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Making Babies: Legal Dimensions

Dr. Ashish Kumar Srivastava*

Introduction:

The emergence of independent India marks an important milestone in the uplift of women's position. The constitution in the preamble proclaimed as its objective to achieve justice, social, economic and political and equality to all citizens. More specifically in the part on fundamental rights; the Article 14 guarantees equality before law and equal protection of laws. Article 15 declares that a citizen shall not be discriminated against only on the grounds of race, religion, caste, sex or place of birth or any one of them and Article 15(3) upholds special provisions in favour of women and children. Women's role in the society has always been undermined. Child bearing is seen as a worthless job. This also does not form a constituent of GDP of the country.

Reproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other relevant United Nations consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes the right of all to make decisions concerning reproduction free of discrimination, coercion and violence as expressed in human rights documents. In the exercise of this right, they should take into account the needs of their living and future children and their responsibilities towards the community.

The national and international community has always been concerned with the health of women. Universal Declaration of Human Rights declares, "*Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control"*. And it also says, *"Motherhood and childhood are entitled to special care and assistance. All*

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children, whether born in or out of wedlock, shall enjoy the same social protection."[1]

International Covenant on Civil and Political Rights 1966 also declares that "*the family is the natural and fundamental group unit of society and is entitled to protection by society and the State. The right of men and women of marriageable age to marry and to found a family shall be recognized. No marriage shall be entered into without the free and full consent of the intending spouses. 4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.*"[2]

The Indian Constitution also declares that, "*The State shall make provision for securing just and humane conditions of work and for maternity relief.*"[3] This part as we know is not enforceable in the court of law.

Biologically the reality is that only woman can conceive and deliver a baby. Etymologically the term 'woman' means 'man with womb'. Now the question is what are the rights of woman pertaining to reproduction? In this regard following four issues are relevant:

1. Right to conceive pregnancy;
2. Right to terminate pregnancy;
3. Right to select sex of foetus;
4. Right to select place of delivery.

When we try to find the traces of evolution of the law in this field we find out that in midwifery history of England the women maintained monopoly in the area of reproduction. In 1591 'forceps' a very crucial surgical equipment was invented[4]. This equipment was main equipment in pregnancy. This equipment remained in the custody of a family for many years. The expectant mother underwent surgery blindfolded. The man maintained monopoly over forceps. The invention of forceps shifted the monopoly from women to men.

In 1902 England Midwives Act was enacted wherein it was provided that only trained and skilled lady can get the baby delivered from an expectant mother. In 1951 Equal Protection Act was enacted wherein the presence of anybody other than midwife, assistant midwife and registered medical practitioner was made illegal as well as a criminal offence.

In an interesting case Ridley Brian was prosecuted and executed for 100 Pound fine because when he approached National Health Authority for delivery the General Practitioner was unavailable resultantly baby was delivered at home without medical aid and care. Similarly in another case a person was fined for 40 Pounds. In many country woman had no right to select

the place of delivery. The policy makers were of the view that gynecology should be promoted. Resultantly gynecologist created monopoly in this field.

1. Right to Conceive:

The only objective of the marriage is to bring offspring. The woman plays a very vital role in conceiving a baby because the role of male is very meager. He only gives sperm to woman which is fostered by woman in womb. The woman is the only person who can decide that a foetus would be developed and delivered by her. Conceiving a baby is not only female's choice in India. Male and other family members also play a crucial role in this regard. Female has not much to do and more to say in family planning.

2. Right to Terminate:

The Indian Penal Code, which was enacted in 1860 and was drafted in accordance with British law at the time of its creation, declared induced abortion as illegal. Induced abortion was defined as purposely "causing miscarriage", Abortion practitioners would either be incarcerated for up to three years, fined, or both; women undergoing abortions could be imprisoned for up to seven years and also be charged an additional fine The only exception was when abortion was induced in order to save the life of the woman[5]. Despite the fact that this passage in the Penal Code was changed in Great Britain in 1967, India did not change it until 1971.

Countless women died attempting illegal abortions as a result of the Penal Code, and it was a combination of this and the growing population that made the country reconsider its initial stance. In 1964, the Central Family Planning Board of the Government of India met and formed a committee designed to examine the subject of abortion from medical, legal, social, and moral standpoints.[6] The Abortion Study Committee, lead by the then Health Minister of the state of Maharashtra Mr. Shantilal Shah, spent the next two years studying the issue, and submitted a report with its suggestions in December 1966. This report considered the Penal Code to be too restrictive and recommended that the laws' qualifications should be relaxed; many of these suggestions were included in the subsequent Medical Termination of Pregnancy (MTP) Act.[7]

Terminating a pregnancy is a very crucial issue as it involves a plethora issues like population, religion, parentage, legacy, proprietary, lineage etc. Terminating a pregnancy is an offence and is felony also according to many religions. But seeing the problem of swelling population it looks very reasonable that woman should be granted unconditional right to terminate pregnancy but if it is done it will open a Pandora box.

Woman cannot terminate a pregnancy at her own will. Doing so is a punishable offence in Indian Penal Code, 1860.[8] In India in order to regulate

the termination of pregnancy, Medical Termination of Pregnancy Act, 1971 was passed wherein the grounds of termination of pregnancy were established in following manner:

A pregnancy[9] may be terminated by a registered medical practitioner, -

(a) Where the length of the pregnancy does not exceed twelve weeks[10], if such medical practitioner is, or

(b) Where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two registered medical practitioners are, of opinion, formed in good faith, that-

(i) 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; or

(ii) 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.

Explanation I - Where any pregnancy is alleged by the pregnant woman 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.

Explanation II -Where any 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.

In determining whether the continuance of a pregnancy would involve such risk of injury to the health as is mentioned in sub-section (2), account may be taken of the pregnant woman's actual or reasonably' foreseeable environment. No pregnancy of a 'woman, who has not attained the age of eighteen years, or, who, having attained the age of eighteen years, is a lunatic, shall be terminated except with the consent in writing of her guardian. Save as otherwise provided in clause (a), no pregnancy shall be terminated except with the consent of the pregnant woman.

Except the aforementioned situations the termination of pregnancy is not possible. All the above conditions are favourable for men and woman in no case is beneficiary of such conditions. While the Act was being enacted policy makers advocated the Medical Termination Pregnancy Act, 1971 saying that it will contain and control population and equally save the energy of woman who is spending her 40% of life in child bearing and rearing. Pregnancy can be terminated only at hospital or authorized place.[11]

In *Dr. Mangla Dogra and Others Petitioners v Anil Kumar Malhotra* Civil Revision No. 6337 of 2011, Punjab & Hariyana High Court evaluated a question whether the express consent of the husband is required for unwanted pregnancy to be terminated by a wife? and answered in negative. "*Besides love and affection, physical intimacy is one of the key elements of a happy matrimonial life. In the present case, the wife knew her conjugal duties towards her husband. Consequently, if the wife has consented to matrimonial sex and created sexual relations with her own husband, it does not mean that she has consented to conceive a child. It is the free will of the wife to give birth to a child or not. The husband cannot compel her to conceive and give birth to his child. Mere consent to conjugal rights does not mean consent to give birth to a child for her husband. The wife did so in order to strength the matrimonial ties*."

Under personal laws impotency and infertility is a ground of dissolution of marriage. Malformation and malfunctioning of reproductive organs may be the reason of infertility. Personal laws depict only one reason child bearing as the reason of marriage for woman. Even the society sees only one role of woman i.e. child bearing.

The Abortion Act 1967 legalised abortion for UK women. The legislation was prompted by the 'thalidomide babies' incident, where mothers who took drugs for morning sickness gave birth to badly deformed children. As noted earlier, the Offences Against the Person Act 1861 made abortion illegal, unless performed for the sole purpose of preserving the life of the mother. During the 1930s, the law was tested in R v Bourne but the legal position was unclear until legislative reform in the late 1960s. However, many termination procedures were performed before that time without prosecution. Thus, many women had 'unlawful' abortions, with a number of poorer women having 'backyard' terminations. In the private sector, the procedure was a lucrative source of income for doctors exploiting the dubious legal situation by charging high fees.

The Abortion Act 1967 made abortion lawful in England, Scotland and Wales (but not Northern Ireland, the Isle of Man or the Channel Islands) under clearly specified criteria that have some similarities to legislation in South Australia, Tasmania, and the Northern Territory. The Act was reviewed by a committee of inquiry (the Lane Committee) in 1974 which reported favourably on its operation. In 1990, the Human Fertilisation and Embryology Act was passed to insert into the Abortion Act a maximum time of 24 weeks up to which abortion would be lawful.

Relevant features of the Abortion Act are:

(1) Up to 24 weeks, abortion with the woman's consent is lawful provided that two doctors certify that a woman's mental or physical health, or that of her children, is at greater risk if she continues with the pregnancy than if she terminates it;
(2) Abortion is lawful at any stage of the pregnancy if the foetus is abnormal or if there is a risk of permanent injury to a woman's life or health.

Despite the liberalisation of abortion laws in the UK, some organisations are concerned that the law does not permit abortion 'on request' and believe that women are still having difficulty accessing the free National Health Service abortion services.

The UK Abortion Law Reform Association (ALRA) was established in 1936. It seeks to promote women's right to safe, free and legal abortion based on informed choice. In particular, it believes that the current law giving doctors rather than women the power to determine whether or not to perform an abortion is not justified because it burdens doctors with making a decision that they are not really trained or suited to make.[12] The main change to the Abortion Act sought by the ALRA is to allow abortion 'on request' in the first three months of pregnancy and, from 15-24 weeks, if a doctor approves it. At the moment, the practitioner has to find that the woman's mental or physical health, or that of her children, is at greater risk if she continues with the pregnancy than if she terminates it (taking into account the woman's actual or reasonably foreseeable environment).

Other bodies, on the other hand, consider that the legislation has served women reasonably well and any difficulties are due to organisation and funding of services rather than the law itself, although some aspects of the law are anachronistic and obtrusive (e.g. the need for certification by two doctors).[13] In particular, some health professionals and managers do not regard abortion as an essential service that should be available within the public system. Medical abortion is common for early term pregnancies, particularly through the use of Mifepristone, currently available only at hospitals and special outpatient units. There are now plans to offer it at family planning clinics as part of a pilot program to reduce the waiting time for termination. It has recently been reported that Britain's rate of teenage pregnancies is the highest in Western Europe and the second highest in the developed world, with38,690 girls under 18 falling pregnant in 2000. The Health Department has responded by introducing a program under which students will be given free contraceptives at school clinics and provided with guidance on sexual matters.[14]

In termination of pregnancy the consent of woman is necessary if she is minor or lunatic consent of her guardian is necessary. The abortion Act, 1967 of U.K. provides four following grounds for termination of pregnancy:

(1) The continuance of the pregnancy would involve a risk to the life of the pregnant woman;
(2) Grave injury to her physical or mental health; or
(3) 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.
(4) If the current pregnancy may affect the interest of other child.

In this condition any medical practitioner may terminate the pregnancy. In this Act the requirement of 12-20 weeks pregnancy is absent any pregnancy may be terminated at any time on aforementioned grounds. The fourth clause makes the termination of pregnancy very meaningful which resultantly makes family planning very meaningful.

The opponents of termination of pregnancy are of the opinion that unborn child is also a living human being and termination of pregnancy is like murder of someone. The basic question in this regard is when the unborn should be treated as living. Whose right should prevail between women's right to life and foetus' right to life? Indian Penal Code protects the murder which is justified under private defense[15] but it does not protect woman's unconditional right to terminate pregnancy. Feminist jurists are of the opinion that women must be conferred an absolute and unconditional right to terminate pregnancy because the life of foetus develops and gets life from women so any woman must have unfettered right to decide what will develop within her body or on her body. In Indian context the consent of women does not matter. The right of living person (expectant mother) is more valuable than the right of unborn child. The conditions incorporated under Medical Termination of Pregnancy Act, 1971 are lopsided and male oriented. The fourth clause of UK Act is very meaningful.

3. Right to Select Sex:

Selective pregnancy has created critical imbalance in the sex ration. Especially in India having a son is seen as a matter of pride because he shall be the bread winner and in marriage he will bring more and more dowry. This taboo of dowry and societal position of woman has badly damaged the sex ratio in India because the expectant mother with the help of ultrasonography diagnoses the sex of foetus and if she finds the baby to be a girl she aborts it. This has resulted in uneven sex ratio in India like in Kerala on 1000 males there are 1033 females and in Haryana on 1000 males there are 823 females.

To prohibit the sex determination and illegal abortion the Pre Natal Diagnostic Techniques (Prevention of Misuse) Act, 1988 was passed wherein sex determination with the help of ultrasonography and IVF Centers was banned. IVF in the recent years have grown manifold and has been misused also. In this technique the couples suffering from malfunctioning of reproductive organs are treated with the help of surrogacy, assisted IVF techniques etc. Selective fertilization is tampering with the nature. In England the Embryology Act was passed in 1990 wherein sex determination and selective fertilization was banned. In selective fertilization permission of National Health Authority is mandatory. The Embryology Act, 1990 establishes harmony between science and social order. In 1994 Maharashtra, Rajasthan and Union Government has enacted a law which is not in force.

The sex determination may cause serious danger to sex ration. Now the elimination is not at the level of foetus but at the level of chromosomes. Infertility is a ground of dissolution of marriage which should be immediately abolished. Apparently, people across the country, bridging class, caste and income divides, are deliberately ensuring that girls are simply not born. The child sex ratio of 914 girls per 1,000 boys is a tragic situation and a poor reflection on India's growth and development. This is in spite of laws, schemes, relentless activism and media campaigns spanning three decades in support of the girl child. According to activists and economists, a society that places a very low value on women will see increased social violence and a definite reduction in human development.

India has two laws that prohibit sex selection – the Medical Termination of Pregnancy (MTP) Act, 1971, and the Pre-Conception and Pre-Natal Diagnostic Techniques (PCPNDT) Act, 2002. The MTP Act prohibits abortion except in qualified situations such as a pregnancy caused by rape or one that is a danger to the mother's life. The PCPNDT Act, 2002, while being progressive in that it disallows sex-selective abortions, has been ineffective in nailing medical professionals who carry out illegal procedures. The Act does not criminalise the doctor under the Indian Penal Code (IPC) but lets the Medical Council of India (MCI) deal with violations of the Act and decide the recourse.[16]

In several cases in Maharashtra, it is the MCI that investigates a charge-sheeted doctor. It promises to conduct an inquiry but often does not. We have seen very few cases of doctors' licenses being revoked for doing these abortions, says A.L. Sharada, director of Population First, a non-governmental organisation. "The medical profession protects its own. Unless punishment is by way of imprisonment, it will not be effective."

Manisha Gupte of MASUM, another NGO, says the issue of sex selection often gets confused with abortion. "Women must have their reproductive rights, including the right to contraception and abortion. Sadly the difference between the right to abortion and the discrimination against women through sex determination is not fully understood or appreciated," she says. India has from time to time attempted to tackle the issue, but the numbers prove that the country has not met with much success. For instance, there are schemes for the girl child, such as the Government of India's Dhanalakshmi and the Madhya Pradesh government's Ladli Lakshmi Yojana, where money is deposited for the girl child, which can be drawn when she turns 18.

"But it isn't as simple as that," says a mother of four girls. "The officials make us run around for all sorts of papers, pay bribes and eventually, a small percentage of the money is given." Activists and enlightened doctors say that there is a desperate need to sensitise the judiciary, the police and the administration on sex selection being a crime. However, unless more forceful measures are enforced, it is unlikely that the numbers will change.

The untimely death of Shanti Devi, Mera Haq reveals the daily toils of surviving pregnancy for societies most vulnerable and marginalized. The film recounts Shanti's journey to maternal death, a journey tragically representative of the systemic barriers that hundreds of thousands of women encounter in accessing basic medical care. Through interviews and photographs with family and friends, and internationally recognized legal and health experts, Mera Haq unveils the Indian government's failure to respect, protect, and fulfill the human rights of its people. Despite rapid economic growth and panoply of laws mandating access to reproductive health services, India consistently has the highest incidence of maternal death worldwide, currently carrying 20% of the global burden.

