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Dr. Pradeep Kumar
Executive Editor & Managing Director
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Analytical Study of the Role of the Higher Judiciary in Development of the Environmental Jurisprudence under Indian Constitution

***Dr. Umesh S. Aswar*[1]**

Introduction

Problem of the environmental pollution is having recent origin. The mankind has been facing this problem after Second World War particularly with the commencement of the process of the liberalization & globalization. The present-day era of privatization, urbanization and industrialization has intensified the evil of environmental pollution. It on one hand has increased the material wealth/luxury for the human being but on other hand has compelled him to suffer environmental pollution. On this background it is interesting to study the contribution of the Indian Constitution in protection of environment and curbing the problem of environmental pollution.

In a strict manner the growth of environmental jurisprudence is also the recent phenomena. Therefore in Indian Constitution also the provisions regarding protection of environment and prevention of environment pollution are having latest origin (42nd Constitutional Amendment Act 1976). However it is interesting to note that some of the original provisions of the Indian Constitution like Article 14, 19 and particularly Article 21 also have contributed a lot for the growth and development of the environmental jurisprudence. Indian higher judiciary has played the significant role in this regard.

Directive Principles of the State Policy (Part IV of the Constitution, Article 36 to Article 51): Indian participation in Stockholm Conference held in 1972 and ratification to its declaration has become instrumental for the beginning of the environmental jurisprudence under Indian legal system. In order to discharge the obligation of the State party at Stockholm conference 1972 the 42nd Constitutional Amendment Act 1976 was passed by the Parliament and following Articles were added in Part Three of the Constitution.

Article 48A, "The State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country.''
Article 47, "The State shall regard the raising of the level of nutrition and standard of living of its people and improvement of public health as among its primary duties."

[1] ***Former Judge, Assistant Professor (Law), Government Law College Mumbai.***

The feature of Part IV of the Indian Constitution is that it is the positive obligation on the part of the State to have the policies and the laws for the fulfillment of the sublime objectives mentioned there. The aforementioned Articles enabled the State to enact laws for the protection of environment and prevention of environmental pollution.

Fundamental Duties (Part IVA of the Constitution): 42nd Constitutional Amendment Act 1976 has inserted Clause (g) to Article 51A which runs as follows, "It shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers, wildlife and to have compassion for living creatures"

Article 51A (j) speaks that "It shall be the duty of every citizen of India to strive towards excellence in all the spheres of individual and collective activity so that the nation constantly rises to the higher levels of endeavour and achievements."

The end of the Article 51A is creation of the culture of protection of environment among Indian citizens which is the most effective way of the protection of environment and prevention of environment pollution.

In *L. K. Koolwal vs. State of Rajasthan*[2] the Rajasthan High Court while making interpretation of Article 51A held that "We can call Article 51A ordinarily as the duty of the citizens. But in fact it is the right of the citizens as it creates the right in favour of citizens to move to the Court to see that the State performs its duties faithfully and the obligatory and primary duties are performed in accordance with the law of the land. Omissions or commissions are brought to the notice of the Court by the citizen and thus Article 51A gives a right to the citizens to move the Court for the enforcement of the duty cast on the State instrumentalities, agencies, departments, local bodies and statutory authorities created under the peculiar law of the State."

Constitutional provisions under part IV and IVA impose two fold responsibilities. On the one hand they give directives to the State for the protection and improvement of environment and on other hand they cast duty on every citizen to help in the preservation of natural environment.

Fundamental Rights (Part III of the Indian Constitution): and Contribution of the Indian Higher Judiciary for the Development of the Environmental Jurisprudence in Indian Legal System

The higher judiciary showing the classic example of judicial activism has interpreted the Article 21, 14 and 19 of the Indian Constitution in a dynamic manner and thereby set up a strong base of environmental jurisprudence in Indian legal system. The researcher hereinafter has discussed the case laws which show that how the original aforementioned Articles in the Constitution have been interpreted liberally by higher judiciary thereby raising of the status of environmental right as the fundamental right of Indian citizens.

[2]AIR 1988 Raj. 2.

Under Article 226 and 32 the petitioner can approach the respective High Courts and Supreme Court (in the latter case as a matter of his fundamental right) to enforce the fundamental right to live in clean and healthy and pollution free environment.

Article 21 of the Constitution

"No person shall be deprived of his right to life and personal liberty except according to the procedure established by law." In landmark case of the *Manika Gandhi vs. Union of India*[3] Supreme Court making interpretation of the term right to life held that, right to life includes right to live with human dignity and all that goes along with it, namely the bare necessaries of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. Special mention to this case has been given because with this case judiciary had started incorporating so many basic human rights within the purview of a right to life. And subsequently right to live in clean, healthy pollution free environment was also declared by Supreme Court as a part of right to life under Article 21. Regarding that following case laws are important.

(1) *Rural Litigation and Entitlement Kendra, Dehradun vs. State of UP*[4] Complaint was filed in Supreme Court against alleged illegal limestone mining in Mussoorie, the southern region destroying the fertile ecosystem in the area. Supreme Court had treated the complaint letter as a writ petition under Article 32 of the Constitution and ordered the closure of some of these quarries on the ground that their operations were upsetting ecological balance. In this case the court for the first time had held that society is entitled for right to live in healthy and pollution free environment.

(2) MC *Mehta vs. Union of India*[5], (Ganga Tanneries Pollution Case) In this case Supreme Court held that "We are conscious that closure of Tanneries may bring unemployment and loss of revenue but life, health and ecology have greater importance to the people". In this case court has clarified that in comparison of the unemployment and loss of revenue issue of protection of environment is more important.

(3) *T. Damodar Rao vs. Special Officer Municipal Corporation of Hyderabad*[6] In this case Supreme Court held that "It would be reasonable to hold that the enjoyment of life and its attainment and fulfilment guaranteed by Article 21 of the Constitution embraces the protection and preservation of Nature's gift without which life cannot be enjoyed. There can be no reason why a practice of violent extinguishment of life alone should be regarded as violative of Article 21 of the Constitution. The slow poisoning by the polluted atmosphere caused by environmental pollution and

[3] AIR 1978
[4] AIR 1985 SC 652.
[5] AIR1988 SC 1038.
[6] AIR1987 SC 1037.

spoliation should also be regarded as amounting to violation of Article 21 of the Constitution" In this case law court had included right to live in healthy and pollution free environment within the ambit of right to life under Article 21 of the Constitution.

(4) *Kinkri Devi vs. State of UP*[7] It was the PIL filed by social activists against unscientific and uncontrolled quarrying of limestone in Shivalik Hills. Here Supreme Court held that state should refrain from granting the licenses for mining in unreasonable manner at the cost of causing loss to the environment and laid down the following principles. (a) Natural resources have got to be tapped for the purpose of social development but tapping has to be done with care so that ecology and environment may not be affected in any serious way. (b) The Natural resources are permanent assets of mankind and are not intended to be exhausted in one generation. (c) If industrial growth sought to be achieved by reckless mining resulting in loss of life, loss of property, loss of amenities like water, creation of ecological imbalance there may ultimately be no real economic growth and no real prosperity. (d) There is both a Constitutional pointer to the State Article 48A and Constitutional Duty of Citizen Article 51A(g) not only to protect but also to improve the environment. The neglect or failure to abide by the pointer or to perform the duties is nothing short of betrayal of the fundamental law which the State and indeed every citizen is bound to uphold and maintain".

(5) *MC Mehta vs. Union of India*[8] ('Taj Mahal Case') Here Supreme Court held that (a) After examining reports of experts it came to the conclusion that emissions generated by coke, coal consuming industries are air pollutants have a damaging effect on Taj and people living in the vicinity. (b) The Precautionary Principle and Polluter Pays Principle have been accepted as the part of the law of land. Article 21 of the Constitution guarantees protection of life and personal liberty. There are other Constitutional mandate to protect and improve the environment, like Article 47, 48A and Article 51 A (g) & (h). (c) In view of the precautionary principle the environmental measures must anticipate, prevent, and attack the causes of environmental degradation. The onus of proof is on industry to show that its operation are not affecting the environment adversely. (d) 292 industries located and operating in Agra must change over within the time schedule to natural gas as industrial fuel or stop functioning with coke, coal and get a relocated. (e) The workmen employed in such industries be awarded with additional compensation of six years wages to be given to employees of industries going to be closed. So far as shifting industries are concerned bonus be given to employees who agree to shift with industries. (f) Agra be declared as the heritage city.

[7]AIR 1988 HP4.
[8]AIR1997 SC734.

(6) *MC Mehta vs. Union of India*[9] In this case Supreme Court observed that, (a) Doctrine of Public Trust rests primarily on the principle that certain resources like air, water and forests are very important for the people as a whole and it would be wholly unjustified to make them subject to private ownership. (b) Our legal system based on English Common Law includes the public trust doctrine as a part of its jurisprudence the State is the trustee of all natural resources which are by nature meant for public use and employment. (c) Public at large is the beneficiary of the seashore, running water, air, forests and ecologically fragile land. The State as a trustee is under a legal duty to protect the natural resources. These resources are meant for public use cannot be converted into private ownership. (d) The doctrine of Public Trust places following restrictions on the Authorities that the property subject to the trust must not only be used for public purpose, but it must be held to be available for use by the general public.The property may not be sold, even for a fair cash equivalent.The property must be maintained for particular type of uses.

Article 14 of the Constitution

The natural resources like air, water, land, minerals, forests, rivers, lakes, fountains etc. are necessary to be used for development purposes. Right to Development is also one of the basic rights. Doctrine of Sustainable Development maintains the balance between development and concept of preservation of natural resources and environment. It expect that natural resources should be used in a reasonable manner. On one hand the natural resources should be used and on other hand natural resources should be preserved or favourable conditions for their enhancement should be created. Doctrine of Sustainable Development expects the State to undertake entire Environmental Audit prior to giving sanction to new industry or before permitting increase in the manufacturing capacity of the industry. Under Article 14 State is duty bound to implement the concept of sustainable development for promotion of Inter-generational Equality regarding use of natural resources. In the above-mentioned rulings the higher judiciary has taken resort to the doctrine of sustainable development and concept of inter-generational equality under Article 14 of the Constitution.

Article 15 (2) and Article 19 (1) (e)

Article 15 (2) No citizen shall on grounds only of religion, race, caste, sex, place of birth or any of them be subject to any disability, liability, restrictions or conditions with regard to, the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds dedicated to the use of general public. As held by the courts it includes fundamental right to use water in wells, tanks, bathing ghats which are clean and pollution free therefore it is obligation of the State (local authorities) to prevent pollution at these places.

[9]AIR1997 SC 734.

Article 19 (1) (e) all citizens shall have the right to reside and settle in any part of the territory of India. Court said that it includes fundamental freedom to reside and settle in a place which is clean and pollution free.

Conclusion

42nd Constitutional Amendment Act 1976 and insertion of Article 48A and Article 51A have paved the way for the creation of the base of environmental jurisprudence under Constitution. It is the higher judiciary which has played dominant role in creation of the environmental jurisprudence under Indian legal system by interpreting Article 47, 48A, 51A(g), 51A(j), 14, 15, 19(1)(e) and Article 21 of the Constitution in dynamic manner and conferring fundamental right to live in healthy and pollution free environment on Indian citizens.

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Liability of Hospitals in Case of Medical Negligence in India

***Dr. Pradeep Kumar*[1]**

Abstract

Medical profession is the noblest social service but due to globalization, commercialization and privatization around the sector prevalence of Medical Negligence has additionally accelerated. Medical Professional has ridiculed to earnings churning best. Medical Practitioners and Hospital Management are worried in earning greater and extra money and are getting negligent closer to their obligations. Medical Practitioners and Hospital Managements are concerned in earning greater and more money and have become negligent towards their responsibilities. Inherent within the idea of any career is the code of conduct, containing the basic ethics that underline the ethical values that govern expert exercise and is aimed at upholding their dignity. With the notice within the society, the people in trendy are amassing cognizance approximately their rights and measures for damages in tort, civil suits and criminal complaints are on the increase. Not only civil fits are filed, the accessibility of a medium for criticism redressal under the Consumer Protection Act, 1986 having jurisdiction to hear lawsuits towards scientific experts for 'deficiency in provider', has additionally given rise to a large range of complaints in opposition to docs, being filed via the aggrieved people. A clinical practitioner's legal responsibility arises while following essentials of negligence that there's- obligation to take care, breach of that duty and the result of breach purpose damage, solely current. The duty to attend to scientific profession is relatively better than an everyday man because, in case of a profession the unique information and skill is deemed to be exists in such a guy of his career. This paper deals with the Liability of Hospitals in Case of Medical Negligence in India.

Introduction

Hospitals are complex industrial organization.[2] They are perplexing in the scope of therapeutic help they give. In India, for the most part emergency clinic, nursing homes, etc. can be set up without the need of any accreditation or confirmation to guarantee consistence with least norms. The liability of these medical institutions in the event of medicinal carelessness is held to be in the nature of vicarious liability. The vicarious obligation of the restorative carelessness depends on the head of 'respondent superior'. Creators of Hospital are obligated for carelessness of their representatives who causes wounds in course of their obligations. The meaning of business, anyway is a not a basic one. The definition of employment, however is a not a simple one. Intern, resident, staff nurses and ward boys who are paid salaries by the hospital authority are considered to be employees.[3]

The general rule of vicarious obligation is that there must be a relationship of work i.e. employment whereby the employer stands in a position of authority *vis-a-vis* the employee in terms of which the former is legally capable of exercising control over the

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[2]Dr. S Rangarajan, "*Minimum Standards in Setting up a Modern Hospital*," proceeding of interactive Seminar on Doctor and the Consumer Protection Act, 1986 dated on Sunday, 28, January, 1996 organised by Sundram Medical Foundation , Annanagar, Chennai, p. 3.

[3]Angele Roddey Holder, *Medical Malpractice Law*, (Canada, John Wiley & Sons, 2nd Ed., 1978), p. 210.

actions of the latter. The possibility of a representative being heavily influenced by the business as the premise of vicarious risk is examined by *Scott*[4] who expresses that the model of control is utilized generally in circumstances where a business contracts or loans out their worker to a third individual to play out a specific undertaking, despite the fact that it isn't altogether clear what is implied by the control rule.[5]

The inquiry emerges in such cases whether the business or the individual to whom the representative is lent out is in real control of the employer or not. Scott contends that the control test is likewise utilized as a rule in case of somebody utilizing someone else essentially to play out a follow up for their sake. In these cases it gets important to decide if the former can be called a employer of the later. In such conditions the relationship would be similar to that of operator and head. Plainly the control test without anyone else isn't adequate to build up vicarious obligation and the South African courts have now clarified that the control test is just one of an assortment of conditions that they will consider when settling on the presence or in any case of vicarious risk.[6]

The subject of vicarious risk will normally emerge in those situations where an individual utilizes another to play out a legal action, and the worker doesn't continue with the required or expected proportion of expertise or care and makes hurt others.[7] Two situations as a rule emerge in the field of restorative carelessness, first where the representatives of a professional are careless and furthermore where the workers, including specialists, of a medical clinic are careless. The facts confirm that therapeutic carelessness is a convoluted subject and choices with respect to risk of medical clinic the executives consistently relies on the realities and conditions expedited record. There might be numerous instances of clear inadequacy/carelessness in administrations rendered by the clinic the executives/medicinal professionals. Such cases can be:

1. Hospital administration doesn't give quick treatment when required;
2. Hospital administration doesn't avoid potential risk, according to restorative statute, of giving the test portion of drugs which are probably going to be deadly at times, or may cause sensitivity;
3. Postoperative treatment isn't given appropriately;
4. Surgical injury is caused at a better place than required;
5. After activity, septicemia or gangrene happens;
6. Improper remedy of medications; if there should arise an occurrence of fever, without appropriate analysis, mix of tablets and infusions for jungle fever, typhoid, and so forth, are uninhibitedly utilized, on experimentation premise;
7. Restorative instruments are left in the body;

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[4] W.E. Scott, "The theory of Risk Liability and its application to Vicarious Liability," *C.I.L.S.A.*, 13, 1979, p. 44.
[5] *Ibid* at 58.
[6] *Mtetwa v. Minister of Health* 1989 (3) SA 600 (D).
[7] *Stadsraad van Pretoria v. Pretoria Pools* 1990 (1) SA 1005 (T); *Gibbins v. Williams, Muller, Wright &Mostert Ingelyf* 1987 (2) SA 82 (T); *Mkize v. Martens* 1914 AD 382; *Minister of Police v. Mbilin*i 1983 (93) SA 705 (A); *Nel v. Minister of Defence*1979 (2) SA 246.

8. Malpractice by the medical clinic the executives, for example, uncalled for neurotic reports or examinations recommended.

In such cases, where restorative carelessness is evident, clinic the board/therapeutic specialists are subject to pay remuneration or harms to the person in question.[8] After occurrences of restorative carelessness risk of therapeutic professionals and emergency clinic has increased. It is selection of patients that they can file a common civil suit or criminal case. Patient is a vulnerable group of our society. They are physically, mentally and financially victims of health care professionals/hospital management. Every patient has a right to health and Human Rights are inherent. Restorative professionals abuse patients' privilege and it is an obvious infringement of right to wellbeing and life of patients.

The emergency clinic administrations and medicinal professional owe a big obligation in tort to his patients regardless of any agreement between them.[9] When an individual has been acknowledged as a patient, the clinic administrations and therapeutic expert must exercise sensible consideration and ability in his treatment of that patient. Any careless blunder in doing treatment and any careless exclusion to give satisfactory treatment will be noteworthy. Medical clinic specialists, and along these lines their staff, owe an obligation to any patient conceded for treatment, including a patient introducing himself at a loss unit.[10] A general professional owes an obligation to each patient acknowledged onto his National Health Service (NHS) list, regardless of whether as a changeless patient or as a transitory occupant. Inability to go to such a patient will be noteworthy on evidence that the sensibly capable general professional would have perceived that participation was essential.[11]
The ongoing case of clinic organization found in Mumbai by an across the nation study found a benefit of sepsis inside escalated care units of medical clinics one of four patients conceded in ICUs gotten the disease in clinics' crisis divisions. Very nearly one out of two patients with sepsis passed on. The purposes behind the rising demonstrate could be poor clinic cleanliness, maltreatment of anti-toxin or widespread self-drug among individuals. Indian legal executive has assumed an extremely huge job to shield persistent from therapeutic carelessness. In the milestone three judge seat (Kuldip Singh J., S.C. Agarwal J. what's more, B. L. Hansaria J.) choice of the preeminent court conveyed in Indian Medical Association v. V.P. Shanta, an unmistakable and powerful law has been set somewhere near the Supreme Court and has been given an obvious decision

[8] Justice M.B. Shah, Foreword Note in Dr. Sunila Sharma, Book *Law and the Doctor* (New Delhi: Paras Medical Publisher, 2011).
[9] *Gladwell v. Steggal* (1839) 5 Bing N.C. 733, cited in Clerk and Lindsell on *Torts* (London: Sweet & Maxwell, 8th Ed., 2000), p. 456.
[10] *Barnett v. Chelsea & Kensington Hospital Management Committee* [196911 Q.B. 428 (patient sent home from casualty by doctor who failed to spot symptoms of arsenical poisoning), cited in Clerk and Lindsell on *Torts* (London: Sweet & Maxwell, 8th Ed., 2000), p. 456.
[11] *Edler v. Greenwich and Deptford H.M.C*., The Times, March 7, 1953; *Kavanagh v. Abrahamson* (1964) 108 Si. 320. The Bolam test applies here, so only if no reasonable doctor would have refused to attend will the doctor he liable; *Morrison v. Forsyth* [1995] 6 Med.L.R. 6, cited in Clerk and Lindsell on *Torts* (London: Sweet & Maxwell, 8th Ed., 2000), p. 456.

concerning the incorporation of the administration under CP Act, Supreme court clarify that administration render to a patient by restorative specialists by the method for interview conclusion and the treatment both by therapeutic and careful would fall inside the ambit of the 'administration', as characterized in Sec. 2(1)(o) of the Act with the exception of those administration which are rendered by the specialist liberated from cost.

The principle of R*es ipsa loquitur* applied

In *Spring Meadows Hospital v. Harjol Ahluwalia*[12] Court while dealing with the medical negligence held that in this case of gross medical negligence the principle of *res ipsa loquitur* can be applied. In *Postgraduate Institute of Medial Education and Research, Chandigarh v. Jaspal Singh and others*[13], the Court held that mismatch in transfusion of blood resulting in the death of the patient, after 40 days, is a case of medical negligence. In *Dr. Jallauddin Khsn v. Inder Sen Verma*[14] patient alleging that homeopathy doctor not qualified and not authorize to practice Allopathy, to give injections of piles to patients, resulting in serer complication.

In *V. Kishan Rao v. Nikhil Super Specialty Hospital*[15] the Apex Court considered at length the principal and gave certain illustrations on medical negligence were the principal of *Res ipsa loquitur* could be applied.

In *Ashish Kumar Mazumdar v. Aishi Ram Batra Charitable Hospital Trust*[16] the plaintiff, an in-door patient in the hospital fell out of the window of the Hospital room. Appling the rule of *Res ipsa loquitur*, a three-judge bench of the Supreme Court held the hospital liable stating it to be a clear case of absence of due care of the hospital.

The Principle of Vicarious Liability

The hospitals authorities using experts are vicariously responsible for any negligence shown by way of them in the course in their employment. A clinic authority is now held to be accountable for negligence of its professional personnel radiographers.[17] It matters no longer whether the character responsible for a NHS patient's injuries is a nurse, a physiotherapist, senior representative, or different employee[18]; supplied that character is an employee, the hospitals authority is vicariously chargeable for his tort.

The position of a affected person handled privately isn't always always the equal. Whether he's handled as a private patient in a NHS clinic or a non-public health center, he

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[12] [(1998) 4 SCC 39].
[13] (2009) 7 SCC 330.
[14] A.I.R. 2010 (NOC) 64 (NCC).
[15] (2010) 5 SCC 513.
[16] AIR 2014 SC 2061.
[17] *Gold v. Essex C.C.* [1942] 2 K.B. 293; *Cassidy v. Ministry of Health* [1951] 2 K.B. 343; *Roe v. Ministry of Health* [1954] 2 Q.B. 66, cited in Clerk and Lindsell on *Torts* (London: Sweet & Maxwell, 8th Ed., 2000), p. 478.
[18] *AB & others v. Tameside H.A.* [1997] P.N.L.R. 140 (alleged insensitive communication of possible danger from AIDS-contaminated doctor leading to psychiatric injury: duty of care conceded, though action failed on the facts), cited in Clerk and Lindsell on *Torts* (London: Sweet & Maxwell, 8th Ed., 2000), p. 478.

may also nicely have selected the consultant to take care of him, shrunk at once with that consultant for the necessary remedy or surgical treatment, after which gotten smaller one after the other with the health center or medical institution for nursing and ancillary care. In the sort of case the consultant does no longer act as the worker of the sanatorium or health center, which isn't accountable for any negligence of his. Where an injury is suffered in the direction of surgical treatment, setting up whether any negligence was the fault of the medical professional or different theatre group of workers can be elaborate and it could be difficult to raise any inference of negligence in opposition to a selected and identifiable individual[19].

A medical practitioner is therefore vicariously responsible for the wrongful acts and omissions of his or her body of workers on the idea of respondent advanced. As regards personnel, that it's miles frequently hard to differentiate between awesome grounds of a physician's liability to his or her patient. There is first his or her vicarious legal responsibility for injury on account of the breach by way of his or her personnel within the route of their employment in their obligation to him or her as corporation, and secondly his or her direct liability in failing inside the right employment and supervision of his or her workforce.

Negligent failure by way of a medical practitioner well to supervise his or her workforce may also in flip provide rise to two wonderful bases of liability; first off on the idea of vicarious liability for the negligence of his or her employees, and secondly as a breach of his or her primary duty of due care in offering for the patient's proper treatment and safety while on his or her premises. For example, if the clinical practitioner changed into to delegate to his or her team of workers his or her own professional duties, she or he may be in my view responsible for his or her personal negligence in so doing, and vicariously answerable for the negligence of his or her team of workers in sporting out those duties which need to by no means have been delegated to them.[20]

Therefore, in cases of clinic clinical negligence, the plaintiff, in addition to proving the necessities for a contractual or delictual claim as set out above, will must prove:

(a) that the person that dedicated the delict was an worker of the health center;
(b) that he or she completed the act within the route and scope of his or her employment;
(c) What that employee's responsibilities were or with what paintings she or he turned into entrusted with on the applicable time.

The liability of scientific negligence gadget has two primary purposes firstly it seeks to offer reimbursement to patient who suffers medical blunders or injury. Secondly it seeks to penalize medical practitioners, whose negligence causes injury to affected person,

[19] *Denning L.J.* suggested in *Roe v. Ministry of Health* [1954] 2 Q.B. 66 at 82 that if one of two persons must have been negligent they cannot defeat the claimant by silence or blaming each other. With great respect, however, it is submitted that this view is heterodox and unsupportable.
[20] *Ibid*.

thereby presenting the incentive to take appropriate precautions in medical remedy. The scientific practitioners are private legal responsibility for his owns negligence and possibly the scientific practitioner's vicarious liability for negligence of her staffs. There is a contractual courting between the scientific practitioners and the patient; the clinical practitioners may be liable for beach of touch if he does not perform her work is a civil legal responsibility if they are gross negligent in remedy is a crook liability in crook law.

Since there's no express provision in Consumer Protection Act to consist of the scientific practitioner's carrier in the purview of the Act, consequently the function of judiciary has emerge as very vital with this regard, before the enactment of the Act the liability of the medical doctor turned into determined on the premise of 'tort' by taking some principle like res *ipsa loquitor* and the concepts laid down by using the British courtroom like *Bolam* take a look at and so forth, but after the enactment the query has been raised, whether or not patients are being stored via applying the CP Act inside the case of medical practitioner. Second part of this chapter offers nature and rising dimension of medical negligence. Third element deals with the liability of health facility in case of medical negligence. The liability of medical institution held in vicarious legal responsibility for the negligent conduct of its worker.

The vicarious liability of the clinical negligence is based at the most important of respondent superior. The higher achievement in identifying the hospitals legal responsibility a The Clinical Establishments (Registration and Regulation) (CE) Act turned into surpassed in 2010 for the registration and regulation of medical establishments in the united states of america and for matters related therewith or incidental thereto and regulates liability of medical professional/medical institution management.

Whereas, it's miles considered expedient to provide for the registration and law of scientific establishments for you to prescribe minimal standards of centers and services which can be provided by means of them so that mandate of the Constitution of India for improvement in public health can be done. The Act shall satisfy the minimal standards of facilities and offerings as can be prescribed the minimal requirement of employees as can be prescribed the provisions for renovation of statistics, different circumstance and reporting as can be prescribed. But in floor realty there was numbers of clinical established order are walking without registration after the passing the act of two years.

A health practitioner is not liable both for the negligence of some other medical doctor who takes rate of his affected person at his request, or for the negligence of a physician whom he engages to carry out an operation. Physicians who're companions, but, are chargeable for the medical negligence, going on within the scope of the commercial enterprise, or any one of the companions. Likewise, by means of the burden of authority, a doctor is accountable for the negligence of a nurse in leaving a sponge or tube within the patient's frame. The choices to the contrary have normally been reached on the ground that the healthcare professional had no control over the hiring and the discharging of the

nurse, or that the medical professional had no understanding, or way of knowing, of the nurse's negligence.

On the opposite hand, a health facility physician isn't always answerable for the negligence of a nurse in recognize of a obligation completely the nurse's. Instances of such negligence are scalding the affected person in a hot tub, or leaving a warm water bottle in the patient's bed. Opinion is cut up as to the effect upon the legal responsibility of a medical institution doctor for a nurse's negligence, in instances in which he could in any other case be liable, of the employment via the affected person of a unique nurse. A health center or its owner, even as now not liable for the clinical negligence of an independent medical doctor is, of direction, responsible for the negligence of its team of workers physicians and nurses.

If you are injured while receiving remedy in a hospital, are you able to sue the sanatorium for negligence or clinical negligence? Though hospitals are regularly at the hook for incompetent care provided via personnel like paramedics, nurses, and scientific technicians, they frequently are not accountable for a physician's scientific malpractice. Here's a primer on when a health facility is, and isn't always, accountable for medical malpractice dedicated by its personnel and team of workers docs[21].

