37] For example, a New York court held that a man who had assumed the role of girl's father since her birth nevertheless had no standing to seek custody or visitation after it was discovered that another man was actually the girl's biological father.[38] Even his acknowledgement of paternity years earlier, allegedly with the mother's full cooperation and consent, was legally ineffective against DNA evidence establishing the other man's reproductive role. Similarly, reproductive parents have got similar preferences over adoptive ones involving the separation of same-sex partners who jointly raised a child born to one of the partners.[39] Despite evidence clearly demonstrating a joint undertaking to parent, these courts have concluded that the status and prerogatives of parenthood remain exclusively with the biological parent. It is pertinent to note that similarly, homosexual parents are bound to be discriminated. Bias and prejudice, whether rooted in ignorance or in intolerance, appear to play a substantial role in many custody cases involving lesbian and gay parents.[40]

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[36] *Ibid.*

[37] *Ephraim H.* v. *Jon. P.*, 2005 WL 2347727 (awarding custody, following death of 12 year old boy's mother, to legal father who had not visited the boy prior to the mother's death rather than to stepfather.

[38] *Sean H.* v. *Leila H.*, 783 NYS 2d 785 (2004).

[39] *In re Thompson*, 11 SW 3d 913, 1999.

[40] Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and their Children*, 71 IND LJ 623 at 664.

V. Conclusion

There is no doubt that societal discourse regarding lesbians and gays has centered so singularly on their sexuality that it appears as their defining trait. However, this fact should not affect the basic fundamental human rights of the homosexual people. There is no doubt that the homosexuals cannot be denied the right to marry or the right to have a family. However, the present laws, especially governing marriages and families will require an overhaul because with the legalization of homosexuality, many questions will arises which the present laws are incapable of dealing with.

INTERNATIONAL LAW. SECOND EDITION By Gurdip Singh, Macmillan India Ltd., Delhi, 2011, Pp. XIV +610, Rs.395/-

"It is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all the time"

Louis Henkin[1]

International law is an ever evolving subject. It has played a significant role in creating conducive conditions for maintaining global peace and security ever since the treaty of Westphalia in 1648. Public international law has made phenomenal progress during the twentieth and the beginning of the twenty first century, due to the increase in global trade, environmental deterioration on a worldwide scale, awareness of human rights violations, rapid and vast increases in international transportation and boom in global communications. The principles of international law have their effect on all states—small and large, weak and powerful alike in this age of globalisation and interdependence. New global challenges such as environmental pollution, terrorism, armed conflicts and refugees etc. transcend national boundaries and affect the humanity as a whole. For translating the dream of peaceful and terror-free world into a reality, respect for human rights, ensuring fundamental freedoms, and the creation of worth-living environment is imperative. Just and transparent laws in the fields of international concern can, to a great extent, help in achieving the objective of establishing a peaceful world and a valued and trustful human society.

International law has remained a very organic and dynamic branch of social science and legal research and practice, which deals with various aspects of world affairs. It has always been the endeavour of the international community to produce an ordered and a just system of international relations. Recent years have witnessed a greater impetus to the development of international law than ever before. This was a natural result of the emergence of greater interdependence between states, and of the vastly increased intercourse between them due to all kinds of inventions that overcame the difficulties of time, space and intellectual communication. New rules

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[1] Louis Henkin, HOW NATIONS BEHAVE (1968) 47.

had to be found or devised to meet new situations. The international law today has had to respond to the extreme complexities of the human activities world over and even beyond earth and for that it has to possess enough flexibility to accommodate the new impulses without, at the same time, compromising its normative character.

The sovereign nations observe rules of international law in their mutual relations showing generally due respect to rules of international law. It makes life in an interdependent world meaningful. We can notice a tremendous growth of international treaties, laws and conventions over the years, covering vast areas including human rights, development of women and children, combating terrorism, protecting environment and smooth growth of trade and commerce. A lot has been done but still a lot more to be done to meet the unprecedented challenges ahead. Although, international law is playing a paramount role in regulating the world affairs, yet it does not mean that the international law is far from controversy or not confronting any problems. The kaleidoscopic changes in public international law have revolutionized the whole perspectives. Despite the positivist outburst on the legal status of international law, the reckoning as on date is that international law is the superior law in the present context, having applicability over the States, international institutions, and the individuals as well.

International law governs the relations not only between states but also between the states and international institutions, international institutions and the individuals as well. It regulates the functioning of the international institutions, which possess international personality. The public international law confers rights on states and the individuals and at the same time creates obligations for them. It provides sanction against violation of mandatory obligations. Public international law has thus become an indispensable body of rules regulating relations between states for the most part, in the absence of which it would be virtually impossible for the international community to have steady and frequent intercourse

At the international arena, the legal system is full of challenges, necessitating research on new principles and directions to meet the challenges. In this process, the United Nations and other international organizations have concentrated on various issues of common concern to the international community and have adopted number of international legislations.

International Law Commission has put its sincere efforts in preparing drafts for conventions and treaties in different fields of international law, and is thus contributing effectively in the making of international law in a great way. At the same time, the contribution of international law experts at governmental level, of judges and jurists at the level of interpretation and decision-making, and of academics/scholars at the level of teaching and scholarly writings, holds significance in the making and shaping of international law.