Refusing to accept delay and denial of medical treatment as a foregone outcome for the lives of the poor, Shanti's family turned to the courts. They sought accountability and a restoration of dignity, and in December 2008 filed Laxmi Mandal v. Deen Dayal Harinagar Hospital & ORS, W.P. (C) 8853/2008. In a groundbreaking judgment, the government was ordered to pay compensation for Shanti's preventable death, and for the first time in history, maternal mortality was recognized as a human rights violation. Mera Haq pays tribute to the tireless spirit of Shanti's family and community members, and illustrates litigation as a powerful tool for advancement of social change and government accountability."

Surrogacy:

Closely linked to such ethical questions are a multitude of legal questions concerning surrogacy, because laws were written for other circumstances, not

specifically for surrogacy. Are surrogacy contract enforceable? Are they illegal? Is payment of fees in violation of baby-selling statutes i.e. is payment of services rendered or for the child? Is the contract counter to public policy? What happens if the surrogate decides to keep the child? What would be the appropriate damages for the breach of a contract? Would they be monetary, or would they require specific performance? How could the dispute over visitation rights be resolved? Who is the legal mother? How can the husband of infertile woman establish his paternity rights? Who should participate in the decisions affecting the welfare of the fetus and the newborn? Would prohibition of surrogate arrangements violate constitutional rights to privacy?

The human rights of the child are heavily biased in this regard. It requires the surrogate mother not to get too involve with the baby in her body. The baby has no say in the matter and has to live the consequences of the social process. The baby's right to bonding and the breast feeding for minimum period of 3 to 6 months is denied also the very right to survival of all babies born out of ART, whether disabled or of a multiple pregnancy, is undermined as they are not treated at par with other babies but depend upon the whims of their commissioning parents for survival.

Legal dimensions of Surrogacy:

In the existing legal framework there can be possibility of disputes relating to the property rights in view of the rights related to marriage, succession etc. Even the concepts of the mother, father, son, and daughter need to be reframed or redefined. The provisions under MTP Act regarding consent for termination need to be reconsidered. In the complicated case of Baby Manji v. Union of India,[17] the Supreme Court of India has indirectly recognized even commercial surrogacy.

"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 dream of being parents. This medical procedure is legal in several countries including in India where due to excellent medical infrastructure, high international demand and ready availability of poor surrogates it is reaching industry proportions. Commercial surrogacy is sometimes referred to by the emotionally charged and potentially offensive terms "wombs for rent", "outsourced pregnancies" or "baby farms".[18]

In the absence of specific law regulating these issues, the only ray of hope was in the form of ICMR Guidelines. But after all these guidelines are not laws. Hence they lack in sanction behind it. They issued the guidelines for accreditation, supervision and regulation of ART clinics in India. These

guidelines are silent on many major issues. After they were introduced in 2005, the incidences of malpractices, surrogacy trafficking have gone undeterred.

After baby Manji's case the Law Commission of India prepared 'The Assisted Reproductive Technology (Regulation) Bill and Rules- 2008'. The committee preparing the Bill consisted of experts from ICMR, medical specialists and other experts from the Ministry of Health and Family Welfare. The Assisted Reproductive Technology (Regulation) Bill 2010 prima facie condemns commercial surrogacy but does not provide for means to prevent it. The Bill suggests for a national framework and regulation and supervision of assisted reproductive technology and the issues connected therewith. It has proposed that the state government will constitute the Registration Authorities before whom all the concerned clinics shall be registered. Under the proposed Act, the semen banks will be delegated responsibilities and authorities regarding sourcing, storage, handling, record keeping etc. The semen bank shall operate independently of ART clinics. The clinics shall work in connection with the semen banks. It further provides rules about the gamete or octet donors, their eligibilities, restrictions, responsibilities of semen banks.

It has not touched many of the ethical and social issues related to surrogacy and the rights of a woman and a child. It specifically provides for an agreement, legally enforceable where the surrogate mother can receive monetary compensation. Thus it approves indirectly the commercial surrogacy. Is India promoting reproductive tourism? Is it a compromising arrangement as an alternative to unsuitable, outdated adoption laws in India?

Surrogate arrangement has no doubt provided a big relief to the childless couples. The arrangement has given happiness of having a child of their own. The proposed Act has certainly taken into consideration the existing problems and anticipated complexities. The regulation is exhaustive but it is necessary to create awareness among the common man, medical fraternity in this regard. The rights of the surrogates are not taken care of in the bill. The availability of the ART technology its self pushes people to try and have their own child rather than adopt. Instead of talking about the rights and wrong of surrogacy we need to concentrate more about upon keeping check on misuse of the technology at the hands of the technocrats. Let the bill regulate technology and not the human lives.

4. Right to select place of delivery or Termination of Pregnancy:

Medical Termination of Pregnancy Act1971 strictly maintains that No termination of pregnancy shall be made in accordance with this Act at any place other than a hospital established or maintained by Government, or a place for the time being approved for the purpose of this Act by

Government.[19] A place may be approved by CMO provided the place fulfills certain requirement of operation table, anesthesia etc. In the same fashion till date home deliveries have not been prohibited by the Government but the Governments promotes and propagates the deliveries in hospitals by qualified doctors. Thus this monopolized section of choosing the place of delivery remains no more women's field only. The hospitals and other nursing homes do not take care the consent of pregnant women.

Conclusion:

Despite some legislative protection of reproductive rights in India, reproductive self-determination is not yet a reality for many Indian women. Low levels of access to contraception and lack of control over reproductive choices and health decision-making often mean that Indian women give birth too early in life and too frequently. Exacerbating this is poor nutrition, low levels of education, poverty, unhygienic living conditions and a public health system that fails to provide adequate antenatal care, access to safe abortion, emergency obstetric care or post-natal care.

It is estimated that 117,000 women die from pregnancy-related causes in India each year. With a rate of an estimated 450 deaths per 100,000 live births, India has the highest number of maternal deaths in the world. According to the Government of India's Millennium Development Goal Report from 2005, approximately 30 per cent of these were due to hemorrhages; 19 per cent from anemia; 16 per cent due to sepsis; 10 per cent due to obstructed labour; 9 per cent from abortion-related causes, and 8 per cent from hypertensive disorders. Maternal deaths reflect wider disparities; rates of maternal mortality vary dramatically by region and are highest amongst India's women who belong to scheduled castes and scheduled tribes.

Government efforts have focused on encouraging institutional delivery and population control. Janani Suraksha Yojana is a relatively new scheme in which cash incentives are offered to health workers and families for delivering in health centers instead of at home. While there are some areas this has met with success, widespread problems with access to quality maternal healthcare persist. Furthermore, the cutoff at two pregnancies for eligibility means overlooks the reality that many poor women do not have control over the number of their pregnancies.

Rural clinics and health centers are often too far and expensive for women to travel to reach. Facilities often lack proper equipment and lack available blood to be used in emergency obstetric care, which continues to be a factor in about half of all maternal deaths. High rates of absenteeism and unfilled vacancies may mean that upon arrival at a health centre, there may not be anyone there, or the facility may be closed. There are too few blood banks

and among those existing, many do not have enough blood in stock. Emergency obstetric care is not always available. Although ambulances are supposed to be able to carry women from primary and community health centers to better-equipped district hospitals when there are complications, the ambulances are either not existent or not functioning.

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A Review on Legal Ethics and Legal Profession

Mr. Mukesh Kumar Malviya*

Introduction:

Legal Practice is an integrated career. It is an accepted fact that there is no such other profession(s) like a legal profession, which shades the light on every angle of the society. Its fundamental target is to combat with tooth and nail for the right(s), liberty and peace, justice and safeguards the life of human beings and also shapes the society. Lawyers are unlike commercial merchants to mint the money like anything. Legal practice having its own ethical parameters known as Legal Ethics. Lawyers who fail to comply with the standard code of ethics in their courses of legal practice amount to professional misconduct. Disciplinary proceedings shall be conducted against such an advocate and punishment may be reprimand to disbarment. Ethical code is mandatory for every profession. A Greek physician "Hippocratic", who engrafted an ethical code for the medical profession called as "Hippocratic Oath". Professional Ethics encompasses a code of conduct for regulating the behavior of individuals who are concerned with profession.

Meaning and Definition:

The term "ethic" originated from the Greek language, "ETHIKOS". It means a set of moral principles. The Dictionary meaning of the word ethics is "the science of morals". It is a branch of philosophy which concerns human character and conduct. Now it is necessary to define the term 'moral', in order to perceive the actual meaning of the term ethics. 'Moral' means concerned with goodness or badness of human character or behavior or in wider sense it is an idea of what is right and what is wrong in the course of conduct. These ideas are considered as norms of ethics. Those norms are learned by a person first of all in his family and then in his society, trade or profession. Observance of these norms in the individual life not only safeguards him from evil habits and practices but also help in the maintenance honesty, dignity of the profession in which he is engaged.

Now the question arises that, what is character and conduct? Character and conduct are two sides of the same coin. These are especially connected to the moral aspects of human being. In this connection, for better understanding,

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I would like to invite the expression of 'Jhone Holt' who has contemplated that "The true test of character is not how much we know, how to do, but how we behave, when we don't know what to do". In other hand, conduct is known as behavior, manner or action. It is an external act. It can be ascertained easily. Character is internal factor. For instance, to be or not to be. Conduct is governed by character but character is not governed by conduct. Ethics of Legal Profession is the body of rules and practice which determines the professional Conduct of the members of the Bar. Professional Ethics for lawyers may be defined as a code of conduct written or unwritten for regulating the behavior of a practicing lawyer towards his client his opponent, witnesses, public, professional brethren, court, community and country.

Duty towards Client:

1. A lawyer should prepare the case with due care and skill.
2. A lawyer should present all relevant documents and materials before the court in support of them claim of his client.
3. A lawyer should not hesitate in placing all, before the court, which court reasonably and finally be submitted or on behalf of his client.
4. A lawyer should not try to deceive misguide the court in any manner.
5. A lawyer should prepare pleadings as far as possible according to the instructions of his client. It does not mean that he may follow all such instructions of his client blindly, however, client is a master of facts of his case.
6. A lawyer having primary duty in criminal case(s) to attend the court on every date fixed for hearing. It is his professional duty that he should not absent himself on such dates.
7. A lawyer should present himself in the court, when the case is 'called on' for hearing. Otherwise, he should inform court through his clerk or client.
8. A lawyer accounts of his client's money entrusted to him.
9. A lawyer should not leave entire management of his office to the clerk.
10. A lawyer returns the whole fees paid by client to him, if he is not in a position to conduct the case of client and it is put to an end.
11. A lawyer should not disclose communications made to them in course of their professional engagement even after the case is over.

Duty towards Opponent:

1. A lawyer should have fair treatment with opposite party.
2. A lawyer should not indulge in discussion of the case with opposite party.
3. A lawyer shall not misuse the weakness of the opposite party.
4. A lawyer should not suppress the facts.

5. A lawyer should not attempt to blackmail (or) corrupt practice with opposite party or counsel.

Duty towards Witnesses:

1. A lawyer should not involve in any malpractice corrupt practice with the witnesses.
2. A lawyer should not misguide the witnesses.
3. A lawyer should pay due respect to witnesses at every stage.
4. A lawyer should not misuse the privileges of cross-examination.
5. A lawyer should not cause embarrassment to the witnesses by putting objectionable questions.
6. A lawyer should not deliberately prolong the cross-examination of the witnesses.
7. A lawyer should not do aimless backing.
8. A lawyer should not appear as witness when he himself is pleading the case of a party.

Duty to professional Brethren:

1. A lawyer requires maintaining high confidence of the colleagues and juniors.
2. A lawyer has to extend mutual co-operation.
3. A lawyer should not to take-up a case in which his colleague is already engaged.
4. A lawyer requires extending mutual understanding with his fellow advocates.
5. A lawyer shall be ready to help the juniors.
6. A lawyer ought to safeguard the dignity and honour of the legal profession.

Duty to the Court:

1. A lawyer should be straight forward and his arguments should be pointed, clear, precise and concise.
2. A lawyer should have sense of honour and pleasing manners in his arguments.
3. A lawyer must be tactful in presenting the matters.
4. A lawyer should not mislead the Court.
5. A lawyer shall not influence the decisions of the court by any illegal or improper.
6. A lawyer shall appear in court at all times only in the prescribed dress. He shall not wear a band or grown in public places other than in courts.
7. A lawyer shall, when presenting his case and while otherwise acting before a court, conducting himself with dignity and self-respect.

8. A lawyer shall not enter appearance, act, plead or practice in any way before a court, Tribunal or Authority on behalf of close Kith and Kin.
9. A lawyer shall not criticize the judiciary with malice.
10. A lawyer should not at or plead in any matter in which he is himself pecuniary interested.
11. A lawyer shall not stand as a surely, or certify the soundness of a surety for his client, required for the purpose of any legal proceedings.
12. A lawyer shall assist the court by presenting fully pertinent law in his case.

Duty towards Community:

1. A lawyer shall establish 'Legal Aid Societies' for the purpose of rendering legal assistance to really poor and deserving persons free of any charge.
2. A lawyer shall help the local bodies such as Pantheist in villages to function on sound lines, so that people may discharge their functions in an enlightened and responsible manner.
3. A lawyer shall provide legal education to the illiterate and working people by informing them of their rights and legal provisions in simple language.
4. A lawyer shall compose family differences and settle petty disputes and controversies by amicable settlement.
5. A lawyer shall educate the masses on the right lines to come out of many social ills from which people are suffering.
6. A lawyer shall work with social welfare committees to promote a social order in which justice, political, economic and social, will be assured to one and all.

Duty towards Country:

1. A lawyer shall endeavour to make the laws suitable to the well being of the people.
2. A lawyer shall protect the liberty and freedom of the people.
3. A lawyer should protect the fundamental and human rights and respect the constitution of the Nation.
4. A lawyer should strive for social legislations to accelerate the advent of socialistic pattern of society in India by dedicating to public service.
5. A lawyer shall uphold the integrity and unity of the Nation.
6. A lawyer shall educate the people to respect the law and respect for the Courts and Judges.

The norms, of morals of the practicing lawyer shall be fixed keeping in view the Intellectual standing of high level, social responsibility and dignity of the

legal profession and high standard of integrity and efficient service to his client as well as public good.

Legal profession is a Nobel Profession and most beneficial to mankind. Such recognition has been given by the society, since so many centuries last. Legal Profession, which is meant for the service of the community at large. It is a fact that there is no such career as this profession which touches various aspects of human life. The lawyers are considered as guardians and vindicators of the two most vital things i.e. LIBERTY & JUSTICE, they can do so well only when they maintain certain ethical and intellectual standard so that not only the high dignity of the profession will be maintained but also the better quality of service would be available to public. Legal Practice is not a trade or business but a profession. It is an institution meant for Public Welfare. In other words, it is a Branch of Administration of Justice and not merely money making occupation. According to Chief Justice Marshal "the fundamental aim of the legal ethics is to maintain the honour and dignity of the law profession, to secure a spirit of friendly cooperation between the Bench and the Bar in promotion of highest standard of Justice, to establish honourable and fair dealings of the counsel with his client, opponent and witness; to establish a spirit of brotherhood in the Bar itself; and to secure that lawyers discharge their responsibilities to community generally".

Unfortunately, the noble objects of this profession are vanishing and various un-healthy practices are coming into existence in this profession. In the present days only to earn more and more money, cause of that the greatness and the honor of this profession is coming down. Such evil practices are prevailing, requires proper attention and suitable remedial measures to eradicate the same. Keeping in view of these noble ideology of the legal profession, The Bar Council of India has invoked a Practical Training Course (PTC) for the LL.B. first year, and B.S.L. third year, as a compulsory course. In which Legal Ethics Accountancy for lawyers and Bar - Bench Relations are concentrated, so as to make aware and upgrade the standard of honorable legal profession.