If a person is an employee of a hospital, the health facility is dependable if that employee hurts a patient by way of appearing incompetently. In different words, if the employee is negligent isn't reasonably cautious whilst treating or managing a patient, the sanatorium is at the hook for any ensuing injuries to the affected person.[22]

Normally, nurses, scientific technicians, and paramedics are clinic employees. As long because the employee become doing something job related while he or she injured the affected person, the patient can sue the sanatorium. For example, if a paramedic employed by means of the sanatorium injects the incorrect solution into the patient on the manner to the hospital, mainly if the medical situation isn't always existence threatening, then the clinic is liable for the paramedic's mistake.[23]

However, if a medical doctor makes a mistake and injures a affected person whilst operating within the clinic, the sanatorium will now not be answerable for the health practitioner's mistake except the doctor is an worker.

Also, if a medical institution employee commits malpractice even as under a medical doctor's supervision, the patient can sue the health practitioner, however the hospital may be off the hook. Whether an worker is beneath the supervision of the physician while the misdeed takes place depends on:

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[21] http://www.nolo.com/legal-encyclopedia/medical-malpractice-patients-sue-hospital-negligence-30189.html access on 12/02/2018 at 13:45pm.
[22] *Ibid.*
[23] *Ibid.*

- whether or not the health practitioner turned into present, and
- whether or not the health practitioner had manage to prevent the employee's negligence.

Whether a Medical Practitioners is a medical institution worker relies upon on the nature of his or her dating with the hospital. Though a few docs are health center employees, maximum medical doctors aren't. Non-employee medical doctors are unbiased contractors, because of this that the clinic can't be held answerable for the physician's medical malpractice, although the malpractice befell within the medical institution. A Medical Practitioners is much more likely to be an worker (in preference to an impartial contractor) if:

- the medical institution controls the health practitioner's working hours and holiday time, or
- the sanatorium units the costs the doctor can price.

Even if a clinic might usually now not be accountable for an independent contractor medical doctor's malpractice, a hospital can be held responsible in positive conditions. If the hospital does not make it clean to a affected person that the medical doctor isn't an employee, the patient can sue the health center for the health practitioner's malpractice. Hospitals try and avoid this hassle by using informing sufferers in the admission bureaucracy that the medical doctor is not a sanatorium worker.

A variety of states preserve the hospital responsible if it offers workforce privileges to an incompetent or risky doctor, even though the medical doctor is an independent contractor. The medical institution is likewise accountable if it need to have acknowledged that a formerly secure doctor had end up incompetent or dangerous. For example, if a doctor will become severely hooked on drugs and the medical institution management knew about it, or it turned into so obvious they ought to have recognized approximately it, a affected person injured by that doctor can sue the clinic.

In *Smt. Kalwati v. State of H.P.*[24] it's been held that the State is liable for the negligence of staff of presidency clinic. The Apex Court in *State of Haryana v. Santra*[25] held that the medical ethics require certain obligations to be done via the medical practitioners with reasonable diploma of care and ability, failing which, such negligence of the clinical practitioners working inside the Government Hospitals vicariously receives shifted on the company State.

In *Marshall v. Lindsey C.C.*[26] affected person was admitted to a maternity home in which there was a case of puerperal fever, the maternity home authority become held to be

[24] AIR 1989 HP 5.
[25] (2000) 5 SCC 182; AIR 2000 SC 1888.
[26] [1935] 1 K.B. 516.

negligent. After years is to the identical effect in *Heafied v. Crane*[27] the patient changed into admitted to a cottage medical institution and put inside the same ward as a "gravely suspicious case," which grew to become out to be puerperal fever. The affected person reduced in size the disease. It was held that by using Singleton J. The hospital authority and the medical practitioners in fee had been negligent.

In *Gold v. Essex Country Council*[28] a lady changed into handled by a radiographer, an employee of the contrary medical institution. During the treatment, the radiographer did no longer provide adequate screening cloth. As a result, the lady becomes injured in her face. She sued the hospital government for negligence. The court of Appeal held that the sanatorium authority have been responsible for the radiographer's negligence. For comparable tendencies in Scottish law in *MacDonald v. Board of Management for Glasgow Western Hospitals*[29] the vicarious responsibility of health center government turned into steadily enlarged making sanatorium government responsible for any negligence on the a part of resident clinical officers.

In *Collins v. Herts C.C.*[30] it turned into held that the hospital authorities have been accountable by way of cause of a negligent machine in the provision of risky capsules. In any other case of *Jones v. Manchester Cooperation*[31] a residence health care professional who were certified for 5 months, administrated the anaesthetic Pentothal too speedy and in immoderate amount with the end result that the patient died. The courtroom of Appeal held that the health center board became negligent in allowing a clinical practitioner with such moderate experience to manage Pentothal. In equal *Fox v. Glasgow South Western Hospitals*[32] hospital authority were held chargeable for alleged negligence of nurse throughout operation.

The NHS affected person who suffers damage because of negligence may additionally sue the fitness authority as being vicariously responsible for the negligence of each and every considered one of its personnel. But what if it is hooked up that the man or woman accountable is not an worker of the authority, but is an enterprise nurse, or a physician delivered in ad hoc? It now appears clear, following suggestions through *Denning L.J*. In *Cassidy v. Ministry of Health*[33] and a choice by the High Court of Australia[34], that health government is underneath a personal, non-delegable obligation to peer that care is taken in supplying remedy, analogous to the non-delegable obligation owed with the aid of an organisation to his employees. Brooke L.J. Stated as a great deal in *Robertson v.*

[27] The Times, July 31, 1937.
[28] (1942) 2 K.B. 293.
[29] 1954 S.C. 453.
[30] [1947] 1 K.B. 598.
[31] [1952] 2 Q.B. 852.
[32] 1955 S.L.T. 337.
[33] [1951] 2 K.B. 343 at 360-362, cited in Clerk and Lindsell on *Torts* (London: Sweet & Maxwell, 8th Ed., 2000), p. 478.
[34] *Commonwealth v. lntrovign*e (1982) 56 A.L.J.R. 749 at 755 and 757, cited in Clerk and Lindsell on *Torts* (London: Sweet & Maxwell, 8th Ed., 2000), p. 478.

Nottingham A.H.A.[35], and it has in view that been determined, according with this precept, that a health authority which contracts out offerings to an independent contractor is chargeable for any fault exhibited via the latter.[36] It is submitted, however, that this precept will now not follow to a consultant or physician specifically chosen by using the patient.[37]

In *Jones v. Manchester Corpn and Ors.*[38] the demise became as a result of negligence of an green medical practitioner (Dr. Wilkes) administering 10 cc of anesthetic drug Pentothal swiftly to the affected person without adequate supervision. The hospital board became held vicariously responsible for negligence. The pro-part of duty for the damage become held as 20% to Dr. Wilkes and 80% to the health facility board.

In case of *Helliman v. Prindle*[39] the court did now not hold to accountable medical practitioners but liability becomes imposed on hospital management. The truth of the case "Instead of xylocaine, the nurse gave formalin to the health care provider who injected it for local anesthesia. This brought about necrosis of the tissues. The health center became held vicariously dependable. The physician becomes no longer held in charge as the nurse was certified."

In *Foster v. Englewood Hospital Authorities*[40] a young guy turned into operated for dislocated shoulder. The clinical practitioners left the OT when he had completed, at the same time as the patient's respiratory become nonetheless definitely assisted. The nurse anesthetist moved him to healing room without attaching to a respirator. In recovery room she realized that the affected person had problem in breathing. She referred to as for a health practitioner however the affected person died of oxygen deprivation. The court docket observed the physician vicariously chargeable for the nurse's negligence and for having failed himself to stay within the OT with the patient until he was respiratory normally.

In *Gray v. Mid Herts Group Hospital Management Committee*[41] a one-yr-antique infant evolved problem in respiration and suffered from anoxia after a premedication of Omnopon (5mg) given for inguinal hernia repair. He developed spastic paraplegia, misplaced control over bowels and bladder and become blind and deaf. He suffered from suits and crying spells occasionally. He reacted slightly too acquainted and friendly touch but changed into blind to his surroundings. He died three 12 months later. His father sued

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[35] [1997] 8 Med. L.R. 113, His Lordship specifically drew on the analogy of the employers' case of *Mc Dermid v. Nash Dredging Co.* [1987] A.C. 906, cited in Clerk and Lindsell on *Torts* (London: Sweet & Maxwell, 8th Ed., 2000), pp. 478-479.
[36] *M. v. Calderdale H.A.* [1998] Lloyd's Rep. Med. 157 (a county court case concerning treatment obtained from a private hospital).
[37] *Ellis v. Wallsend* District Hospital (1989) 17 N.S.W.L.R. 553.
[38] Court of Appeal [1952]2 QB 852 [1952]2 ALL ER 125.
[39] 62P 2S 107 [1963].
[40] 313 NE 2d 255, III 1974.
[41] [1974] 118 sol J0 501.

the health center. A clinical practitioner changed into held negligent as he did now not monitor the child at some point of this era. The court also held the sanatorium was responsible of vicarious legal responsibility.

In *State of M. P. V. Dr. Bharti Patidar*[42] the clinic author can be held responsible while they're without basic facility for which they are obliged. The fact of this example is the patient become given spinal anesthesia and this causes troubles. The nursing domestic in this example turned into without fundamental facilities to address this trouble and as a consequence turned into held to be tried for negligence.

In *Jasbir Kaur v. State of Punjab*[43] a newly born child, changed into all at once determined lacking in night from the bed within the Govt. Run, Shri Guru Teg Bahudar Hospital, Amritsar. It turned into held that medical institution authorities are prone to pay reimbursement of 1, 00,000/- to the parents of the child.

In some other case of *A. H. Khodwa v. State of Maharashtra*[44] a sterilization operation was achieved after the child beginning of a patient. The clinical practitioners left a mop inside the stomach of the patent. As a effect of that, she evolved peritonitis and the same bring about her loss of life. The clinical practitioner acting the operation changed into presumed to be negligent and for that the country, which was running the clinic turned into held vicariously accountable.

In *Dr. P Narasimha Rao v. Gundmarapa Jay Prakesh*[45] Andhra Pradesh High Court held that the tragedy that took place the plaintiff turned into so shocking that any amount of cash could no longer supply him what he held misplaced permanently. It become past controversy that the permanent harm sustained by the patients changed into because of the negligence of the medical practitioners. Since on the relevance time, those medical practitioners have been the employee of the Government of Andhra Pradesh, so that latter was held vicariously susceptible to compensate for the deficiency of the medical practitioners.

In *Aleyamma Varghese Dewan Bahadur v. Dr. V Varghese & Ors.*[46] the complainant alleged negligence and deficiency in service of the other events which had ended in huge expenditure and intellectual discomfort. The State Commission, Kerala, held that there has been negligence on part of scrub nurse in counting the sponges that caused the complications. The health facility turned into vicariously prone to compensate the complainant.

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[42] 1995 Cr LR (M.P.) 243.
[43] A.I.R. 1995 P. & H. 278.
[44] 1996 ACJ 505 (S.C.).
[45] [1990] I ACJ 350; A.I.R. 1990 AP 207.
[46] 1997[1] CPR 310, Kerala State Consumer Dispute Redressal Commission.

In *R.P. Sharma v. State of Rajasthan*[47] patient became admitted to S.M.S. Hospital, Jaipur for operation of removal of gallstone. The operating general practitioner advises transfusion of blood institution O+ive to the patient. One bottle of blood group O +ive turned into transfused. After that some other bottle of blood was obtain from the Blood Bank. Due to the negligence of the sanatorium personnel the new bottle become of some other blood group, B+ive. Soon thereafter the condition of the affected person determinate and she lost her eyesight and she or he died. The State, who ran that clinic, become held vicariously responsible for the loss of life causes due to the negligence of the health center team of workers.

In *Samira Kholi v. Prabha Manchanda*[48] the appellant (Samira Kholi), an unmarried women aged 44 years, visited the clinic of the respondent (Dr. Manchanda) complaining of pronged menstrual bleeding for nine days. The respondent examined and advised her to undergo an ultrasound test on the same day. After examining the report, the respondent had a discussion with appellant and advised her to come on the next day for a laparoscopy test under general anesthesia, for making an affirmative diagnosis. She was admitted and the consent form for hospital admission, medical treatment and also, surgery, were signed. The consent form for surgery said "diagnostic and operative laparoscopy. Laparotomy may be needed". She was subjected to a laparoscopic examination under general anaesthesia. While Samira was unconscious and was being examined, Dr. Lata Rangan came out of the operation theatre and took the consent of the patient's mother for a hysterectomy. After her mother's consent was obtained, Dr. Manchanda removed the patient's uterus (abdominal hysterectomy), ovaries and fallopian tubes.

Samira Kohli filed a complaint before the National Consumer Disputes Redressal Commission, claiming compensation of Rs. 25 lakh from Dr. Manchanda. She complained that the doctor had been negligent and that the radical surgery, by which her uterus, ovaries and fallopian tubes had been removed, had been performed without her consent. The compensation claimed was for the loss of her reproductive organs, diminished prospects of matrimony, irreversible damage to the body, loss of the opportunity to become a mother, as well as painful emotional trauma. The National Commission dismissed the complaint, declaring that the hysterectomy had been performed with adequate care and also, that the patient had voluntarily sought treatment at the clinic. A plea was filed at the apex court. Overruling the order passed by the National Consumer Dispute Redressal Commission, the Supreme Court held the doctor liable for malpractice. The Supreme Court opined that while additional surgery was beneficial to the patient in terms of saving time, suffering, pain and expenses, this was no ground for defence.[49]

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[47] A.I.R. 2002 Raj. 104.
[48] AIR 2002 SC 1385.
[49] Available at https://ijme.in/articles/patient-autonomy-within-real-or-valid-consent-samira-kohlis-case/?galley=html visited on 14/02/2018 at 01:16 pm.

In *Rukmani v. State of Tamilnadu*[50] the petitioner sought damages for her unwanted pregnancies, alleging medical negligence on the part of the Doctors working in the second respondent Hospital, in performing sterilisation operation on her. Even though the petitioner is entitled for damages for the alleged unwanted pregnancies, alleging medical negligence on the part of the Doctors working in the second respondent Hospital, I do not see valid reason for the silence on the part of the petitioner when she conceived her third child in the year 1992, when the sterilisation operation was performed on her on 10/10/1988, which would have at least prevented the fourth pregnancy. That apart, as contended by the learned Special Government Pleader, the petitioner could have brought to the notice of the medical practitioner about her pregnancy at an early stage. In any event, as rightly pointed out by Mr. P. Chandrasekaran, learned Special Government Pleader, the claim for damages could be granted only in appropriate civil proceedings or in a proceedings before the Consumer Forum by adducing relevant material evidence proving negligence on the part of the Doctors working in the second respondent-Hospital, for which the second respondent-Hospital is vicariously liable.

In *A.V. Janki Amma v. Union of India*[51] the wife of an Army Personnel died due to negligence of responded doctors in military hospital. The respondents and their associated claimed themselves to be specialist officers. The respondents and their associated claimed themselves to be specialist officers. It was held by the Court that the Army doctors were guilty of negligence. The duty to care required by them even if they are army officers, is pretty high and is like any other doctor of his slandered elsewhere. The Army doctors were liable for negligence. The Union government and higher authorities in Armed Medical Services cannot escape from tortuous liability on principal of vicarious liability.

In *King v. South Eastern Area Health Service*[52] case the hospital responsible for the negligence of a medical practitioner in failing to disseminate information to colleagues about significant revisions to a treatment protocol of which he was, or should been, aware.

In *Sobagmal Jain v. State of Rajasthan*[53] the petitioner got his pregnant wife admitted to the Government Hospital who gave birth to twins but excessive bleeding after delivery could not be controlled on account of negligence of the doctors and she died. Report of the deputy Director found the concerned doctor negligent since they delayed attending the wife of the petitioner. The court held that the State Government was vicarious liable for negligent act of the concerned doctors.

In *Balram Prasad v. Kunal Saha*[54], it has been held that the doctors, hospitals, the nursing homes and other connected establishments are to be dealt with strictly if they are found to

[50] Writ Petition No.5716 of 1997 on 31st March, 2003.
[51] AIR 2004 NOC 82 AP.
[52] [2005] NSWSC 305.
[53] AIR 2006 Raj. 66.
[54] (2014) 1 SCC 38.

be negligent with the patients who come to them pawning all their money with the hope to live a better life with dignity. The patients irrespective of their social, cultural and economic background are entitled to be treated with dignity which not only forms their fundamental right but also their human right. We, therefore, hope and trust that this decision acts as a deterrent and a reminder to those doctors, hospitals, the nursing homes and other connected establishments who do not take their responsibility seriously.

In this case Hospital to pay for negligence, After 16 years of a costly legal battle through all three courts of justice, the Supreme Court finally found Samitivej Plc, which owns Samitivej Hospital and two doctors guilty of wrongful action amounting to medical malpractice which led to the death, in hospital, of Mrs. Jureerat during delivery. The child did not survive. The court said the two doctors were in breach of the constitution regarding human dignity, for their failure to keep a record of the patient's changing symptoms. All medical practitioners must adhere to proper ethics while complying with medical standards in their treatment of patients.[55]

In 2010 *The Clinical Establishments (Registration and Regulation) Act, 2010* (CE Act) was passed to provide for the registration and regulation of clinical establishments[56] in the country and for matters connected therewith or incidental thereto and regulate liability of medical professional/hospital management. Whereas, it is considered expedient to provide for the registration and regulation of clinical establishments with a view to prescribe minimum standards of facilities and services which may be provided by them so that mandate of Art.47 of the Constitution of India for improvement in public health may be achieved.

No person shall run a medical established order unless it has been duly registered according with the provisions of this Act.[57] Every clinical status quo shall fulfill the minimal requirements of centers and services as may be prescribed the minimum

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[55] Available on http://www.bangkokpost.com/news/local/276853/hospital-to-pay-for-negligence accessed on 27/01/2018 at 15:18 pm.

[56] *According to Section 2(c) of the Clinical Establishments (Registration and Regulation) Act, 2010 "clinical establishment" means: (i) a hospital, maternity home, nursing home, dispensary, clinic, sanatorium or an institution by whatever name called that offers services, facilities requiring diagnosis, treatment or care for illness, injury, deformity, abnormality or pregnancy in any recognised system of medicine established and administered or maintained by any person or body of persons, whether incorporated or not; or*

(ii) a place established as an independent entity or part of an establishment referred to in sub-clause (i), in connection with the diagnosis or treatment of diseases where pathological, bacteriological, genetic, radiological, chemical, biological investigations or other diagnostic or investigative services with the aid of laboratory or other medical equipment, are usually carried on, established and administered or maintained by any person or body of persons, whether incorporated or not, and shall include a clinical establishment owned, controlled or managed by:

- *(a) the Government or a department of the Government;*
- *(b) a trust, whether public or private;*
- *(c) a corporation (including a society) registered under a Central, Provincial or State Act, whether or not owned by the Government;*
- *(d) a local authority; and*
- *(e) a single doctor.*

[57] Section 11 of the Clinical Establishments (Registration and Regulation) Act, 2010.

requirement of employees as may be prescribed the provisions for maintenance of information, other circumstance and reporting as can be prescribed in CE Act, 2010.[58]

The scientific established order shall adopt to offer in the personnel and facilities to be had, such medical exam and treatment as can be required to stabilise the emergency scientific condition of any man or woman who comes or is introduced to such medical establishment.[59] Section 32 of this Act provided that the authority, after cancellation of registration for motives to be recorded in writing, may also restrain straight away the clinical established order from sporting on if there's drawing close hazard to the fitness and safety of patients. After the passing of CE Act, 2010 medical Professionals and Medical institutions can't deny the emergency remedies.

The sanatorium authority shall within a length of two years from its establishment, compile, put up and hold in digital layout a sign in of clinical establishments, registered via it and it shall enter the details of the certificate so issued in a check in to be maintained in such shape and manner, as may be prescribed via the State Government.[60]

Each and each clinic authority, together with any other authority set-up for the registration of medical establishments beneath some other law at the moment in force, shall supply in virtual format to the State Council of scientific establishments a replica of each access made inside the sign in of scientific institutions in such way, as can be prescribed to ensure that the State Register is continuously updated with the registers maintained via the registering authority inside the State.[61]

If hospital government violates the availability of CE Act, the consequences are given in Chapter VI. The first offence with fine which may additionally make bigger to 10 thousand rupees, for any 2d offence with first-class which can also extend to fifty thousand rupees and for any subsequent offence with nice which might also make bigger to 5 lakh rupees.[62]

The provisions of penalty is whoever includes on a scientific established order without registration shall, on conviction for first offence, be punishable with a economic penalty as much as fifty thousand rupees, for 2d offence with financial penalty which may additionally amplify to 2 lakh rupees and for any next offence with economic penalty which may additionally amplify to 5 lakh rupees.[63] Whoever knowingly serves in a scientific established order which isn't duly registered beneath this Act shall be punishable with economic penalty which can also enlarge to 25 thousand rupees.[64]

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[58] Section 12 (1) of the Clinical Establishments (Registration and Regulation) Act, 2010.
[59] Section 12 (2) of the Clinical Establishments (Registration and Regulation) Act, 2010.
[60] Section 37 (1) of the Clinical Establishments (Registration and Regulation) Act, 2010.
[61] Section 37 (2) of the Clinical Establishments (Registration and Regulation) Act, 2010.
[62] Section 40 of the Clinical Establishments (Registration and Regulation) Act, 2010.
[63] Section 41 (1) of the Clinical Establishments (Registration and Regulation) Act, 2010.
[64] Section 41 (2) of the Clinical Establishments (Registration and Regulation) Act, 2010.

Medical specialists and sanatorium authority regularly forget about their obligation closer to their sufferers and conduct their expert work without observing the code of ethics and thereby violate the human rights of the patients. After enactment of Consumer Protection Act, the situation has improved a bit and Indian patients are actually privy to their rights and report complaints if their rights are infringed. But a lot is to be accomplished. It can be taken into consideration to be a small step on the lengthy avenue of stopping Medical Negligence.

Medical career has come to be a enterprise within the arms of these whose simplest purpose in life is to build up wealth via any method, truthful or foul. Indian medical practitioners spend much less and less time with their sufferers. The scientific practitioners need to communicate appropriately with the patients. The affected person's dissatisfaction is on the upward push. Most of sufferers in India are illiterate and poor. So they accept the dying in hospital as future and by no means query anyone. But when you consider that proper to health is each affected person's essential right in order that they be protected if any patient or spouse and children method the courts.

For the above discussion the statistics numbers of following liability of hospital management:

1. It is duty of sanatorium management that treatment and prognosis related fact's should be made available to every Clients/sufferers.
2. Hospital controls have to pay for compensations for victim.
3. Medical practitioner/ clinic control is to serve the humanity with full appreciate for the honor of patients.
4. Human lifestyle is more treasured. It needs to be preserved in any respect fee and medical practitioners/clinic management is ethically sure to offer necessary hospital treatment to the patients.
5. There is need to maintain minimal trendy of health care to be supplied by using each hospital.

Conclusion

Hospitals aren't above the law therefore for his or her negligence and if they're discovered responsible they need to now not break out punishment.[65] Continuation of unfair alternate practices, scientific autonomy, expanded sophistication and demand of customers, infections, unsatisfactory processing of lawsuits and emergence of clients have bolstered the purchaser movement for patient rights. In the case of scientific negligence the legal responsibility of medical institution under the important of *Res ipsa loquitur*, vicarious legal responsibility and also strict legal responsibility [66] will be implemented.

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[65] Gurjeet Singh, "Consumer Protection Act, 1986 and Medical Profession in India: Conflicts and Controversies," *JILI*, 1995, Vol. 37, No. 3, p. 360.

[66] *State of Chhattisgarh v. Gajendra Singh* AIR, 2015 SC 2836.

Also State is chargeable for negligence dedicated through doctors of government hospitals[67]. The Apex Court has inside the case of *Savita Garg v. Director National Heart Institute*[68] surely laid down that no matter the manner a specific physician is impleaded or now not, if there's negligence on his part the health facility needed to be held to have vicarious obligation. The hospitals and nursing houses are equally answerable for acts of paramedical personnel and its clinical practitioners.

[67] *V. Krishan Kumar v. State of Tamil Nadu* AIR 2015 SC 2836.
[68] (2004) IX (AB) SC 545.

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An Analogy on right to life with Dynamics Perceptive on Right to Die

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Abstract

Fundamental Rights need aid essential to heading an honorable what's more satisfying life. Most likely the greater part critical Fundamental. Rights in the Indian constitution may be those rights to life under article 21. Right to life under Article 21 doesn't incorporate correct with right to die. Right to life will be a common right, Likewise it might have been should state that an aggregation stared characteristically by what means would a chance to be wind artificially, this paper concentrate on may be right to life incorporate right should decide mercy killing, Similarly as exceptional concentrate on those situation about the most important case Aruna Ramchandra Shanbaug v. Union of India, right to die need ended up vital recognizing the headway to restorative law and the likelihood of abuse for this right Toward relatives. This situation managed for euthanasia for point of interest by recognizing between animated What's more indifferent euthanasia. Laws identifying with euthanasia in distinctive locales were viewed as. Those court deleted under A situation the place the tolerant might have been unable from claiming providing for assent Also specified who Might approach those court with respect to as much sake. It additionally laid down rules prescribing the circumstances What's more technique from claiming administering passive euthanasia. The paper Also discuss the bill which pending, with the diverse issue and the recent discuss considering perspective about administering passive euthanasia, and talk about the bill which pending, with the different issue and debate on point of euthanasia and Assisted to suicide, the bill comes in news by recent plea filed by NGO Common Cause Case v. Union of India.

Introduction

Indian constitution ensures Fundamental Rights to the residents which must be looked upon as natural rights of a person, which each individual qualified for appreciate on the off chance that he is to keep up his pride and sense of pride. These are fundamental rights basic for the acknowledgment of the most astounding great of a subject. Any infringement of these six essential rights can be addressed in the official courtroom. These are in type of fundamental and basic opportunities which each subject appreciates independently and overall. Everybody has the right to life, freedom and the security of individual.

The right to life is without a doubt the most key of all rights cherished in the Constitution of India. Every single other right add quality to the life being referred to and rely upon the pre-presence of life itself for their operation. As human rights can just connect to living creatures, one may anticipate that the correct will life itself to be in some sense essential, since none of alternate rights would have any esteem or utility without it. There would have been no Principal Rights worth saying if Article 21 had been translated in its unique sense. This article enormously joins the accentuation on different parts of life, for

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example, protect, poise, business and so forth., that accordingly has been incorporated under this article as different rights that an individual hold.

Constitution of India gives right to life and no individual ought to be denied of his life. Article 21 of the Indian constitution ensures the right to life and individual freedom to all subjects and non-nationals and no individual might be denied of his life or individual freedom except for as per method established by law. As indicated by this article right to life implies the right to lead important, finish and honorable life. It doesn't have confined importance. The protest of the principal directly under Article 21 is to keep any limitation by the State to a man upon his own freedom and hardship of life except for as indicated by technique set up by law. This right has been held to be the core of the Constitution, the most natural and dynamic arrangement in our living constitution, the establishment of our laws.

'Life' under Article 21 of the Constitution isn't just the physical demonstration of relaxing. It doesn't imply simple creature presence or proceeded with drudgery through life. It has a substantially more extensive significance which incorporates ideal to live with human respect, ideal to business, right to wellbeing, ideal to contamination free air, and so on. Right to life is major to our extremely presence without which we can't live as person and incorporates every one of those parts of life, which go to make a man's life important, finish, and worth living. It is the main article in the Constitution that has gotten the amplest conceivable understanding. Under the shade of Article 21 such huge numbers of rights have discovered safe house, development and food. In this manner, the minimum essentials, least and fundamental prerequisites that is basic and unavoidable for a man is the centre idea of right to life.

The inquiry that impacted the work on this theme is that right to live is an essential human right which has been given by the Constitution of India as Fundamental Right that implies that a man can experience the he/she plans to. If we have the right to be conceived and the right to live, then among these many rights do we likewise have the right to die? In this theme the focal point of dialog will be one of the disputable parts of the article 21, i.e., Right to Pass on. The Aruna Shaunbaug case gave another swing to this issue. By and by this point turned into the focal point of civil arguments on different news channels and daily papers.

Right to die or Euthanasia or Mercy Killing are for the most part equivalent words to each other. The easy executing of a patient experiencing a serious and difficult illness or in an irreversible trance like state. Euthanasia expects to be killing for good, alludes to purposefully finishing life of a man with a specific end goal to ease the individual from all the drawn-out torments and sufferings, there is a continuous civil argument over the sanctioning of Euthanasia. The open deliberation is with respect to the sanctioning of Euthanasia. This open deliberation is a proceeding with one as a few people are of the view that life is sacrosanct, and nobody has the right to end it while then again some say that life has a place with oneself thus every individual has the right to choose what he

needs to do with it regardless of the possibility that it adds up to dying. There is nobody unambiguous view, there is a continuous verbal confrontation regarding the matter which could never reach end.