The book under review is an attempt to analyze the efficacy of various existing instruments in different fields of international law. It provides detailed analysis and insights in this field and the author has undertaken exercise to historically analyse all significant developments in international law. The framework of study under the book comprises two Parts respectively dealing with "Peace" and "Conflict Resolution, War, Neutrality and Human Rights". The usefulness of this book is contained in its approach, its selection of topics and its inbuilt ambition to indepth research into each of the topic.

Part one includes chapters on topics relating to: development of international law; nature of international law; sources of international law; relation between international law and municipal law; position of individual in international law; recognition; State responsibility; modes of acquisition or loss of territorial sovereignty; individual and the state; law of treaties; jurisdictional immunities of states; diplomatic and consular relations; and law of the sea. The chapters under Part two are focused on: diplomatic modes of conflict resolution; arbitration; International Court of Justice; United Nations peace-keeping operations; compulsive methods; war; economic warfare; star wars; implementation of human rights; World Trade Organization; and international environmental law.

The hallmark of the author's quest is to identify and critically assess the contribution of international community to the codification and progressive development of various faculties of international law especially with reference to selected topics. The author has also made an attempt to evaluate the trends of international law, with a view to determine the extent that the existing instruments of international law have succeeded to attain in balancing the interests of the developed and developing states. A careful perusal of the book reflects that the author has conducted in-depth study

in highlighting the intricate problems related to international law areas dealt therein. He has adopted both empirical and doctrinal approach to project the causes of failure of international legal instruments in their respective fields. The author has emphatically focused on the growing needs of international society, which calls for review and updating of international law. The relevant and intricate queries on different topics have been elaborately discussed. Commentary on each topic is arranged under separate headings and sub-headings for easy reference. Reasoning given by the author with regard to his views concerning explanation of international law aspects is based upon relevant cases, references of which have been given in support at relevant places. Style and method of placing facts and law has been maintained in a perfect manner throughout the book. Most of the cases have been reported in a standard format indicating clearly the issues involved therein. The author has successfully attempted to deduce certain guiding principles. The observations and interpretations of the author are consistently discernable throughout the book.

In Part one, basic and traditional principles of international law highlighting the development, nature and sources thereof have been elaborately discussed. Individual's position under international law, which holds importance because of the emergence of individual as a subject thereof has been appropriately dealt. Sincere effort has been made to look into the functioning of institutions under the law of the sea. The skill put in preparing the diagrams showing the continental shelf and other important aspects of maritime zones would make it possible for the readers of this book to understand easily the law of the sea related concepts, which are very technical in nature. The relationship of international law with the municipal law is most significant to transform the international legal principles in the municipal law, to help reach the benefit of harmony between both the international and municipal legal systems to individuals, and to ensure proper and effective implementation of laws for that purpose. With this view, the author has ably explained the relationship between international and municipal laws, by having special focus on substantive laws and necessary practices in the fields of diplomatic and consular relations, and the laws relating to jurisdictional immunities and nationality. Extradition, being the most important means to curb international crimes including

terrorism by making the availability of absconding criminals possible for the purpose of prosecution, has been dealt under the chapter 'Individual and the States', by giving reference to Indian laws.

Under Part two, the author has tried to sail the readers through the history and basic principles of international law to the efforts of international community towards the resolution of international disputes. He has conducted in-depth research in different warfare, by putting the world community on alert regarding the gravity of the danger and consequences of international armed conflicts, and by suggesting the preventive and remedial measures for them. In this regard, his work on star wars deserves mention, which once being a scientific fiction only has now been translated into reality. The study, while making an analysis of different available means of dispute resolution, has mainly focused on resolution by peaceful means including arbitration. The author has provided a comprehensive overview of protection of human rights and environmental protection by highlighting the need for the effective implementation of the relevant international instruments in these areas. The author outlines in details the human rights implementation mechanisms at national as well as international levels which can enable the readers to perform in depth research into this subject to understand the law and practices of human rights. His exposition of laws of human rights and Indian laws provides a useful critical appreciation of the situation to the readers.

The history of international affairs of the last fifty years suggests that there are few states which have taken lead in ensuring that international law continue to further the goals of peace, rule of law, democracy, good governance and development, India being one of them. Its efforts to get the world rid of colonialism, apartheid, global economic inequality, etc. are the hallmarks of its contribution. India has played significant role in various fields of international law including the trade law, patents and, maritime laws. On the other hand, its efforts to reform international organizations like the United Nations and to ensure representation in the Security Council for countries which have made significant contributions to the realization of the purpose and principles of the United Nations indicate its commitment toward more democratic world institution. India has been a torchbearer in enhancing the ideals and idealism of international law through variety of ways and means. In this context, the author efficiently

gives an account of Indian interests, policy and law to assess their compatibility with the international standards. The author has enriched vocabulary to explain his viewpoint about the subject, which shows his long experience, vast knowledge and enough maturity about the law of nations. He deserves congratulations for taking all pains in compiling such an invaluable book and supplementing the literature on this important area. An exhausted subject index has enhanced the usefulness of the book.

The book would be a useful source of reference for the students of international law and for others who are associated, in any form, with the study, interpretation or application of international law. The price of only Rupees 395/- for such a content-rich book shows the generosity of the author and the publisher and their interest in imparting knowledge of international law and spreading the same at large scale among the users, by making it available at such an affordable price. One cannot help praising the publisher - 'Macmillan India Limited', for beautifully and impeccably publishing this book with flawless printing and proper proof reading.

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