Conclusion:

All law teachers have responsibilities to give attention to the ethical underpinning of legal practice, and to sensitize law students to the ethical problems, they will face as practitioners to provide them with some assistance in the task of resolving these problems and to expose them to wider issues such as the unmet need for services. Moreover, the rules of Legal Ethics are made applicable for every learned lawyers and their observance be strictly watched by the respective Bar Councils of States. In so many countries of the world, the efforts have been made in this regard by framing the Rules of Legal

Ethics or by Incorporating Rules of Ethics in various Acts and Statutes. For instance, in India were made to regulate the acts and conducts of lawyers during their practice by the Legal Practitioner Act, 1879, The Bar Council Act, 1926. the civil Procedure Code,1973, Under Section 136 of the Transfer of Property Act, The Letters patent of the various High Courts. The disciplinary committee of the Bar Council of States has been held responsible to ensure the observance of the rules of the Professional Ethics by the lawyers and to punish any of them found guilty of Professional Misconduct.

Therefore, the Learned Lawyers and Law Learners are charged with responsibilities on their shoulders. They required to feel and understand that responsibilities and upkeep the "High tradition" and "Dignity" of the Law Profession. Philosopher Aristotle rightly stated that "It is better for a city to be governed by good man than by good laws". Think positive, encouraging, uplifting thoughts and the negative will soon disappear.

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Sustainable Development and Human Rights: An Overview

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Abstract:

It is a known fact that India is nature loving country on the ground of literature available from its ancient period but the society is dynamic in nature that's why greed in the name of development increased and scientific development provided impetus to developmental processes and impact of these unplanned industrial development are before us in form of environmental degradation. The principle of sustainable development and human rights are complementary to each other.

Although sustainable development principle is of recent origin in comparison to human rights declaration but environmental issue was not so severe at the time of declaration, and both are in consonance of objective to human rights. The compliance of this principle at domestic level is only way to save humankind. The unplanned industrial development is posing danger to survival of life on this planet. A healthy environment is primary requisite to entertain all rights provided by UDHRs. The genesis of this principle of sustainable development is a step to achieve the goal set by human rights declaration. By compliance of this principle the interest of next coming generation may be secure so that they can avail their rights as we are availing today. Environmental issue is different in nature so it makes international agencies more liable. Presently, states are realizing their international commitment to implement this principle at domestic level.

It is beyond doubt that after independence of India a number of laws have been enacted by the legislature under international commitment but the state has failed to discharge its responsibility. Accordingly, under international commitment as well as constitutional demand a number of environmental protection laws have been enacted by legislature but in reality the scene is not satisfactory. Now question is that how this "paper law" may become "living law"? There is inadequate sensitivity amongst the professional, technical and even judicial people too. Though international and national laws and policies have already provided various guidelines legal or executive, the concept of sustainable development still requires special attention and emphasis to bring awareness among industrialists and others engaged in the exploitation of natural resources so that dream of human rights may came in true. Therefore this paper is an attempt to examine the efficacy of the principle of sustainable development with regard to human rights with its past, present and future challenges for compliance.

Keywords: *Sustainable Development, Human Rights, Environment, Paper Law, Living Law.*

Introduction:

Human rights and sustainable development during the last few years have become not only a matter of national concern but of global importance. It is now accepted truth beyond all doubts that without a clean environment the

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very survival of mankind is at stake. International law was solely concerned with states in the classical period which was influenced by the theory of state sovereignty[1].The transformation of the position of individuals after the Second World War has been one of the most remarkable developments in contemporary International Law[2]. There are a number of views about place of individual in international law with their own justification. But now it is established fact that individual is also subject of international law and this debate has only academic importance. The two International covenants, i.e., Covenant on Civil and Political Rights, 1966 and Covenant on Economic Social and Cultural Rights 1966, alongwith Optional Protocol, have made successful representation of United Nation's effort to fulfill the principles of the Universal Declaration of Human Rights, 1948. These two covenants have legal force of treaties for the state parties, besides constituting detailed codification of Human Rights[3]. At the time of declaration the environmental degradation was not in question. Now question before international and national community is that how balance can be made in different competing rights?

Nature and mankind are inseparable parts of environment[4]. But change is the law of nature[5] and law, life, and legal institutions are not beyond nature. There are two type of changes one by nature and other by human being. The regulation of change by nature is not possible either by state or human being but change made by human being may be subject matter of regulation. There are a number of causes for environmental degradation but root cause is developmental processes at international and national level. Introduction of modernization in various spheres of economic activity –agriculture, industry, mining, forest, trade, transport and animal husbandry- with commercial outlook and technological competence brought big attitudinal change for maximization of profits[6].

Although human rights and sustainable development are in consonance but more liberal developmental rights create danger to environmental rights. Human rights declared by UDHRs may become in reality when principle of sustainable development followed at international and domestic level too. Therefore this paper is an attempt to examine the efficacy of the principle of sustainable development with regard to human rights with its past, present and future challenges for compliance in domestic legal system i.e. India.

Conceptual Frame Work:

Here, it will be relevant to discuss the concept of human rights and sustainable development one by one.

(a) Concept of Human Rights:

All the human rights recognized by the international organization were not easily available to our forefather. In due course of social development and legal maturity these rights came into existence. The rights available in the name of human rights are not absolute because in a civil society right may never be absolute. Absolute right will create new hurdle in the society. Now it is established fact that healthy environment has become the part of human rights in absence of this all other rights will be fruitless either it may be civil, political or economic, social and cultural.

(b) Concept of Sustainable Development:

Human beings and nature are inextricably connected and this fact has led to the view that protection of nature is a prerequisite for the survival of mankind[7]. The concept of sustainable development is not as old as human rights but it is the need of time. Development and environment are inseparable part in present scientific and technological era. We can harmonize these two competing interest by the principle of sustainable development only. The natural resources are not man made so utilization of the same should be in such a way that every one can share his own part according to their own way. In case of developed and developing nation, maximum part of the natural resources are owned by developed nation because they are competent to utilize these resources. In domestic level the scene is same. We can ask our selves that who can utilize the natural resources in the name of development? I think answer will be one, that who will be competent, and every body knows who are these persons at domestic level. The poor person who has born with equal human rights as capitalist or industrialists has but he enjoy their share inform of different difficulty due these developmental activities. This is again against natural justice. So compliance of this principle is in favor of rule of law as well as natural justice too.

Presently mankind faces overwhelming environmental problems. There is a direct link between development environmental degradation. The tragedy is that we are ourselves responsible for the environmental degradation. Human being in the name of scientific development doing deadly experiment by spewing noxious gases like carbon monoxide, carbon dioxide, sulfur oxides, nitrogen oxides, chlorine, chloroform, chlorofluorocarbons, methane etc. which has resulted in globally pervasive environmental problems as global warming, depletion of ozone layer, deforestation, acid rain etc.

With the rapid increase in the industrialization and population growth, there has been a depletion of our natural resources, including contamination of our rivers, lakes, seas, water, soil and air. The development process has now begun to exert pressure on the nature resulting in the impoverishment of men; Polluted air, water, and atmosphere are posing danger not only to the human race but also to global existence in the future.

No doubt industrialization is essential to improve the economy of a country and to solve unemployment problem, but not at the cost of the environmental which is essential to flourish all the human rights.

Constitutional Obligation:

As constitution is the supreme law of the land, has imposed an obligation to protect the natural environment both on the State as well as the Citizens of India. Part IV of the Constitution called the Directive Principles of State Policy has imposed certain fundamental duties on the State to protect the environment. Part IV A of the Constitution has imposed a fundamental duty on every citizen of India "to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures."It will be relevant to discuss constitutional obligation under following sub-heads.

(a) Constitutional Provision for Environment Preservation:

The provisions imposes obligation on state are as fallows:

Article 39 (b) of the Constitution of India provides that the State shall direct its policy to see "that the ownership and control of the material resources of the community are so distributed as best to sub serve the common good." The term material resources of the community' embraces all things, which are capable of producing wealth for the community.[8] The expressions 'material resources on the community' has been held to include such resources in the hands of the private persons and not only those, which have already vested in the State.[9]

The constitution of India through Article 42 has directed the State to endeavor to secure just and human conditions of work.

Under article 47 it imposes a duty upon the state to raise the level of nutritional and the standard of living of its people and improve public health.

The Supreme Court in Municipal Council. Ratlam v. Vardhichand[10] observed. "The state will realize that Article 47 makes it a paramount principle of governance that steps are taken for the improvement of public health as amongst its primary duties.

Of all articles, Article 48A which was added to the constitution by the Constitution of India 42nd Amendment act in the year 1976, expressly directs

the state to "to protect and improve the environment and to safeguard forests and wild-life".

The state is also required under Article 49" protect every monument or place or object of artistic or historic interest (declared by or under law made by Parliament), to be of national importance from spoliation, disfigurement, destruction, removal, disposal or export."

Article 51 provides that the state should strive to "foster respect for international law and treaty obligations."

In light of above Article we can say that constitution imposes an obligation over all authorities under the meaning of state to respect for international enactments.

Most important of all articles is Article 37 which declares that the directive principles contained in Part IV of the Constitution is "fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws."

The Supreme Court in M.C. Mehta v. Union of India[11] held that "these directive principles (Article 39 (b), 47 and 48 A) individually and collectively impose a duty on the state to create conditions to improve the general health level in the country, and to protect and improve the natural environment."

(b) Obligation on the Part of State:

The changes which held in society due to socio-economic and political factors have influenced the state. Now the nature of state is not the same as it was before these international developments. The expression 'State' is used an in all the Articles in part IV so one should understand the meaning of the word 'State'. The framers of the constitution of India chose to adopt the same definition for the word 'State' as defined in Article 12 for the purpose of Part IV of the Constitution as well.[12] The objective behind it was to enable the judiciary to interpret it so widely to bring all agencies and instrumentality of the state under the scope of the word 'state'. The purpose was to direct all such agencies and instrumentality of the state to apply the directive principles in making laws. The word state as defined in Article 12 and as interpreted by the Supreme Court through various cases decided by it means and includes:

1. The executive and the legislature of the union.
2. The executive and the legislature of the state.
3. The judiciary[13]
4. Local authorities like Municipalities, District Boards, Panchayats, Townships, Corporations, Improvement Trusts, etc. and
5. Other authorities which are agencies or instrumentality of the state.[14]

By a generous interpretation of the word 'State' the Supreme Court has now included many institutions including societies registered under the societies

Registration Act, 1860[15], a Government Company[16] incorporated under Sec. 617 of the Companies Act, and every 'other authority' as a 'state' if it is an instrumentality of the state. The wide interpretation given to the expression 'state' by the Supreme Court is to widen the scope and amplitude of the fundamental Rights and the Directive Principles of state policy. Hence now it has become the fundamental duty of all 'authorities' coming under the purview of article 12 to fulfill the obligations contained in Part IV of the constitution of India.

The legislature, both the Union and the state, to fulfill their fundamental obligations contained in the constitution, have enacted a number of legislation to protect and improve the natural environment and to safeguard forests and wildlife.

(c) Obligation on the part of Judiciary:

As mentioned above the judiciary is also the part of state under the meaning of word state as decided by judiciary himself. With this judiciary is one important in three pillar of democracy. Here it is relevant to discuss the role of judiciary because it is the place of justice where people see with hope. The judiciary, to fulfill its constitutional obligations was and is always prepared to issue 'appropriate' orders, directions and writs against those persons who cause environmental pollution and ecological imbalance. This is evident from a plethora of cases decided by it starting from the Ratlam municipality Case[17]. Vardhichand[18] provoked the consciousness of the Judiciary to a problem, which had not attracted that much attention. The Supreme Court responded with equal anxiety and raised the issue to come within the mandate of the constitution. In this case, the question related to the court's power to force public bodies under public duties to implement specific plan in response to public grievances, which related to environmental pollution.

The Supreme Court in Ratlam Municipality case observe: "Why drive common people to public interest action? Where Directive Principles have found statutory expression in Do's and Don'ts the court will not sit idly by and allow municipal government to become a statutory mockery. The law will relentlessly be enforced and the plea of poor finance will be poor alibi when people in nursery cry for justice. The dynamics of the judicial process has a new enforcement dimension not merely through some of the provisions of the criminal procedure code but also through activated tort consciousness. The officers in charge and even the elected representatives will have to face the penalty of the law it when the constitution and follow up legislation direct them to do are defied or dented wrongfully."

The Supreme Court in Rural litigation and Entitlement Kendra v. state of U.P.[19] ordered the closure of certain lime stone quarries causing large scale

pollution and adversely affecting the safety and health of the people living in the area.

Likewise, the Supreme Court in M.C. Mehta v. Union of India[20] directed an industry manufacturing hazardous and lethal chemicals and gases posing danger to health and life of workmen and people living in its neighborhood, to take all necessary safety measures before reopening the plant.

In yet another case filed by Mr. M.C. Metha it ordered the closure of all tanneries, which were found to be polluting the river Ganga[21].

The Supreme Court on another occasion[22] directed the Mahapalika to get the dairies shifted to a place outside the city and arrange for removal of wastes accumulated at the dairies so that it may not reach the river Ganga.

In the Delhi industries pollution case[23], the Supreme Court ordered for the shifting of 168 hazardous industries operating in Delhi as they were causing danger to the ecology.

In S. Jagannath v. Union of India[24] the Supreme Court has held that setting up of shrimp culture farms within the prohibited areas and in ecologically fragile coastal areas has adverse effect of the environment, coastal ecology and economics and hence, they cannot be permitted to operate.

The Supreme Court in A.P. Pollution Control Board II v. M. V. Nayudu[25] referred to the Resolution of the UNO[26] passed during the United Nations Water conference in 1977 to which India is a party and observed that "the right to access to drinking water is fundamental to life and there is a duty on the state under article 21 to provide clean drinking water to its citizens.

Above stated cases are very small portion of the contributions made by the judiciary to protect and improve the environment and to safeguard forests and wildlife.

(d) Obligation on the part of Citizen:

All these institutions in any democratic system are working for betterment of its citizen's life. The rights provided either through international enactment or domestic enactments are part of this very objective. Without co-operation of its citizen the natural resources of a state can not be protected. As citizens enjoy, fundamental rights, provided under part III of the constitution, so constitution imposes obligation on this part too. Here an observation is made in this regard. The constitution under part IV A, Article 51 A (g) has declared that it shall be the fundamental duty of a citizen of India "to protect and improve the natural environment including forests, lakes, rivers, and wildlife and to have compassion for living creatures".

Article 51A (j) has imposed on citizens another fundamental duty "to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavor and achievement."

The Rajasthan High Court in Vijay Singh Puniya v. State of Rajasthan[27]observed that "any person who disturbs the ecological balance or degrades, pollutes and tinkers with the gifts of the nature such as air, water, river, sea and other elements of the nature, he not only violates the fundamental right guaranteed under Article 21 of the constitution but also breaches the fundamental duty to protect the environment under Article 51 A (g). This observation was made in a writ petition filed against dyeing and printing units, which were discharging effluents and polluting the water sources used for agricultural and drinking purposes.

The question before us is whether we as citizens of India have fulfilled our part of obligation imposed by the constitution of India? The answer is "No".

Since man does not know how to behave, the necessity arises of legal responsibilities to prevent liberty from degenerating into license. It is true that eternal vigilance is the price of liberty. But it is true, in even a deeper sense, that eternal responsibility is also part of the price of liberty. Excessive authority, without liberty, is intolerable; but excessive liberty without authority and without responsibility, soon becomes equally intolerable.[28] Paras Diwan, in his "Environment Administration, Law and Judicial Attitude" has pointed out that the people in India love pollution to such an extent that they cannot live without it, because "traditionally we are a pollution loving nation. We pollute air by bursting crackers on Dussehara, Diwali and on the occasions of marriages and other festivals. We pollute our rivers by disposing of dead bodies and all other human and other wastes. We take out so much from wood from our trees for fuel that in many areas trees have become scarce. We are lovers of cleanliness and therefore, broom out all of our household and other waste on the public streets. Any space is good enough for us to case: we are country which believes in open latrines.

Municipalities are oblivious of their duties and all city wastes, human and industrial effluents are allowed to flow in open drains and to flood the streets. We are equally fond of noise pollution. Godmen's voice must be heard by all, day and night, and our Ratjagas, Akhandpaths and azan must use loudspeakers and amplifiers; no one should be deprived from hearing God and Godmen's voice and Gods too are far away beyond the hell and heaven. Our voice must reach them; otherwise our spiritual needs will remain administered. We are not less noisy in our secular matters. Our marriage and funeral processions must be accompanied by bands, twists and Bhangras[29].