Euthanasia and article 21 in concern to Right to Life

Euthanasia is end of life of individual who is critically ill or in a lasting vegetative state. In *Gian Kaur case*, the Supreme Court has recognized Euthanasia and endeavour to submit suicide. The court held that demise because of end of normal life is sure and up and coming and the procedure of common passing has initiated. These are not instances of dousing life but rather just of quickening finish of the procedure of characteristic passing that has just initiated.

The court additionally held that, this may fall inside the ambit of right to live with human poise up to the finish of regular life. This may incorporate the privilege of a diminishing man to likewise pass on with nobility when his life is ebbing out. This can't be compared with the privilege to right to die an unnatural passing shortening the regular traverse of life.

Introduce Situation in India with the present scenario

Passive euthanasia is lawful in India. On 7 March 2011 the Supreme Court of India sanctioned Passive euthanasia by methods for the withdrawal of life support to patients in a lasting vegetative state. The choice was made as a major aspect of the decision for a situation including Aruna Shanbaug, who had been in a Persistent Vegetative State (PVS) until her demise in 2015.

In March 2011, the Supreme Court of India passed a memorable judgment-law allowing Passive Euthanasia in the nation. This judgment was passed in wake of Pinki Virani's request to the most elevated court in December 2009 under the protected arrangement of "Next Companion". It's a point of interest law which puts the energy of decision in the hands of the person, over government, restorative or religious control which sees all misery as "predetermination". The Supreme Court indicated two irreversible conditions to allow Passive Euthanasia Law in its 2011 Law: (I) The brain dead for whom the ventilator can be turned off (II) Those in a Persistent Vegetative State (PVS) for whom the bolster can be decreased out and torment overseeing palliatives be included, as indicated by set down global details.

A similar judgment-law likewise requested the rejecting of Section 309 of IPC. In December 2014, legislature of India pronounced its goal to do as such. Notwithstanding, on 25 February 2014, a 5-judge seat of Preeminent Court of India was constituted by the then CJI P. Sathasivam who guaranteed that unmistakable law on subject in India was obligatory. Furthermore, on December 23, 2014, Administration of India embraced and re-approved the Inactive Passive Euthanasia judgment-law in a Public statement, in the wake of expressing in the Rajya Sabha as takes after: that The Honble Supreme Court of India in its judgment dated 7.3.2011, while rejecting the request for mercy killing in a

specific case, set down complete rules to process cases identifying with passive euthanasia. From there on, the matter of mercy killing was inspected in interview with the Ministry of Law and Justice and it has been chosen that since the Honble Supreme Court has effectively set out the rules, these ought's to be taken after and regarded as law in such cases. At exhibit, there is no proposition to authorize enactment regarding this matter and the judgment of the Honble Supreme Court is authoritative on all. The Wellbeing (Health) Minister P Nadda expressed this in a composed answer in the Rajya Sabha.

The Supreme Court rejected active euthanasia by methods for lethal injection. Without a law directing euthanasia in India, the court expressed that its choice turns into the rule that everyone must follow until the point when the Indian parliament authorizes a reasonable law. Active euthanasia, including the organization of lethal compounds to end life, is yet unlawful in India, and in many nations.

Aruna Shanbaug Case

Aruna Shanbaug was a nurse working at the King Edward Memorial Hospital, Parel, Mumbai. On 27 November 1973 when she was choked and sodomized by Sohanlal Walmiki, a sweeper. Amid the assault she was choked with a chain, and the hardship of oxygen has abandoned her in a vegetative state from that point onward. She has been dealt with at KEM since the episode and is kept alive by encouraging tube. For Aruna, her companion Pinki Virani, a social lobbyist, documented a request of in the Supreme Court contending that the "proceeded with presence of Aruna is infringing upon her entitlement to live in respect". The Supreme Court settled on its choice on 7 March 2011.[2] The court dismissed the request to stop Aruna's life bolster however issued an arrangement of wide rules sanctioning latent passive euthanasia in India. The Supreme Court's choice to dismiss the cessation of Aruna's life bolster depended on the way that the clinic staff who treat and deal with her did not bolster euthanizing her. She passed on from pneumonia on 18 May 2015, in the wake of being in a state of insensibility for a long time.

While dismissing Pinki Virani's supplication for Aruna Shanbaug's euthanasia, the court laid out rules for latent passive euthanasia. As India had no law about killing, the Supreme Court's rules are law until and unless Parliament passes enactment.[3] India's at that point Minister of Law and Justice, Veerappa Moily, called for genuine political verbal confrontation over the issue. The accompanying rules were set down:

1. A choice must be taken to end life bolster either by the guardians or the companion or other close relatives, or without any of them, such a choice can be taken even by a man or an assortment of people going about as a next companion. It can likewise be

[2] *After 36 yrs. of immobility, a fresh hope of death* - Indian Express (07/12/ 2009), available at http://archive.indianexpress.com/news/after-36-yrs-of-immobility-a-fresh-hope-of/555048/> last seen on 18/11/2017.

[3] Magnier M, *India's Supreme Court Lays out Euthanasia GuidelinesLos Angeles Times* (08/03/2011), available at http://articles.latimes.com/2011/mar/08/world/la-fg-india-euthanasia-20110308, last seen on 18/11/2017.

taken by the specialists going to the patient. In any case, the choice ought to be taken genuine to the greatest advantage of the patient.

2. Even if a choice is taken by the close relatives or specialists or next companion to pull back life bolster, such a choice requires endorsement from the High Court concerned.
3. When such an application is filled the Chief Justice of the High Court ought to forthwith constitute a Seat of no less than two Judges who should choose to concede endorsement or not. A board of three rumoured specialists to be selected by the Seat, who will give report with respect to the state of the patient. Before giving the decision a notice with respect to the report ought to be given to the nearby relatives and the State. In the wake of hearing the gatherings, the High Court can give its decision.

Over 10 years prior, the administration felt that enactment on euthanasia would add up to specialists abusing the Hippocratic Vow and that they ought not to respect a patient's "short lived want out of transient melancholy" beyond words as to die. The administration's most recent stand speaks to forward development in the journey for an authoritative structure to manage the inquiry whether patients who are in critical condition and perhaps past the extent of restorative recovery can be permitted to pass on with respect. The inquiry was raised with a lot of energy because Aruna Shanbaug, a nurse who lay in a vegetative state in a Mumbai clinic near 1973 and 2015. In this point of interest 2011 decision that was eminent for its dynamic, sympathetic and touchy treatment of the intricate interaction of individual nobility and social morals, the Supreme Court set out a wide legitimate structure.

It discounted any support for active euthanasia, or the making of a stride, for example, infusing the patient with a lethal substance, to put a conclusion to a patient's agony, as that would be obviously illicit. It permitted 'passive euthanasia', or the withdrawal of life bolster, subject to shields and reasonable technique as set around the Supreme Court. It has likewise discharged a record on the site of the Ministry of Health and Family Welfare on May 9, 2016 and welcomed popular feeling on the issue. This bill contends for Passive euthanasia and is in accordance with the Judgment conveyed in the Aruna Shaunbaug case. On picking up help the bill won't just end up being a point of interest enactment in India yet will likewise give an alleviation to the at death's door and the individuals who champion patient's rights.[4]

“The submission had been made during a hearing on a PIL filed by the NGO Common Cause. The NGO sought a law to permit passive euthanasia for terminally ill patients so that they candie by withdrawal of life support if the person has made a ‘living will’

[4] J. Venkatesan, Supreme Court Disallows Friend's Plea for Mercy Killing of Vegetative Aruna, *The Hindu* (08/03/2011) available at <http://www.thehindu.com/news/national/article1516644.ece, last seen on 19/11/2017.

which can be prepared by the person and signed by witnesses during the normal course of their life to that effect.

Prashant Bhushan, counsel for Common Cause, said, "Right to life includes right to refuse medical intervention when a board of doctors certifies that the person would not live without life support system. I am in favour of active euthanasia too. But living will is a corollary to passive euthanasia," reported the *Times of India*. For the Centre, Narasimha said the government still had to examine the pros and cons of a 'living will', which may not be a good policy as the issue was complex, given the cultural, religious and legal systems in India.

In passive euthanasia, artificial life support system can be removed with the consent of the patient's family and the approval of a medical board. This practice takes place in several countries but not in India, Bhushan told the court.

"The committee considered the draft Bill submitted by the law commission after elaborate discussions with all the stakeholders. The revised bill has been sent to the government for its consideration and it will be introduced in parliament," Narasimha said, adding that the Centre had formed a panel to consider this. He also said that the Bill would have adequate safeguards to ensure it is not misused, according to the *Telegraph*.

Bhushan had earlier said that when a doctor says that a terminally ill patient had reached a point of no return, then they should be given the right to refuse life support that prolongs their agony. In a country with a massive population like India's, and no adequate healthcare facilities, he had said, it was no point in using scarce resources for the terminally ill with no hope of survival."[5]

As indicated by these rules, passive euthanasia includes the pulling back of treatment or sustenance that would enable the patient to live. Types of active euthanasia, including the organization of lethal compounds, legal in manynations and jurisdictions including Luxemburg, Belgium and the Netherlands, as well as the US conditions of Washington and Oregon, are yet illicit in India. Somewhere else on the planet active euthanasia is quite often illicit. The lawful status of passive euthanasia, then again, including the withdrawal of nourishment or water, fluctuates around the world of the world.[6]

Examination

[5]*Passive Euthanasia Bill Ready, but Supreme Court to Still Examine 'Living Will',* The Wire (11/10/2017), available at https://thewire.in/186342/passive-euthanasia-bill-ready-but-supreme-court-to-still-examine-living-will/, last seen on 19/11/2017.

[6]V.Subodh, *Euthanasia: Widely Debated, Rarely Approved, Times of India* (08/03/2011), available at http://timesofindia.indiatimes.com/india/euthanasia-widely-debated-rarely-approved-/articleshow/7651439.cms?referral=pm, last seen on 19/11/2017.

It could be brought up that the majority of the nation's take after passive form of euthanasia. Taking the case of Netherlands, it could be seen that Supreme Court of Netherlands has punished euthanasia yet aside from two exemptions, i.e., because mental impulse or some other crisis latent passive voluntary euthanasia is permitted, although it involves certain rules to be taken after and performed by the specialists.

In USA there is about a same picture as Netherlands. Active euthanasia is unlawful in US and passive form of euthanasia is held to be lawful. Canada too have sanctioned passive euthanasia to give the genuinely necessary alleviation to the at death's door patients. Though, in Belgium the two types of euthanasia are predominant. As of now active euthanasia is legitimate just in Belgium, Holland and Luxembourg. In these spots a person's life could be finished by the specialists by regulating different tranquilizers or deadly infusions yet just on confined grounds, for example, patient's dynamic demand and that such patient is enduring the intolerable torment and has no extent of recuperation. Concerning helped suicide Netherlands had authorized it in 2002 by passing an enactment. Canada has authorized helped suicide as of late on seventeenth June 2016 by the Canadian government.

There are tiny numbers of nations who have really legitimized active or assisted euthanasia, while passive euthanasia is sanctioned in numerous nations. Being a creating country India has taken a solid and propelled advance forward by acquainting the bill with affirm and bolster support euthanasia (passive) in India. In any case, there is yet far to go before this bill could make it to be an enactment, the fundamental inquiry or rather a quandary still exist that is India sufficiently developed or is prepared as country to offer impact to such a weighty bit of enactment.

Issue Further more tests.
Concerning illustration, we have seen that from those thick, as origin for this idea there need been contrast of notion for this issue. There need dependably been separated see on the theme for good with right to die or Euthanasia.

Contentions for Euthanasia furthermore supported suicide.
There are two primary sorts from claiming contention used to backing the polishes about Euthanasia What's more supported suicide. They would the:

Moral contention – individuals if bring flexibility from claiming choice, including the right on control their body and term (as in length Concerning illustration they don't ill-use whatever available person's rights), and that those state if not make laws that prevent kin having the capacity will pick. At what's more entryway the right to die. Those moral contention states that everybody ought to have the ability to decide at what's more entryway they need to die, also that they ought to have the capacity with do with the goal with respect.

The idea from claiming "quality from claiming life" may be a paramount part about this contention. The thought place ahead concerning illustration and only the religious contention against Euthanasia What's more helped suicide that an aggregation is holy. Furthermore, is subsequently constantly superior to demise is rejected. The moral contention recommends that term ought to further to bolster best proceed with as long as an individual feels their life may be worth living.

To example, somebody who backs the utilization for Euthanasia alternately supported suicide. Considering those moral contention might accept that, an individual ought to have the capacity to decide with conclusion their existence, on they need aid living over deplorable agony and their personal satisfaction for an aggregation may be seriously lessened.

Even minded contention – that euthanasia, especially indifferent passive euthanasia, may be allegedly now a broad practice, only not person individuals would eager to concede to, thereabouts it may be finer on control Euthanasia appropriately.

Contentions against Euthanasia What's more supported suicide

There need aid four principle sorts from claiming contention utilized Eventually Tom's perusing kin who are against Euthanasia What's more supported suicide. They would know as the:

Religious contention – that these hones might never be advocated to religious reasons; for example, numerous individuals trust that best lord need the correct should end a human existence.

'Slippery Slope' contention – this is considering those concern that legalising Euthanasia Might prompt huge unintended progressions Previously, our social insurance framework What's more pop culture on the loose that we might after the fact arrive at lament.

Medicinal ethics contention – that asking doctors, Medical caretakers alternately whatever available social insurance professional to do Euthanasia alternately aid in a suicide aerial attacker might make a violation about basic therapeutic morals.

Elective Contention– that there is no purpose behind an individual with middle of the road whichever rationally or physically a result successful conclusion about an aggregation medicines are available; therefore, Euthanasia will be not a substantial medication option, be that as speaks to A disappointment on the and only the specialist included over a person's forethought.[7]

[7]*Euthanasia and Assisted Suicide – Arguments,* NHS Choices, available at http://www.nhs.uk/conditions/euthanasiaandassistedsuicide/pages/arguments.aspx, last seen on 20/11/2017.

Conclusion

Passive voluntary Euthanasia ought to make license for certain uncommon condition. Elsewhere in the universe active, automatic Furthermore non-voluntary Euthanasia is Just about generally particular illicit. That legitimate status for latent voluntary euthanasia, on the other hand, varies over the countries of the globe.

The legislature about India need at last thought of a draft bill ahead Passive euthanasia, it need Additionally discharged a report on the website of the Ministry of Health and Family Welfare on October 11, 2017, welcoming open remarks once indifferent Euthanasia to accumulate conclusions from individuals in the nation. This is a possible venture forward toward that Indian parliament.

There may be a dire have for that establishment of a bit for enactment regarding Euthanasia which manages What's more empowers a specialist on limit the frightful cycle about an aggregation of the patient torment from a hopeless malady with his/her assent. Parliament if set down exactly particular circumstances Also procurements under which Euthanasia if a chance to be legitimate similarly as bellow:

- assent of the patient must a chance to be obtained,
- disappointment for everyone therapeutic medicines alternately the point when the patient, anguish from a terminal disease, may be in an awful state alternately need no risk to recoup alternately that for survival Concerning illustration he torments starting with a frightful term alternately the patient need been in unconsciousness fora verwoerd in length time,
- the monetary or monetary condition of the patient alternately as much gang ought to be considered,
- Proposition of the specialist must not a chance to be with make mischief in best possible shield must be taken on Abstain from misuse of it by doctors.

That banter around Euthanasia in India remains uncertain. The deem late move frantic by those India legislatures of drafting a bill around latent Euthanasia. Furthermore, welcoming open remarks might be viewed similarly as an enormous venture forward. Thus, Euthanasia Might be legalized, yet the laws might need will a chance to be Verwoerd stringent what’s more stable. Each instance will must make deliberately monitored taking under attention those purpose for perspectives of the patient, those relatives and the doctors. Yet if Indian social order may be full grown sufficient with face this, similarly as it is A matter from claiming existence Also death, may be yet on a chance to be seen.

If we precisely inspect the resistance of the sanctioning for euthanasia, we could presume that those the majority critical purpose that the Rivals raise will be that it will prompt its abuse toward the doctors. Another question that is frequently all the brought up may be that though the doctors will be given tact to act voluntary Euthanasia after that without a doubt it will bit by bit prompt asking for automatic or non-voluntary Euthanasia. Be that

as it will be submissively submitted that a separate enactment ought to a chance to be aggravated permitting just voluntary Euthanasia What's more not automatic alternately non-voluntary Euthanasia. Concerning illustration examined earlier, we likewise must keep in mind those restricted medicinal offices accessible to India Concerning illustration contrasted with those number of patients.

This address even now lies open that who ought to be Gave for the individuals facilities; A terminally sick patient or of the patient who need reasonable possibilities of recuperation. Likewise, the patient himself crazy of as much ache What's more desolation will be asking for death, it will be in the interest from claiming every bit should not increment as much enduring and ache.

Once more the perspective that stays unanswerable may be viewing that misuse from claiming this good by those doctors. Anyhow pertinent safeguards might a chance to be set once this correct What's More therefore its ill-use might a chance to be avoided. A standout amongst the safeguards might a chance to be that a fitting quasi-judicial power hosting legitimate information in the restorative field might make delegated should research the demand of the patient, as much therapeutic condition and the steps taken Toward those specialists.

This will abstain from at whatever misuse or abuse of the right allowed of the terminally sick patients. Here, we must see the frightful circumstance to which those patients may be whatmore Main necessity ought to be decreased as much torment. Notwithstanding The point when we officially know that he is anyways setting off on pass on today alternately tomtate Furthermore he himself will be asking to death, there may be no side of the point that he ought to be precluded for this straight for no less than heading a life with base poise Furthermore willingly.

Overall as much life will make no preferred in that circumstances. Thus, recognizing the money related What's more medicinal offices also, that inquiry still lies open that what will be better-allowing Euthanasia alternately not permitting Euthanasia.

There are even now overwhelming dialogs revolving around that point about Euthanasia. Both ace and anti-euthanasia need solid focuses supporting for Also against Euthanasia. Everyone nations must think about legalising voluntary Euthanasia a result it camwood assistance a huge number about patients around the globe anguish of the gruelling pain, as opposed to honourable and serene passing. Passing may be that last stage to everyone’s term.

There might be a few conditions at Euthanasia is the ethically right action, however, person ought also to get it that there would true worries something like legalizing Euthanasia due to dread of abuse or abuse and the dread of those dangerous incline prompting a passing about admiration for the quality from claiming life.

What will be necessary would upgrades to research, the best palliative forethought available, what's more over all, individuals should, perhaps, at this run through start modifying crime laws on incorporate motivational Components Likewise a real resistance? Obviously, strict parameters might need on be created that might incorporate patients ask for what's more approval, or, on account from claiming clumsy patients, propel directives. Everyone need should pass on one day or the opposite Furthermore it ought to make their choice to bite the dust anhonourable an aggregation after Hosting existed anhonourable an aggregation as A mankind's.

Liberty, welfare and Human Rights

Gunjan Agrahari[1]

Abstract

The project elaborates the inter-relationship between liberty, welfare and human rights. In this project it has been elaborated as to how the human rights have been derived from the liberty and welfare rights. In this project contemporary development of all these concepts has also been discussed. In the present time, for the actual realization of human rights, it is important that the very basic rights of the people are granted to them. In other words, basic liberty and welfare rights are indispensable.

Introduction

Liberty, welfare and human rights are closely related to each other. Human rights are a phenomenon which involves role of both liberty and welfare. In other words it can be said that to provide for welfare of people it is imperative that they are given their basic need of liberty and also rights without which their cannot be peace and harmony. This article deals with the overlapping inter- relationships that these three concepts have.

Liberty

In literal sense it means the condition of being free from restriction or control or the right and power to act, believe, or express oneself in a manner of one's own choosing or the condition of being physically and legally free from confinement, servitude, or forced labor. It also entails freedom from unjust or undue governmental control or a right or immunity to engage in certain actions without control or interference.[2]

However it has been explained by various writers in varied ways. In other words it can be said that there have been given variant dimensions to this concept of liberty. For instance, Hohfeldjural correlatives from point of view of liberty. A liberty of a person is liberty to deal with him. This liberty is the right recognized by law. Its correlative is general duty of everyone not to prevent the free exercise of this liberty except so far as his own liberty of action may justify him in doing so. But a person's liberty as right to deal with other is nugatory unless they are at liberty to deal with him if they chose to do so. Any interference with their liberty to deal with him affects him.[3]

Liberty as a legal relation (or "right" in the loose and generic sense of that term) means, the same thing as privilege. . It is equally clear, as already indicated, that such a privilege or liberty to deal with others at will, might very conceivably exist without any peculiar

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[2]Liberty, available at http:// www .thefreedictionary.com/liberty.
[3]Cook, Walter, Hohfeld Fundamental Legal Conceptions , philosophy of Law Spring,2007, (New Havan and London: Yale University Press,1919),pp.35-64.

concomitant rights against "third parties" as regards certain kinds of interference. Whether there should be such concomitant rights (or claims) is ultimately a question of justice and policy; and it should be considered, as such, on its merits. The only correlative logically implied to the privileges or liberties in question are the "no rights" of "third parties." It would therefore be a non sequitur to conclude from the mere existence of such liberties that "third parties" are under a duty not to interfere, etc. [4]

Concept of liberty in contemporary time

There has been immense change in philosophy of liberty over the years. One such observation can be made by analyzing Mill's view on liberty with changes in contemporary society.

Mill has always acknowledged that to compel men to do their share of what is necessary for society is not a violation of their liberty, but with changing economic scenario, this concept has undergone a radical change. The idea of liberty that was envisaged by Mill was no realized automatically by introduction of parliamentary government or popular rule. Rather it is possible that it may get threatened thereby.[5] His ideals erected principles not only against power of despots, but also against majorities and tyranny. he believed that there needs to be rationally grounded principle which governs a society's dealings with individual's, which is called harm principle which says that, "The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection.

That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he does otherwise".[6]

This anti-paternalistic principle identifies three basic regions of human liberty: the "inward domain of consciousness," liberty of tastes and pursuits (i.e. of framing our own life plan), and the freedom to unite with others. A basic philosophical problem presented by the work is what counts as "harm to others." It is very difficult to mark the boundary between conduct that is principally self-regarding versus conduct that involves others

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[4]Id

[5]Binkley, Robert, *Mill's Liberty Today* , Foreign Affairs, Vol.16 , No.4 (Jul , 1938) , pp. 563-573 , Council on Foreign Relations , http:// www. jstor.org/stable/20028877.

[6]Heydt, Colen, *John Stuart Mill*, Internet Encyclopedia of Philosophy, available at www.iep.utm.edu/mills/, last visited on 2nd December

rather problems that exist in today's time that are unanswered such as the harm caused due to prostitution, pornography etc that result in greater harm to the society.[7]

Thus it can be concluded that concept of liberty has undergone a radical change over time. Liberty does not now mean complete non-interference but it means having restrictions so that minimum indispensable is enjoyed by everybody. It is true that states are watchdogs of this liberty but the states themselves also cannot work in arbitrary manner. There are now many conventions and treaties which grant many liberties to their respective citizens. Even constitutions of various states provide for the same, for example Indian constitution article 21. Providing liberty to the people further leads in accentuating human rights which are imbibed in people by the very virtue of their being human beings.

Welfare

One of the most contentious rights is the right to welfare. Welfare rights did not gain great impetus till end of 18th century. They gained momentum in early and middle twentieth centuries. One such instance was when the Constitution of the USSR granted rights to education, to work, to rest and leisure, to provision in old age, and to aid in sickness and disability in the year 1936. The most important development in the sphere in welfare rights was development of the United Nations Universal Declaration of Human Rights of 1948 which included all the major welfare rights. For example, Article 25 says that:

"Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, social services, and the right to social security in the event of unemployment, sickness, disability, widowhood, old age, or other lack of livelihood in circumstances beyond his control."[8]

Welfare rights are often classed as positive rights wherein one is not prevented from choosing one's own goals (autonomy) and not being interfered with in their pursuit (liberty). The welfare rights of mid twentieth century are generally categorised as second generation rights and being positive in character seem to increase not only the number of rights but also the kinds.[9]

Human Rights

Human rights have been defined as, basic moral guarantees that people in all countries and cultures allegedly have simply because they are people. Calling these guarantees "rights" suggests that they attach to particular individuals who can invoke them, that they are of high priority, and that compliance with them is mandatory rather than discretionary. Human rights are frequently held to be universal in the sense that all people

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[7]Id
[8]Griffin,James, Welfare Rights , The Journal of Ethics,Vol.4, No.1/2,Springer, Rights,Equality and liberty , Universal Torcuato Di Tella Law and Philosophy Lectures,1995-1997 (Jan-Mar,2000), pp. 27-43 available at http://www.jstor.org/stable/25115634
[9]Id

have and should enjoy them, and to be independent in the sense that they exist and are available as standards of justification and criticism whether or not they are recognized and implemented by the legal system or officials of a country. [10]

As James Nickel states, human rights aim to secure for individuals the necessary conditions for leading a minimally good life. It is generally seen that public authorities, both national and international, are best sources to secure these conditions and so, the doctrine of human rights has become, for many, a first port of moral call for determining the basic moral guarantees all of us have a right to expect, both of one another but also, primarily, of those national and international institutions capable of directly affecting our most important interests. The doctrine of human rights aspires to provide the contemporary, allegedly post-ideological, geo-political order with a common framework for determining the basic economic, political, and social conditions required for all individuals to lead a minimally good life.

The moral justification of human rights is thought to precede considerations of strict national sovereignty. An underlying aspiration of the doctrine of human rights is to provide a set of legitimate criteria to which all nation-states should adhere. Appeals to national sovereignty should not provide a legitimate means for nation-states to permanently opt out of their fundamental human rights-based commitments. Thus, the doctrine of human rights is ideally placed to provide individuals with a powerful means for morally auditing the legitimacy of those contemporary national and international forms of political and economic authority which confront us and which claim jurisdiction over us. This is no small measure of the contemporary moral and political significance of the doctrine of human rights. For many of its most strident supporters, the doctrine of human rights aims to provide a fundamentally legitimate moral basis for regulating the contemporary geo-political order.[11]

Human rights are conceptually derivatives of rights themselves. They are moral guarantees to human beings to lead a minimally good life. There is generally an argument as to whether human rights are moral rights or legal rights. Legal positivists argue that the only rights that can be said to legitimately exist are legal rights, rights that originate within a legal system. On this view, moral rights are not rights in the strict sense, but are better thought of as moral claims, which may or may not eventually be assimilated within national or international law. According to a legal positivist, such as Jeremy Bentham, there can be no such thing as human rights existing prior to or independently from legal codification. For a positivist determining the existence of rights is no more complicated than locating the relevant legal statute or precedent.

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[10]Nickel,James, Making Sense of Human Rights:Philosophical Reflections on the Universal Declaration of Human Rights, University of California Press , Berkeley , 1987, cited from Human Rights, Internet Encyclopedia of Philosophy, http://www.iep.utm.edu/hum-rts/

[11]Fagan,Andrew, *Human Rights* ,Internet Encyclopaedia of Philosophy, available at http://www.iep.utm.edu/hum-rts, last visited on 2nd December.

In stark contrast, moral rights are rights that, it is claimed, exist prior to and independently from their legal counterparts. The existence and validity of these rights are not dependent upon the action of the legislators. Human rights derive its legitimacy from moral rights. The universality of human rights as moral rights clearly lends greater moral force to human rights. However human rights should not exclusively be identified with moral rights. But their practical efficacy is dependent upon them getting legal recognition. Therefore they are considered both as moral and legal rights. However where specific human rights do not get legal recognition, moral rights must be prioritized with the intention that defending the moral claims of such rights as a necessary prerequisite for the eventual legal recognition of the rights in question.[12]

The interest theory approach

The principle function of human rights according to this approach is to protect and promote certain essential human interests. This interest approach is primarily concerned to identify the social and biological pre-requisites for human beings leading a minimally good life. To secure essential interests of human beings' is the principal ground upon which human right may be morally justified. Philosopher John Finnis has provided a good representation to this approach. He argues that those human rights are justifiable on the grounds of their instrumental value for securing the necessary conditions of human well-being. He identifies seven fundamental interests, or what he terms 'basic forms of human good', as providing the basis for human rights. These are: life and its capacity for development; the acquisition of knowledge, as an end in itself; play, as the capacity for recreation; aesthetic expression; sociability and friendship; practical reasonableness, the capacity for intelligent and reasonable thought processes; and finally, religion, or the capacity for spiritual experience.

According to Finnis, these are the essential prerequisites for human well-being and, as such, serve to justify our claims to the corresponding rights, whether they are of the claim right or liberty right variety.[13] Typically, this approach attempts to provide what James Nickel has termed 'prudential reasons' in support of human rights. Taking as the starting point the claim that all human beings possess basic and fundamental interests, advocates of this approach argue that each individual owes a basic and general duty to respect the rights of every other individual. The basis for this duty is not mere benevolence or altruism, but individual self-interest.[14]

The Will theory Approach

This theory attempts establish the philosophical validity of human rights upon a single human attribute that is capacity of freedom. The theorists of this approach argue that

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[12]Id
[13]Finnis,John, Natural Law and Natural Rights, Clarendon Press,1980,cited from ,Internet Encyclopaedia of Philosophy, available at http://www.iep.utm.edu/hum-rts, last visited on 2nd December.
[14]*Supra* n.10

human agency is the capacity for freedom and that constitutes the core of any account of rights.[15]

Thus the theorists of this approach view human rights as originating in or reducible to a single, constitutive right or alternatively a highly limited set of purportedly fundamental attribute. H.L.A Hart, one of the eminent philosophers of this theory argues that all rights are reducible to a single, fundamental right. He refers to this as 'equal right of all men to be free'. He insists that rights to such thing as political participation or to an adequate diet, are ultimately reducible to and derivative of individual's equal rights to liberty. The moral philosopher Alan Gewirth has further developed this concept and given a very comprehensive outlook. Gewirth argues that the justification of our claims to the possession of basic human rights is grounded in what he presents as the distinguishing characteristic of human beings generally: the capacity for rationally purposive agency. Gewirth states that the recognition of the validity of human rights is a logical corollary of recognizing oneself as a rationally purposive agent since the possession of rights are the necessary means for rationally purposive action.

Gewirth grounds his argument in the claim that all human action is rationally purposive. Every human action is done for some reason, irrespective of whether it be a good or a bad reason. He argues that in rationally endorsing some end; say the desire to write a book, one must logically endorse the means to that end; as a bare minimum one's own literacy. He then asks what is required to be a rationally purposive agent. He answers that freedom and well-being are the two necessary conditions for rationally purposive action. Freedom and well-being are the necessary means to acting in a rationally purposive fashion. They are essential prerequisites for being human, where to be human is to possess the capacity for rationally purposive action. As essential prerequisites, each individual is entitled to have access to them. However, Gewirth argues that each individual cannot simply will their own enjoyment of these prerequisites for rational agency without due concern for others. He bases the necessary concern for others' human rights upon what he terms the 'principle of generic consistency' (PGC).

Gewirth argues that each individual's claim to the basic means for rationally purposive action is based upon an appeal to a general, rather than, specific attribute of all relevant agents. I cannot logically will my own claims to basic human rights without simultaneously accepting the equal claims of all rationally purposive agents to the same basic attributes. Gewirth has argued that there exists an absolute right to life possessed separately and equally by all of us. He states that a 'right is absolute when it cannot be overridden in any circumstances, so that it can never be justifiably infringed and it must be fulfilled without any exceptions.'[16] In other words Will theorists attempt to establish

[15]Id

[16]Gewrith,Alan, Human Rights: Essays on Justification and Applications, University of Chicago Press, Chicago,1982,cited from *Supra* n. 10

the validity of human rights upon the ideal of personal autonomy, that is rights are a manifestation of the exercise of personal autonomy.

The interest's theory approach and the will theory approach contain strengths and weaknesses. When consistently and separately applied to the doctrine of human rights, each approach appears to yield conclusions that may limit or undermine the full force of those rights. It may be that philosophical supporters of human rights need to begin to consider the potential philosophical benefits attainable through combining various themes and elements found within these (and other) philosophical approaches to justifying human rights. Thus, further attempts at justifying the basis and content of human rights may benefit from pursuing a more thematically pluralist approach than has typically been the case to date.[17]

Human rights have a long historical heritage. The principal philosophical foundation of human rights is a belief in the existence of a form of justice valid for all peoples, everywhere. In this form, the contemporary doctrine of human rights has come to occupy centre stage in geo-political affairs. The language of human rights is understood and utilized by many peoples in very diverse circumstances. Human rights have become indispensable to the contemporary understanding of how human beings should be treated, by one another and by national and international political bodies.

Human rights are best thought of as potential moral guarantees for each human being to lead a minimally good life. The extent to which this aspiration has not been realized represents a gross failure by the contemporary world to institute a morally compelling order based upon human rights. The philosophical basis of human rights has been subjected to consistent criticism. While some aspects of the ensuing debate between philosophical supporters and opponents of human rights remain unresolved and, perhaps, irresolvable, the general case for human rights remains a morally powerful one. Arguably, the most compelling motivation for the existence of human may rest upon the exercise of imagination.[18]

Relation of liberty, welfare and human rights

Human rights are best seen as protections of one's human standing - one's personhood. There are two different ways of taking a personhood account of human rights. One can see it as justifying liberty rights, but giving no support at all to welfare rights. This point of view, if human rights are protections of the essential components of agency, then they protect only our autonomous choice of a course of life and we are not stopped from pursuing it; nothing else is contained in the essence of agency. But there is a different interpretation to this concept of personhood too. An agency can be attacked from different sides so a person can be stopped from choosing and pursuing conception as visualised by that person by other persons' blocking him or by such suffering of

[17] *Supra* n.10
[18] Id

deprivation that level of agency cannot be raised. Hence protection of agency can be described as requiring and human rights therefore as including, not only autonomy and liberty but also minimum material provision-that is some sort of right to welfare.

Human right is a claim of all humans, simply as humans, against all other humans. Hence it has a universal characteristic. The liberty rights generally are universal in character. It implies that all people have a right to be not to be dominated or blocked, and the correlative duty to maintain this phenomenon falls on every other individual, on groups, on governments - in short, upon all agents. If there were a human right to welfare, it would therefore seem that all people would have a claim to minimum provision that fell upon every other individual and group and government. But it is seen that the perception of people is very negative in this respect as they generally accept these rights to be limited to a particular group of people say for instance; citizens of a particular country assume welfare rights to be attributed to them by virtue of they being citizens of that country.

By giving it such interpretation the welfare rights are narrowed as only ethical rights. The conceptual trouble in determination of human rights as welfare rights also includes the trouble in ascertaining as to what would constitute minimum provision. It is generally explained by authors as minimum requirement for subsistence. That would give the minimum a basis in universal human nature, in biological facts about what it takes to keep body and soul together. But if this definition is taken literary than it is possible that it leads to gross violations as it would be difficult to ascertain as to what would be generous levels of that subsistence. That is what exactly would constitute this. This would lead to high levels of indeterminacy. Thus it can be said that whereas autonomy and liberty are constituents of personhood, minimum provision is only a necessary condition of it. But a necessary condition of personhood is still grounded in personhood. For instance: A right to life is regarded as one of the classic human rights, but it too is only a necessary condition of personhood. [19]

Another reason of not regarding welfare rights as human rights is because regarding it as such would allow all of us to have a certain claim against all the rest of us and, that would produce problems both of scarce resources and of pointless duplication. But this problem can be solved by finding a rationale for assigning the responsibility. If this is made possible the problems of scarce resources and of senseless duplication no longer arise - that is, they are no greater than in fact we have them today. This responsibility may arise either due to ethics or due to some moral obligations which are enshrined in a human being.[20]

It is also considered that welfare rights are mere civic rights. But this too has been nullified due to its practical infeasibility. Most of the governments also do not follow this

[19] *Supra* n.7
[20] Id

concept. For instance, the State of California had, in recent years, tried to deny various welfare services to illegal immigrants - that is, to people who are, in this particularly egregious way, non-citizens. In August 1996 the Governor, Peter Wilson, signed an executive order ending their access to a wide range of welfare benefits, including pre-natal care, long-term health care, and public housing. But his order stopped short of denying them emergency health care. The Governor acted under a provision of a recently enacted federal law that made illegal immigrants ineligible for all state and federal benefits, though with similar exceptions, the federal law also excludes services such as emergency medical care and disaster relief. And there is an obvious justification for those exceptions: there are some forms of aid that anyone able to give them owes to anyone in need of them - whether or not the two agents are related as government and citizen. [21]

It is thus observed that countries should observe welfare obligations keeping in view large public interest that is their human rights. It is generally perceived that it is difficult for any government to carry out only those welfare obligations that they can actually carry out. But it is hardly plausible to work on the principle that nothing can be a human right unless its claims can be met immediately and in full.

Comparison of welfare rights and liberty in context of human rights[22]

When comparison of welfare rights and liberty comes into picture it is perceived that welfare rights would require substantial transfers of goods and would allow to keep back at least a minimum provision for ourselves, but they would lay claims to some of the surplus. But it is seen that when this minimum provision is obligated upon the people it becomes gross violation of their human rights. Only voluntary sharing of surplus is accepted in society generally. This distribution of surplus is mostly seen as duty of the state. Hence it can be said that welfare rights bring about an expansion in the role of the state which is certainly an unhealthy expansion. Liberty rights on the other hand impose negative duties on the state and thus are not very unachievable.

They require minimal state apparatus that in most cases all states would want to, and be able to, supply such as police and courts. Welfare rights, in contrast, fall largely upon central governments, because they are the most effective and appropriate agents these days to discharge the duties. So welfare rights require a gigantic state apparatus. In the past, the needy were looked after (to the extent that they were) by civil society, by associations such as families, churches, local communities, and so on. But as more and more welfare work was pushed onto the central government, these smaller institutions intermediate to the individual and the centre withered and institutions that were more sensitive, more flexible, more efficient, and more economical than the central government that supplanted them. Thus the over-burdened economies begin to stagnate, and the personalities of individual citizens decay.

[21] Id
[22] *Supra* n.7

Welfare rights are destructive of the self-reliance on which all communities rest. There once was the notion, which we today associate with the harsher side of the nineteenth century, of the "deserving" poor, which has not been allowed to play a prominent role in the conceptual apparatus of the twentieth century welfare state. Some philosophers have written a restriction to the "deserving" poor into the right to welfare: the right is, says one, "an ethical claim of the individual human being against his or her society to be provided with a minimal livelihood in the event that he or she lacks the means of sustaining life because of circumstances beyond his or her control!' Human rights are claims that one has simply in virtue of being human, not in virtue of being a deserving human. That, indeed, is precisely the trouble that many find with a human right to welfare. Human rights are protections of personhood, and even undeserving persons are persons. Once welfare becomes a matter of human rights, as opposed, say, merely to special ethical rights, other ethical considerations, such as desert, seem to get squeezed out. We seem not to be permitted to introduce desert.

The recognition of welfare rights has, had very good and very bad consequences. There have been transformations from societies of a century ago with the evils of fear, insecurity, ignorance, malnutrition, and low life expectancy to the present societies in the richer countries with the evils, on the personal level, of lack of self-reliance, self-respect, ambition, and hope, and, on the social level, of inefficient and costly central government and the undermining of valuable intermediate social institutions. Although one set of ills have been cured but another set have been produced. But these need to be accepted as phenomenon of social change.

The concept of liberty has to be understood in a wider sense. Not every interference with what one wants to do is a violation of liberty. One violates someone's liberty only by stopping that person from pursuing what that person sees as a valuable life. For example a government to tax someone's income, especially someone comfortably above the minimum level, would not stop that person from pursuing, or even living, a valuable life. Somebody's income's being taxed for redistributive purposes does not destroy that person's liberty, but is kind of a moral obligation .This could also be taken as a charitable activity and thus by laying substantial consideration to both the situations, neither of them destroy one's liberties.

Conclusion

It can thus be concluded that human rights are protections of human standing which includes both right to liberty and life. But it is also to be seen that not every condition of autonomy and liberty has to be included in realm of human rights. Hence the chain of necessary conditions can be controlled by restricting human rights simply to a human agent as a going concern. This can be observed in the theories of early advocates of natural rights. They tried to ethically derive human rights. The rationale for human rights is not a deontological prohibition, concept of personhood. The crux of the issue about a human right to welfare includes a phenomenon wherein one is to determine whether human rights are confined to liberty rights or if they also include a right to welfare. If the

presumption is, that human rights are limited to limited to liberty rights, it would provide a narrow conception which would be confined to a strict interpretation of the constituents of agency which are autonomy and liberty. While if the second presumption is done it would result in broader, conception and would include variant facets of agency which are life, minimum material provision, and so on. Many writers have claimed (Isaiah Berlin's) that Liberty is one thing and the conditions for it are another.

The literal interpretation of this quotation states that, there is sufficient difference between a thing and a necessary condition for the thing. But in case of liberty, this distinction is often ignored. Many writers suggest that a lot is being smuggled into the notion of liberty in order to trade on liberty's undeniable rhetorical appeal. It is suggested that , the human right to autonomy must be read as concerned not just with the possibility of autonomy but also with its realization. Thus it can be concluded that certain facilitation such as in fields of education, sufficient material resources to allow one's children enough time off to be educated, ballot boxes widely distributed, voting protected from intimidation and fraud, a press not only free but widely distributed, to realize such autonomy.

But it should be seen that split between negative and positive duties isn’t pushed very far as in that case, autonomy becomes unrealizable in the actual world and so unhelpful in political thought. Many of the negative duties that are correlated with human rights (for example, not denying autonomy) themselves involve positive duties (for example, ensuring conditions for the exercise of autonomy). Thus it can be said that human rights are protections of our human standing and hence include right to welfare along with liberty rights.

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Historical perspective of Right to Public Services in India

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"…We think it right that all public services—nationally and locally—should set out clear standards of service, and report on their performance; should consult and involve their users in carrying out these tasks; and should provide effective remedies when things go wrong".

-The New Charter Programme, June 1998

Introduction

Change in society and law is a continuous process and last few decades has set out its journey with right-based laws[2]. The legislature is endeavouring to tone up an efficient governing system resulting in individual entitlements, guarantees and reducing the proportion of corrupt practices[3]. Not only right oriented legislation is seemed to be efficient to provide guarantee but it was felt that right based laws must be time bound one also. Hence, a new scenario has been emerged in the form of various right based and time bound service laws in different States[4] in India[5].

The, Legislature in its effort to facilitate an accountable, efficient and citizen-centric governance, has introduced various administrative reforms through legal measures such as the Right to Information Act,2005[6] and various Right to Service Acts[7]. While the legislations indicate progress in right direction, their effective implementation is dependent upon complementary capacity building measures to strengthen public administration[8].

Meaning of Service

The word 'Service' is originated from Latin term '*Officium'*, which is defined as: duty, service, and job. According to Oxford Advanced Learner's Dictionary, the term

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[2] The Right of Children to Free and Compulsory Education (RTE) Act, 2009, The National Food Security Act, 2013,The Mahatma Gandhi National Rural Employment Guarantee Act 2005, The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, The Right to Information Act, 2005 etc. are some legislative enactments in this respect.

[3] Abantika Ghosh, *Corruption Watchdog hails Bihar*, Madhya Pradesh as the Best Service Provider, *The Times of India*, April 21, 2011.

[4] The State's enactments are Madhya Pradesh, Bihar, Delhi, Jharkhand, Himachal Pradesh, Uttarakhand, Rajasthan, Uttar Pradesh, Kerala, Karnataka, Odisha, Assam, West Bengal, Punjab etc.

[5] Thulaseedharan Sindhu "*Right to Public Services In India-A New Legal Scenario*" Vol. 55 1 *JILI* 59 (2013).

[6] Act No.22 of 2005.

[7] Also known as Public Service Guarantee Acts.

[8] Report On National Consultation On Strengthening Delivery and Accountability Frameworks for Public Services 8-9 December 2011, Bhopal, Madhya Pradesh.

'Service' is derived from the term '*Serve*' which means *to work for* or *to perform duties*[9]. As per Black's Law Dictionary[10], service has variety of meanings, dependent upon the context or the sense in which used for example in the context of public utilities: furnishing of water, heat, light and power etc. by other.

So far as statutory definition is concerned, the term 'Service' is defined under section 2(h) of the Punjab Right to Service Act,2011[11] which means any service notified under section 3 and 'right to service' means a right to obtain service within the given time limit. According to Section 3(1) of the Act the State Government may, by notification from time to time notify the services, to which this Act shall apply. Several States Governments have notified some important services for the purpose like certified copies of all documents at village level i.e. Record of Rights (Jamabandi), Girdawri, Mutation, Demarcation of Land, Registration of all kinds of documents e.g. Sale Deed, Lease Deed, General Power of Attorney, Partnership Deed, certified copies of all kinds of previously registered documents etc[12]. These services vary in different States as per their local need.

Meaning of Public Service

'Public Service' is closely related to politics, process and people. The term 'public service' is aggregation of two words 'public' and 'service', where public means for the purpose of general people and service means to give a good serve. So over all public service means to give a good serve or help by government or its employ or any man for any type of work to general people, which also carries two meanings - It means Government employment and It refers to all the public functionaries drawing their salaries from the public funds. Thus it includes all those working in the army as well as the judiciary and the executive. According to some authors public service means government service. Public service also means the provision of essential services namely, essential goods or services such as electric power, water, fuel etc.

The term civil service refers to that section of public service employed in the civil service of the government. This excludes all those in the army and judiciary. The delivery of public service means the goods and services offered by government institutions to the public and it includes the interface between the citizen and the government[13]. Again the term 'service delivery' can be defined in two forms: behaviour and economy. In behaviour, a service means an act or service offered by one group to another. Whereas in the form of economy, a service is an economic activity that generates value and provide benefits to customers within a specific time and place. However customers expectation about service delivery vary from person to person, product to product, culture to culture, service to service, industry to industry, business to business and country to country.

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[9] A.S. Hornby, Oxford *Advanced Learner's Dictionary of Current English 778* (Oxford University Press, 1989).
[10] ST. Paul, Black's Law *Dictionary*, 1533-1534 (Minn. West Publishing Co., 1968).
[11] Punjab Act No.24 of 2011, almost same definition of word 'service' is given under various other Right to Service Acts.
[12] The Punjab State Government has notified the services wide notification no. 1/22/2011- PGRC/757, Dated 26 July 2011.
[13] Available on http://wiki.answers.com/Q/Definition_of_service_delivery#ixzz1doBuRffn (visited on 20 Feb, 2015).

Historical Background

EPIC Age

The duty of rendering services towards subjects the Dharmshatra was voicing these obligations on the part of Kings. During Ramanya age and Mahabharata , the Kings were seen performing duties[14] towards subjects. In *Bhagwat-Geeta*, various *Shlokas* described public services as divine duties imposed upon the rulers by God. Chapter 18 of the *Geeta* has many *Shlokas* related to the concept of duties. The duties of various *Varnas* have been prescribed there and the *Kshatriya* was supposed to be the ruling class. *Shlokas* 43[15] defines his functions subjecting himself to the will of God and then performing his duties, as per the dictates of *God*. This obviously implies high standards of fairness and objectivity.

Pre Vedic Age

Concept of public services traces back in ancient Indian history which is known as one of the world's oldest history. Harappan[16] is that history which recognizes political entity in terms of central authority understood to be linked with services possibly provided by merchants. The Harappan Civilization is between 2,300 B.C. to 1750 B.C[17].

Vedic Period

The early vedic Aryans are broadly dated between 1500-1000 B.C. Aryan society was divided into four classes, Brahman, Kshatriya, Vaishya and Sudra. The teachers and Priests were called Brahmans; rulers and administrators were Kshatriyas. The power of governance was given to those who possessed spirit whereas the trading and commercial jobs were assigned to the Vaishyas[18]. The age of *Rig Veda*[19] found the administrative machinery of Aryans with tribal chief called *Rajan (King)* in the center providing protective services to its tribes. The primary duty of the king was to protect the life, honour and property of the people. The king was assisted by number of officers[20].

Later Vedic Age

The later vedic Aryans are dated between 1000- 500 B.C. Kingship was consolidating itself as the normal form of government. The kingship was being given the status of divine origin. The king was not only a military leader, but also the protector of people's lives and one who would look after their well being. A bureaucracy to assist the king was formed . The administrative machinery was highly organized and became efficient instrument for ruling[21].

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[14] K.K.Saxena, *Bureaucracy for Public or Hostages of Power 75*(University Book House, 2004).

[15] *Danamishavarbhavaschakshatram karma svabhavajam* which means Charity and Ishwarbhav are the natural duties of *Kshatriya*.

[16] Ram Saran Sharma, *Ancient India* 61(NCERT, 1999).

[17] S.R. Myneni, *Indian History* 19 (Allahabad Law Agency 2008)

[18] *Id* at p 38.

[19] *Id* at p 73.

[20] S.R. Myneni, *Indian History* 33 (Allahabad Law Agency Reprint- 2008).

[21] *Id* at p 44.

Magadha Empire

Bimbisara was the real founder of the supremacy of Magadha. He was an efficient administrator. He built a good administrative system by dividing officers into various categories according to their work. The building of roads indicate his good administration[22].

Mauryan Dynasty (324 B.C to 232 B.C.)

During Chandragupta[23], the expansion of administrative services was traced back in taxation system. *Arthshatra* by *Kautilya*[24] was containing a particular duty of the king namely *Yogakashema*. The *Yogakashema* was containing the notion of modern concept of Welfare State. It implied welfare, happiness and prosperity of the subjects.[25]

Satavahanas

The satavahanas followed the pattern of the Mauryan administration. The king was the head of the state. One of the important duties of the king was to protect the people from external invasion and internal disturbances.

Gupta Dynasty (300-600 A.D.)

The king was the sovereign ruler and the head of the state. The Gupta period was a landmark in the history of the administration. It was efficiently organized, keeping in view the welfare of the people[26].

Harsha (606 A.D.- 647 A.D.)

The king was the sovereign ruler in the monarchial form of government. Subordinate kings were called rajas or bhupalas but were mostly known as samantas. They also used the title Maharajas. They acted as officials also. Harsha was the pivot of administration. He personally looked into the affairs of the state. He toured different parts of the empire and met people[27].

Cholas

The cholas were well known in history as efficient and enlightened administrators to provide services. The cholas polity was humane, benevolent and democratic. Kings assumed the title chakravartigal. The king was assisted by an assembly of officers called adhigariga[28].

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[22] *Id* at p 110-111.

[23] In 322 BC "Chandragupta……established a complex bureaucracy to see to the operation of the State and bureaucratic taxation system that financed public services". See P. McKay John, B.D. Hill and J. Buckler, *A History of World Societies*Vol.1 74(Boston: Houghton Mifflin Co.1988).

[24] Also known as Chankya and Vishnu Gupta.

[25] Shubhra Saxena, *Public Administration* 171 (Competition Wizard, Delhi, 2010).

[26] S.R. Myneni, *Indian History* 145 (Allahabad Law Agency, 2008).

[27] *Id* at p 159.

[28] *Id* at p 169.

Pallavas

The king ruled the country with the eye of Dharama. The king was assisted by a mantra mandali, which consisted of Brahamins, princes and nobles, appointed from among the feudatories[29].

Rashtrakutas

The administration of Rashtrakutas was ethical. The king was assisted by the ministry. Mahamatya, Mahasandhi Vigrahaka etc. are known from the records. The other officials of the king stationed in different localities were known as rajsthaniya.

Rajputs (647 A.D.-1206 A.D.)

The Rajputs continued the polity and administrative system that prevailed during the Harsha and Gupta times without any major changes[30].

Mughals

The rule of the Mughal is distinguished by the establishment of a stable government with an efficient system of administration, a very high development of architecture and paintings and, above all, wealth and splendor such as no other Islamic State in any part of the world may boast of[31]. Mughals introduced fundamental changes which persisted till the time of Aurangzeb. Described as the Kagaz Raj (paper government), the Mughals introduced the system of carrying on the affairs of the government through correspondence. Another innovation of the Mughals was the conduct of the business of the government through departments. Some elements of Indian political ideas were retained. It is evident that the set-up of the government during the Muslim rule in India was responsive to the changing needs of the time[32].

East India Company

Among the more recent advances in public services in India, the model of land revenue collection designed by Sher Shah Suri in the 1540 is acknowledged as a major milestone in systematic governance. The Sher Shah model was then adopted by the Mughals and later by their successor—The East India Company[33]. It was one of the world's oldest joint-stock company, hence a pioneer. It became a private company that 'ruled' people: a unique combination earlier unknown to the system of governance. It had to quickly come up with policies to deal with this completely new role. The bureaucracy invented in response to this challenge was perhaps the first modern bureaucracy in the world. Given the lucrative opportunities created by the political patronage of their commercial

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[29] *Id* at p 180.
[30] *Id* at p 196
[31] H.V. Sreenivasa Murthy, *History of India* 217 (Lucknow, Eastern Book Company, 2006)
[32] *Id* at p 219.
[33]The East India Company (EIC), originally chartered as the Governor and Company of Merchants of London Trading into the East Indies, and more popularly called the Honorable East India Company. Further, it is interesting to point out here that now this company has been purchased by Sanjeev Mehta a person of Indianorigin.

activities, corruption[34] began to flourish in British Bengal. In England to curb the menace prevalent in India, legislations were started to be enacted. To improve the processes of administration civil service manuals were implemented. Similar steps were taken by various rulers in different parts of the country as per local needs.

The Regulating Act, 1773

The Act empowered the Governor-General and Council to make rules, ordinances and regulations for the good governance. These rules and regulations were to be registered with the Supreme Court and they had not come into with laws of England. The Amendment Act of 1781 regulated the relations of the Supreme Court and the Council[35].

Pitt's India Act, 1784

This Act empowered the Governor-General to override the decisions of the majority in Council. The Act distinguished between commercial and political functions[36].

The Charter Act, 1833

The Governor-General of Bengal became the Governor-General of India. He was given complete control over the civil and military affairs. The Act laid the first attempt to distinguish between the executive and legislatives branches in the Government[37].

The Charter Act, 1853

The Charter Act, 1853 was the last Charter Act. A Lieutenant (Assistant) Governor was appointed for Bengal for better administration. For the first time the Act set up a Legislative Council for India. However, the Legislative Council was not representative of ther people of India and the executive was not responsible to legislative[38].

The Government of India Act, 1858

By the Government of India Act, 1858, the East India Company was abolished. India was transferred from the company to the British Crown. The Act created a Secretary of State for India to look after the administration of India on behalf of the British Parliament[39].

The Government of India Act, 1919

The Act gave extraordinary powers to the Governor-General in respect of Indain Administration. He could override the decisions of his Executive Council. The Act introduced a new system of administration called 'Dyarchy' in the provinces. The Act

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[34] *Kautilya in Arthashastra* 2,400 years ago already asserted that "The *Mahamatras* are like fish. Does one know when the fish is drinking water?"

[35] S.R. Myneni, *Indian History* 451-452 (Allahabad Law Agency, 2008).

[36] *Id* at p 451.

[37] *Id* at p 453.

[38] *Id* at p 454.

[39] *Id* at p 455.

accepted the principle of division of powers between the Centre and the Provinces. It paved the pave for the self government[40].

The Government of India Act, 1935

The Act abolished diarchy in the provinces and introduced the same in the Central or Federal Government. The Act divided the subjects if administration into three lists- Federal list, Provincial list and Concurrent list[41].

Constitution of India

With the advent of the Welfare State[42] under the Constitution of India, 1950 the public services happened to be the responsibility of the government towards its citizenry. The modern administrative State[43], prior to the inception of our Constitution, had already acquired its own place in various systems in the world mechanized by the fundamental documents. The primary character of such modern administration system had already started to reflect the feeling that it was the duty of the government to provide remedies for social and economic evils of many kinds and the Indian Constitution is not an exception to this fact. The Constitution of India declares that a sovereign, socialist, secular and democratic republic's committed to secure social, economic and political justice & liberty of thought, expression, belief, faith and worship for promoting and assuring the dignity of the individuals and unity and integrity for the nation[44]. Constitution again reinforce this faith of constitution-makers to remove social imbalance by harmonizing the rival claims or the interests of different deprived groups in the social structure and build a democratic public Welfare State by Part III[45] and Part IV[46] of the Constitution.

The rights under Part III[rd] are available with citizens against the State. The State on the other hand is bound to govern the country in accordance with the Constitution. Fundamental Rights like Right to Equality and Right to Life are basic rights which cast upon a duty on the part of the State to provide many related rights comprising various rights to services in order to reach these basic rights. Further, the Directives under Part IV[th] give Constitutional vision to the State to run the administration while rendering the number of services to the citizens with the ultimate aim of welfare of the people. However, both the parts are having different feature on the basis of justifiability or non-justifiability but meant for realizing the same goal.