In M.K. Janardhanam v. District Collector, Tiruvallur[30] the Madras High Court appreciated the petitioner for the efforts taken by him. "Under Article 51A (g) it is the fundamental duty of every one of the citizens of this country to protect and improve the natural environment including forests, lakes, rivers, all other water resources and wild life and to have compassion for living creatures. The petitioner should be complimented for discharging his constitutional obligation by bringing to the notice of this Court at the risk of his personal safety the unimaginable aggression on natural resources by unscrupulous element."

Indian society is different in comparison of other developed countries so there is a need to sensitize them about their right and duties. It is possible only through educate them.so that they can understand their duty for the state. While we are commendably concerned with the issue of 'Human rights' we may ask ourselves-are we equally mindful of the paramount need of legal responsibilities?

Conclusion and Suggestions:

On the ground of aforesaid discussion it is clear that we have not achieved desired result yet till today. Human rights and sustainable developments are the need of hour. In absence of these rights the existence of dignified life is not possible. "Rule of law" only is possible when these rights flourish in a democracy because it shows the maturity of that democracy. The equal distribution of natural resources is part of international and national legal system.

Although attempt has been made to combat the challenges to human rights and sustainable development but due to different factors these rights are not fully enjoyed. Lack of education is the main reason that people are not aware about their rights including human rights to environmental rights. The poverty is another reason because rights can be enjoyed only in the prosperous society. This dream only can become realty when state discharges its constitutional and other statutory obligations with a strong will. There is a need of long term policy so that people may enjoy their human rights in a healthy environment.

In the context of above discussion, following suggestions are made:

1. All the enactments should be reviewed at regular intervals.
2. After reviews, necessary changes should be included in that enactment.
3. The compensation and punishment in case of environmental damage should be increased and it should be reasonable.
4. There should be a separate commission with certain powers and duties to tackle environmental issue.

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Surgical Medical Negligence under Consumer Law in India

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Abstract:

Negligence in the medical world has great importance in relation to the medical malpractices suits in various countries including India. The Constitution of India does not provide any special rights to the patient. Medical Negligence is a kind of professional negligence. Negligence may be defined as 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 affairs would do, or doing something which a prudent and reasonable man would not do". The legal position of medical negligence and the tests to determine it was first described in Bolam vs. Friern Hospital Management Committee which was accepted by Indian Apex Court. Relation between Doctor and patient is a contract for service and can be described under Sections 2(1) (g) and 2(1) (o) of Consumer Protection Act, 1986. So deficiency of service is the basis for liability for medical negligence and the doctor must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Later on the Apex Court in Indian Medical Association vs. V.P. Shanta enunciated certain principles that medical practitioners, government hospitals, and private hospitals and nursing homes are also covered under Consumer Protection Act, 1986. This paper further investigates the recent trends Apex Court and NCRC in expanding the scope of medical negligence in case of surgery.

Key Words: Medical, Negligence, Professional, Surgical

Introduction:

Purpose, Object & Background of the Study: A doctor owes certain duties to the patient who consults him for illness and deficiency in this duty results in negligence. Negligence in the medical world has great importance in relation to the medical malpractices suits in various countries including India. The Constitution of India does not provide any special rights to the patient. Previously patient's rights were basically indirect rights, which flow from the obligations of a physician or health care provider under the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002. But after 'right to health' was regarded as right to life[1] under article 21 of constitution of India, patients' right is also recognised with great Importance.

The adjudicating process with regard to medical professionals' liability for 'Medical Negligence' considers common law principles relating to negligence, i.e., vitiated consent, and breach of confidentiality whether it is in a consumer forum or a regular civil or criminal court. But in India the position

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of Medical Negligence under the Consumer Protection Act, 1986, is stronger than procedures in regular criminal or civil court in providing relief to the patients. The Apex Court in Indian Medical Association vs. V.P. Shanta[2] enunciated certain principles that medical practitioners, government hospitals, and private hospitals and nursing homes are also covered under the concept of 'deficiency of service' of Consumer Protection Act, 1986. This paper investigates the recent trends of Indian Courts and Consumer Forums in expanding the scope of surgical medical negligence which in turn will prove that the concept of negligence is the basis of "deficiency in service" and law of consumer protection in India in this regard has been expanded a step ahead for the development of Medical practitioner's liability in case of surgery for protecting Patients' rights by the courts and forums in India.

Concept of Medical Negligence:

The Concept of 'Medical Negligence' has evolved from the conception of 'Negligence' and it is basically related to professionals. Professionals are the category of persons professing some special skill such as lawyers, doctors, architects etc. generally[3]. Before going into the definition of 'Medical negligence', the term 'negligence' should be clarified. Negligence is defined as 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 affairs would do, or doing something which a prudent and reasonable man would not do"[4]. The definition involves three constituents of negligence: (1) A legal duty to exercise the due care on the part of the party complained of towards the party complaining the former's conduct within the scope of the duty, (2) Breach of the said duty, and (3) consequential damage[5].

A doctor who is giving medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for that purpose. A Doctor when consulted by a patient owes him certain duties, namely, (a) a duty of care in deciding whether to undertake the case, (b) a duty of care in deciding what treatment to give, and (c) a duty of care in the administration of that treatment. A breach of any of these duties gives a cause of action for negligence to the patient[6].

How Medical Negligence comes under the purview of Consumer Protection Act:

The concept of medical negligence under Consumer Protection Act, 1986 depends on various factors:

- Whether patients are consumers?
- What is the nature of the doctor-patient relationship?

- Whether professional negligence by doctors can be brought under 'deficiency of service' concept under Consumer Protection Act, 1986?

The Consumer Protection Act, 1986, defines 'Consumer'[7], 'Deficiency'[8] and 'Service'[9] separately. But confusion arose among the various contradictory decisions delivered all over India by Consumer Forums[10]. The Apex Court dealt with these questions in Indian Medical Association vs. V.P. Shanta[11] and clarified that the relationship between doctor and patient is 'contract for service' and not 'contract of Service' though there exists the concept of trust and confidence as put forwarded in the averments[12]. The difference between 'contract for service' and 'contract of service' was stated in the case of Dharangadhara Chemical works Ltd. Vs. State of Saurasthra[13] by which it is clear that the patient-doctor relationship is not contract of service[14] and thus service rendered to patient by way of consultation, diagnosis and treatment by way of both medicinal and surgical will fall within the ambit of Section 2(1) (o) of the said Act. The medical service which is rendered free of cost will not be regarded as service under the Act[15]. The paid-services which are provided by the medical practitioners to the patients fall under this Act[16]. In case where both paid and unpaid medical services are available, both of these services will be under the Consumer Protection Act[17]. This judgement was followed by various State Commissions in India in case of surgical medical negligence. If the medical practitioner has taken the fees for the surgery, the complainant is consumer[18] and if no charges are paid for incidental expenses for operation then the complainant is not consumer[19]. The husband is also consumer if he is beneficiary and agruement for second class heir is not tenable[20].

Medical Negligence: How to Determine?

The skill of medical practitioners differs from doctor to doctor. The Supreme Court stated, "The very nature of the profession is such that there may be more than one course of treatment which may be advisable for treating a patient and as long as a doctor acts in a manner which is acceptable to the medical profession and the Court finds that he has attended on the patient with due care skill and diligence and if the patient still does not survive or suffers a permanent ailment, it would be difficult to hold the doctor to be guilty of negligence"[21]. Thus it is very difficult to determine medical negligence.

The test to determine medical negligence was first described in Bolam vs. Friern Hospital Management Committee[22] and it clarified that "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. In the case of a medical man, negligence means failure to act in accordance with the standards of reasonably competent medical men at the time. A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by

a responsible body of medical men skilled in that particular art"[23]. The Bolam's test is approved by Supreme Court of India in various cases like Jacob Mathew (Dr.) Vs. State of Punjab[24] and the court held that a professional may be held liable for negligence on one of two findings[25]:

- 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.

The standard to be applied for judging the negligence would be that of an ordinary competent person exercising ordinary skill in that profession as it is not necessary for every professional to possess the highest level of expertise in that branch which he practices.

In Dr. Kunal Saha vs. Dr. Sukumar Mukherjee and Others[26]**,** the National Consumer Commission summarised the real test for determining 'deficiency in service' in the medical negligence law referring to the Halsbury's Laws of England[27] which is as follows:

a) The practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care.

b) Failure to use due skill in diagnosis with the result that wrong treatment is given is negligence.

c) It is neither the very highest nor a very low degree of care and competence but to be judged in the light of the particular circumstances of each case.

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.

Medical Practitioners, when enter into this Profession, undertake to bring to the exercise of a fair, reasonable and competent degree of skill[28]. A Doctor or a Surgeon never undertakes that he will positively cure a patient or will use the highest possible degree or skill, as there may be person more learned and skilled than himself. There is notable difference between the 'standard of care' and the 'degree of care' of Medical professionals. The standard of care is a constant and remains the same in all cases. Thus, though the same standard of care is expected from a generalist and a specialist, the degree of care would be different. In other words, amount of reasonable care with regard to the specialist and the generalist would be different[29].

Surgical Medical Negligence: Recent Trend of Courts and Forums in India:

In case of surgery, the doctors owe various duties towards patients which includes not only due care and protection during Operation/Surgery but also pre and post operative care etc. There are various factors which have been taken into consideration by the courts and forums. The recent trends of courts and forums in India in dealing with Surgical/Operational Medical negligence can be summarised as follows:

- Improper administration of Anaesthesia without proper check up before surgery can lead towards medical negligence[30]. Proper record and explanation must be maintained while giving two anaesthesias in Operation Theatre[31]. The forums are also of the opinion that the hospital authority is liable for the negligence of professional men employed by the Authority under contracts for service as well as under contracts of service[32]. In some cases doctor who is performing surgery can also be jointly liable with anaesthetist[33].
- In case of Surgery consent must be taken from the patient and the records should be kept accordingly[34]. If the medical practitioner has taken proper consent and care, no deficiency of service exists there[35]. If the Consent has been taken but the risk factors are not explained to the patient, it is negligence and deficiency of service[36].
- If the required tests are not done before surgery or wrong report is given before surgery, it is medical negligence[37]. Incomplete prior investigation before operation is also deficiency of service[38]. If post operative care is not advised and not taken, it is a case of medical negligence[39]. If Pre and Post operative care is reasonably taken by the Medical Practitioner, there is no negligence[40].
- If major surgery is conducted without proper infrastructure, it is negligent surgery[41]. During operation the doctor must take due care. Operation by an unqualified person is negligence and thus it is deficiency of service[42]. But operation done by an orthopaedic surgeon instead of Neuro-surgeon is not negligence and lack of exercising reasonable care[43]. If foreign body is left inside the body during operation, it is a negligent operation[44].
- The Doctor is not negligent if he can provide the proper explanation why the decision was taken during surgery[45]. Delay in operation[46] can also make the Doctor liable for negligence. If the patient is negligent and take measures contrary to the advice of the doctor after operation then the doctor cannot be made liable for medical negligence[47]. In a very critical case if four stage operations are needed and which is not possible, then there is no negligence on part of the doctor[48].

Conclusion:

The jurisprudential concept of negligence differs in civil and criminal law. The degree of negligence in civil law is not same as that in criminal law. In criminal law, the element of mens rea must be there in negligence to constitute an offence. For an act to amount to criminal negligence, the degree of negligence should be gross or of a very high degree. Negligence which is neither gross nor of a higher degree can be a ground for action in civil law but cannot form the basis for prosecution. In addition to this, regular courts are overburdened with case and thus cannot provide speedier remedy. For these reasons, Consumer Protection Act, 1986 is preferred. To establish negligence or deficiency in service under Consumer Protection Act, 1986, sufficient evidence that a Doctor or a hospital has not taken reasonable care while treating the patient, should be shown. 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 of a hospital has undertaken. The Supreme Court held that there are various mode and course of treatment and if a Doctor adopts one of them with due care and caution the Court could indeed be slow in attributing negligence on the part of a Doctor if he has performed his duties to the best of his ability and with due care and caution[49]. In India, the Bolam's test is applicable, but then also some flaws exist which can be overcome by applying Bolitho[50] Test. In this test the testimony for the medical professional can be found to be unreasonable which is applied in very rare cases in India[51]. So, the Courts and forums in India must use more comprehensive approach in deciding medical negligence cases.

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Honour Killing a Menace for Civilized Society- Need of New Legislation to Curve the Problem

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From the very inception of human civilization, the certain rights are given to all human to make his/her family. But there are certain restrictions are imposed as well on this right on the basis of caste religion race and colour etc. But due to globalization, the society has gradually changed and became more advance than before. Though this change can be easily perceived across the world but its pace differs and developing countries are far behind from developed countries. There in developing countries the societal norms and religious sanctions are prevailing in all sphere of human life so strictly. Accordingly they are bound to follow such social and religious rule and thereby the some of very important individual rights get affected very badly. Right to get marry according to will is not well supported in such developing countries and with some exception no one is free to choose his/her spouse. And if they do so the problem may arise. And present situation is becoming more critical due to this a no. of murders are taking place every day in the name of to save honour of family. And such heinous practice is called "honour killing" now a days. This is continuing in most of developing countries because people of this part (third world countries) strictly follow the traditional (patriarchal) and orthodox (religious) values.

And such "honour killings" have been rampant in orthodox and socially backward in many countries including India, Bangladesh, Pakistan, Turkey, Jordan and the Palestanian Territories etc. And reports by human rights organizations show that cold-blooded murders in the name of saving family's pride had been prevalent in many parts of the world, while statistics are hard to come by due to non-reporting of such crimes. United Nations Population Fund approximate that as many as 5,000 women murdered in this manner each year around the world. But this is undoubtedly a low estimate as reports from many countries are filtered and not brought to public notice. An "honour killing" is carried out because the honour of men in the family is perceived to been injured. Though this offence is done against the women mostly but loose term it applies to killing of both males and females in cultures that practice it. An "honour killing" (also called customary killing) is

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the murder of a (typically female) family or clan member by one or more fellow (mostly male) family members, in which perpetrators (and potentially the wider community) believe the victim to have brought dishonour is normally the result of the following behaviours, or the suspicion of such behaviours:

(1) utilizing dress codes unacceptable to the family/community,
(2) wanting to terminate or prevent an arranged marriage or desiring to marry by own choice, or
(3) engaging in certain sexual acts, including those with the opposite sex or same sex.

Such killings or attempted killings result from the perception that the defence of honour justifies killing a person whose behaviour dishonours their own clan or family.

Though this offence mostly committed against the females but there are some evidences that homosexuality can also be perceived as ground for "honour killing" by relatives. In one case, a gay Jordanian man was shot and wounded by his brother. In another case, a homosexual Turkish student, Ahmet Yildiz, was shot outside a cafe and later died in the hospital. Sociologists have called this Turkey's first publicized gay "honour killing". When we analyse this then we found another threat here in our country because presently gay and lesbian rights has been protected by our judiciary on the basis of right to equality (Art. 14). The position may become more burst because gay and lesbian relations are not socially and religiously accepted here.

Despite "honour killing" have been documented among a variety of ethnic and religious groups throughout the world, but recently most prevalent in Southern Asia, the Middle East, and the North Africa, but here aim is to deal with Indian scenario where this problem becoming more and more critical day by day. "Honour Killings", which are widespread in some of the economically advanced State, is an example. Perpetrated under the grab of saving of the "honour" of the community, caste, or the family, such incident occur often as the State governments are not keen to take action. The act of violence include public lynching of couples, murder of either man or the woman concerned, murder made to appear as suicide, public beatings, humiliation, blackening of the face, forcing couples or their families to eat excreta or drink urine, forced incarceration, social boycotts and the levying the fines.

The largest number of cases was found to have occurred in Punjab, Haryana and Uttar Pradesh – most of the incidents reported at the convention took place in these three States. One reason for the increased visibility of such

crimes is the trend of more and more girls joining educational institutions, meeting others from different backgrounds and the caste and establishing relationships beyond the confines of caste and community. Such individuals, both boys and girls, are being targeted so that none dares to breach the barriers of castes and communities. Significantly, in the majority of the cases it is economically and socially dominant castes that organize instigate and abet such acts of retribution.