Welfare State

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[40] *Id* at p 463.
[41] *Id* at p 465.
[42] In *Kesavananda Bharati and Ors. v. State of Kerala and Anr.,* AIR 1973 SC 1461 where the Supreme Court held that the object of Directive Principles of State Policy is to embody the concept of a Welfare State.
[43] H. W. R. Wade & C. F. Forsyth, *Administrative Law* 3 (Oxford University, 2007).
[44] Preamble of the Constitution of India, 1950.
[45] Part III[rd] of Constitution enumerates Fundamental Rights.
[46] Part IV[th] of Constitution provides Directive Principles of States Policy.

There was a time, known as the *laissez faire* era, when the State was mainly concerned with the maintenance of law and order and defence of the country against external aggression. Such a restrictive concept of the state no longer remains valid.[47]

Today we are living in an era of welfare state which seeks to promote the prosperity and well being of the people. The state has to take positive actions in certain directions in order to promote the welfare of the people and achieve economic democracy. The Supreme Court observing in Paschim Banga:[48]

"The Constitution envisages the establishment of a welfare state at the federal level as well as the state level. In a welfare state the primary duty of the government is to secure the welfare of the people."

The concept of welfare state is essentially British in origin. It took roots around the Second World War, when the government of Great Britain resolved to tackle the five giant facing people - want, disease, ignorance, squalor, and idleness. A series of measures were passed resulting in the nationalization of the railways, coal mines and steel industry; nationalization of the Bank of England and transport. Provisions were also made for social insurance schemes, old age pensions, widow's benefits, unemployment benefits, milk for school children , free medical service, free secondary education, scholarships for higher education, and other liberal measures. After the Second World War, the idea of welfare state spread in other countries also[49].

The idea of a police state prevailed in the nineteenth century. The primary business of a police state is to provide law and order. It restricts the scope of state activity. Whereas the idea of welfare state has broad meaning. It encourages the state to undertake enormous tasks towards the welfare of its citizens. It is essentially a social service state. T.W. Kent says that a welfare state is "a state that provide for its citizens a wide range of social services." Hobman describes the welfare state as a compromise between communism on the one side and unbridled individualism on the other. He says that the welfare state guarantees a minimum standard of subsistence without removing incentives to private enterprise and it brings about a limited redistribution of income by means of graduated high taxes[50].

Citizens' Charter

The public services law in India owes its origin from the Citizens Charter of UK, promulgated in 1991. Though it is not a legal document in the strict sense of law, being an agreement of contract entered into between the citizens and the public servants, providing for competent and time bound delivery of services. It sought to add consumer rights to those citizen's rights, equipping users with the means of seeking personal redress

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[47] Prof. M. P. Jain, *Indian Constitutional Law 1363* (Wadhwa Nagpur, 2007).
[48] *Paschim Banga Kher Mazdoor Samity v. State of West Bengal*,(1996)4 SCC 37.
[49] L.S. Rathore *Political Theory and Organisations 20(Eastern Book Company, 2007).*
[50] *Id* at p 21.

if the services they received were inadequate. The objective of the Charter was to make public services accountable. The idea arose from a simple question in UK that if the public service which people have paid for is not good, why should they not get their money back, as they would have the right to purchase it with any shop or service provider in the private sector. The Citizen Charters were introduced in India in 1997, which was voluntary in character. That was based on the logo " services first " as in UK. The charters gradually spread through central to state ministers and to their local bodies and organizations .

Right to Service Acts

Right to Public Services legislation in India comprises statutory laws which guarantee time bound delivery of services for various public services rendered by the Government to citizen and provides mechanism for punishing the errant public servant who is deficient in providing the service stipulated under the statute. Eighteen State Legislatures have passed Public Service Guarantee Acts by enumerating the time charter failing which the individual accountability has been ensured by the provisions of concerned Acts by way of appellate stages and review system. Madhya Pradesh [51]became the first state in India to enact Right to Service Act and Bihar[52] was the second. Several other states like Delhi[53], Jammu & Kashmir[54], Uttar Pradesh[55], Rajasthan[56], Uttarakhand[57], Himachal Pradesh[58], Punjab[59], Jharkhand[60], Chattisgarh[61], Kerala[62], Karnataka[63], Odisha[64], Gujrat[65], Goa[66], Haryana[67] have introduced similar legislation for effectuating the right to service to the citizen.

The common framework of the legislations in various states includes, granting of "right to public services", which are to be provided to the public by the designated official within the stipulated time frame. The public services which are to be granted as a right under the legislations are generally notified separately through Gazette notification. Some of the common public services which are to be provided within the fixed time frame as a right under the Acts, includes issuing caste, birth, marriage and domicile certificates, electricity connections, voter's card, ration cards, copies of land records, etc.

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[51] Passed on August 18, 2010.
[52] Passed on January 13, 2011.
[53] Passed on April 03, 2011.
[54] Passed on April 13, 2011.
[55] Passed on August 15, 2011.
[56] Passed on September 21, 2011.
[57] Passed on October 4, 2011.
[58] Passed on October 17, 2011.
[59] Passed on October 20, 2011.
[60] Passed on November 15, 2011.
[61] Passed on December 12, 2011.
[62] Passed on November 01, 2012.
[63] Passed on April 2, 2012.
[64] Passed on September 6, 2012.
[65] Passed on April 1, 2013.
[66] Passed on May 2, 2013.
[67] Passed on May 11, 2014.

On failure to provide the service by the designated officer within the given time or rejected to provide the service, the aggrieved person can approach the First Appellate Authority. The First Appellate Authority, after making a hearing, can accept or reject the appeal by making a written order stating the reasons for the order and intimate the same to the applicant, and can order the public servant to provide the service to the applicant.

An appeal can be made from the order of the First Appellate Authority to the Second Appellate Authority, who can either accept or reject the application, by making a written order stating the reasons for the order and intimate the same to the applicant, and can order the public servant to provide the service to the applicant or can impose penalty on the designated officer for deficiency of service without any reasonable cause, which can range from Rs. 500 to Rs. 5000 or may recommend disciplinary proceedings or both. The applicant may be compensated out of the penalty imposed on the officer. The appellate authorities have been granted certain powers of a Civil Court given under Code of Civil Procedure, 1908, like production of documents and issuance of summon to the designated officers and appellants.

The Punjab Right to Service Act, 2011

The term Punjab comprises two words: 'punj' meaning five and 'aab' meaning water, thus the land of five rivers.[68] With the expansion of economy and the growth of the civil society there has been increasing awareness that citizens are not getting various citizen centric services in time, though it is their right to get them in a reasonable time and in a hassle free manner. Feeling the pulse of the public, Punjab Government undertook an exercise to study various services being provided by the Government departments to the citizens; the problems being faced by the public in getting these services; process involved and the time consumed in delivery of these services.

With this object the Punjab Government promulgated an Ordinance[69] which later on took the shape of Act[70]. This Act enabled the Government to notify time lines for delivery of various services and provide a mechanism to redress grievances in case the timelines were not observed. It is a major administrative reform aimed at providing citizen services to people as a right and in order to promote efficiency, transparency and accountability.
This Act has 23 Sections and one Schedule. Initially the Act covered 67 services but later on the number of services went up to 149, a few of them are issuance of Driving license, mutation, jamabandi(record of land rights), land demarcation process, approval of water supply/sewerage connection, vehicle registration certificates, fitness certificate for commercial vehicle, renewal of arms license, issue of various certificates such as birth, death, caste, income, residence etc. These services are related to nineteen departments such as Revenue, Health, Transport etc.

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[68] After the partition of India in 1947, the Punjab province of British India was divided between Indian and Pakistani Punjab. It was again divided in 1966.
[69] Punjab Right to Service Ordinance on July 14, 2011.
[70] The Punjab Right to Service Act, 2011 and it came into effect on October 20, 2011.

For the better implementation of the Act, the Punjab Government has framed Punjab Right to Service Rules[71] and Punjab Right to Service Commission (Management) Regulations[72]. The Act defines "right to service"[73] as the right to obtain service within the stipulated time limit. The Act has provided biting teeth in the shape of Penalty for delay or default in rendering services within the time prescribed in the Act. There are similar provisions on appeal, appellate authorities, revision, protection of action taken in good faith, bar of Jurisdiction of courts, power to make rules and power to remove difficulties, if any, arising in giving effect to the provisions of the Act, by order of the State government.

As per the provision Section 2 (b) read with Section 3 (2) of Punjab Right to Service Act, 2011 the officers in the machinery include the designated officers or their subordinate officers[74] charged with the delivery of services. The Section 5 of the said Act provides the procedure for obtaining the services. Section 6 and 7 of the said Act give the provisions of first and second appeal.

The designated officer who is at the lowest in the hierarchy of the State machinery may reject the application within the time limit specified for that service with reasons recorded in writing[75]. An eligible person, whose application is either rejected or who is not provided with the service within the time limit may file an appeal to the first appellate authority within thirty days[76] from the date of rejection or on the expiry of the given time limit as the case may be. Further, the aggrieved citizen may file a second appeal from the order of first appellate authority or within thirty days from the date of rejection of his first appeal to the second appellate authority. The second appellate authority may decide the appeal and pass an order either accepting the appeal or directing the designated officer to provide the service or reject the appeal, within sixty days[77] from the date of receipt of appeal. The second appellate authority also determines the penalty to be imposed on the designated officer[78]. According to section 9(2) of the said Act, there is provision for compensation to the appellant.

Punjab Right to Service Commission

Punjab State in context of Right to Service Laws has constituted a Commission[79] named Right to Service Commission Punjab[80] in which there is one Chief Commissioner and

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[71] The Punjab Right to Service Rules, 2012

[72] The Punjab Right to Service Commission (Management) Regulations, 2012.

[73] *Ibid,* Section 2 (g) of The Punjab Right to Service Act, 2011.

[74] *Ibid*, Section 4. It declares that designated officer shall provide the services to the eligible person within the given time limit.

[75] *Ibid*, Section 5.

[76] *Ibid*, Section 6(1).

[77] *Ibid*, Section 7(2).

[78] *Ibid*, Section 9(1) (b). (…Penalty at the rate of Rs 250 per day which shall not be more than Rs. 5000 for undue delay in providing the service).

[79] *Ibid*, Section 12.

four Commissioners[81] who would look after the task of effective implementation of the Act[82]. The Act also makes provision for revision[83] by the Commission. The person aggrieved by the initial order may make an application for revision of the said order to the Commission within a period of sixty days from the date of said order. The Commission may take matter *Suo Motto*[84] and issue notice to the errant designated officer and may also recommend the departmental action against concerned officers.

The Commission has been receiving data of services availed by the public online from the month of August 2012 onwards through the Deputy Commissioners. Prior to August, 2012 this data has been received manually. According to this data :-(a) the total number of applications to avail services are 9119475 and among these Applications 9086423 are disposed off; b) total number of Revisions filed before the Commission are 8 in number with 100% disposal rate; c) Commission has taken Suo Moto action in 60 cases, out of them 53 are decided; d) there were 600 appeals filed before 1st appellate authority and out of that 554 are disposed off e) 8 numbers of appeals preferred to 2nd Appellate authority and out of which only 1 is pending.[85]

Suwidha Centers, Sanjh Kendras and Fard Kendras

For the better implementation of the Act, there are Suwidha Centers, Sanjh Kendras and Fard Kendras at Sub-Division and District level. These centres provide services through the Single Window System to prevent the harassment of the general public. Additional Deputy Commissioner (General) of the concerned district shall be the Nodal Officer in the district for all the departments whose services are notified under the Act. In case of service sought from Suwidha Centre, an additional period of two days would be added to the above said given time limit and in such cases the Designated Officer and the Incharge of the Suwidha Centre, as the case may be, would be jointly and severally responsible for the delivery of such service. However, the said Act still requires introspection by taking into consideration the provisions of other States.

Conclusion

Concept of public services traces back in ancient Indian history. Many rulers during their reign tried to provide various services for the upliftment and betterment for their subjects. The Constitution of India has also enshrined so many provisions related to welfare of nation. Since last decade in India it is seen or being driven by various movements that some mechanism must be brought into force which is citizen-centric and various movements in India have supported the instrument of Citizen Charter. In present scenario

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[80] The Punjab Right to Service Commission has been constituted on 20th October, 2011. It is situated at Mahatma Gandhi State Institute of Public Administration, Institutional Area, Sector 26, Chandigarh.

[81] At present Sh. S C Agrawal, IAS (Retd.) is a Chief Commissioner and Sh. S.M. Sharma, IPS (Retd.), Sh. Iqbal Singh Sidhu, IAS (Retd.), Dr. Dalbir Singh , M.B.B.S., PCMS-I (Ex) and Sh. H.S. Dhillon are Commisioners. It is unfortunate to mention here that there is no judicial officer in this list.

[82] Section 13 of The Punjab Right to Service Act, 2011.

[83] *Ibid*, Section 10.

[84] *Ibid*, Section 17 (1) (b).

[85] Annual Report, Punjab Right to Service Commission (October 2011- March 2013) p-22.

due to the change of the need of society or to effectuate such demands on the part of various movements or protests by civil society, several State Legislatures have enacted legislations in terms of Citizen Charter and one of them is Punjab Right to Service Act, 2011.

Police and its Powers

Anuranjan Sharma [1]

Introduction

The name 'Police' at once evokes a picture of awe and dread. To the high and mighty it may mean protection, but to a lay man it means fear. The powers of the police to a common men are the unlimited powers of state .The British administration in India was based on three pillars; the Civil service, the Army and the Police. All the three were brought in to existence by Lord Cornwallis. The British created the police-system apparently to maintain law and order. This still remains its sole purpose. But its image as a force for repression to curb voices of protest is a reality. Still worse is the alleged nexus between Police and Criminals, which perhaps provoked a great legal luminary to call it the organized gang of robbers. However this is not the subject matter of this discussion.

The First Police Commission[2], contained detailed guidelines for the desired system of police in India. The Second Police Commission[3] went into details of the organisational structure of police at the district level, functioning of the railway police and the river police, recruitment, training and pay structure of different subordinate ranks of police.

The British contribution was to put the system of policing on a professional footing and to bring about a large measure of uniformity in its laws, procedures and practices. After Independence,under the Indian constitution policing and maintenance of law and order was made exclusively a state subject and each state and union territory of India had its own separate police force. Article 246 and Schedule 7 of the Constitution designates the police as a state subject, which means that the state governments frame the rules and regulations that govern each police force. These rules and regulations are contained in the police manuals of each state force. The Present Policing System in the country is based on the Police Act, 1861. Though recently some of the states have framed a new law to regulate their police force[4], still it is more or less a reflection of the Act of 1861.

Police Organisational : Its Rank and File

Police is a state subject[5].Superintendence over the police force in the state is exercised by the State Government.[6] The head of the police force in the state is the Director General of Police (DGP), who is responsible to the state government for the administration of the

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[1] ***Assistant Professor (Law) Apeejay Stya University, Gurgaon.***
[2] Appointed on 17th August, 1860.
[3] Appointed in 1902
[4] Bihar Police Act 2007, Himachal Pradesh Police Act 2007, Madhya Pradesh Police Bill 2002
[5] Entry 2, List II, Schedule 7 of the Constitution of India, Art. 246
[6] Section 3 Police Act, 1861

police force in the state and for advising the government on police matters. The DGP represents the highest rung in the police hierarchy. The hierarchical structure of the police in India follows a vertical alignment consisting of senior officers drawn, by and large, from The Indian Police Service (IPS) who do the supervisory work, the "upper subordinates" (inspectors, sub-inspectors, and asst. sub-inspectors) who work generally at the police station level, and the police constabulary who are delegated the patrolling, surveillance, guard duties, and law and order work. The constabulary accounts for almost 88% of total police strength.

An officer of the rank of Superintendent of Police heads the district police force. A group of districts form a range, which is looked after by an officer of the rank of Deputy Inspector General of Police. Some states have zones comprising two or more ranges, under the charge of an officer of the rank of an Inspector General of Police. Every district is divided into sub-divisions. A sub-division is under the charge of an officer of the rank of ASP/ Dy.S.P. Every sub-division is further divided into a number of police stations, depending on its area, population and volume of crime. Between the police station and the subdivision, there are police circles in some states - each circle headed generally by an Inspector of Police. The police station is the basic unit of police administration in a district. Under the Criminal Procedure Code, all crime has to be recorded at the police station and all preventive, investigative and law and order work is done from there. A police station is divided into a number of beats, which are assigned to constables for patrolling, surveillance, collection of intelligence etc. The officer in charge of a police station is an Inspector of Police, particularly in cities and metropolitan areas. Even in other places, the bigger police stations, in terms of area, population, crime or law and order problems, are placed under the charge of an Inspector of Police. In rural areas or smaller police stations, the officer in charge is usually a Sub-Inspector of Police. To enable the police have greater and speedier reach and the public to gain easier access to police help, police posts have been set up under police stations, particularly where the jurisdiction of the police station, in terms of area and population, is large.

Different units

Civil Police and Armed Police

A state police force has many wings. The primary function of the civil police is to control crime, while the armed police mainly deal with law and order situations. The civil police include mainly the district police forces, supervisory structures at the range, zone and state police headquarters and specialised branches to deal with crime, intelligence and training problems. The district police force also has armed reserves, which are used mainly to meet the requirements of armed guards and escorts. They are occasionally also deployed to meet any emergency situation, before the state armed police arrive to handle it. The armed reserves of districts are treated as a part of the district civil police force. The armed police is in the form of battalions, which are used as striking reserves to deal with emergency situations. A state armed police battalion is divided into companies. Generally, there are six service companies in a battalion. A company is further sub-divided into platoons and platoons into sections. Ordinarily, three sections constitute a

platoon and three platoons a company. The rank structure of an armed police battalion is different from that of the civil police. The head of a battalion is called the Commanding Officer or the Commandant. Generally, he has a second in command, called the Deputy Commandant. An officer known as Assistant Commandant or a Subedar, who is equivalent in rank to a Dy.SP or an Inspector, commands a company in most cases.

Criminal Investigation Department (CID)

Criminal Investigation Departments or CIDs, as they are popularly known, are specialized branches of the police force. They have two main components - the Crime Branch and the Special Branch. The officer in charge of the CID generally supervises the work of both branches, though some states appoint a separate officer in charge of the Special Branch. The Crime Branch is the most important investigation agency of the state police. It investigates certain specialized crimes like counterfeiting of currency, professional cheating, activities of criminal gangs, crimes with inter district or inter-state ramifications etc. In fact, when certain major crimes remain unsolved or when the public demands investigation by an agency other than the local police, the government or the head of the police force transfers cases for investigation from the district police to the CID. The Special Branch, on the other hand, collects, collates and disseminates intelligence from the security point of view. Its main role is to keep a watch over the subversive activities of persons, parties and organisations and keep all concerned informed.

P.A.C: Provincial armed constabulary

It fills the need for deployment of additional force, whenever it arises. The S.P is equivalent to a commandent and both the officers are interchangeable.

Powers of the Police

The functions of the police, mainly as a law-enforcing agency engulf its powers. This sometimes allows them to tread on an otherwise forbidden path.

Police officers are entrusted with exceptional power in the field of law enforcement and maintenance of public order. Police have the power to arrest and detain individuals, search and seize private property and in exceptional circumstances resort to force. The use and extent of use of these powers are left at the discretion of the police officers and it is expected that they will tread a fine line in balancing the rights of the individuals and needs of the society.

The Code of Criminal Procedure, 1973 has outlined the scope of police activities in arrest and detention and has established police procedure in several areas of police investigation. The various provincial Police Acts, the provincial offences Acts and numerous other regulatory laws also determine the powers and duties of police.

This part of the paper endeavours to broadly study the powers of the police outlined under the code of criminal procedure

Powers of a police officer under the Cr.PC

The criminal procedure code confers specific powers, e.g. power to make arrest, search, etc. on the members of the police force who are enrolled as police officers. Wide powers have been given to police officers who are in charge of police stations. Such station house officers are also required to discharge onerous duties in relation to detection, investigation and prevention of offences.

Section 36 provides that police officers superior in rank to an officer in charge of a police station may exercise the same powers, throughout the local area to which they are appointed, as may be exercised by such officer within the limits of his station.

This shows the key role given by the code to police stations in the scheme of investigation and prevention of crime.

Investigating Powers

The police are the officers of the state who have the task of the investigation of crime. Indeed, they see it as central to their job, even though, in reality, non-investigative work takes up most of their time. In carrying out this work, the police have a great deal of discretion. The Supreme Court in *Jamuna Chaudhary v. State of Bihar*[7] observed that 'the duty of the investigation officer is not merely to bolster up a prosecution case with such evidence as may enable the court to record a conviction but to bring out the real unvarnished truth'.

According to clause (h) of Sec. 2 'investigation' includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf,

The Supreme Court has viewed the investigation of an offence as generally consisting of—

(1) Proceeding to the spot;
(2) Ascertainment of the facts and circumstances of the case;
(3) Discovery and arrest of suspected offender;
(4) Collection of evidence relating to the commission of the offence which may consist of—
    (a) The examination of various persons (including the accused) and the reduction of their statements into writing, if the officers think fit,
    (b) The search of places or seizure of things considered necessary for the investigation or to be produced at the trial; and
(5) Formation of the opinion as to whether on the materials collected there is a case to place the accused before a magistrate for trial, and if so, taking the necessary steps for the same by the filing of a charge-sheet under sec. 173.[8]

The distinction between cognizable and non-cognizable offences demarcates the powers of the police in respect of criminal investigations. While the police officers have the

[7] AIR 1974 SC 1822
[8] *H.N Rishbud v. State of Delhi*, AIR 1955 SC 196

power and also the duty to investigate into all cognizable offences, they are enjoined not to investigate the non-cognizable offences without the order of a competent magistrate[9]. It may also be noted that the power to investigate is not conferred on every police officer, only an officer in charge of a police station (or any other officer of a higher rank)[10] has been empowered by the code to investigate.

Section 154 to 176 contained in chapter XII of the code deal with "information to the police and their powers to investigate". These sections have made very elaborate provisions for securing

that an investigation does take place into a reported offence and the investigation is carried out within the limits of the law without causing any harassment to the accused and is also completed without unnecessary or undue delay.[11]

Section 154: Registration of FIR on disclosure of cognizable offence. Any person can give information to the police relating to the commission of a cognizable offence, and section 154 of the code provides for the manner in which such information is to be recorded. An analysis of section 154 brings out the following points:

(1) The information is to be given to an officer in charge of police station having jurisdiction for investigating the case[12].
(2) If the information is given orally, it shall be reduced to writing by the officer himself or under his direction.
(3) The substance of the information is to be entered by the police officer in a book kept by him in the prescribed form. This book is called the Station Diary or General Diary.[13]

The statement of the informant as recorded under section 154 is usually mentioned in practice as the first information report or popularly called as FIR. The principal object of the first information report from the point of view of the informant is to set the criminal law in motion[14]. A statement recorded by the police in respect of a cognizable offence can be considered and used as FIR, if the same is recorded before the commencement of the investigation, but not otherwise. The Delhi high court in *Laxminaryan Gupta v. Commissioner of Police*[15], held that provisions of section 154 of Cr. P.C. are mandatory in nature and concerned officer is duty bound to register case on the basis of an information disclosing cognizable offence.

Evidentiary value of First Information Report

A first information report means the information, by whomsoever given, to the officer in charge of a police station in relation to the commission of a cognizable offence and which

[9] Section 155(2)
[10] See section 36
[11] *Abhinandan Jha v. Dinesh Mishra*, AIR 1968 SC 117
[12] Section 154(1)
[13] See section 44 of the Police Act, 1861.
[14] *Hasib v. State of Bihar*, (1972) 4 SCC 773
[15] 2007 (1(Crimes 608

is first in point of time and on the strength of which the investigation into that offence is commenced.

It is settled law that a first information report is not substantive evidence, that is to say, it is not evidence of the facts which it mentions. However, importance as conveying the earliest information regarding the occurrence cannot be doubted. Though the FIR is not substantive evidence, it can be used to corroborate the informant under section 157 of the Indian Evidence Act, 1872 or to contradict him under sec.145 of the act, if the informant is called as a witness at the time of the trial. It may however, become relevant under section 8 of the Evidence Act.

The FIR should be lodged with the police at the earliest opportunity after the occurrence of a cognizable offence. The object of insisting upon prompt lodging of the report to the police is to obtain early information regarding the circumstances in which the crime was committed. Delay in lodging the FIR quite often results in embellishment which is a creature of after-thought and on account of delay, the report not only gets bereft of the advantage of spontaneity, but danger creeps in of the introduction of colored version, exaggerated account or concocted story as a result of deliberation and consultation and for these reasons, it is essential that delay in lodging the first information report should satisfactorily be explained. The FIR will have better corroborative value if it is recorded before there is time and opportunity to embellish or before the informant's memory fails. Undue or unreasonable delay in lodging the FIR therefore, inevitably gives rise to suspicion which puts the court on guard to look for and consider its effect on the trustworthiness or otherwise on the prosecution version. Though generally speaking the contents of FIR can be used only to contradict or corroborate the maker thereof, there may be cases where the contents become relevant and can be put to some other case also. FIR can also be used for the cross-examination of the informant and for contradicting him. This is possible by relying on sec.145 of the Evidence Act.

If the FIR is given to the police by the accused himself, it cannot possibly be used either for corroboration or contradiction. Moreover, if the FIR is of a confessional nature it cannot be proved against the accused-informant as it would be hit by sec.25 of the Evidence Act.

Role of police as to non-cognizable cases:-

Generally speaking, non-cognizable offences are more or less considered as private criminal wrongs. Therefore, the investigation into such cases is not the responsibility of the police unless otherwise ordered by a magistrate. The aggrieved private individual can, however, approach a magistrate with a complaint and the magistrate may take necessary steps for the trial of the offender.

(a) Information to police as to non-cognizable offence:-

If any person gives information to an officer in charge of a police station of the commission of a non-cognizable offence, the officer shall enter or cause to be entered the substance of the information in a book prescribed for this purpose. The officer

shall then refer the informant to the magistrate.[16] The police officer has no further duty unless he is ordered by a magistrate to investigate the case.

(b) Powers of the police to investigate a non-cognizable case depends on magistrate's order:-

The primary rule is that no police officer shall investigate a non-cognizable case without the order of a magistrate having power to try such case or commit the case for trial.[17] The code does not expressly give any direction or guidance to the magistrate as to how and in what circumstances the power to order investigation is to be exercised. Certainly the power is not to be exercised arbitrarily or capriciously. Probably the magistrate is to consider the totality of the circumstances and consider whether it would not be just and proper to ask the police to investigate the non-cognizable case.

(c) A case consisting of both cognizable and non-cognizable offences:--

In a situation where a criminal case consists of both cognizable and non-cognizable offences, a question may arise as to whether the case is to be treated as a cognizable case or a non-cognizable case. To meet such a situation section 155(4) provides that "where a case relates to two or more offences of which at least one is cognizable, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are non-cognizable". A case alleging commission of offences under sections 494 and 498-A of IPC could be investigated by the police, though offence under section 494 is a non-cognizable offence, by virtue of sec.155(4) of the code.

(d) Power to investigate a non-cognizable case:--

Where a magistrate under sec.155(2) of the code, gives an order to a police officer to investigate a non-cognizable case, the police officer receiving such order may exercise the same power in respect of the investigation as an officer in charge of a police station in a cognizable case.[18]

Police officer's Power to require the attendance of Witnesses

According to section 160, an investigation police officer can by order require the attendance before himself of any person, if the following conditions are satisfied:

(a) The order requiring the attendance must be in writing;
(b) The person is one who appears to be acquainted with the facts and circumstances of the case;
(c) The person is within the limits of the police station of the investigating police officer or is within the limits of any adjoining police station.

However a person below fifteen years of age or a woman shall not be required to attend any place other than the place in which such person or woman resides. It is the legal duty of every person to attend if so required by the investigating police officer. Where such person intentionally omits to attend, he is liable to be punished under section 174, IPC.

[16] Sec.155(1) of the Code.
[17] Sec.155(2) of the Code.
[18] Sec 155(3) of the Code.

However, the police officer has no authority to use force to compel attendance of such person, nor does he have any power to arrest or detain such a witness.
Section 161 and 162 deals with the oral examination of witnesses by the police. The object of section 161 is to obtain evidence which may later be produced at the trial. According to this section any person supposed to be acquainted with the facts and circumstances of the case can be orally examined—

(a) by a police officer making an investigation of the case, or
(b) on the requisition of such officer, by any police officer not below such rank as the state Government may by order prescribe in this behalf.

Police to investigate and report in cases of unnatural or suspicious death.
An officer in charge of a police station and other police officers specially empowered in this behalf are required by section 174 to make investigation into cases of suicides and other unnatural or suspicious deaths and to report to the District Magistrate or the Sub-Divisional Magistrate. Section 175 empowers such police officers to summon persons for the purposes of such investigations.

Bail
Bail commonly means release on one's own bond, with or without sureties. The purpose of bail is not to set the accused free, but to release him from custody and to entrust him to the custody of his sureties who must produce him at his trial at a specified time and place. Every accused person is presumed under law to be innocent until proved guilty. An opportunity is given to him to prove his innocence by granting bail.

When any person accused for a bailable offence is arrested or detained without warrant by police [19]officer he is entitled to be released on bail, if a request for bail is made.[20] It may be recalled that section 50(2) makes it obligatory for a police officer arresting such person without a warrant to inform him of his right to be released on bail. As soon as it appears that the accused person is prepared to give bail, the police officer is bound to release him on such terms as to bail as may appear to the officer to be reasonable.[21] If such officer thinks it fit, such person may be released on a personal bond without sureties. If for any reason, the police doesn't give bail, the arrested person must be produced before a Magistrate within 24 hours of arrest.

Cancellation of bond and bail bond
Section 446A provides that where a bond under this Code is for appearance of a person in a case and it is forfeited for breach of a condition and the bond executed by such person as well as the bond, if any, executed by one or more of his sureties in that case shall stand cancelled then, no such person shall be released only on his own bond in that case, if the

[20] Section 436.
[21] *Talab Haji hussain v. Madhukar Purshottam Mondkar*, AIR 1958 SC 376.

Police Officer, for appearance before whom the bond was executed, is satisfied that there was no sufficient cause for the failure of the person bound by the bond to comply with its condition.

Search Power

Procedure of search of closed place

Section 100 empowers a police officer to search a person concealing, while executing a search warrant under section 93 or under section 94. While section 51 authorises a police officer to search a person while arresting him under a warrant.

The section has three important aspects:

(a) The occupant of a place liable to search is required to give all reasonable facilities to the persons authorised to conduct a search;

(b) The police and others authorised to search are armed with necessary powers for the proper and effective execution of the search;

(c) Procedures have been designed 'to obtain as reliable evidence as possible of the search and to exclude the possibility of any concoction, or malpractice of any kind'.[22]

Sub sec (4) provides that before making a search the officer shall call upon two or more independent and respectable inhabitants of the locality to attend and witness the search.

Powers of Police Officer to seize certain Properties

Section 102 empowers a police officer to seize any property which may be alleged or suspected to have been stolen or which may be found under circumstance which create suspicion of the commission of any offence. The words any offence show that even though there may be the commission of a non-cognizable offence, a police officer may seize any property found under suspicious circumstances.[23] A seizure under this section would be illegal where there were no materials on the record to show that there was any information to the police officer about the commission of any offence nor is there any suspicion of its being a stolen property.

Power of Arrest

An arrest is the act of depriving a person of his or her liberty usually in relation to the investigation and prevention of crime. It means the taking of a person into custody so that he may be held to answer for a crime, effected by actual restraint or submission to custody. If the arrest is effected without due compliance with the provisions of the code or other relevant law, it would amount to wrongful confinement[24]. The essential elements to constitute an arrest in the above sense are that there must be an intent to arrest under the authority, accompanied by a seizure or detention of the person in the manner known to law, which is so understood by the person arrested.

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[22] *Emperor v. Balai Ghose*, AIR 1930 Cal 141
[23] *Babulal Agarwalla v. Province of Orissa*, AIR 1954 Ori 225
[24] Section 342 I.P.C.

Section 41 provides that any police officer may without an order from a Magistrate and without a warrant, arrest any person-

a) Who has been concerned in any cognizable offence, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned; or
b) Who has in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house-breaking; or
c) Who has been proclaimed as an offender either under this Code or by order of the State Government; or
d) In whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; or
e) Who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; or
f) Who is reasonable suspected of being a deserter from any of the Armed Forces of the Union; or
g) Who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any place out of India which, if committed in India, would have been punishable as an offence, and for which lie is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in India; or
h) Who, being a released convict, commits a breach of any rule made under subsection (5) of section 365; or
i) For whose arrest any requisition, whether written or oral, has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears there from that the person might lawfully be arrested without a warrant by the officer who issued the requisition.

Further, any person may be arrested belonging to one or more of the categories of person specified in section 109 or section 110. The power of arrest under this section does not, of itself, confer on the Police officer the power to investigate the case against the case against the arrested person. Therefore, the police officer who arrests without warrant has to send the arrested person before the officer in charge of the police station or before a magistrate having jurisdiction[25] in the case.

The word ‘may’ in section 41 indicates that it confers only a discretionary power on a police officer and not a duty to arrest, such as under section 55(1), when directed by a superior officer in accordance with the requirement of that section or when a warrant is issued to him.

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[25] *Gulam v. State*, AIR 1959 M.P. 147 (para 3).

Arrest on refusal to give name & residence

Section 42 provides that a person may be arrested, without warrant, by a police officer, only if the following conditions are satisfied:

(a) Such person must have committed a non-cognizable offence in the presence of such police officer, or have been accused before such officer of having committed a non-cognizable offence.

(b) On demand by such police officer, such person (i) refuses to give his name and address, or (ii) gives a name or residence which such officer has reason to believe to be false.

The object of arrest under this section is to ascertain the name and address of such person, if the police officer was already aware of he name and address of such person, he cannot arrest the person under this section; in such case, he can be arrested only after obtaining a warrant.[26] Further, the person so arrested is to be released on execution of a bond for appearance as soon as his name and address are ascertained after arrest.

Procedure of Arrest

Section 46 lays down how arrest is made. When a person is arrested by a police officer he is taken into custody of such officer within the meaning of section 27 of the Evidence Act. The point of time when a person has been arrested is material. Arrest may be effected in any of the ways:

(i) Submission to the custody of the officer empowered to arrest

(ii) Touching or confining the body of the arrested person. In the absence of voluntary submission to custody the person may be arrested only if the officer actually touches or confines the body of such person.

Mere utterance of words or gesture or flickering of eyes does not amount to arrest; actual seizure or touch of person's body with a view to arresting is necessary. It need not be by handcuffing a person, but could be complete even by spoken words if a person submits to the custody.[27]

The person making an arrest may use 'all means' necessary to make arrest if the person to be arrested resists or attempts to evade the arrest.[28] The words 'all means' are very wide and include the taking of assistance from others in effecting the arrest.[29]

An arrest not made in either of the foregoing modes would be illegal and the police officer who restrains such person would be punishable for wrongful restraint or wrongful confinement.

Power of Police officer to search of a Place entered by a person sought to be arrested

Section 47 provides for search of place entered by person sought to be arrested. The object of this provision is to compel a house holder as well as other persons residing in a

[26] *Gopal v. Emperor*,(1922) 46 Mad 605
[27] *Birendra Kumar Rai* v. *Union of India*, 1992 CrLJ 3866(All).
[28] Sec. 46(2) of the Code.
[29] *Nazir*, AIR 1951 All 3(F.B.)

house to afford facilities to the police acting under a warrant of arrest in carrying out their duties. In case of obstruction the police officer executing the warrant may use force under sub section (2) to obtain ingress.

If the house holder or other inmate offers obstruction or resistance in breach of his duty under sub section (1), he may render himself liable under section 186 or section 225 IPC, if the conditions laid down therein are present. This section exonerates the arresting officer from criminal trespass if he is refused entry, after demand for that purpose is made.

Power to pursue offender into other jurisdiction

A police officer may for the purpose of arresting without warrant any person whom he is legally authorized to arrest, pursue such a person into any place in India.[30] Hence the arrest of a person by the police officer, investigating an offence, in pursuit of an offender is legal though it is made outside his circle.[31] It may be noted that ordinarily a police officer is at liberty to go outside the police district and to arrest there an offender without a warrant.[32]

Search of Arrested Person

Section 51 provides that a police officer making the arrest or the police officer to whom a person arrested by a private person is made over may search the arrested person and place in custody all articles other than the wearing apparel found upon him.

Power to seize Offensive weapon

Section 52 is also consequential upon the arrest of a person under the preceding provisions. When a person has been arrested, the person making such arrest is empowered to seize any offensive weapons found about his person, irrespective of the provision for search under section 51.

Examination of accused by medical Practitioner at the request of Police

Section 53 facilitates effective investigation, Under this section provision has been made authorizing an examination of the arrested person by a medical practitioner, if, from the nature of the alleged offence or circumstances under which it was alleged to have been committed there is reasonable ground for believing that a examination of the person will afford evidence. Section 53 is inculpatory and imposes an obligation upon the arrested person to be subjected to medical investigation at the instance of the police to help the investigation.

Power, on escape, to pursue and retake

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[30] Sec. 48 of the Code.
[31] *Manbodh*, AIR 1955Nag.23.
[32] Sec. 22 of the Police Act.

The effect of section 60 is to extend the powers of a police officer under section 41(1) (e) to arrest an escaped offender (subsequent arrest) in any place in India and also confer similar power on a private person making an arrest under section 43 and any other person in whose custody the arrested person may have been lawfully kept. In making such pursuit the police officer shall have all the powers conferred by section 47 to search any place where the escaped person may have taken shelter.

Section 60A lays down that every arrest has to be made strictly according to the code.
In order to have transparency in the the accused-police relationship, the Supreme Court in *Joginder Singh* v. *State of U.P.*,[33] has formulated the following rules:--
(i) An accused person being held in custody is entitled, if he so requests to have one friend, relative or other person who is known to him or likely to take interest in his welfare, told, as far as is practicable that he has been arrested and where he is being detained.
(ii) The police officer shall inform the arrested person when he is brought to the police station of his right.
(iii) An entry shall be required to be made in the diary as to who was informed of his arrest. These protections from power must be held to flow from Article 21 and 22(1) enforced strictly.

The frequent instances of police atrocities and custodial deaths have prompted the Supreme Court to have a review of its decisions like *Joginder Kumar*[34], *Nilabati Bahera, Shyamsunder Trivedy*, and issue the following instruction in *D.K.Basu case,*[35] to be followed in all cases of arrest or detention till legal provisions are made:-

(i) The police personal carrying out the arrest and handling the interrogation of the arrestee should beer accurate, visible and clear identification and name tags with their designations. The particulars of such all such police personnel who handle interrogation of the arrestee must be recorded in a register.
(ii) That police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness who may either be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall be countersigned by the arrestee and shall contain the time and date of arrest.
(iii) A person who has been arrested/detained shall be entitled to have one friend/relative/other person known to him or having interest in his welfare being informed as early as possible.
(iv) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend/relative of arrestee lives outside the district/town through the Legal Aid Organization in the district and the police station of the area concerned telegraphically within a period of 8-12 hours after the arrest.

[33] (1994) 4 SCC 260.
[34] *Ibid*.
[35] (1997) 6 SCC 642.

(v) The arrestee must be aware of his rights to have someone informed of his arrest/detention as soon as he is put under arrest/detained.

(vi) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the arrestee who has been informed of the arrest and the name and the particulars of the police official in whose custody the arrestee is.

(vii) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The 'Inspection Memo' must be signed by the arrestee and the police officer and its copy provided to arrestee.

(viii) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health services of the State/U.T. the director should prepare such a panel for all tehsils and district as well.

(ix) Copies of all documents including the memo of arrest should be sent to the Area Magistrate for his record.

(x) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

(xi) A police control room should be provided at all districts and state headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board.

Failure to comply with the above instructions the court noted, would entail not only departmental action but also punishment for contempt of court.

Maintenance of public order and tranquility

Dispersal of assembly by use of civil force (Section 129)

The preventive power to disperse an assembly by force if necessary can be invoked in two contingencies

(a) that the assembly is an unlawful assembly the membership of which is an offence as defined in section 141 of IPC.

(b) that though it does not fall within the definition in section 141 IPC it is an assembly of five or more persons which in the circumstances is likely to cause a disturbance of the public place.

An officer in charge of a police station may exercise power under section 129(1) and command any unlawful assembly to disperse in obedience to his command and the officer may use civil force to effect the dispersal. Generally speaking, before any force can be used for the dispersal of the unlawful assembly, three pre-requisites are to be satisfied. Firstly, there should be an unlawful assembly with the object of committing violence.

Secondly, such assembly is ordered to be dispersed and thirdly, in spite of such order to disperse, such assembly does not disperse.[36]

Preventive action

Chapter XI of the code deals with preventive jurisdiction of the police. Whereas the magisterial preventive jurisdiction is quasi judicial and quasi executive, the preventive jurisdiction of the police is purely executive in nature. Chapter XI of the code covers:

(i) Prevention of cognizable offences
(ii) Prevention of injury to public property
(iii) Inspection of weights and measures.

Section 149 provides that every police officer may interpose for the purpose of preventing, and shall, to the best of his ability, prevent, the commission of any cognizable offence.

Section 151 provides that a police officer knowing of a design to commit any cognizable offence may arrest, without orders from a Magistrate and without a warrant, the person so designing, if it appears to such officer that the commission of the offence cannot be otherwise prevented.

Section 152 provides that a police officer may of his own authority interpose to prevent any injury attempted to be committed in his view to any public property, movable or immovable, or the removal of injury of any public landmark or buoy or other mark used for navigation.

Section 153 provides that any officer in charge of a police station may, without a warrant, enter any place within the limits of such station for the purpose of inspecting or searching for any weights or measures or instruments for weighing, used or kept therein, whenever he has reason to believe that there are in such place any weights, measures or instruments for weighing which are false. If he finds in such place any weights, measures or instruments for weighing which are false, he may seize the same, and shall forthwith give information of such seizure to a Magistrate having jurisdiction.

Power of Police under the Police Act, 1861

Under Section 23 of the Police Act, 1861, the powers of police officers are delineated as below:-

It shall be the duty of every police officer promptly to obey & execute all orders & warrants lawfully issued to him by any competent authority :-

(i) To collect & communicate Intelligence affecting the public peace.
(ii) To prevent the commission of offences & public nuisances

[36] *Karam Singh v. Hardayal Singh*, 1979 Cri LJ 1211.

(iii) To detect & to bring offenders to justice & to apprehend all persons whom he is legally authorized to apprehend & for whose apprehension sufficient grounds exist.

(iv) It shall be lawful for a Police officer, for any of the purpose mentioned in this section without a warrant, to enter & inspect any drinking shop, gamming house or other place of resort of loose & disorderly charters.

Role of Police in Criminal Justice System

The criminal justice system consists of three main parts: (1) law enforcement (police); (2) adjudication (courts); and (3) corrections (prisons, probation and parole). In a criminal justice system, these distinct agencies operate together under the rule of law. Though the Constitution strives for separation of power, and favor separating the three wings of the governance. Yet, in the realm of criminal justice system it would not be possible to separate the functioning of the police and the courts. Investigation of offences is the prime concern of the police and any inadvertence on their part would severely upset the Criminal Justice System. A case in point would be delay in lodging of FIR on account of laxity on the part of the Police. Any such delay raises a presumption against the genuineness of the facts and the victims might suffer by no faults of them. An illustrative account would be *Harendra Sarkar v. State of Assam*[37], wherein a delay in lodging FIR was considered against the prosecution case. The aforesaid delay was due to large scale communal violence and complete paralysis of administration system. Yet, the court considered the delay material.

Another issue would be prompt and effective investigation. In an adversarial system the onerous task of establishing the guilt of the accused lies on the prosecution. It is the duty of the police to bring every fact on record which establishes the guilt of the accused or which exonerates him. The police is not required to act as a guilt finding body but to bring out the untarnished truth. However, in doing so it has to follow the best practices and collect evidence which can withstand the claim of 'beyond reasonable doubt' burden of proof. Though, the most important role of police is investigating crimes yet in reality it is mostly pre-occupied with other works. It will be better if the investigation aspect of policing is conferred on a separate force which specifically is concerned with this role only.

The Police in India have been under severe criticism for rights abuse, corruption and lack of efficiency. It is also known that the police are poorly paid, badly trained. A lot of measures have been taken to improve the police force. In 1997, the Union government set up a National Police Commission (Henceforth NPC) to improve the functioning of the police. In 1996 two former Directors General of Police filed a Public Interest Litigation (PIL) in the Supreme Court, asking the court to direct the Union and state governments to address the poor quality of policing in India. The court asked the Union government to set up a committee to study the recommendations of the NPC. Accordingly, the JF Rebeiro

[37] (2008) 9 SCC 204.

committee and the K Padamanabhaiah studied the recommendations. In 2005, the Soli Sorabjee committee drafted a Model Police Act and submitted it to the Union government. To set police reforms in motion, the Supreme Court in *Prakash Singh v. Union of India*[38], issued orders to the Union and state governments to comply with seven directives for police reform. The court's objectives were to increase police autonomy and accountability. But the response from the states has not been very encouraging.

Conclusion

The powers of the police, wide ranging as they are not unoften leads to their misuse. The unethical nexus between the politicians and the criminals has roped in the Police as an important component. The rampant charges of corruption have irreparably damaged the image of the police-power. It has become to some a show-peace, while to some other a symbol of brutal force while still to some other influential people whom they serve as body-guards, a matter of prestige.The picture needs to be completely changed through effective reforms.The objective should be to make police function with the human angle always in mind.The police should be allowed to work with dignity and objectively without fear and favour.

[38] (2006) 8 SCC 1.

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An Analysis of Sedition Law in India

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Introduction

"Section 124 A is prince among political sections of Indian Penal Code designed to suppress the liberty of citizen. Affection cannot be regulated by law. If one has no affection for a person or for a system, then he should be given fullest liberty to give the fullest expression to his disaffection, so long as he does not contemplate, promote or incite violence."[2]

-Mahatma Gandhi

The debate on sedition law keeps on reigniting time and again, with the filing of case against human rights activist, journalist and public intellectuals, etc in the country. Recently in the month of February a case was filed against congress leader Mani Shankar Iyer for praising Pakistan on a political issue. Previously there were instances of Binayak Sen, Arundhati Roy, S.A.P. Geelani, Aseem Trivedi, JNU Student Leader Kanhaiya Kumar, Uday Kumar (Kudankulam activist), & against Tamil folk singer S Kovan etc.[3] One thing that is common under these cases was that this law of sedition stands in contradiction to 'the right to dissent' specified under constitution of our country.

Birth of Sedition Law in India:

The sedition law was introduced through clause 113 of the Draft Indian Penal Code by Thomas Macaulay in the year 1837. The reason behind its inclusion in the draft was the increase in rebel by the Indian revolutionaries against the company rulers. The British observing that the Indians were spreading hatred against them felt the need of a law which can suppress their rebel. As a result, the law of Sedition was incorporated in the draft of Indian Penal Code[4]. However, the Law of Sedition was not present in the original Indian Penal Code of 1860. But due to rising rebels and unrest, the British government amended the Indian Penal Code and inserted Section 124A in 1870.

The law of Sedition was not the only law which was passed by the British government to curb the voices of Indian freedom fighters. Other laws such as the Vernacular Press Act, 1878, [repealed in 1881], the Newspapers (Incitement of Offences) Act, 1908, and the Indian Press Act, 1910 [repealed in 1921] – gave legal back up to the British government to restrict voices of them.

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[2] Noorani G. Indian Political Trials: 1775-1947, Oxford University Press, New Delhi. 2005, 227.
[3] http://www.livelaw.in/is-sedition-law-anti-indian-legal-analysis/ Accessed on 15/06/2018 at 14:00pm
[4] Furtado Rebecca,'*All you need to know about sedition law in India*' available at https://blog.ipleaders.in/sedition-law-in-india/ Accessed on 21/06/2018 at 10:22 am

The conflict relating to justifiability of sedition laws may arise that, how far it is justifiable to have this kind of penal provision in a democratic country. The sedition law in India still continues to be functional even more than 70 years after independence.

Sedition Law and It's Definition

Law of sedition is being defined under Section 124A of Indian Penal Code as, "*Whoever, by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, the Government established by law in India, shall be punished with imprisonment for life, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine*."

The section has the following key elements as:

1. Bringing or attempt to bring hatred; or
2. Exciting or attempting to excite disaffection against government of India;
3. Such act or attempt may be done
    a) By words, either spoken or written, or
    b) By signs, or
    c) By visible representation; and
4. The act must be intentional.

Beside the definition, there are three explanations also, which describes the nature, scope and limitation of the charge under the section. Explanation 1 to the Section sets out the scope of disaffection. Explanations 2 and 3 states what is not considered to be seditious intention as referred under English law. Thus, we can say, criticism of government measures and administrative and other action of the government, if done without exciting or attempting to excite hatred, contempt or disaffection towards the government established by law is not sedition[5].

In simplified terms, Sedition is an act by any person or entity who seeks to incite "disaffection" against the State of India. Such person will be subjected to the due process of law and accordingly punish for such act.

Sedition is a crime against government which tries to show it against the society. Originally, Sedition is a political term and it indicates all those ill-will practices, whether by word, deed, or writing, which are considered to "disturb the social and political order of the State, and show the way ignorant persons to make an effort to undermine the government and laws of the country"[6].

The objects of Sedition generally are to induce discontent and insurrection, and stir up opposition to the government. It incites the people for rebellion. The recent disturbances

[5] http://www.iiir.co.in/ijiir/vol1issue1/IJIIR-01-01-11.pdf Accessed on 15/05/2018 at 09:30am

[6] https://www.scribd.com/doc/192469912/Sedition-Laws-the-Death-of-Free-Speech-in-India Accessed on 16/07/2018 at 14:45pm

in the Arabic world in Egypt, Libiya, and Oman come close to this. In our own country the period preceding the Emergency showed similar signs of dissatisfaction.

"Sedition has been described as disloyalty in action, and the law considers as sedition all those practices which have for their object to excite discontent or dissatisfaction to create public disturbance, or to lead to civil war; to bring into hatred or contempt the Sovereign or the Government, the laws or constitution of the realm, and generally all endeavours to provoke public disorder".[7]

The meaning of sedition places absolutely on the same footing the successful exciting or feelings of disaffection and the unsuccessful attempt to excite them.

Historical Importance:
History of 'sedition' states that many of the freedom fighters were victims of this law straight from *Shri Bal Gangadhar Tilak*, who was tried thrice for Sedition and his further imprisonment to Mandalay jail with nationalists like *Annie Besant* and *Mahatma Gandhi* at the time of Independence. Britisher's used sedition laws to quell the Indian freedom struggle and retain its imperial power. After the establishment of High Courts and the advent of Constitution, many High Courts were in favour of striking down Section 124A. Some High Courts in the late 1950's declared Section 124A as being voilative of Article 19(1)(a) . One such decision being In *Ram Nandan v. State*, a full bench in the Allahabad High Court held sedition to be void and unconstitutional restricting freedom of speech declaring it *ultra vires*.[8]

However, the decision of the Hon'ble High Court was overruled by the Hon'ble Supreme Court overruling its decision and validity in the case of *Kedar Nath Singh v. State of Bihar*[9] considering the scope of subversive speech and thus holding it intra vires. This decision laid down the law of sedition of what it is interpreted today. In this decision 5 appeals were clubbed together to discuss the constitutionality. Further the change which was brought in *Kedar Nath Singh v. State of Bihar* was put to test on the touchstone of Article 19 in the case of *Tara Singh Gopichand v. State*[10], before the Punjab and Haryana High Court where it was struck down as being contrary to freedom of speech and expression. In *Balwant Singh v. State of Punjab*[11], the court was of an opinion that mere raising of slogans and absence of valid proof in other persons joining former in raising those slogans will not amount to sedition. It laid down guidelines as to how police should conduct itself in situations like these and use of excessive force can be counter-productive.

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[7] https://www.legallyindia.com/views/entry/a-closer-reading-of-the-supreme-court-of-india-decision-in-kedar-nath-singh-vs-state-of-bihar-1962-on-the-offence-of-sedition-defined-in-section-124a-ipc Accessed on 16/07/2018 at 14:55pm
[8] http://www.lex-warrier.in/2016/12/sedition-laws-in-21st-century-india/ Accessed on 30/07/2018 at 21:25pm
[9] AIR 1962 SC 995
[10] AIR 1951 East Punjab, 27
[11] 1995 (1) SCR 411

The case of *Meerut conspiracy* in which the accused were charged with conspiracy to wage a war for having formed a union on the lines of trade unions of soviet Russia which led their conviction in sessions court which further the Allahabad court held that unless it's a conspiracy to overawe the government using means of criminal force, such act will be considered wrong.[12]

Sedition vs. Freedom of speech and expression:

Charges under the provision of sedition law will naturally be brought against speech or writing that happen to incite acts of a seditious nature and therefore put a restriction on the fundamental right of freedom of speech and expression provided for under Article 19 of the Constitution.[13] As with any limitation on a fundamental right, the concept of imprisonment or punishment for seditious behaviour has its detractors who believe that in a proper democracy, seditious behaviour is also covered under and protected by the freedom of speech and expression. Such an idea is in direct conflict of traditional notions of nationalism and patriotism while others claim that India is not a nation so weak as to be in any actual danger by mere seditious words and ideas.

It is wrong to say that sedition shouldn't be a law at all, in fact, in order to prevent the abuse of democracy and its attributes, there should be a license to the same, but this in no way should mean that it curtails the Fundamental Right in itself…after all we are the citizens of the country and not the citizens of the government! Instances of the same can be found when in 2012, the news an image where instead of three lions of Ashoka Pillar, Aseem Trivedi drew three wolves oozing out the blood, and altered "Satyameva Jayate" (Truth alone Triumphs) into "Bhrashtameva Jayathe" (Corruption alone Triumphs) .[14]

The question here which comes to the mind is – Is it actually seditious? Is it actually an insult to the National symbol? If it is actually considered seditious every person who is charged with corruption too shall be sent to jail. Drawing of a cartoon or writing an article relating to whatever serious meaning it may communicate shouldn't be considered 'seditious'. Trivedi only expressed his mind set of an agitated India considerate about his country, where the politicians and the bureaucrats have turned National symbols into symbols of Danger, nothing more nor less! However his arrest has been heavily criticized in India terming it as 'stupid move'. Back to the philosophy classes, one can actually relate the issue of free speech and sedition to Roscoe Pound's Theory of Social Engineering, in a way that Free speech and Sedition have conflicting interests much like Section 499 of IPC and Article 19(1)(a) of the Indian Constitution. Article 19 of the Constitution gives every citizen six fundamental freedoms and one of them happens to be of 'Free Speech and Expression'. These rights are subjected to reasonable restrictions in public interests under vague and ever inclusive ambits of public order, morality, public health, national security, etc. We believe that Laws should aim at reconciliation of

[12] Supra note 8
[13] https://indiankanoon.org/doc/37654110/ Accessed on 30/07/2018 at 21:00pm
[14] Supra note 8

conflicting interests in the society but looking at the flipside to it, sedition laws have been time and again misused for political mileage. Anyone who dares to question the actions of his political masters is instantly labelled as anti-national and is slapped with sedition charges against him.

But we cannot ignore the other side of the coin at the same time that, every case of sedition offender has a common defence that the action was done in pursuance of Article 19(1)(a). i.e. It was his freedom of speech under which he said those statements. But what people are not aware of is Article 19(2) which states that a speech or an act should not be something which can invoke or incite others against the state. If something is capable of causing unrest in the nation, it can't be defended by using Article 19(1)(a). Such an act which incites others to destroy the unity and integrity of the nation will be termed as sedition and not free speech.

Sedition Law in U. K. and U. S. A.: However, the controversy on sedition is not limited only to India and has a long jurisprudential history in almost all over the world. To offer some perspective on the situation in India, it is vital to compare the history and future of sedition in India and other countries across the world.

The British Empire enacted the Law of Sedition in its colonies and many commonwealth countries still keep a hold onto that law. But the Law of Sedition has been discarded by the UK (where punishment once included chopping ears).

United Kingdom (U.K.): These common law principles of Sedition evolved from some of Britain's oldest laws, such as the Statute of Westminster 1275, when the divine right of the King and the principles of a feudal society were not questioned. Seditious libel was established by the Star Chamber case *De Libellis Famosis* of 1606.[15] Later, the Criminal Libel Act 1819 made statutory provisions for the seizure, confiscation and destruction of all seditious materials.

However, in the twentieth century as British democracy evolved, the number of prosecutions for these offences declined sharply with the 1970s was the last decade to see any prosecutions.[16] Of the three offences during that decade, one defendant (1971) received a sentence of six months, the second (1972) received a suspended sentence, and the third (1978) received a conditional discharge.