In Muzaffarnagar district in western Uttar Pradesh, at least 13 "honour killings" occurred within nine months in 2003. In 2002, while 10 such killings were reported, 35 couples were declared missing. It was estimate that Haryana and Punjab alone account for 10 percent of all "honour killings" in the country. It is not surprising that no so such category of crime exists in the government records. In fact there is refusal even to recognise this phenomenon. Data for such incidents are seldom available and they would mostly be classified under the category of general crimes. Moreover, most of such cases go unreported and, even when reported, often First Information Report (FIR) are not filled and post mortems are not conducted.

Caste Panchayats have to come play an increasingly important role in Haryana and elsewhere, especially in situation where political patronage also exists. Central to the theme of honour and violence is the subordinate position of the girls and women in all castes, communities and religions. A woman's chastity is the "honour" of the community and she has no sovereign right over her body at any point of time in her life. The retribution is particularly swift and brutal if she crosses caste, class and religious barriers to choose a lower-caste man as her partner. Though at present problem relating "honour killings" is because of class and castes but root cause is with the religion though it was present before the concept of religion as well.

On this issue our Supreme Court termed the practice an act of barbarism. It ordered the Police across the country to take stern action against those resorting to violence against young men and women of marriageable age who opted for inter-caste and inter-religious marriages. In the case of *Lata Singh Vs State of Uttar Pradesh And Others 2006 (5) SCC 475* the apex court directed: "Since several such instances are coming to our knowledge of harassment, threats and violence against the young men and women who marry outside their caste, we feel it necessary to make some general comments on the matter. The nation is passing through a crucial transitional period in our history, and this court can't remain silent in matters of great public concern, such as the present one. The caste system is a curse on the nation and the sooner it is destroyed the better. In fact, it is dividing the nation at a time when we have to be united to face the challenges before the nation unitedly. Hence

inter-castes marriages are in fact in the national interest as they will result in destroying the caste system. We sometimes hear of "honour killings" of such persons who undergo inter-castes or inter-religious marriage of their own free will. There is nothing honourable in such killings, and in fact they are nothing but barbaric and shameful acts of murder committed by brutal, feudal minded persons who deserve harass punishment. Only in this way we can stamp out such acts of barbarism".

On June 23, 2008 Justice K S Ahluwalia of the Punjab and Haryana High Court made a revealing observation while simultaneously hearing 10 cases pertaining to marriages between young couples aged 18-21: "The High Court is flooded with petitions where..... judges of this Court have to answer for the right of life and liberty to married couples. The State is mute spectator. When shall the State awake from its slumber (and) for how long can Courts provide solace and balm by disposing of such cases?"

On June 22, 2010 the Supreme Court issued the notice to the Central Government and nine States in the face of rising Honour Killings across the country on the Public Interest Litigation filed by Shakti Vahini. The Court wants to know what steps are being taken to curb such violence.

Honour Killings are homicide and murder which are serious crimes under the Indian Penal Code. It also violates Articles 14, 15(1) & (3) 19, 21 and 39(f) of the Constitution of India. It is against the various International Commitment the Government of India has made in the "United Nations Convention on the Elimination of all forms of Discrimination against Women"(CEDAW) of which India is signatory and has also ratified the Convention. It is also against the spirit of Universal Declaration of Human Rights and International Covenant on Civil and Political Rights.

The Central Government has made its view clear that it is coming out with a new legislation. Under the proposed law, members of the Khap Panchayats or the victim(s)' families, if their action results in the death of the person of persons who they feel went against the tradition of wishes of the Khap, will be punishable with the sentence of death or life imprisonment. In such cases, entire Panchayat will be held responsible. More importantly, the proposed law puts the burden of proof on the accused, thereby making them responsible to prove their innocence in the event of death taking place due to their actions.

Among other things, the draft bill intends to add a clause to Section 300 of the IPC. Section 300 deals with the crime of murder, the maximum punishment for which is death and/or a fine. It also wants to amend the Indian Evidence Act and the Special Marriages Act, 1954, which would do away with the provision for the mandatory 30 days notice period for marriages intended

to be solemnized under this Act. The new bill is also expected to bring in a definition of such "honour killings" so that it will be treated as special crime and will ensure clarity for the law enforcement agencies.

Even after the judgement in the Manoj and Babli case by Karnal Court in which five people were awarded death penalty the diktats of such Khap Panchayats have increased and have become more and more organized. The killings are increasingly being reported and being glorified by such community groups. They just refuse to acknowledge the Rule of Law. So curve this great threat to the society there is need to take stringent action against it and there is need of new legislation and amendments in old one where it necessary.

The present study adopts analytical, descriptive and evaluative methods to draw conclusions and inferences. The materials for the present study have been collected from primary and secondary sources. And the study relies on the judgements of the Apex Court and the High Courts.

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Causes, Issues and Impact in Medical Profession: A Study with special reference to Medical Negligence

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Introduction:

Medical Practitioners should maintain standard norms the principal objective of the medical profession is to render service to humanity with full respect for the dignity of profession and man. Medical Practitioners should merit the confidence of patients entrusted to their care, rending to each a full measure of service and devotion. Medical Practitioners should try continuously to improve standard norms of medical knowledge and skills and should make available to their patients and colleagues the benefits of their professional attainments. The Medical Practitioners should practice method of healing founded on scientific basis and should not associate professionally with anyone who violates this principle. The honored ideals of the medical profession imply that the responsibility of the physician extend not only to individuals but also to society.

Due to the lack of facilities and care towards patients in government hospitals people are forced to visit private hospitals. Even in small cities private hospitals have mushroomed up. These private hospitals are more driven towards money making than treating patients with care and attention. Unnecessary medical tests are done and medicines prescribed to enhance their profit. In the light of these developments doctor patient relationship is needed to be relooked.

Causes of Medical Negligence:

There are number of causes of medical negligence in India. We are focused basically on failure to attend or treat; wrong Diagnosis; failure of advice & communication; error in treatment and quacks or unqualified Medical Practitioners heads with reference to judicial examples.

(1) Failure to Attend or Treat:

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Sometimes medical practitioner's failure to attend patient to her personal interest but the professional ethics does not allow doing so. A private and government medical professional both are liable to attend to patient if they or on duty. No medical practitioner anywhere in the world, who does not already have an obligation to treat a person by way of his employment or otherwise, can be sued for refusing treatment, even in an emergency.

If a medical practitioner makes unwarranted assumptions about his patient's condition without examining him, he is at peril of an action for negligence.[1] In *Corder v. Banks*[2] the plaintiff's telephone message to the defendant's surgery did not reach him. Consequently, the defendant did not attend and deal with the bleeding. *McNair J.* held that defendant was negligent.

If medical practitioner does not care to attend to a patient admitted in the emergency ward of a hospital and the patient dies, the medical practitioner would be liable to pay compensation. In *Sishir Ranjan Saha v. The state of Tripura*[3] the medical practitioner was busy in attending his private patients and did not bother to come to the hospital to attend to the accident victim. The medical practitioner was held to liable to pay ₹ 1, 25,000 as compensation for the death of the deceased.

In *Harding v. ScottMoncrieff*[4] a general practitioners who had made a differential diagnosis which included pulmonary embolus and myocardial infection was held to have been negligent in failing to stay with the patient, failing to telephone for ambulance service to take the patient to hospital as an emergency, and failing to administered a diuretic or aspirin, all of which were considered to be standard practice in the circumstances.

(2) Wrong Diagnosis:

A medical practitioner owes duty to correctly diagnose the patient's condition and exercise reasonable skill while treating the patients. Failure to exercise due care while diagnosing and providing treatment amount to medical negligence.[5] If a medical practitioner fails to diagnose a relatively common or obvious illness or injury, then he is likely to be held negligent.[6]

Approximately 1.5 million people are injured by prescription wrong diagnosis or drug errors annually. Prescription errors are one of the more common types of medical negligence, and often they can prove deadly.[7]

In a case wherein permanent disability was caused due to unskilled treatment of fractural arm, the doctor was held guilty of negligence of negligence for not advising or adopting for surgical invention when there was no possibility of union of the bone. The State Commission, U.P. directed the doctors to pay compensation of ₹ 1, 63, 000 and cost of ₹ 5,000 to the complainant.[8]

In this case of mixing of wrong combination drugs, the facts were that the accused was a medical practitioner in-charge of a hospital attached to a mill.[9] Some time medical practitioners prescribe wrong combination drug like this case *Banarasi Das Kankan v. Shyam Behari Lal,*[10] where a doctor had prescribed a novel and dangerous mixture for the trouble in ear to the patient, had failed to given the warning that it must be vigorously shaken before use, was held to be negligent.

In *Jayender Maganlal Padiya v. Dr. Lalit P. Trivedi*[11] the patient was treated for fever, swelling on lips, followed by lesions both inside and outside the mouth. The medical practitioners gave treatment for measles for measles for about five days. Ultimately the disease was diagnosed as Stevens Johnsons Syndrome which reaction of sulphur drug. The patient lost eye-sight and became permanently disabled at the age of 12 years, due to wrong diagnosis and treatment given by the medical practitioners. The State Commission, Gujarat, held the medical practitioners guilty of negligence in not diagnosing Stevens Johnson's Syndrome, but he was not held liable for loss of vision of the patient resulting in permanent disability for the whole life.

In *Dayanand Medical College & Hospital, Ludhiana v. Jugal Kishore Syal*[12] the complainant was suffering from ulcerative calitis, got examined as having pain in stomach. Medical practitioners diagnosed the same as cancer. Believing the report of the medical practitioners, the complainant was admitted in hospital and underwent a major surgery for cancer. Subsequent report declared the case of complaint as a simple case of ulcerates colitis. It was held that the medical practitioners committed negligence in service by given a wrong report.

In a case victim Randhir Singh was suffering from heart disease, that due to a wrong diagnosis, he was treated for tuberculosis and as a consequence he died due to heart disease. The High Court held that the above amounted to criminal negligence on the part of the prison officials.[13]

(A) Failure to take full Medical History:

Every medical practitioner must take full medical history of patients. The patient's medical history may include not only the signs and symptoms of the illness or injury for which the patient is seeking treatment, but also details of any previous treatment either for the same condition or, in appropriate circumstances, a previous injury or disease.[14] The duty to take a full history obviously required the medical practitioners to listen to what the patient is saying. Sometimes, particularly if the patient is considered to be 'difficult', medical practitioners may disregard or discount what the patient is telling him and this can colour the diagnoses. A failure to listen to a patient who is

describing symptoms which would affect diagnosis and treatment will amount to negligence, where harm results.[15]

In India the medical practitioners should maintain medical the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulation, 2002. Regulation 1.3.1 reads "every physician shall maintain the medical records pertaining to his/her indoor patients for a period of three years the date of commencement of the treatment in a standard proforma laid down by the Medical Council of India and attached as Appendix3". A close reading of this regulation makes it clear that this regulation applies not to every hospital but to "every physician" who treats patients on indoor basis. Such "every physician" is required to preserved not the actual case record/case sheet but simply the summary of the case record of patients treated by him in any hospital in a simple format which treated by him in any hospital in a simple format which is given as a "slandered proforma" given as an appendix to the regulation.[16]

In *Ruiz v. Mount Saint Joseph Hospital*[17] a medical practitioner failure to ask the patient about a history of jaundice when symptomatic gallstones were suspected was held to be negligent. The patient died, 14 days after surgery from the removal of gallstones, from complication known to be associated with abdominal surgery carried out in presence of chronic liver disease.

(B) Over Testing or Unwanted Pre-Medical Test:

Some time medical practitioners prescribe unwanted pre medical tests in their own hospital and dispensary but acutely they are not necessary but as patient want quick relief they do this checkup and waste money and suffer physical and mental pain unnecessarily. Claims are sometime made about defensive medicine suggest that defensive practices tend to be manifested in the form of unnecessary diagnostic tests. If a diagnostic test or procedure is unnecessary by reference to the standards of the medical profession, i.e. according to the standards of the reasonability competent medical practitioner exercising and professing to have that skill, it will be negligent to perform it, and it will be actionable if the patient suffers injury as a consequence.[18]

This was the essence of the claimants' action in *Maynard v. West Midlands Regional Health Authority*[19] namely that the defendant had undertaken an unnecessary diagnosis operation during which an inherent risk of the procedure materialised, causing her injuries.

This would apply with as much force to unnecessary diagnostic tests, such as asking for blood test and X-rays, as it would it would to unnecessary operations, such as Caesarean section. For example, the Healthcare Commission has reported on a number of incidents in which patients have

been exposed to radiation unnecessary or to level of radiation that were excessive. As the Commission noted, unnecessary doses of radiation can cause distress and in extreme cases has the potential to cause harm. The most common error was X-raying the wrong patient, followed by operator error, X-raying the wrong part of the body, and procedure being unnecessary repeated.[20] This type of professional conduct is not only against ethics of the profession but it also amount to unfair trade practice and medical autonomy for which liability has also been imposed on such professionals under the provisions of the Consumer Protection Act 1996.[21]

(C) Prescription of a Higher Price Medicine:

It is greatest example of medical autonomy and consumerisms. A medical practitioner is totally free to prescribe higher medicine in his own clinic. They write a symbolic hand writing which can be read only by their own clinic pharmacist. It is difficult that a common man would know about chemical combination of medicine; but the patients have right to obtain good quality medicine. Sometimes medical practitioners prescribe higher price medicine. If you are suffering from some illness can go to a medical practitioners than they prescribe a medicine ₹100 but you do not know about combination of medicine the seme medicine are in new combination ₹20 but chemical formula is same, you loose your money.[22]

Sometimes medical practitioners prescribe more medicines than necessary and more over under the letter pad of a particular medical shop. And generally the patient approaches that shop to purchase those medicines. There exists a contract between medical shop and the medical practitioners and also between pharmaceutical companies and the medical practitioners so as to prescribe the higher price product of their company.[23]

Now government steps toward making it mandatory for medical practitioners to prescribe low-cost generic drug, and not higher-priced branded medication. It is mandatory for pharma companies to reveal any payment made by them to medical practitioners. Such payment, whether by pharma companies or testing labs, ought to be banned by law.[24]

(3) Failure of advice and Communication:

The communication between a medical practitioners and the patient plays an important role in strengthening the therapeutic relationship. Good communication is soul of good medical care. Communication improves the level of patient's satisfaction and helps in providing quality care.[25] There must be adequate communication between the parties as to the condition diagnosed, the treatment so far given and, possibly, the treatment required.[26] But in present time medical practitioners lost their responsibility and they involve in

commercial activities. Medical practitioners fail in rendering advice and communications to patients.

In *Sidaway v. Governors of Bethlem Royal Hospital*[27] the court of Appeal held unanimously that failure to give patient sufficient information would not vitiate his consent to an operation. In *Hutchinson v. Epson St. Helier NHS Trust*[28] defendant was held to have been negligent to fail to advise a patient who was a heavy drinker, and at serious risk of developing fatal cirrhosis of the liver, to stop drinking alcohol. Whether a failure to advise a patient to stop smoking would be negligent in same way?

In *Cooper v. Royal United Hospital Bath NHS Trust* the medical practitioner were held to be negligent in failing to advise the patient, who had a history of breast disease, of the desirability of having a respect biopsy, giving the claimant the impression that a repeat mammogram in a year's times was of equal diagnostic value.

(A) Failure to take consent:

Any medical treatment which is given without consent constitutes trespass to the person[29] saves in exceptional circumstances.[30] Consent means two or more persons are said to consent when they agree upon the same thing in the same sense.[31] Consent is said to be caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake.[32] Where the medical practitioners proceed with the treatment on the basis of such consent, it can very well be said that he proceeded without real and true consent and that action based on trespass, battery will lie against him.[33]

Consent to medical treatment must be freely given. In other words such consent must be obtained by course, it will be reasonable for a medical practitioner to put great pressure on a patient to accept treatment which is plainly for his benefit. A child under 16 is capable of freely consenting to medical treatment, provided he or she has adequate understanding.[34] If medical practitioners are not taken freely consent to medical treatment is liable for torts of assault and battery.