The last major case in England relating to Sedition was the one involving the publication of Salman Rushdie's book, The Satantic Verses (*R v. Chief Metropolitan Stipendiary* (Ex Parte Choudhury)). This book was alleged to be a "scurrilous attack on the Muslim religion" and resulted in violence in the U.K. as well as to a severance of diplomatic

[15] https://www.hindustantimes.com/world/sedition-law-in-uk-abolished-in-2009-continues-in-india/story-Pkrvylv6J0T3ddY8uqvKsO.html Accessed on 05/07/2018 at 13:35pm
[16] https://issuu.com/englishpen/docs/englishpen_seditiouslibel_2009 Accessed on 05/07/2015 at 14:02 pm

relations between the U.K. and Iran. An application to obtain a summons against Mr. Rushdie and his publisher was dismissed, on the ground of non-existence of seditious intent by either of the parties against any of the UK's democratic institutions.[17]

Section 73 of the Coroners and Justice Act 2009 abolished the common law offences of sedition and seditious libel. The laws on sedition were indeed quite arcane in today's society where freedom of thought and expression is a protected right in the U.K. under the Human Rights Act 1998. Even before the enactment of the Human Rights Act, back in 1977 the Law Reform Commission had recommended that these offences be abolished.

United States of America (U.S.A.): United States of America criminalises 'Seditious Activities and Speech'. Under Section 2385 of the US Code, it is unlawful for anyone to knowingly teach/advocate the propriety of overthrowing the government by force.

The U.S. government's first attempt at regulating speech in wartime resulted into the enactment of the Alien and Sedition Acts of 1798 , the main purpose of which was to protect the nation from 'spies' or 'traitors'. Being antagonist to the law, Thomas Jefferson pardoned all those who had been sentenced under it after being elected as President of the United States.

The Sedition Act, 1918 targeted those during the World War I who professed a Communist ideology. The Alien Registration Act or the Smith Act of 1940 served the same purpose as the Act of 1918 and brought about 140 prosecutions. However, both these Acts have now been repealed.

In the case of *Yates v. United States*, the U.S. Supreme Court held that teaching an ideal, however unpopular or unreasonable it might be, does not amount to sedition. The decision in the case of *New York Times v. Sullivan* was that the free criticism of public officials and public affairs would not constitute libel. In this context, it stated that the Sedition Act, 1798 had by "common consent" come to an "ignominious end", being a violation of the First Amendment.

Finally, in 1969, in the case of *Brandenburg v. Ohio*, the law of Sedition was upheld. Hence, in the United States, the courts have generally afforded wide protection to political speech, excepting where it results in immediate lawless action.

While USA holds on to this 218 year old law of Sedition, India also shares this law with other countries like Germany, Saudi Arabia, Iran, Uzbekistan, Sudan, Senegal and Turkey. Malaysia and Australia are also amongst those countries that are facing a lot of criticism over their Laws on Sedition.

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[17] https://blogs.loc.gov/law/2012/10/sedition-in-england-the-abolition-of-a-law-from-a-bygone-era/ Accessed on 23/06/2018 at 12:00 am

Judicial Pronouncements and Case Laws:

No study on sedition can be complete without a reference to and guidance from the various judicial pronouncements. There have been instances of conflicting views at the level of highest echelons' of Judiciary. On the question of ambit of s.124 A there was conflict between decisions of the Federal Court and the Privy Council. The federal court held that words, deeds or writings constituted an offence under s.124A only when they had the intention or tendency to create public disturbance or to promote disorder. Whilst the Privy Council considered that 'intention' was not an essential ingredient .These controversies necessitate a look at Case laws.

1. The Tilak Case: The most famous case on sedition is: *Queen-Empress v. Bal Gangadhar Tilak.*[18] *Tilak*, the freedom fighter was the editor of two journals. He published a column narrating the killing of a Mughal General, Afzul Khan by the Maratha hero *Shivaji* and a poem entitled 'Shivaji's Utterances', among other works on the occasion of a commemorative festival.[19] The relevant portion of the publication reads as follows –

"What a desolation is this! Foreigners are dragging our Lakshmi violently by the hand by means of persecution; along with her plenty has fled and after that health also. This wicked misfortune personified stalks with famine through the whole country; relentless dearth moves about spreading the epidemics of disease……do not circumscribe your vision like a frog in a well. Get out of the Penal Code, enter into the high atmosphere of the Shrimat Bhagawatgita and then consider the actions of great men."

Strachey, J. in his direction to the jury in this case said that that in order to satisfy the ingredient of disaffection the person must excite or attempt to excite and must make other people feel enmity of any kind against the Government. The amount of disaffection was not to be absolutely immaterial in the decision, nor was it important whether any actual feelings of disaffection were created amongst the audience or not.

The learned judge rejected the contention of the accused that there can be no offence against the section unless the accused counselled or suggested rebellion or forcible resistance to the government. This, according to Strachey, J was a complete misreading of the relevant section.

The accused appealed thereafter to the Judicial Committee of the Privy Council by special leave. The main ground for appeal was whether the direction of the jury that 'disaffection' meant 'absence of affection' in any degree towards British Rule or its administrators or representatives was correct.

[18] (1897) 22 Bom 112

[19] https://www.scribd.com/document/325214124/Sedition-Law-docx. Accessed on 07/07/2018 at 10:07am

The council held the direction of the judge to be correct and added that 'disaffection' did not mean 'absence of affection' in the literal sense. Thus the court interpreted the words of the section more or less literally. The courts of India adopted this literal interpretation of S. 124A, and this was the prevailing view for the first part of the 20th Century.

The decision of the court in *Tilak's Case* was subsequently followed in another famous decision – *Annie Besant v. Advocate General of Madras*[20]. This case dealt with S. 4(1) of the Indian Press Act that was framed similar to S. 124A. The relevant provision said that any press used for publishing/printing newspaper, books, or other documents containing words, signs or other visible representations that had a tendency to bring into hatred or contempt His Majesty's government…or any class of subjects (either indirectly or directly, by way of inference, suggestion, metaphor, etc.), would be liable to have its deposit forfeited.

In this case an attack was levelled against the English bureaucracy. The Privy Council followed the earlier interpretation given by the Judicial Committee and the Bombay High Court in *Gangadhar Tilak v. Queen Empress* and affirmed the decision of the lower court confiscating the deposit of Besant's printing press.

2. Niharendu Dutt's Case: The so-called 'broad interpretation' of the meaning of sedition in the Indian Penal Code was, as has been stated earlier the prevailing view in Indian Courts. This trend continued till the landmark judgment of the Federal Court of India in 1942 in *Niharendu Dutt Majumdar v. Emperor*[21].

The case was decided in appeal from the Calcutta High Court. The accused (a member of the legislature) had made a certain speech against the Ministry and the Governor of Bengal against their acts and omissions in riots that had taken place in Dhaka. The speech upbraided the government for the alleged misuse of police forces and the governor for not fulfilling his responsibilities. The audience was made to believe that the government was encouraging communal disturbances and it was suggested that the ministry and the government should be made personally liable for the suffering of the victims. The accused was tried for the violation of Rules 34(6)(e) and (k) under the 'Defence of India Act, 1939' .

The opinion of the court of whether the speech was seditious or not is best summed up in the words of Gwyer, CJ – "It is true that in the course of his observations the appellant indulged in a good deal of violent language and had worked himself up to such a state of excitement… The speech was, we feel bound to observe, a frothy and irresponsible performance, such as one would not have expected from a member of the Bengal Legislature; but in our opinion to describe an act of sedition is to do it too great an honour."

[20] (1919) 21 Bom.L.R. 867
[21] AIR 1939 Cal 703

Indeed the learned Chief Justice of the Federal Court opined that violent words by themselves did not make a speech or written document seditious. According to the Court, the gist of the offence was public disorder, or the reasonable anticipation, or likelihood of public disorder, or must be of such intensity as to satisfy a reasonable man that that was the intention or tendency.

The learned Chief Justice however did not refer to any of the decisions of the Privy Council while allowing the appeal of the accused. He justified his decision on the grounds that the interpretation of the words of the code must be in light of the changing circumstances and what was once seditious may not be considered to be seditious now.

3. King-Emperor v. Sadashiv Narayan: Following the judgement of the Federal Court in *Niharendu Dutt Majumdar's Case* another case with similar provisions in question went up in appeal to the Judicial Committee of the Privy Council. The Defence of India Act was again at issue in *King-Emperor v. Sadashiv Narayan Bhalerao*.[22] The subject matter of the charge was a document published and distributed by the accused in Jalgaon on January 23rd, 1943. The statements pertained to the widespread poverty and hunger of the people, who had been allegedly been the subject of several collective fines. The trial judge held himself bound by the decision in Niharendu Dutt Majumdar and pointed out that nowhere in the leaflet was it stated that an alternative government should be formed and be set up by use of violent means, and the audience was rather exhorted to achieve national unity. Therefore, in the absence of any incitement to violence or disorder, the trial court acquitted the accused.

Lord Thankerton, who delivered the judgement of the Privy Council, however disagreed with the lower courts' reliance on the conclusions of Gwyer, CJ in *Niharendu Dutt's Case*. According to the Committee the Federal Court had proceeded on a mistaken construction of the section and had disregarded previous decisions of the Privy Council by which it was bound. The judgement of Strachey, J. in *Bal Gangadhar Tilak's case* was cited with approval and it was re-iterated that incitement to violence was not a necessary ingredient of the offence of sedition.

4. Kedar Nath's Case: In 1962, the Supreme Court of India decided on the ambit and scope of S. 124A of the IPC. In the facts of *Kedar Nath Singh v. State of Bihar*[23], the accused in the main of the 4 appeals was a member of the Forward Communist Party and made a harsh speech against the government in power of the containing a good deal of violent language. Though it was not contended by the accused that his speech did not fall under the ambit of S. 124A as construed by the Supreme Court, it became necessary to decide on the constitutionality of S. 124A particularly and on the construction of the section generally, in order to dispose of the other three appeals.

[22] Privy Council Appeal No. 49 of 1946
[23] AIR 1962 SC 955

Sinha, C.J. who delivered the judgement of the court examined the entire history of interpretation of S. 124A. There was no doubt that the provisions of S. 124A were voilative of the right enshrined in 19 (1)(a) S. 124A. The question was primarily whether the section would be saved by bringing it under the ambit of the restrictions enumerated in Article 19(2). The court weighed the conflicting meanings given to S. 124A given by the Federal Court and the Privy Council.

Sinha, C.J. accepted the necessity of having the offence of sedition. He favoured the presumption of constitutionality that was created by accepting the view of the Federal Court. The court decided that S. 124A should make penal only those matters that had the intention or tendency to incite public disorder or violence. Therefore S. 124A was held to be constitutional. The restrictions imposed on freedom of speech could be said to be in the interest of public order.

Kedar Nath Singh v. State of Bihar has been followed subsequently in cases such as *Bilal Ahmad Kaloo v. State of Andhra Pradesh*[24] and *Raghubir Singh v. State of Bihar*[25]. In the latter case a jeep containing 5 persons was intercepted at the Indo-Nepal border. The vehicle contained certain pamphlets of Sikh separatist propaganda and a history of Amritsar that portrayed India as the enemy. The accused raised the contention that they were not liable for sedition as they were not the authors of the seditious materials. While not expressing any opinion on the issue of sedition that was raised before it, the Supreme Court said that authorship of seditious materials was not the gist of the offence. Distribution and circulation of seditious materials could in the particular circumstances of the case be enough to constitute sedition.

Conclusion and suggestions

The law of Sedition has been remained the subject of controversy since its inception in Indian Penal Code. It has been said the words used in Section 124A of IPC is vague and capable of interpreting by rulers as a tool to suppress the freedom of speech and expression that goes against them. Beside that the final position of the law was settled by the Supreme Court *Kedar Nath v. State of Bihar*, yet modern trend regarding the applicability of sedition laws show that administration and Courts have divergence of opinion and they misunderstands the correct application of sedition laws.

The need of the hour is sedition laws should be interpreted and applied according to the guidelines given by the Supreme Court. It has become more important after the commencement of Indian Constitution as Article 19(1)(a) gives freedom of speech and expression as fundamental right to the citizens and this freedom can only be restricted on the grounds mentioned under Article 19(2). The essentials mentioned under in Article 19 (2) which are relevant to the offence of sedition are *Integrity of India, Security of the*

[24] Criminal Appeal No. 1391 of 1995
[25] 1986 SCR (3) 802

State and *Public Order*. So it is necessary that sedition laws should have specifically contain words which fulfil the restrictions of Article 19(2).

It can't be proposed that the law of 'sedition' should be repealed completely but with the changing conditions, it should be amend keeping in mind that how this is being misused in these days. In a modern, democratic and progressive India it is needed to check and put a bar on its misuse, so that the frivolous cases under the provision could not be registered. This law should be amended in such a approach so that the political parties may also not misuse this.

Historical Development of Laws on Sexual Harassment at Work Place

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Abstract

Sexual harassment is one of the most concerned issues of employment laws. The Constitution of India guarantees all its citizens equality of status and opportunity and gender equality in all dimensions. It affects the social and economic growth of the women as it provides an anxious and unfriendly environment for work. Sexual harassment is considered as a violation of a woman's fundamental right to equality as per Articles 14 and 15 and her right to live with dignity as mention under Article 21 of the Constitution. The emphasis of this research paper is to explain the historical development of policies and the role of courts in setting up of a reliable and better organisational culture in workplace. In doing so this paper will look at the recent developments in the area of sexual harassment, the legal requirements for implementing policies, procedure and remedies available for victims of sexual harassment. The research methodology adopted for this paper is doctrinal and sources of information is secondary which includes reports and articles from books, newspapers, websites, case laws, etc. Various statute books and Bare Acts like Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, The Criminal Law (Amendment) Act 2013 and The Indian Penal Code, 1860 has also been referred for the study. This paper is an attempt to understand the sensitivity of sexual harassment issues and identify the consequences and incidents of sexual harassment at workplace.

Keywords: *Sexual Harassment, Gender equality, Fundamental right, Equality, Dignity.*

Introduction

"One in three women may suffer from abuse and violence in her lifetime. This is an appalling human rights violation, yet it remains one of the invisible and under-recognized pandemics of our time." [3]

–Nicole Kidman

Sexual harassment of a woman is an attack on her dignity and equality. Every woman should be guaranteed a safe work place to enable her lead a life of her choice and work with dignity and equality. The legal right guaranteed to women for safe work was ratified by the Indian government way back in the year 1993 vide UN Convention on the Elimination of all forms of Discrimination against Women (CEDAW) adopted by UN General Assembly (1979).

The root of the act of sexual harassment lies in patriarchy and the fact of mindset that men are superior to women and so some form of violence against women are acceptable. The mindset for such an act of sexual harassment and fear to suffer from inaction or non-disclosure has physical, physiological impact on individuality of a woman and is beyond

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[3] Available at: http://intentblog.com/stop-violence-against-women-quotes-and-images-your-blogs/ ; last visited on 25.1.17

visualization of an offending gender or society at large. This vulnerability towards women in general is also an infringement of her right to equality besides attacking her dignity. The stigma is of immense dimension and especially because women does not come out in open due to numerous reasons which includes losing one's livelihood and impact on reputation

History of the law

The problem of sexual harassment of women is not a new development. Sexual harassment is one of those problems which plays a negative role by discouraging women in taking active part in economic and social development. Civil Society claims 70% of women have had sexual harassment experience.[4] Since the early 80's sexual harassment at workplace has remained a main issue in India. In 1980's the Forum Against Oppression of Women took action against the sexual harassment of nurses .After this incident again in 1990 the same women's organization filed a PIL to bring amendments to the old rape law which defined rape in narrow sense. But there was hardly any significant development.

Major development came through the landmark case of *Vishaka and others Vs. State of Rajasthan*[5] in which the apex court laid down guidelines for preventing and redressing the complaints by women who were sexually harassed at workplace. The Guidelines entrusted the Employer with the obligation to provide a safe and woman friendly environment. (the case has been discussed later on in this article).

Pre Vishaka case

International community had recognized in various international treaties the right of women to have the right to work without any kind of Sexual Harassment because it is an infringement of their human rights. All the legal instruments dealing with this matter have laid down protection of life and liberty and these instruments have been used as a source to prevent and address the issue. In India till the Vishakha judgment came there was no law to govern this matter and the guidelines which came as an outcome of this case were derived from the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW). Even the Constitution of India had provisions in the form of fundamental rights of life and liberty(Art.21), the right against discrimination(Art.15) and the freedom to practice any trade or profession or to carry on any occupation.[Art.19(1)(g)].

IPC & Other Laws on the issues of harassment of Women

Some major laws which could be taken into consideration while filing case for sexual harassment of women are as follows:

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[4] Available at: http://www.legalservicesindia.com/article/article/sexual-harassment-of-women-at-workplace-2114-1.html; last visited on 25.01.17

[5] (1997) 6 SCC 241

IPC

Section 354 IPC deals with assault or criminal force to a woman with the intent to outrage her modesty and lays down that: Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine or both. In cases where the accused sexually harasses or insults the modesty of a woman by way of either- obscene acts or songs or- by means of words, gesture, or acts intended to insult the modesty of a woman, he shall be punished under Sections.294 and 509 respectively. Under Sec.294 IPC the obscene act or song must cause annoyance. Though annoyance is an important ingredient of this offence, it being associated with the mental condition, has often to be inferred from proved facts. However, another important ingredient of this offence is that the obscene acts or songs must be committed or sung in or near any public place. Section 509, IPC deals with word, gesture or act intended to insult the modesty of a woman.[6]

Civil Remedy

Civil suit can be filed for damages under tort laws. That is, the basis for filing the case would be mental anguish, physical harassment, loss of income and employment caused by the sexual harassment.[7]

Indecent Representation of Women (Prohibition) Act (1987)

The section 3 provides for prohibition of advertisements containing indecent representation of women. Under this no person shall publish, or cause to be published, or arrange or take part in the publication or exhibition of, any advertisement, which contains indecent representation of women in any form. Further section 4 provides for prohibition of publication or sending by post of books, pamphlets, etc., containing indecent representation of women. The provision says that no person shall produce or cause to be produced, sell, let to hire, distribute, circulate or send by post any book, pamphlet, paper, slide, film, writing, drawing, painting, photograph, representation or figure which contains indecent representation of women in any form subject to exceptions.[8]

Penalt**y**-Any person who contravenes the provisions of section 3 or section 4 shall be punishable on first conviction with imprisonment of either description for a term which may extend to two years, and with fine which may extend to two thousand rupees, and in the event of a second or subsequent conviction with imprisonment for a term of not less than six months but which may extend to five years and also with a fine not less than ten thousand rupees but which may extend to one lakh rupees.[9]

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[6] Available at: http://indianlawwatch.com/practice/laws-prevent-sexual-harassment-women-work-place/; last Visited on 26.01.17
[7] *ibid*
[8] *Id*
[9] Available at: http://indianlawwatch.com/practice/laws-prevent-sexual-harassment-women-work-place/; last isited on 26.01.17

Section 7 (Offences by Companies) holds companies where there has been "indecent representation of women" (such as the display of pornography) on the premises guilty of offenses under this act, with a minimum sentence of 2 years.[10]

Along with all these laws major blow to sexual harassment of women at workplace was basically through vishakha guidelines.Naina kapoor who was a leading counsel for the vishakha case states in one of her interview that; "prior to the *Vishaka* judgment in 1992, there was no law on sexual harassment in India. "If anything, what we had was the criminal law which was basically archaic in language and it criminalised something, which meant that the woman had to go to the police station. The language of the Sections were 'outraging the modesty of a woman' or 'insulting the modesty of a woman'". The bar was therefore high in terms of evidence and proof."[11] In this case of Vishakha the doctrine of pubic law remedies was also successfully applied by the honourable court. The guidelines[12] provided in this judgement are expressed here under:-

Duty of the Employer or other responsible persons in work places and other institutions

It shall be the duty of the employer or other responsible persons in work places or other institutions to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment by taking all steps required.

Definition:

For this purpose, sexual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as:

a) physical contact and advances;
b) a demand or request for sexual favours;
c) sexually coloured remarks;
d) showing pornography;
e) any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

Where any of these acts is committed in circumstances where under the victim of such conduct has a reasonable apprehension that in relation to the victim's employment or work whether she is drawing salary, or honorarium or voluntary, whether in Government, public or private enterprise such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory for instance when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work including recruiting or promotion or when it creates a hostile work environment. Adverse consequences might be visited if the victim does not consent to the conduct in question or raises any objection thereto.

[10]Available at: http://indianlawwatch.com/practice/laws-prevent-sexual-harassment-women-work-place/; last visited on 26.01.17

[11] Available at: http://blog.mylaw.net/tag/vishaka-guidelines/ ; last visited on 25.01.17

[12] Available at: http://icc.cit.ac.in/assets/Uploads/VishakaGuidelines2.pdf; last visited on 25.01.17

Preventive Steps

All employers or persons in charge of work place whether in the public or private sector should take appropriate steps to prevent sexual harassment. Without prejudice to the generality of this obligation they should take the following steps:

(a) Express prohibition of sexual harassment as defined above at the work place should be notified, published and circulated in appropriate ways.
(b) The Rules/Regulations of Government and Public Sector bodies relating to conduct and discipline should include rules/regulations prohibiting sexual harassment and provide for appropriate penalties in such rules against the offender.
(c) As regards private employers steps should be taken to include the aforesaid prohibitions in the standing orders under the Industrial Employment (Standing order Act)1946.
(d) Appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at work places and no employee woman should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

Criminal Proceedings

Where such conduct amounts to a specific offence under the Indian Penal Code or under any other law, the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority. In particular, it should ensure that victims or witnesses are not victimized or discriminated against while dealing with complaints of sexual harassment. The victims of sexual harassment should have the option to seek transfer of the perpetrator or their own transfer.

5. Disciplinary action

Where such conduct amounts to misconduct in employment as defined by the relevant service rules, appropriate disciplinary action should be initiated by the employer in accordance with those rules.

6. Complaint Mechanism

Whether or not such conduct constitutes an offence under law or a breach of the service rules, an appropriate complaint mechanism should be created in the employer's organization for redress of the complaint made by the victim. Such complaint mechanism should ensure time bound treatment of complaints.

7. Complaints Committee

The complaint mechanism, referred to in above, should be adequate to provide, where necessary, a Complaints Committee, a special counsel or other support service, including the maintenance of confidentiality.

The Complaints Committee should be headed by a woman and not less than half of its member should be women. Further, to prevent the possibility of any undue pressure or

influence from senior levels, such Complaints Committee should involve a third party, either NGO or other body who is familiar with the issue of sexual harassment.
The Complaints Committee must make an annual report to the Government department concerned of the complaints and action taken by them. The employers and person in charge will also report on the compliance with the aforesaid guidelines including on the reports of the Complaints Committee to the Government department.

8. Workers' Initiative
Employees should be allowed to raise issues of sexual harassment at workers' meeting and in other appropriate forum and it should be affirmatively discussed in Employer-Employee Meetings.

9. Awareness
Awareness of the rights of female employees in this regard should be created in particular by prominently notifying the guidelines (and appropriate legislation when enacted on the subject) in a suitable manner.

10. Third Party Harassment
Where sexual harassment occurs as a result of an act or omission by any third party or outsider, the employer and person in charge will take all steps necessary and reasonable to assist the affected person in terms of support and preventive action. The Central/State Governments are requested to consider adopting suitable measures including legislation to ensure that the guidelines laid down by this order are also observed by the employers in Private Sector. These guidelines will not prejudice any rights available under the Protection of Human Rights Act, 1993. The most important statement made in this judgement was that "These directions would be binding and enforceable in law until suitable legislation is enacted to occupy the field. "[13]

Post Vishaka case
The Indian Supreme court ruling on Vishaka's case powerfully grounded the argument that incident of sexual harassment of women at workplace was a human right violation and laid the foundation and paved the way for legislation on sexual harassment at work place in India. The guidelines issued were taken as a 'Law' as declared by apex court but it was observed that the guidelines were not followed properly.

After the Vishaka Judgment there were many judgments that argued the need for a broad law on sexual harassment. *Apparel Export Promotion Council v. Chopra*[14] is one of them, which emphasized that sexual harassment is gender based discrimination and quoted the International Labour Organization for the same. The Sexual Harassment at Workplace Bill was tabled in the Parliament in 2007. This further encouraged cases such

[13]Available at: https://www.iiap.res.in/files/VisakaVsRajasthan_1997.pdf; last visited on 26.01.17
[14] (1999) 1 SCC 759.

as *Grewal v Vimmi Joshi*[15] that emphasized on the stipulations of the bill while delivering judgments related to sexual harassment. However, none of them strongly asked for a bill to be passed.

Recent cases that caught everyone's attention in media reporting's on the sensitive issue are mentioned below to understand the sensitivity of the issue. Delhi Police registered a case against Former Chief of the Energy and Resource Institute (TERI), R K Pachauri, the probe agency has charge sheeted the scientist for allegedly sexually harassing and outraging the modesty of a former woman colleague. In 2010, a few members of Indian Women's Hockey team complained of being sexually harassed by the then chief coach Maharaj Krishan Kaushik. In yet another incident of sexual harassment, gymnastics coach Manoj Rana and gymnast Chandan Pathak were booked for allegedly sexually harassing a female gymnast at the Indira Gandhi Indoor Stadium while attending a national camp for the Asian Games 2014. A budding talent who could have made India proud in the boxing ring like Mary Kom chose to end her life following the continuous onslaught of harassment by her coach. Twenty-one-year-old S Amaravathi consumed poison at Hyderabad's Lal Bahadur Stadium for not being able to cope with constant altercations with her coach Omkar Yadav. Former Supreme Court Justice (Retd) AK Ganguly, accused in a sexual harassment case involving a law intern decided to resign as West Bengal Human Rights Commission chairman. A woman Additional District and Sessions Judge of Gwalior, Madhya Pradesh alleged sexual harassment. The issues are sensitive, if proved and disproved both, has dimensions of occurrence across different workplace and there is a need to handle them sensitively.

It was finally after 16 years that a bill was passed relating to sexual harassment in India. Thus one would unsurprisingly expect the bill to be inclusive and free from faults. But the bill not only faulted on certain essential provisions, but also failed to take account of some uninfringeable theories relating to sexual violence.

The Sexual Harassment of Women At Workplace (Prevention, Prohibition and Redressal) Act, 2013 and its drawback:

The main objective behind The Sexual Harassment Act, 2013 was to protect women, prevention and redressal of sexual harassment complaints. Sexual harassment has been termed as a breach of basic Fundamental Rights of women under Article 14 and 15(3) and Article 21 of the Constitution of India. Sexual Harassment is also considered as infringement of the right to practice any profession or to carry on any trade, occupation or business under Article 19(1) (g) of the Constitution of India.[16]

[15] (2009) 2 SCC 210
[16] The Preamble,the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013.

The Act made it obligatory for every employer to comprise an Internal complaints Committee[17] 'ICC' which would be entertaining the complaints of aggrieved women. The member of ICC should consist of: i) a Presiding Officer, ii) not less than two members from amongst the employees preferably committed to the cause of women or who have had experience in social work or have legal knowledge and iii) one member from amongst non-governmental organizations or associations committed to the cause of women employees.

It further emphasized on establishing local complaints committees[18] 'LCC' for every district where the ICC has not be formed due to less than 10 workers. Under this Act, the aggrieved Women is required to make a written complaint of the same to the ICC or LCC within three months from the date of incident and when there are series of incidence then three months from the last incident.[19] If the woman is not able to make a complaint in writing then proper assistance can be given by the presiding officer or any member of ICC or by the Chairperson or any member of the LCC. It further provides that if a woman is unable to make a complaint due to her physical incapacity then the complaint can be made by her friend or her co-worker or any Officer of the National commission for Woman or State Women's Commission or any person having the knowledge of the incident, with the prior written permission of the aggrieved woman.[20]If one looks at the conciliation procedure the main aim is to do away with the unnecessary and long litigation and solve by warm discussions.

However, there are certain provisions which need more clarity and thus it becomes necessary to understand the problematic and concern areas associated with it. In this article the ambiguity in the provisions of the Act is discussed.