In *Murray v. McMurchy*[35] a surgeon was not entitled to carry out an unauthorised procedure during the course of an operation merely because it was convenient or desirable to do so. In *Ram Bihari Lal v. Dr. J.N. Srivastava*[36] the medical practitioner after taking permission to remove the appendix found at the start of the operation that the appendix was normal. He then took another insertion and removed the gall bladder of the patient without consent of the patient husband, waiting outside consent of the patient's husband, waiting outside consent of the patient husband, waiting outside the operation room. The gall bladder did not need an emergency operation. But

the operation took two hour to be completed. Throughout this period, the patient was under chloroform. The patient died on the third day of the operation, owing to the toxic effects of chloroform and renal failure, as her liver and kidney were further damaged by the chloroform. The operation was performed in an ill-equipped hospital, with no anesthetist or other basic facilities like oxygen and blood transfusion. It was undertaken without the necessary investigations, such as urine test and without preparing the patient for the operation. The medical practitioner was guilty of negligence and to pay damages.

(B) Failure to give proper Instructions to the Patient:

A medical practitioner's duty to give proper instruction to the patients and warn about the risk of his/her ailment, advising appropriate treatment strategy and warn against the risk involved. Where a medical practitioner is aware that the patient lifestyle may be putting his health at serious risk there will be a duty to advise the patient to take appropriate steps to reduce that risk.[37]

Medical practitioners must need the patient co-operation, in performing an examination or administering the treatment. It may be simple as requiring the patient to keep still or instruction the patient about taking medical prescription in the right quantity and at the right times of day. It may also be necessary to give the patient a warning as to any danger signs that he should look out for e.g. as to the side-effects of a drug or the symptoms that indicate that his condition is deteriorating with instructions as to what should be done if they occur, such as stopping the medical prescription or seeking medical assistance immediately.[38]

The medical practitioner was held liable on the basis that the warning, although the very warning that he had been taught to give, was inadequate to enable the claimant to be safe, because the words used would not indicate to a reasonable person that his safety dependent on his informing the medical practitioner as soon as he felt more than a comfortable warmth. The instruction must be couched in terms which made it abundantly clear that it was an instruction of dander. A number of cases[39] concern with the failure of medical practitioners to warn patient about the significance of the side-effects of the drugs, and what they should do if the symptoms appear. If a medical practitioner discharging the patient too soon after surgery and bethought appropriate instructions and advice as to what to do, if he experienced furthers problems the medical practitioners has liable for negligent.[40]

(C) Failure to Consult or Refer Patient to Specialist:

It is frequently necessary to transfer the treatment of a patient from one hospital to another or possibly from a hospital to the patient own medical practitioners'.[41] It is big example of medical autonomy, once a patient come in

private hospital the notion is that 'client' has come and apply all the checkups and all pre treatment requirement are thought necessary. If patient is in serious condition hospital do not refer to specialist then it is against to medical ethics clearly.

In *McDonnell v. Holwerda*[42] the defendant a general practitioner was held liable for failing to refer a young child with meningitis to hospital, having diagnosed gastroenteritis. A similar point arose in Indian case in *Sushma Sharma and Ors. v. Bombay Hospital And Ors.*[43] in the Bombay Hospital, no efforts have been made to bring proper coordination between various specialists and Resident staff of ICU in the treatment of a patient. One cannot expect the patient and his relatives to play this coordinating role and to find out as to what doctor has prescribed which treatment and whether the specialist's instructions are being implemented properly and within reasonable time by the Resident doctors. It is also clearly not possible for the individual subject specialist to coordinate overall management of the patient and such responsibility has to rest on the doctor in-charge of the parent unit. It is necessary that all super specialty hospitals lay down a clear protocol for coordination and management of the patient suffering from multiple medical problems requiring consultation with various specialists, and to see that their instructions are properly implemented. This is a communication gap between medical practitioners among hospital authority to refer the case. Court ordered to pay ₹ 3 lakhs to the Complainant within four weeks from today.

In *Smt. Indrani Bhattacharjee W/O Chinmoy Bhattacharjee v. Chief Medical Officer, Farakka*[44] the person who is suffering from premature is chamic heart disease is serious one and this patient may lead to sudden death, if untreated. That the patient like Chinmoy Bhattacharjee should have been referred to Cardiologist for his opinion and treatment. That the medicines which had been given to Chinmoy Bhattacharjee were not meant for the treatment of cardiac patient and it further appears no antinational medicine were given to late Chinmoy Bhattacharjee. That Chinmoy Bhattarjee was neither referred to Cardiologist nor to a specialist and as such I can opine beyond length of doubt that the patient Chinmoy Bhattacharjee died due to gross negligence on the part of the attending Doctor. Considering the deficiency in service on the part of the Opposite Parties and the contributory negligence on the part of the deceased, in our view, it is just and reasonable to award a compensation of ₹ 5 lakhs to the Complainant.

(D) Bad Handwriting:

Doctors' 'bad handwriting' is a serious problem. Some time wrong drugs are given because nurses are unable to correctly decipher the doctors' prescription owing to bad handwriting. It is the duty of doctors if they tackle the patient

that they should take more responsibility and legibly prescribe medicines. In news entitiled as 'Doctor's bad handwriting causing death', reported from Shilong, on December 29, 2010 believe it or not, annually over 5, 000 patients admitted in US hospitals die due to" non-medical reasons" and the figure could be higher in India. According to Commissioner and Secretary Health and Family Welfare, D.P. Wahlang at the 17th Scientific Conference of Meghalaya Medical Service Association, the causes of non- medical death occurred because nurse were unable to correctly decipher the doctors' prescription owing to "bad handwriting" and wrong drug were administered.[45]

It is a duty of doctors if they treat the patient, doctors should take more responsibility to write more liability while prescribing medicines. In Florida US there has been a legislation passed for legible prescriptions while demand for computer printed prescription is growing all over the world.

(4) Error in Treatment:

Providing wrong treatment is deficiency in service. The smallest mistake during an operation can result in injury. Common surgical errors include lacerations of an internal organ, uncontrollable blood loss, puncturing of an organ or foreign objects left inside the patient. Symptoms of surgical errors may not be noticeable until months after the procedure. Surgical errors can result in additional surgeries, damage to internal organs, immune system failure, infection, wrongful death etc.[46]

In *Cassidy v. Ministry of Health*[47] the patient was treated at Walton Hospital, Liverpool for Dupuytren's construction of the third and fourth fingers of left hand. Dr. F. performed the operation. After the operation the plaintiff's left hand and lower arm were kept rigid in a splint. When released from the splint the patient left hand was useless. The third and fourth figures were bent and stiff. The two good fingers were also affected. The Court of appeal held that the surgeon, nurses and hospital authorities are liable for negligence.

In *Urry v. Bierer*[48] during operation to deliver a child by caesarian section one swab was left in the patient body. The court of Appeal held, in the light of the evidence as to general practice, that the failure to use tapes did not in itself amount to negligence. On the particular facts it was held that the medical practitioner and hospital authority was negligent.

In *Aparna Dutta v. Apollo Hospital Enterprises Ltd. Madras,*[49] due to the negligence of the hospital medical practitioner who performed the operation, left foreign object, viz. abdominal pack had been left behind in the abdomen. Subsequently, second surgery was performed and the abdominal pack left inside the body was removed. The doctrine of *res ipsa loquitur*[50] was

applied and the concern medical practitioners and the hospital were held liable for error in treatment.

(i) Errors in Operation:

In operation theater numbers of acts done by medical practitioners, but the most negligent acts are:

a) Poor maintenance of electric apparatus, wiring, foot switches and earthing.
b) Non-provision of conductive flooring.
c) Non-usage of conducting rubber or vinyl thermoplastic products with antistatic properties.
d) Non-maintenance of relative humidity of OT above 50%, resulting in static sparks.[51]

The courts have always recognized the dangers which are inherent in an operation. Mistake will occur on occasion, despite the exercise of reasonable skill and care, and the patient may suffer grievous injuries in consequence. The numbers of claims arise from the medical practitioner's failure to remove object from the patient's body at end of an operation. In *Mahon v. Osborne*[52] at the end of an abdominal operation one of the swabs used to pack of adjacent organ was left in the patient's body, with the result that he died three month later. The jury found that the medical practitioner, but not the operation theater sister, was negligent.

The matter goes to court of appeal the court observed that there was no general rule of law requiring a medical practitioner in an operation such as this one, after removing all the swabs of which he was aware, to make sure by a separate search by feel that no swabs were left in the patient's body. The question whether the omission by the surgeon to remove a swab constituted failure to exercise reasonable skill and care was to be decided on the evidence given in the particular case.[53]

In *Dr. P. Narsimha Rao v. G. Jayaprakasu*[54] proper treatment was not done by surgeon and anesthetist was also negligent in so far as he failed to administer respiratory resuscitation by also negligent in so far as he failed to administer respiratory resuscitation by oxygenating the patient with a mask or bag, which act is an act of per se negligence in the circumstances. He exposed the patient to the room temperature for about 3 minutes and this coupled with his failure to administer fresh breaths of oxygen before the tube was removed from the mouth of the patient has resulted in respiratory arrest; these are foreseeable factors. The patient was, therefore, held entitled to claim compensation for the same.

In *State of Gujarat v. Laxmiben Jayantilal Sikligar*[55]the patient who was suffering from discomfort and pain in swallowing, etc. went to Civil

Hospital at Godhra for treatment and the Civil Surgeon performed the surgery on her thyroid gland. Due to negligence in performing of the operation she suffered permanent partial paralysis of larynx as a consequence of damage to or cutting of recurrent laryngeal nerve. There was held to be negligent on the part of surgeon to take appropriate precautions before and during operation.

In *State of Harina v. Smt. Santra;*[56] *Joint Director of Health Services, Shivagangal v. Sonal;*[57] *State of Punjab v. Shiv Ram & others;*[58] *and Kamli Devi v. State of Himachal Pradesh*[59] there was a error in operation of sterilization. Both the medical practitioners and the hospitals were held liable to pay damages to the plaintiff.

In a case boy fractured his right arm, city doctors operated on left, Kaushik Lodha (9) was a victim of gross medical negligence, and he writhed in pain as he was admitted in LG Hospital. If earlier one hand was paining, Kaushik cried from excruciating pain on Wednesday as both his hands were operated upon. The doctors had operated and put plates and screws in his left arm which was not fractured while the broken right arm had not even been touched Kaushik's father Manoj Lodha, who runs a tyre repair shop in Isanpur, said, That the medical negligence committed by the medical practitioners is unacceptable and strict action should be taken against them. Fortunately, it was just a fracture. A police complaint has been filed against the doctors for negligence.[60]

(ii) Failing to Prevent Infection:

Sometimes, patient in hospitals catch infection from insanitary conditions in the hospital. A hospital must take to ensure that steps are taken to keep the hospital premises reasonability safe. A maternity hospital had to pay damages when a women who had been admitted for her confinement aught puerperal fever from other patients. The hospital authorities knew that some patients had this fever, and did not take necessary precautions for keeping the women in isolation.[61]

(iii) Miscalculating and Drug Reaction:

Medical practitioners, healthcare or nursing staff, pharmacists, and marketers and manufacturers of the drugs themselves can be found liable in prescription drug reaction claims. It is the legal duty of the medical practitioners to manage drug reaction to the best of his ability and informed the patient and his/her relatives, as to what went wrong.

(iv) Over Dose Medicine or Drugs:

Medical Practitioners must take account of manufacturer’s instructions and known side-effects when prescribing drugs, although they should not necessarily rely on the manufacturers’ information unthinkingly, since it is known that manufacturers are not always entirely frank about the contra-

indications or risks associated with their product. Where a medical practitioner ignores the manufacturer's instructions and warnings, it is the medical practitioner who is responsible for any adverse reactions. Three types of case will tend to arise. *Firstly*, where the medical practitioners is simply unaware of the known side-effects. If he ought reasonably to have known then he is negligent. *Secondly*, where the medical practitioner is generally aware of the dangers but makes an isolated error and gives an overdose or prescribes the wrong drug. *Thirdly*, there may be cases where the medical practitioner is aware of the risk from side-effects, but calculates that it is a reasonable risk to run in the circumstances, given the condition for which the drug is prescribed.[62]

Administration of a drug in an incorrect dose, resulting in a damage or injury to a patient prima facie constitutes medical negligence. A Nurse is expected to administer the prescribed drug in the correct prescribed dosage and in the correct schedule to a patient. Failure to do so might result in liability for negligence. If a medical practitioners prescribe a drug or an injection of over dose than after come out its side effect medical practitioners are liable for this over dose medicine.[63]

In *Wright v. Eastwood*[64] it was accepted that where it was suspected that a patient had suffered an adverse reaction to an anesthetic drug, the anesthetist has a duty to investigate, or refer the patient for investigation, in order to be in a position to warn the patient of the possibility of a similar adverse reaction to the drug in future. In *Smith v. Brighton and Lewes Hospital Management Committee* case a patient who was negligently given 34 instead of 30 injection of streptomycin lost her sense of balance as a result. It was held that the defendant should have appreciated that some injury could be caused by giving an overdose, and she did not have to foresee the quality or extent of the damage.

(v) Infected Injection or Vaccination:

Irreparable loss was caused when four kids died after vaccination in Mohanlalganj Lucknow[65] it is a responsibility of state to safely conduct vaccination programs. Vaccination programmed is conducted for better improvement of public health not to death.

(vi) Wrong Blood Group:

The National State Consumer Disputes Redressal Commission has observed that wrong blood transfusion is a mistake which no doctor with ordinary skills would make and was an instance of medical negligence. The Commission directed a Kolkata-based doctor to pay ₹ 5.38 lakh to the family of a man who died following complications after being given blood of the wrong group[66] The same in another incident negligence of Government-run Umaid Civil

Hospital in Jodhpur Rajasthan 56 kids suffering from thalassaemia tested positive for HIV, hepatitis B and hepatitis C after receiving blood transfusion.[67] This is an act of gross negligence act by hospital administration.

Missed Blood Test and Kidney Transplant Cause Malpractice case involves a Pennsylvania couple suing a high profile medical center after doctors transplanted the woman's kidney to her significant other, in spite of tests showing she had hepatitis C. But the story gets worse from here. Michael Yocabet and Christina Mecannic of Greene County, Pennsylvania say Michael does have the potentially fatal liver disease due to his April 6, 2010 transplant at the University of Pittsburgh Medical Center. The idea of the transplant, because she was compatible, was to save his life. Ironically, it may ultimately kill him as treatment for hepatitis could harm his new kidney, leading to organ failure and death.[68]

Doctors and lab technician indicted for wrong blood transfusion in Chandigarh, the case of major embarrassment, Government Multi-specialty Hospital in Sector 16, has on Tuesday admitted the negligence of its doctors in transfusing wrong blood to Suman on December 16, 2010. However, the hospital authorities denied its liability to pay compensation under Consumer Protection Act. This has been stated in the written arguments filed on Tuesday in UT State Consumer Disputes Redressal Commission, Chandigarh, by Sanjay Kaushal, who is the senior standing counsel for Chandigarh administration. The hospital said it is not covered by the Consumer Act as it is not rendering 'paid' services.[69]

In *Mallette v. Schulman*[70] a 57 years old woman who was seriously injured in a car accident was taken to the hospital and she was unconscious. A nurse discovered in the woman's handbag, a card signed by the woman identifying her as a Jehovah's Witness and requesting that no blood transfusions be given to her under any circumstances, that she fully realized the implications of that position but did not object to the case of non-blood alternatives. The doctor was informed of the contents of the card but he personally administered blood transfusion to the woman as he was of the opinion that it was necessary to replace the blood that was lost and her life had to be saved. The woman made 'a very good recovery from her injuries'. She was discharged from hospital after 6 weeks. She then sued the doctor for negligence, assault, battery and religious discrimination. The trial judge Donnelly J accepted the plea of battery only and awarded damages of $20,000. This was affirmed by the Court of Appeal. The case demonstrates that doctors must respect their patient's wishes provided that the patients were in a fit state to make it plain or indicate in advance as to what treatment they do not want.

Doctors cannot substitute their decision from a validly made decision of the patient.[71]

In *R.P. Sharma v. State of Rajasthan*[72] patient was admitted to S.M.S. Hospital, Jaipur for operation of removal of gallstone. The operating surgeon advises transfusion of blood group O+ive to the patient. One bottle of blood group O +ive was transfused. After that another bottle of blood was obtain from the Blood Bank. Due to the negligence of the hospital staff the new bottle was of another blood group, B+ive. Soon thereafter the condition of the patient determinate and she lost her eyesight and she died. The State, who ran that hospital, was held vicariously liable for the death causes due to the negligence of the hospital staff.

(vii) Failure to take Precautions or Monitor Treatment:

The duty of the medical practitioners is to examine the patient record and monitor it to procure. When treating a patient, a medical practitioner has to use the appropriate standard of care deviation can cause an injury to the patient which may result in liability. The medical practitioners while treating patients must thoroughly check which include routine eye, hemoglobin testing, blood pressure, x-ray, blood test, nutrition, etc.

If a patent admitted in ICU or in ventilator or on oxygen support it a duty of medical practitioners or hospital authorities to take more precautions to them patient. Where a medical practitioners or hospital authorities rejects precautions for no good reason, then any resulting mishap is more likely to be treated as negligence.[73]

Much is being done by many medical practitioners involved in the support and treatment of patients. When treating a patient, a medical practitioner has to use the appropriate standard of care deviation can cause an injury to the patient which may result in liability. If a medical practitioner fails to meet these goals and a deficiency occurs, the medical practitioners may be liable for the patient's injuries.[74]

(viii) Prescription of Prohibited Drugs:

India has become a dumping ground for banned drugs; also the business for production of banned drugs is booming. Indian medical practitioners prescribe this type of drug due to lack of knowledge. Not many people know about these banned drugs and consume them causing a lot of damage to themselves. This is far more important. Dangerous drugs have been globally discarded but are available in India. The most common ones are Vicks Action-500, Nimulid, Enteroquinol, Ovalgin, Ciza, Syspride, Droperol, Furoxone, Lomofen, Nise, Furacin, Agarol, Sioril, Piperazine etc.[75]

In *Vincent Panikurlangra v. Union of India*[76] a writ petition was filed under Article 32 of the Constitution of India, wherein, the petitioner asked for

direction, in public interest, Prohibited or banning import, manufacture, sale and distribution of such drug which were recommended for banning or prohibited by the Drugs Consultative Committee and there was prayer for cancellation of all licenses authorizing import, manufacture, sale and distribution of such drugs. The Supreme Court appreciated the initiative taken by the petitioner. As the above judgment has direct bearing on both medical practitioners and patients, strict compliance should be made. If any medical practitioners prescribed this prohibited drug they are responsible of this act.

(ix) Lack of Resources:

Apart from medical practitioner's responsibility in medical care, the hospital, nursing homes, etc., which undertake to treat or cure the patients are also duty-bound to provide all sort of facilities available therein and exercise all standard of care. If any person sustains bodily injury, illness, damages or death as a sequel to any fault or negligent of the employee of hospitals in the course of employment, the hospital would be vicariously liable for that, Hospital can be liable for lack of resource of its employee, e.g., medical practitioners, surgeons, assistant surgeons, nurses, compounders, anesthetists, radiographers, technician and so on.[77] Resources may include the following:

(i) Ambulance:

It is a deficiency in service if ambulance service driver do not to know the proper route of hospital address in case of serious labour pain of patient.[78] Ambulance services do not respond to calls from the patients which amount to deficiency in service.

(ii) Oxygen Cylinder:

Many times occupied gas cylinder has taken patient's life because of lack of services in proper maintenance of oxygen cylinder. In the medical department of SN College Agra three patients died on 10 June, 2012 due to the lack of oxygen cylinder.[79] Recently in 05 December, 2012 a mega drill began across the New Delhi to check the city's preparedness for medical emergencies, a shocking case of medical negligence; four patients lost their life allegedly after oxygen supply suddenly stopped in the Delhi's Government hospital.[80]

(iii) Medical instruments:

If a hospital authority admits a patient for treatment and secures the full treatment with necessary medical life care instruments. If these life care instruments are not available in hospital the hospital authority should be liable for medical negligence.

(5) Quacks or Unqualified Medical Practitioners:

In India numbers of unrecognized and illegal health providers who without any formal qualifications or having formal qualification are practicing in other areas are found. Some examples of them are tantric; Vaidyas, hakim, herbalist

and a homeopathic doctor practicing in allopathic etc.[81] Quacks are not only a danger to the public but also stand between medical practitioners and their patients.[82]

Medical practitioners must have a qualified degree of skill and knowledge, and must exercise a reasonable qualification degree of care. Neither the very highest nor a very low degree and competence can judge in the light of particular circumstances of each case, is law require a person is not a liable in negligence because someone else of better skill and knowledge would have prescribed different way nor is he guilty of negligence if he has acted in accordance with a practice accepted as proper by a reasonable body of medical men skilled in that particular art although a body of advise opinion also existed medical term.[83]

A Homoeopathic or Ayurvedic practitioners or practitioners in any other system of medicine, is licensed to practice only in his own system of medicine. Where such a practitioners prescribes Allopathic medicine, he exceeds his professional competence and commits quackery. Thus he can face legal action under Section 15(3), Indian Medical Council Act, 1956. He also commits negligence. Should be damage be mild, he would be liable for civil negligence, but where such an act has result in a fatal outcome he would also be liable for criminal negligence.[84]

An unqualified practitioner, who does not inform his patient that he is not qualified, when he undertakes to cure an illness, causes injury to the patient, he is prima facie guilty of negligence. In *Rex v. Bateman*[85] the court held that it is not the business of an unqualified man to pretend or profess or promise to cure a disease which he had not the adequate skill to treat, or to which he cannot give such care as the case demands.

In *Khusaldas v. State of M.P.*[86] a person who is a quack, utterly ignorant of the science of medicine, when practicing it, are sued than his ignorance alone would make his conduct of giving treatment rash and negligent. A medical practitioner registered in those filed thy can practice in own filed. In *Poonam Verma v. Ashwin Patel & ors.*[87] it was held that a medical practitioner registered under the Bombay Homeopathic Practitioners Act, 1989, can practice Homeopathy only but in this case Homeopathy doctor treated a patient of fever and typhoid under Allopathic system prescribing allopathic medicines patient dying within two weeks. The Supreme Court held negligence per se on the part of the doctor such as a doctor is under is a statutory duty not to enter the field of any others system of medicine prescribing Allopathic medicines amounted to an actionable negligence.

The patient approached the doctor for treatment of severe molar tooth ache and resultant swelling. The doctor gave DC Injection ½ gm = 1 vial with

medical Sugarnil Tb 3, Dexona Tb 3 on three consecutive dates. The medical practitioner had no qualification to practice allopathic medicine. He only got one certificate issued by W.B. Medical Union and Post Graduate Union of India, Calcutta. The patient developed pain and tumour at the site of the injection. The condition of the patient did not improve even after treatment given in two different hospitals. Ultimately the patient expired.[88] The State Commission, Gujarat[89], found the doctor negligent, because he administered injection on gluteal region and prescribed steroid tablets to the patient without being qualified to practice allopathic medicine.

No person other than a doctor having qualification recognized by Medical Council of India and registered with medical Council of India/ State Medical Council is allowed to practice modern system of Medicine or surgery. A person obtaining qualification in any other of Medicine is not allowed to practice Modern system of Medicine in any forms.[90]

If a doctor registered under Homeopathic Practitioners Act he cannot practice allopathic medicines i.e. glucose drip and other injections. If medical practitioner prescribe allopathic medicine to the patient, his action is in contravention of Sec. 15 (2) of the Indian Medical Council Act 1956.

In *Dr. Shiv Kumar Gautam v. Alima B*[91] the deceased was suffering from gastro enteritis disease. The medical practitioner was a Homeopathic doctor who treated the deceased in allopathic system. The medical practitioner was prohibited to practice in Allopathic as he was legally not qualified. The medical practitioner was held guilty of negligence.

In the case of *Shri Sarjoo Prasad v. State of Bihar*[92] the Patna High Court was concerned with the right of practice of occupational therapists/ physiotherapists. To begin with, after studying the literature in detail the court held that occupational/ physiotherapy is a recognized form of medical practice. However, the court further observed that unless the concerned qualification finds a place in the schedule to the Medical Council Acts and the holders of the qualifications are registered under that Act, they have no right to practice modern scientific medicine or prescribe allopathic drugs.

In the case of *Charan Singh v. State of U.P.*[93] the Allahabad High Court was concerned with practitioners having degrees from unrecognized colleges. This arose as a follow up of the D.K. Joshi case cited above. The court came down heavily on these practitioners and held that they had no right to practise medicine. In *Rajesh Kumar Srivastava v. A.P. Verma*[94] a monitor order was passed by Hon'ble Supreme Court in D.K. Joshi case by which the Supreme Court had taken notice of the distressing situation of public health in the state of U.P. and inaction of the State Gov. to stop the menace of the unqualified and unregistered medical practitioners proliferating all over the

State. A boy died at the Mohanlalganj, Lucknow Community Health Center after undergoing treatment at the hands of a quack. This boy was treated by DOTS provider deputed by the health department. The volunteer is not authorised to treat patient or prescribe medicines.[95] In India a numbers of incident of quakes every day numbers of people died.

At the policy level, the pertinent legal & ethical point is, whether the ethically justified in stopping all those quacks or unqualified medical practitioners and nurses from pursuing their occupation? No doubt, their practice does constitute a public health danger and it is the duty of government to look after the safety of people.[96] However there is another side of the fact India has 76% less government doctor than required. The latest available rural health statistics for 2011 show a shocking shortfall of human resources is it doctors, nurses or other healthcare personnel. According to the Planning Commission's draft, the country's government-run health-care system is hamstrung because the number of doctor is short of the target by a jaw dropping 76%, there are 53% fewer nurses, specialist doctor are short by 88%, radiographers are short by 85% and laboratory technicians are short by 80%.[97] A big proportion of such quacks or unqualified medical practitioners practice in the under-served rural areas.

Issues of Medical Negligence:

The issues of medical practitioners are very susceptible in India because most of people are not aware about their own rights. Sometimes medical errors are not visible at the time but they become complicated later on. Some important issues which are relevant are:

(i) Issue of Patient and Doctor Relationship:

Our first issue is patient doctor relationship, in present time patients have lost faith in doctors. In global commercialized era, it is rat race and the priority is money, not treatment. There are serious communication issues between doctors and patients. A survey of 89 hospitalized patient and their 43 doctors at Yale University School of Medicine and Waterbury Hospital, published in the Archives of International Medicine, found that 79 per cent physicians agree that they did not always discuss things comprehensibly. As for patients, 57 per cent were unaware of their diagnosis when discharged, about 90 per cent weren't told of side-effects of new medication and 54 per cent believed their doctors don't discussed their fears with them.[98]

(ii) Issue of deciding Compensation:

Our second issue is the standard measurement technique should be developed for deciding compensation in the matter of medical negligence. The basic issue who and how much relief compensation could be provided? The quantity

of compensation is not the same in similar cases of negligence, different amount of compensation is provided by different courts.

In the case of medical negligence Courts should grant highest compensation unanimously and equally to every patient and it should not differ from patient to patient. Many times like a US- based doctor was awarded a record compensation of ₹ 1.73 crore in a medical negligence case by National Consumer Dispute Redress Commission. Three doctors and Advance Medical care and Research Institute, Kolkata, was ordered to pay the sum collectively. Dr. Kunal Saha's wife, Anuradha, died of toxic epidermal necrology-a rare disease resulting in the peeling of skin in sheets-at Mumbai's Breach Canady Hospital. Dr. Kunal made a claim of compensation exceeding ₹ 102 crores, perhaps the highest ever claimed by any compensation for medical negligence before any consumer forum established under the provision of Consumer Protection Act, 1986.[99] In the above case victim was related by a doctor so he got higher compensation but in maximum cases the victim could not found sufficient relief.

In the highest compensation ordered by an Indian Court in a medical negligence case, a techie who found himself paralyzed waist down after a surgeon damaged his spinal cord during an operation to remove a tumor in the chest, was awarded ₹ 1 crore in damages by the Supreme Court. Thought it is a pittance compared to the 5 million pound (a little over ₹ 37 crore) awarded to British TV actors Leslie Ash in a similar case in year 2008. Victim Prashant S Dhananka's nightmarish experience is similar to the case national table tennis player V Chandrasekhar, who fought a legal battle against Apollo Hospital Chennai, for over by the Supreme Court in February 1995.[100] The highest compensation in a medical negligence cases in India were the Dr. Kunal Saha's wife case and Dhananka verdict.

(iii) Issue of Maintaining Confidentiality:

Third issue is privacy and confidentiality which is one of other important patients' rights as well as fundamental tenets of medical care. Any threat to them in the present era of computerised record-keeping and sharing of patient care among numerous medical professionals can undermine the therapeutic relationship and adversely affect patient care. Patient's privacy should be maintained at any cost according to international norms of international law**.** Right of privacy may, apart from contract[101], also arise out a particular specific relationship which may be commercial, matrimonial, or even political. Doctor-patient relationship, though basically commercial, is, professionally, a matter of confidence and, therefore, doctors are morally and ethically bound to maintain confidentiality.

Maintaining professional secrecy and not to divulge any information obtained in the due course of treatment is both moral and legal obligation of medical practitioners. Secrecy is an essential condition of contract between medical professionals and his employer, a breach of secrecy affords a relevant ground for action of damages.[102]

(iv) Issue of dilemma in deciding Medical Negligence under Civil Law or Criminal Law:

The fourth issue under Indian law for medical negligence is that both civil and criminal remedies are provided for medical negligence. According to *Mr. Justice V.R. Krishna Iyer* "*no profession is above the law*". The prosecution for offence committed by medical practitioner in the course of their practice and the liability in tort of medical practitioners when they commit culpable negligence or fraud or other delinquent disregard of due case is also not taken away. In spite of the Consumer Protection Act, it is open to party aggressive to sue in the Civil Court or prosecute in the Criminal Court.[103]

(A) Remedies under Civil Law:

Medical negligence is a Civil wrong the kind as well as the degree of negligence is such that it gives a right for compensation. Civil wrong is a form of negligence in which a patient brings an action or damages in the civil court against the medical attendant, who owes him a duty in tort, if he had suffered an injury in consequence of negligence or unskilled treatment. The amount of damage inflicted is a measure of the extent of liability.

(B) Remedies under Criminal Law:

In Indian Penal Code Section 219 deals Criminal Negligence: (1) everyone is criminally negligent who (1) in doing anything, or (2) in omitting to do anything that it is his duty to do; shows wanton or reckless disregard for the lives or safety of other persons.

The Section 304 A says whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine or with both.

In order to hold a medical practitioners criminally responsible for the death of his patient, it must be establish that his negligence or incompetence was such that it showed utter disregard for the life and safety of other in a manner that amount to a crime against the state. Such conduct may, therefore, be punished under the criminal law[104]. The Indian Penal Code, 1860, Section 304A, states that whoever causes the death of a person by a rash or negligent act not amounting to culpable homicide will be punished with imprisonment for a term of two years, or with a fine, or with both. It is used to frame charges against medical practitioners in India.

In India people are not aware about their rights so very few people go to courts in cases of medical negligence. There is no specific provision in the Indian Law which specifically deals with medical negligence. The delay in legal process is also a hindrance in medical negligence cases.

(v) Issue of deciding Liability in case of ownership of Hospital is Deferent from the Doctors:

Our fifth issue is who will be responsible for paying compensation in case of medical negligence if the ownership of the hospital is different from the doctor who is practicing there? The hospital authority should be held liable to pay compensation in case of negligence of their doctors. The principle of '*respondent superior'* should be applied in such cases.

If someone is an employee of a hospital, the hospital is responsible (liable) if that employee hurts a patient by acting incompetently. In other words, if the employee is negligent is not reasonably cautious when treating or dealing with a patient, the hospital is on the hook for any resulting injuries to the patient.[105]

(vi) Issue of deciding Liability in case of Medical Tourism:

Our sixth issue is medical tourism; today medical tourism is also a new kind of health services is being provided by the health providers in the private health care sector. There is no legislative control on this health service. The foreigners are attracted towards these health care services in India due to low cost in comparison to other countries. A large number of herbal massage therapies, yoga therapy centers are established to conduct their business in India. This service is known as medical tourism. The Government passes a medical visa for such services. But these health facilities are provided on contract basis and appointments are made by telephone, video conferencing or internet. The question appears where medical contract concludes? In India or in those other countries. If in a medical tourism any medical deficiency or negligence is committed then who is liable for this negligence?

Impact of Medical Negligence:

The impact of medical negligence is long lasting as the patient could not survive to their usual routine they cannot perform and enjoy their life because they are suffering medical practitioner's error. The basic impact of medical negligence has become a Socio, Economic and Legal problem because patients are vulnerable group of society who are physically, economically and mentally harassed by medical professional. Now a day the medical error is common basic problem in Indian health scenario. The doctor patient relationship is social concern but due to the commercialization of this profession now it has become an economic problem. The doctor-patient

relationship is contractual relation and if medical practitioners fail to perform their duties it is a legal problem of medical negligence.

(i) Premature Death:

The worst impact of medical negligence could be that the patient can die. Sometimes due to the negligence of the doctors the patient looses their lives. This is the most severe result of medical negligence. The patient visit the doctor for getting relief from his disease but due to the negligence in treatment the patient pays very heavy price by losing their life.

(ii) Social Suffering by the Patient and his Family:

In cases of medical negligence not only the patient but his entire family has to suffer. The social relation and activities are also badly affected.

(iii) Undue Financial Burden:

Sometimes the patient losses his job as the result of physical problems caused by medical negligence. The heavy expenditure on treatment also adversely affects his economic conditions. Poor people have to sale his property to pay for medical expenses.

(iv) Burden of Cases on Courts:

Most of the courts in India are overburden by cases including consumer cases. The numbers of cases, pending in the different courts, causes delay in disposal of these cases. So, there is an urgent need to increase the courts.

(v) Decreasing faith between Doctors and Patients:

Due to the heavy commercialization of medical profession patients are losing faiths in doctors. Unnecessary tests and medicines are prescribed by doctors to extract money from the patients. This has resulted in flinching of faith on doctors.

(vi) Undue Physical Suffering:

Sometimes the medical negligence causes extreme physical suffering to the patient. Instead of becoming healthy he has to suffer pain and other physical ailments.

Conclusion:

In light of the findings of our study, conclusion is that in case of medical negligence most of cases of negligence are ignored by patients in India. Medical negligence is not legal problems but it is a social challenges. Medical practitioners are not above the law and have, therefore, for their negligence and if found guilty should not escape punishment.[106] Continuation of unfair trade practice, medical autonomy, increased sophistication and demand of consumers, infection, unsatisfactory processing of complaints and emergence of consumer has strengthened the consumer movement for social challenges.

Commercialization or the monetary consideration emerges out as one of the major barriers affecting the patient doctor relationship in India. With

coming of corporate hospitals the relationship of doctor and patients has gone a sea change. These big hospitals are more profit oriented than being sensitive to the patients. As exorbitant fees are charged from the patients so the magnitude of care and attention should also be higher. There are numbers of cause's issues and an impact in medical profession therefore there needs to proper regulate this profession. In the case of medical negligence not only the patient but his entire family has to suffer. The social relation and activities are also badly affected.

Since the doctor is considered as a living God on the Earth, thus the expectation from doctors with regard to his duty and obligation is higher than other because patient unconditionally believes on the doctors. The duty of doctor is to take due care and diligence in the treatment of the patient is of high degree and doctor should follow all standard and noble practices that are prevailing in the medical field.

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Surrogacy in India – Problems and Laws: An Overview

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Before the introduction of modern techniques of conception natural surrogacy was the only means which assisted a barren woman to conceive. Before the birth of artificial insemination women conceived the natural way. In cases of infertility artificial insemination was socially accepted as a means to achieve pregnancy. The process of artificial insemination paved way for in vitro fertilization (IVF). In this method a woman who wishes to have a baby either her or the donor woman's eggs and the sperm of her husband or the male donor in order tocreate their embryos in vitro and to transfer them to a host who is suitable.[1]Surrogacy has been around a long time and dates back to biblical times. In the Mahabharata Dhritarashtra's wife Gandhari conceived but the pregnancy was confirmed only after two years after which she delivered a mass comprised of 10% normal cells. These cells were put in nutrient medium which develop in vitro till full term. These developed into 100 male children known as Kauravas and one female child Duhsheela.[2]The underlying principle concept of surrogacy is splendid as it is based on altruistic principle which implies doing good to others i.e. one woman assisting the other. The practice of surrogacy in ancient times is highlighted in the religious texts of Hinduism and Christianity. The Old Testament cites the example of Abraham's infertile wife Sarah who entrusted her maid Hager to bear her a child by persuading Abraham to sleep with her. The Bhagavata Purana gives an account of how with the blessing of Vishnu the embryo from Devaki's womb was transferred to Rohini's womb another wife of Vasudev so that their son's life is protected. These stories indicate how surrogacy was undertaken by the relative. Therefore it was an act between two women who are not at par either socially or economically.[3]

Concept & Meaning:

The term surrogacy implies substitution. It has been derived from the Latin word "Subrogare" meaning appointed in the place of. Traditionally surrogate motherhood is referred to as an arrangement between married couples because of wife's infertility cannot produce a child a fertile woman agrees to conceive the husband's child through artificial insemination to bear the child for the

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entire term and then relinquish all parental rights. The ART bill has defined surrogacy as an arrangement in which a woman gives consent to pregnancy with the assistance of reproductive technology in which neither of the gametes belong to her or her spouse with the purpose to carry it to full term and hand over the child to the person or persons for whom she is acting as a surrogate.[4]
Surrogacy is manifested in two forms:

1) When a surrogate has a child for the couple where the genetic father is the husband and the genetic mother is the surrogate.
2) The host mothering where the surrogate mother bears the genetic child of both the husband and the wife through IVF/ gift technique which requires the doctor's intervention.[5]

Types of Surrogacy:

The act of surrogacy is altruistic or commercial which depends on surrogate mother's motivation, the act is either traditional or generational which is based on types of procedure involved. When the surrogate mother agrees on pregnancy on behalf of commissioning parents without any consideration for the service labeled as altruistic surrogacy which is opposite to commercial surrogacy where a surrogate agrees to conceive for economic gain. Her intention is to hand over the child to others or to the biological father and his partner it is known as traditional surrogacy.[6] The most recent form of surrogacy is gestational where in a surrogate mother conceives via embryo transfer with a child of which she is not the biological mother and as per the contract she has to hand over the baby and surrender all her rights to the commissioning parents. The most prevalent form is gestational surrogacy with or without monetary incentive. Genetically the surrogate mother is not related to the child hence has no legal claim over the child but the procedure involved in gestational surrogacy is a complexed one resulting in high risks and low success rate.[6]

Assisted Reproductive Technique (ART):

India is fast becoming a booming centre of a fertility market with its reproductive tourism industry. This is clinically called Assisted Reproductive Technology (ART), it has been in vogue in India since 1978 and today an estimated two lakh clinics across the country offer it. ARTs are extensively used for surrogacy in this case an embryo is created with in vitro fertilization and implanted in the uterus of a surrogate mother. The sperm and ova used for IVF come from donors or the commissioning couple. Ova are 'harvested' surgically following the administration of drugs.[7]

Baby Manji Case:

The Supreme Court of India's decision on the landmark case of baby manji Yamada Vs Union of India on surrogacy and the importance of contractual

obligation involving surrogate parties. Japanese baby Manji born to an Indian surrogate mother with IVF technology, upon fertilization of her Japanese parent's eggs and sperm in Tokyo and the embryo being implanted in Ahmedabad triggered off a complex knotty issue. The Japanese biological parents unfortunately divorced and the mother disowned the infant. Under the Guardian Wards Act, 1890 a single father cannot adopt a girl child since he is the only biological father the girl's legitimacy will have to be proved. The grandmother of the infant petitioned the Supreme Court challenging the direction given by the Rajasthan High Court relating to the production and custody of Baby Manji Yamada. Her request to the Apex court for permission for the infant to travel with her and for issuance of passport under consideration with the Central government had been directed to be disposed of expeditiously. The Japanese baby case has opened a Pandora boxwith a floodgate of questions and issues related to the ethics and legality surrounding surrogacy. In Manji's case the Supreme Court decision on legitimizing surrogacy and equating it with an industry has re-opened the debate on commercialization of surrogate motherhood. Linking surrogacy with other types of outsourcing business of identifying factors like excellent medical infrastructure, high international demand and easy availability of poverty stricken surrogateshave raised a gamut of questions on women's exploitation, misuse of their reproductive organs and excessive pressure on women to earn money in a male dominated society. Metropolis is representing the popularity of surrogacy arrangement. Indian scenario paves way for baby booming business where there is ample scope for a woman to give her womb on hire and promote parenthood by proxy.[8]In India the issue came into limelight when a grandmother from Gujarat gave birth to her daughter's twins in Jan 2004. Under the present legal system the grandmotherwill be given the status of mother of her grandchildren though the finding of DNA Test shows that they are not her children. The genetic mother has to adopt these twins before she can legally call them her own. The reports depict that this case is not the only incident of surrogacy in India there are many more babies borne by surrogate mothers. In India in most of such cases anonymity is maintained or facts have been concealed for reasons of social repercussions due to its unacceptability. In the developed countries the services of surrogate mother is very expensive. Due to abject poverty people from developed countries choose India.[9]In India legitimacy issue is governed by section 112 of the Evidence Act under which the child would be the legitimate child of the woman and her husband and artificiality of the process would not make a difference. This presentation can be refuted on the ground of access. If the marriage was consummated in the usual sense it is arguable that a decree of nullity of marriage can still be

obtained. In India legitimacy is governed by thepersonal laws. Under the Indian Legal system there is no provision for legitimizing. The Special Marriage Act, 1954 and the Hindu Marriage Act, 1955 confers legitimacy on children of void marriages numerated under various Acts alone and deny legitimacy to children of other void marriages which fall outside the purview of this Acts.[10]

Surrogacy Contract:

In order to make commercial surrogacy viable the most important issue is the issue of contract.Women who rent their wombs would be treated as industrial workers. If the Assisted Reproductive Technology (Regulation) Bills and Rules 2008 is passed would also require the making of a contract. The following four aspects have been finalized

1) The choice over the surrogate mother
2) The Choice over the clinic
3) The financial aspect with respect to the compensation
4) The date of signing of the surrogacy contract enacts a pivotal role in judging the mind of the parties who enter into a contract. It is vital that the surrogate enters into a contract before taking up medical procedures. It is the result of contract entered between parties. Both these events cannot be rearranged. There are cases where the clinics do not feel the need for signing an appropriate agreement with the surrogate before carrying out the procedures. It is the result of contract entered between parties. Both these events cannot be rearranged. There are cases where the clinics do not feel the need for signing an appropriate agreement with the surrogate before carrying out the procedures. However the practice does not serve any purpose.[11]The consequence of not signing a surrogacy agreement at a fairly correct time has an unfavorable inference over the agreement. In such cases the court will question a person as to why agreement was not entered into with the surrogate mother before she had gone in for medical procedures. Whether these contracts are enforceable is debatable. In India section 23 of the Indian Contract Act, 1872 a surrogacy agreement may be declared void on a consideration of being immoral or against public policy. India does not have legal measures to deal with the above subject. However the ethical guidelines for Biomedical Research on Human Subjects of Indian Council of Medical Research lay down certain rights and duties to be. But followed in these processes. The problem is that the guidelines are not sufficient to deal with such immense problem. As these techniques are used extensively there will be a need for more explicit public policy in several areas must be addressed.

Remedies to parents under Surrogacy Contract:

'Surrogacy Agreement' defined in Section 2(cc) of the Bill as a contract between the person availing of Assisted Reproductive Techniques and the surrogate mother. Section 34(1) of the Bill provides that "Both the couple or individual seeking surrogacy through the use of ART and the surrogate mother shall enter into a surrogacy agreement which shall be legally enforceable. The surrogacy contract between the surrogate mother and the parents is treated as a simple agreement and is governed by the Indian Contract Act, 1872 and Specific Relief Act, 1963. Abortion amounts to breach of surrogacy contract. Parents may ask the surrogate mother for specific performance of contract. Section 10 of the Specific Relief Act, 1963 provides for the Specific Performance of the contract in the cases where the Act agreed to be done is such that the compensation is money for its non-performance would not afford adequate relief. Under Section 42 the court may also grant injunction to aid the specific performance of a negative agreement contained in the terms of a contract.[12]Various kinds of relief are available for the breach of a contract. The remedy for the non-performance of a duty is compensatory and specific. Under Section 73 of the Indian Contract Act, 1872 and Section 21(1) and (2) of the Specific Relief Act, 1963 the parent would be entitled for compensation for the breach of a contract that is abortion where the contract becomes impossible of performance for no fault of the plaintiff. Court can award compensation in lieu and substitution of specific performance. Measures of compensation will be by the standard of Section 73 of the Contract Act.[13] In the calculation of the damages under a contract the provision of Contract Act, 1872 or the terms of contract would be relevant.[14]The intention of the parties should be gathered from the terms of a contract while determining the damages .[15]

Conclusion:

There are three views on the legality of commercial surrogacy firstly on ethical and ideological grounds demands total prohibition of surrogacy, secondly supports surrogacy but is contemptuous of its commercialization and thirdly view supports commercial surrogacy. After Supreme Court decision in Baby Mangy case the entire debate on commercialization of surrogacy becomes redundant. The medical fraternity and political establishment are of the opinion that commercial surrogacy can resolve the problems of infertile couple's one hand and help the economically downtrodden to cater to their financial needs on the other hand. But in the absence of an effective legal measure the act of surrogacy will continue to play a dominant role in exploiting the poor and the vulnerable surrogate mothers and expose them to unwanted risks. The proposed legislation on ART Act, 2008 even though is a

step towards right direction it is inadequate to deal with the complexities of commercial surrogacy. Israel regulatory mechanism is a role model for every nation which intends to legalise commercial surrogacy as it has successfully balanced the needs of the society with those of private individuals. The goal of India in becoming a global destination of medical tourism will be achieved only when the concept of exploitation is replaced with fair and equal opportunities for all.[17] India is considered as an effective destination for surrogacy but there are cases where problems have arisen. Medical Science's advancement has raised the hope of childless couples who are in favour of promoting the process of surrogate arrangement. It is likely that the process will continue to thrive. Hence some regulation is necessary in the form of licensing and authoritative inspection for the benefit of the society.

Suggestions:

With the advancements in the technology and medical science to avoid the intricate complications arising in surrogate birth the country needs legislation encompassing all these aspects. They are as follows the basic query that arises regarding the legality of a surrogate contract on the issue we think that the surrogate birth should be lagalised under the statute to protect the interest of infertile parents which will serve as an alternative to adoption. In context to the legal mother of the child we support the Californian view that the intended mother should be awarded the status of a legal mother (& thus the intending parents the legal parents). We support this contention with the following argument.As the very purpose of surrogate birth is to provide the intended parents with a child. Hence it is the surrogate mother intending mother or donor ovum the legal status should be conferred on the intended mother unless contrary is specified in the contract. The contractual evidence shall prevail over the medical evidence of DNA test because the genetic evidence is given supremacy then in case of donated ovum and sperms. The child may belong to an anonymous donor which does not satisfy any logic. In case the child is deformed due to biological complications in which the intended parents denies adopting the child what should be her liability? Should she be answered negatively and for this reason we support the above contention. Furthermore the surrogate mothers right should not be neglected. It should be made mandatory to specify the rights of surrogate mother in the contract before the commencement with mutual consent. Next vital aspect that needs to be dealt is the legitimacy of the child since the surrogate contracts are considered legal and valid as per the assumptions of the suggested legislation conferring legal status to the mother automatically leads to legitimacy of the child. In India the suggestions made for legislation jeopardizes the legal position. It is not that there are no instances of surrogate birth in India but they remain latent because

of obscure legal position and social rejection of such techniques. A proper legislation will make it easier for the intended parents to deal with their problems. The Bill not only openly promotes unregulated commercial surrogacy but also contradicts existing national policies on health and family welfare.

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