The definition of 'aggrieved women'[21] make it clear that any woman whether employed by the workplace or not, could file a complaint. However the said definition leaves uncertainty to the extent as to whether it is necessary for the said women to be 'working', in terms of employment at some other place. Thus these kinds of lacunae can arise in cases of temporary researchers, who can said to be working, however their employment may not be defined in terms of a specific employer. Further this creates the problem of the extent to which this definition can increase the scope of the Act. If one includes 'any women' within the purview of the definition, then the same can also extent to include students, clients, visitors etc., which will hamper the essential purpose for the formation of the Act, i.e. for establishing a safe working environment for the workers. Further, the extents of 'workplace'[22] are uncertain which will render many situations out of the ambit of the Act. Thus this act will fail to give any recourse to the incidents happening outside

[17] S. 2(h), The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013.
[18] S. 2(i), The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013.
[19] S. 9(1), The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013.
[20] S. 9(2), The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013.
[21] S. 2(a), The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013.
[22] S. 2(o), The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013.

the purview of workplace. It further fails to give any clarity regarding disciplinary enquiries of contract workers. As per the definition of 'employee'[23], a person employed through a agent (including contractors), along with contract workers are covered. However there is no clarity given in the Act as to how the disciplinary enquiry of such an employee is to take place. By analysing the definition of 'sexual harassment'[24], which is the core element of the Act, lacks in describing the electronic means which covers a huge portion in one's professional and personal life. Further the term 'unwelcomed' makes it difficult to understand as there are different perspectives existing in the society. So the definition needs more clarity to avoid difficulties and to set standards for assessing cases with ease.

For filling a complaint a time period of 3 months is given to the victim and complaint file after 3 months are taken into consideration on the desire of the committee members. Setting up of such a time frame is very harmful for limiting the act of sexual violence, as a woman might be under tremendous pressure to not file the complaint as a result of the disgrace attached to the act of sexual harassment. Social stigma related to the act might increase violence against the complainant. Thus, there is no protection against victimisation in this Act. Further the Act should have also taken into account the trauma that is associated with sexual violence, such as depression, anxiety etc., which might render the filing of the complaint impossible till the victim has recover her strength.
The conciliation procedure followed by 'ICC' and 'LCC' under is this Act adds to the problem as it will take steps for conciliation between the executor and the victim, if the victim wants so and after the conciliation there is no provision of further inquiry. Moreover this provision also undermines the fact that many women are not properly aware about the remedies that are available to them thus the settlement may favour the perpetrator.

Another unconcerned provision comes in the form of 'false and malicious complaint'[25] in the Act. As per this provision, a woman would have to face action if there is a false or malicious complaint that has been filed by her. This provision defeats the very purpose of a gender-specific legislation such as this one. Thus it may create a notion in the minds of the people that the complaint could be filed for hidden motives also.

The constitution of the committees poses a big problem. It is hard to miss the broad ambit of qualification that has been prescribed for the members. No adequate specifications have been given as to the extent to which there needs to be commitment to the cause and what work they should have done in that particular field. Moreover no requirement for an 'expert in the field of law' has been provided as a qualification for the members. The only requirement is that they need to have legal knowledge, which is a highly broad standard for an Act like sexual harassment.

[23] S. 2(f), The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013.
[24] S. 2(n), The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013.
[25] S. 14, The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013.

Another negative issue is that the employer is supposed to nominate members to the committee, i.e. the Internal Committee. Hence such a provision gives an upper hand to the employer who might be the perpetrator himself, or to an employer who is in direct competition with the victim. A possible solution could be the creation of an external committee consisting of eminent members from the fields of law, social science etc., who could nominate the members for the internal committee based on their track record, performance in the company, reputation etc. Such a process would be more transparent and would help to a great extent in dealing with the power dynamics of the workplace. Another process of nomination could be through voting amongst the employees, which to a certain extent would ensure a fair committee to the woman employees.

A major drawback in the Act is that there is no responsibility that has been put on the employer with respect to maintaining a safe environment in the workplace. Although Chapter VI of the Act stipulates certain duties for the employer, there is no provision to ensure mandatory compliance of such duties, i.e. no penalty in case of non-compliance. No stipulation exists for compensation from the employer, which could highly contribute in the unwillingness of the employer in taking the duties seriously. A sum of Rs 50,000 is stipulated as penalty if the employer fails to constitute an ICC, take action under sections 13, 14 etc. [26]The interesting part is that while there is no penalty for not adhering to the duties, a criminal offence is stipulated on part of the employer if he does not take action against false and malicious complains. Thus these provisions need modification in relation to the object and purpose of the act.

The Central Administrative Tribunal (CAT) in its recent judgments in National Institute of Mental Health and Neuro Sciences Case (NIMHANS), Whistleblower Case questioned certain provisions of the Sexual Harassment of Women at Workplace Act, 2013. The CAT declare Section 4 and 7[27] of the Act as unconstitutional because once an adjudicatory body is to be determined as biased in its affect it destroys the fairness concept embedded in adjudication and cautioned that the Act of Sexual Harassment is "Double-edged".

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013 leaves a vacuum place. The Act has certainly not stood up to the expectations as it took about 16 years to implement a law on sexual harassment. The Act, which should have been highly victim friendly, poses problems for the victim at each and every step. Law should be representative of the societal changes, especially in areas such as sexual

[26] S. 26, The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013.

[27] Section 4: The Act makes it compulsory that at least two members among the Internal Complaints Committee, who are required to deal with sexual harassment cases in the workplace, must be "committed to the cause of women. Section 7: The Local Committee constituted under the said act the members of the same should be chaired among the "eminent women from the field of social work and committed to the cause of women". Further in this regard, the Tribunal said that "if members of the committee of the adjudicatory committee are to be committed to an ideology, there mental frame will be such that it would give an opportunity for unwelcomed bias and their finding also will be in resonance of their personal commitment."

violence and exploitation. The malfunction to connect legal development with societal development in these cases says a lot about how much ignorance is there towards highly degrading activities like sexual harassment. The legislature needs to really revisit the Act and deal with the lacunae that prevail in the Act. A firm and concerned effort is required on part of the legislature to deal with this problem.

Conclusion

The Indian National Bar Association conducted a survey on sexual harassment at workplace between April and October 2016. Around 6,047 participants, both male and female, and 45 victims responded to their questionnaire. Most of the respondents were from sectors like IT, media, education, legal, medical and agriculture. The respondent victims were mainly from Delhi, Mumbai, Bengaluru, Kolkata, Hyderabad, Lucknow and other areas. Around 38 percent of the respondents said they faced sexual harassment in the workplace.[28] It further reveals that most of the women victims deal with it of their own instead of filling a complaint. It also reveals the nature of sexual harassment which involve inappropriate comments, touching and physical harassment. Another shocking revelation in this survey was that around 65 percent of the respondents answer 'no' when asked did the company follow the process prescribed under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

The Constitution of India declares & guarantees the right to equality before law & equal protection of law for both men & women, but the reality is otherwise. The constitution of India declares and confers the de- jure equality, the women in India has not attained de facto equality till this date. Thus, the crimes against women in general, rape and sexual assault against women and girl children is showing steadily raising trend rather than declining.

Thus ,it is the high time to implement the ideas of Mahatma Gandhi in real sense and implement them.

"Woman is the companion of man, gifted with equal mental capacities. She has the right to participate in the minutest details in the activities of man and she has an equal right of freedom and liberty with her. She is entitled to a supreme place in her own sphere of activity as man is in his."

[28] Available at: http://www.firstpost.com/india/sexual-harassment-at-workplace-69-victims-did-not-complain-to-management-says-survey-3189524.html; last visited on 27.1.2017

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Violence against Women

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Abstract

"We realize the importance of our voices only when we are silenced."

……**Malala Yousafzai**

Violence against women or gender based violence is a very complex, widespread issue and constitutes one of the most serious forms of violation of women's human rights in this world. Violence against women is fundamentally a result of gender-based inequities, more than the product of any other individual or social factor.In most cases the male aggression towards women and girls remains tacit, hidden or unrevealed. 'Domestic Violence' includes harms or injuries which endangers women's health, safety, life, limb or well-being, whether mental or physical. It may also be through physical, sexual, verbal, emotional and economic abuse. Domestic violence is a common problem that may affect more than a quarter of women.In India where almost half of the population are women, they have always been ill-treated and deprived of their right to life and personal liberty as provided under the constitution of India. Women are always considered as a physically and emotionally weaker than the males. Offences against women which reflects the pathetic reality that women are just not safe and secure anywhere. According to a latest report prepared by India's National Crime Records Bureau (NCRB), a crime has been recorded against women in every three minutes in India. Every 60 minutes, two women are raped in this country. Every six hours, a young married woman is found beaten to death, burnt or driven to suicide. According to 'United Nation Population Fund Report', around two-third of married Indian women are victims of Domestic Violence attacks and as many as 70 per cent of married women in India between the age of 15 and 49 are victims of beating, rape or forced sex. In India, more than 55 percent of the women suffer from Domestic Violence. This paper aims to describe various forms of violence that are directed towards women and girls.

Introduction

In spite of the fact that laws to safeguard women's status and their interest in our country are quite adequate, but it seems that status of women in our society has not achieved the desired standards and their interests are badly ignored and contrarily violence against them is increasingly day-by-day."One in three" is the stark figure that sums up the crisis confronting women throughout the world globally, one in three women will be raped, beaten, coerced into sex or otherwise abused in her lifetime. Violence against women has become as much a pandemic as HIV/AIDS or malaria."[2] Domestic violence is universally accepted as violence against women within the family as most of the times they are the victims of the violence. The United Nations Declaration on the Elimination of Violence against Women (1993) defines violence against women as "any act of gender based violence that results in, or is likely to result in, physical, sexual or psychological harm or

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[2] Preface by Noeleen Heyzer, Executive Director, UNIFEM, in not a minute more: Ending Violence against Women, UNIFEM, New York, 2003, p 6.

suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."[3]

***Gender* inequality is global issue**

The question of gender inequality is a burning problem of the world. Gender based discrimination represents the ugly face of the society. This issue is global with varying degree and very old. Really, it is a travesty of all canons of social justice and equity that women who constitute half of the world's population and who work two-third of world working hours should earn just one-tenth of the world's property and also remain victim of inequality and injustice. This anomaly is now, being openly questioned and some discrimination seriously challenged. As human development moves center stage in the global development debate, gender equality is emerging as major challenges. Gender discrimination, though amongst the most subtle, is one of the most all-pervading forms of the institutionalized deprivation. The basic concepts of the human rights have been developed as a result of the experience of men and women all over the world in their struggle against the atrocities of the governments. The declaration of Human Rights adopted by the UNO embodies this human principle that "All the human being are born free and in equal dignity and rights"[4]

Forms of violence against women's

"You can tell the condition of a nation by looking at the status of its Women" these great words are penned by Nehru. All around the world, genders are being discriminated in workplaces, societies, etc...Domestic violence can range from physical abuse alone, to physical, sexual and psychological abuse. Where individuals are subjected to domestic violence the perpetrator can often employ a range of behaviours, with physical assaults overlapping with psychological, emotional and/or financial abuse. Research has suggested that in some cases the psychological abuse experienced may have a more lasting impact than the physical injuries sustained, and that this can be true even where those injuries were severe.[5]Women's are facing lots of discrimination against them. Some of them are rape sexual harassment, sexual exploitation, child marriage, female infanticide and feticide, dowry demands, injustice policy of reservation in public office, educational inequalities etc..

Discrimination and sexual harassment in the workplaces:

Women experience discrimination in the work force in terms of pay, hiring and promotions. There earnings are consistently lower than that of a man's in almost every occupation, regardless of the overall gender domination of that sector of work. They are more susceptible to sexual harassment, with one in four women claiming that they have experienced some form of unwanted advancement. Strides have certainly been made to

[3]Archanadassai,(2010) Domestic Violence: Determinants And Remedies, Indian Journal Of Criminology & Criminalistics, Volume XXXI p.33.
[4]Malik and Raval,(2011), law and social transformation in India, Allahabad law agency.
[5] *Ibid* 2 p. 34.

improve the work place for women, but their potential still goes largely untapped.[6]There is no definition of sexual harassment in Indian penal code, 1860, because at that time this term is not coined. Sexual harassment is a form of sex discrimination. The board meaning of sexual harassment is that of unwelcome sexual advances or verbal or physical conduct of sexual nature, which has the purpose or effect of unreasonably interfering with the individual's work performance, or creating an intimidating, hostile, abusive or offensive working environment.[7] Each incident of sexual harassment, at the place of work, results in violation of the fundamental rights to gender equality and right to life and personal liberty of the women. Rights against sexual harassment, a Public Interest Litigation filed before the Supreme Court, it has laid down a new law in VishakaVs State of Rajasthan[8] regarding sexual harassment of women in work places. In Promotion Council V Chopra, the SC referred to the conviction on the elimination of a form of discrimination against women and also the resultant violation of gender equality under Article 14 and 15 and right to life personal liberty of the women under Article 21 of the constitution. Thus sexual harassment may take place in following ways which can be generally be classified into three groups- physical, verbal, non-verbal. Further there are two forms of sexual harassment at the work place- one is quid pro quo and the other is hostile worth environment.

Sexual abuse and rape in intimate relationships

Sexual abuse includes acts such as coerced sex through threats, intimidation or physical force, forcing unwanted sexual acts or forcing sex with others. Sexual abuse and rape by an intimate partner is not considered a crime in most countries, and women in many societies do not consider forced sex as rape if they are married to, or cohabiting with, the perpetrator. The assumption is that once a woman enters into a contract of marriage, the husband has the right to unlimited sexual access to his wife. Surveys in many countries reveal that approximately 10 to 15 percent of women report being forced to have sex with their intimate partner. Some countries have begun to legislate against marital rape. Although provision of such laws represents considerable progress, it is often difficult for a woman to press charges because of the evidential rules concerning the crime. In a study conducted by Bhatti and George (2001), shows that around 56 percent of the wives reported to have been forced to engage in sexual intercourse in mild to severe form, while 40% were deprived of sex in mild to moderate forms. This indicates that both forms (forced sex and deprivation of sex) of sexual violence are present in the family.Considering the taboo in most countries that surrounds incest or the sexual abuse of children and adolescents within the family, this is one of the most invisible forms of violence. Because the crime is perpetrated most oftenby a father, stepfather, grandfather, brother, uncle, or another male relative in a position of trust, the rights of the child are usually sacrificed in order to protect the name of the family and that of the adult

[6]Available on www.mrps.com.
[7] ABC of Women Worker's Rights and Gender Equality, ILO, 92 (2000).
[8]AIR 1997 SC 3011.

perpetrator. However, studies have shown that from 40 to 60 per cent of known sexual assaults within the family are committed against girls aged 15 years and younger, regardless of region or culture.[9]

Rape

Rape destroys the entire psychology of a women and pushes her into deep emotional crisis.[10] In every society, women often suffers the violence and humiliation of rape. 'Rape' literally means a forcible seizure; and intercourse with a women without her consent by force or fraud. It is an offence affecting the human body. It is an outrage by all canons.[11] Different types of rape include but are not limited to, date rape (also known as 'acquaintance rape'), forcible rape, statutory rape, gang rape, marital rape (also known as spousal rape), custodial rape, prison rape, war-time rape, etc. The offence of rape occurs in chapter XVI of the IPC and rape is defined in the section 375 of the code. It is to be noted that section 375 and 376 of the IPC have been substantially changed by the criminal law (amendment) act, 1983, and new sections 376-A, 376-B,376-C and 376-D were introduced in this act. To constitute the offence of rape it is not necessary that there must be a complete penetration of penis with emission of semen and rupture of hymen.[12] In Jiten Das V State of West Bengal[13] the court stated that the presence or absence of injury or mark of violence on the body of the prosecutrix is not decisive.

Rape is an offence against the human body affecting the person of a women, while adultery[14] is an offence relating to marriage. Section 228A of the Indian penal code, 1860, relates to non-disclosure of identity of the victim of certain offences etc... Section 376(2) of the code, 1860 makes some special case of rape punishable with more stringent punishment.it may be noted that the Medical termination of Pregnancy Act 1971 aims at protecting the physical and mental health of the pregnant women. There was no apparent reason for a married women to falsely implicate the accuse after scatting her own prestige and honour.[15] Rape of a woman who is of easy virtues is equally entitled to the protection of law. Therefore, merely because she is of easy virtue, her evidence cannot be thrown overboard.[16]

Forced prostitution

Forced prostitution or other kinds of commercial exploitation by male partners or parents is another form of violence against women and children reported worldwide. Destitute families, unable to support their children, often hire out or sell their children, who may then be forced into prostitution. Very often the young girl is sent as a domestic worker, in which case she may be physically and sexually exploited by her employers. For example,

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[9] *Ibid* at p. 2.
[10] *Mohan Anna Chavan v. State of Maharashtra*, 2008 (9) Scale 474.
[11] *Phul Singh v. State of Haryana*, AIR 1980 SC 249.
[12] *State of Himachal Pradesh v. Amrish Kumar*, 2009 Cri.L.J.2126.
[13] 2013 (1) ACR 1162.
[14] Sec497 of the Indian Penal Code, 1860.
[15] *Om Prakash v. state of Uttar Pradesh*, AIR 2006 SC 2214.
[16] *State of Maharasthra v. Madhukar N. Mardikar*, (1991)1 SCC 57.

in certain hill districts of Nepal, prostitution has become an almost 'traditional' source of income. Women and girls are tricked or forced by their husbands and relatives into being trafficked to India for prostitution. Similarly, in southern India young women and girls are "donated" to serve a temple as devadasis; and very often end up being prostituted.[17]

Child Marriage

Child marriage is a complex issue, rooted deeply towards poverty and gender inequality. The practice of child marriage violates girl's human rights, limits their education and harms their health's. Early marriage, with or without the consent of the girl, constitutes a form of violence as it undermines the health and autonomy of millions of young girls. The legal minimum age of marriage is usually lower for females than for males. Early marriage leads to childhood/teenage pregnancy, and can expose the girl to HIV / AIDS and other sexually transmitted diseases. It is also associated with adverse health effects for her children, such as low birth weight. Furthermore, it has an adverse effect on the education and employment opportunities of girls.

Dowry demand

The country's extreme caste system, cultural customs and gender inequality have aided in the creation of a male dominated society. One of the India's more extreme evidence of abuse is seen through dowry practices: Even though India has legally abolished the institution of dowry, dowry-related violence is actually on the rise. An average of five women a day are burned by their husbands and in-laws, who burn them in "accidental" kitchen fires if their ongoing demands for dowry before and after marriage are not met., and many more cases go unreported. In the year 2006, 4504 cases were reported under the 'Dowry Prohibition Act'. The cases under this act have increased by 40 percent as compared to 2005 (reported case, 3204). Similarly the incidents of Dowry death have increased in the year 2006 (reported cases 7618) by 12.2 percent over the previous year 2005 (Crime in India, 2006).[18]Dowry or 'Dahej' is the payment in cash and/ or kind by a bride's family to the bridegroom's family, along with the giving away of the bride. The custom originates from the Indian subcontinent and is called 'Kanyadaan'. However, the dowry is commonly exchanged in other cultural and faith groups. It is worth noting that, depending on the culture/ faith, dowry payments can be made by either the bride or the groom's family. Dowry abuse is often where the bride or groom is perceived to have brought in less dowry than expected (monetary or otherwise) by the in-laws. Alternatively, the dowry could have been a 'promised' amount, and in the event of a relationship breakdown, this is not paid. Both situations can result in the mistreatment or abuse of either party.[19]

Sexual exploitation

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[17] *Ibid.*
[18]Lawz, (2013),current blaze, p. 26.
[19]Available on https://www.iwight.com.

Trafficking women and children for social exploitation is the fastest growing criminal enterprise in the world. It considers that the exploitation of women legitimizes negative attitudes towards women and is inextricably linked to gender inequality and sexual violence. Art. 23 (1) of Indian Constitution states Traffic in human being and beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law. ITPA was legislated in 1956, which made commercial sexual exploitation an illegal activity. It was further amended in 1986.Several sections of IPC make almost every activity in relation to trafficking a crime. There are other wide range of other relevant Acts viz. Child Marriage Act, Dowry Act, SC/ST prevention of atrocities Act, Organ Transplant Act, Child Labour Act etc. India had also signed/ratified/acceded to, several relevant International conventions viz. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949 Convention)

Apart from the above legal instruments there have been various directives of High Courts and Supreme Court making provisions for administrative machinery and infrastructure to protect women, combat trafficking, rescue and rehabilitation of the victims. In the cases of Visha*kha*, *Vishal Jeet and Gaurav Jain*[20] courts gave landmark Judgements. In consequence to Gaurav Jain case Union Government came up a National Plan of Action to Combat Trafficking and Commercial Sexual Exploitation of Women and Children in1998.

In past few years there had been demand coming up for legalization of commercial sexual exploitation and recognition of it as a work. As if that is not the end there have been some support coming for it even from the ruling class. Recently on the eve of the elections Mayor of Calcutta announced that the profession would be legalised in the city. Similarly minister of state Kanti Singh announced in a press conference in Bihar that government would take step to stop exploitation and legalize commercial sex.South Africa is a transit point for a large trafficking network operating between developing countries and Europe, United States, and Canada. Migrants from foreign countries, particularly China, India, the Middle East, former Eastern Bloc countries and other African countries, are lured to South Africa.[21]According to an ILO estimate, 15% of the country's estimated 2.3 million prostitutes are children. The traffic is controlled largely by organised crime.[22]

Female foeticides

In our so-called civilizes society, news often appear in the newspaper that new born baby if her sex is female is murdered or abandoned by the parents.[23] Female foeticides and female infanticides are most inhuman of acts and it is a shame that in India these practices are prevailing at large scale. The girl child in India has been the most vulnerable one for centuries and is even susceptible to the ignominy of deprivation and discrimination.

[20][1984] 2 SCC 244.
[21]US Dept of State, Country Reports on Human Rights Practices - 1999, 25 February 2000.
[22]US Dept of State, Country Reports on Human Rights Practices - 2000, February 2001.
[23]Sec.317,318, the Indian Penal Code, 1860.

Female foeticides, neglect of the girl child, female infanticide are the clear instance for gender discrimination. This practice is illegal, is still prevalent in our country. It has a serious impact on the society, in overall growth and development of the country. Female foeticide is perhaps one of the worst forms of violation against women. Where a women is denied her most basic and fundamental rights i.e., "the right to life". In societies where a higher value is placed on sons, discrimination towards female children can take extreme forms such as sex-selective abortions and female infanticide. An official survey in China revealed that, with its one-child policy, 12 per cent of all female embryos were aborted or otherwise unaccounted for. And in many countries the discrimination that leads to the neglect of girl children is the greatest cause of sickness and death among girls between the ages of two and five years.

Girls in many developing countries receive less nourishment than boys, and they are more likely to suffer mental or physical disability or even die, as a result of poor nutrition. Less access to health care also exacerbates the much higher mortality rate among girls. Sex-selective abortion, female infanticide, and systematic differential access to food and medical care have led to the phenomenon known as the "missing millions" of women and girls. An estimate 60 million women are simply missing from the population statistics. In other words there are 60 million fewer women alive in the world than should be expected on the basis of general demographic trends.

In India, Census 2001 shows that there is a sharp decline in child sex ratio in the age group of 0-6 years, from 945 in 1991 to 927 in 2001. The States and union territories that have shown a huge decline in child sex ratio are Punjab, Haryana, Rajasthan, Bihar, Gujarat, Tamil Nadu and Delhi. The worst hit is Punjab, where the sex ratio has further dipped from 875 to 793 girls per 1000 boys. According to a Times of India report, a national newspaper (September, 2001), a village in Barmer district of Rajasthan received a baraat after 110 years. This is simply because that the villagers ensured that no girl born in the village survived after birth. It very clearly reflects that because of the lower status of the women and inhuman cultural practices of the society towards the women, female foeticide and female infanticide is widespread. The horrible illegal practice must be stopped by harsh law and change the mind -set of the people and society. Save the girl child for a better tomorrow's.[24]

Honour based violence

Honour violence is violence against an individual who has 'dishonoured' their family.[25] Victims of honour violence are targeted because their behaviour violates cultural or religious norms.[26] The assailant feels that the only way to restore family honour is to

[24] *Ibid* at p. 9.
[25]"Ethics Guide, Honor Crimes", BBC, 2012 available at http://www.bbc.co.uk/ethics/honourcrimes/crimesofhonour_1.shtml
[26]Honor Violence – What Is Honor Violence? Ayyan Hirsi Ali Foundation, available at http://theahafoundation.org/issues/honor-violence.

harm or kill the victim. Victims are shot, stoned, burned, buried alive, strangled, smothered, and stabbed in the name of restoring honour. [27]Honour violence is a widespread phenomenon that represents the most horrific outcome of a patriarchal, honour-based society in which honour is considered more important than human life.[28]In Jordan and Iraq, honour killings are in a separate legal category – murderers benefit lighter sentencing for honour killings.[29]

In Pakistan, tribal courts may order honour-based violence in cases of family disputes.[30]Honour killings are an extreme example of violation of the human rights of mainly women who are perceived to have brought shame or dishonour. Articles of the European Convention on Human Rights which apply: Article 2: Everyone has the right to life, liberty and security of person, Article 3: No one shall be subjected to torture or to cruel, inhuman or degrading treatment, Article 12: Men and women of marriageable age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. There have been a number of high profile cases in the United Kingdom where women have lost their lives in a brutal and 'symbolic' manner in recent years.

Solutions for gender discrimination and violence

Education:

Education develops the skills, knowledge, changes the attitude. Educating women is the prime factor to combat gender discrimination and for upliftment of women. Not only must the women, society be educated to give equal rights without discrimination.

Employment:

Employment gives income and economic position for women. Employment also gives economic independence for women.

Empowerment:

Empowering women with the help of education, law and employment will make the society to accept the women are equal to men.

Social integration:

Social integration is to achieve and maintain peaceful social relations. Integrating the social, economic, political and cultural ethos for the general welfare of the society.

Spreading awareness:

Generating awareness against discrimination among the society and everyone should be treated equally.

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[27] "Impunity for domestic violence, 'honour killings' cannot continue" UN, March 2010 available at http://www.un.org/apps/news/story.asp?NewsID=33971&Cr=violence+against+women&Cr1#.UKpKmrukG M4.

[28]BBC. Ethics Guide, Honor Crimes. 2012 available at http://www.bbc.co.uk/ethics/honourcrimes/crimesofhonour_1.html

[29]YotamFeldner, "Honor" Murders – Why the Preps Get Off Easy." Middle East Quarterly, December 2000, Volume 7, No. 4, pages 41-50.

[30]4"Honor Killings By Region" Honor Based Violence Awareness Network (HBVA), International Resource Centre

Stopping sex identification:
Stop injustice against women. Stop sex identification and abortions and gender discrimination.

Social welfare developments:
Social welfare developments are important and helpful for the empowerment of women and welfare of the nation.

Promoting NGO's:
NGO's promotes women's right worldwide. NGO's are involved in the field of women empowerment in various states. NGO's can play a vital role to eradicate gender inequality.

Conclusion & Suggestion

"If you educate a man, you educate a man.
If you educate a woman, you educate a generation".

A nation or society without the participation of women cannot achieve development. Men and Women are two sides of a coin. If we eliminate gender discrimination, women will deliver all the potentials, knowledge to develop the society, the nation and the whole world. Let us hope that with the incorporation of above stated suggestions, the high degree of violence against women in our society would become a thing of past in this new millennium because –"The stark reality is that the future of development of society lies in the future of women equally with men. Never has it been more apparent that women's issue cannot be compartmentalized and isolated as secondary issues in development."

On the basis of above discussion, it is clear that crimes against women are on the rise. Hence, it becomes necessary to suggest some measures to prevent woman's abuse and exploitation in our society, for tackling various crimes against women, and for dealing with female depersonalization trauma. For our convenience, the suggested measures may fall into five main categories:

(1) Socially redefining patriarchal norms and removing gender bias,
(2) Change in women's values and their parents' thinking
(3) Strengthening women organizations,
(4) Adopting humanistic approach to victims, and
(5) Changing criminal justice system.

Shreya Singhal v. Union of India: The Victory of Virtual Speech

Nisha[1]

Abstract

In the era of digitalization, with the Government's vision of making 'Digital India', a lot of emphases has been laid on making these modern digital facilities available to all. The electronic commerce expanded wildly and a need was felt for a legislation to govern it. In 2000, the Information Technology Act (ITA) was passed to provide legal recognition to such transactions. But to curb the growing abusive use of such freedom in the name of free speech, the ITA was amended in 2008 to incorporate various Sections, out of which the most disputable was Section 66A, relating to restrictions on free online speech. In 2015, the constitutional validity of this Section was challenged on the grounds of violating Article 19(1), vagueness, lack of intelligible differentia and chilling effect on free speech. Using the Qualitative method of research, the author has dissected the judgment and has penned down brief notes on the grounds declaring it to be unconstitutional. The Supreme Court explained freedom of expression using the three fundamental principles: discussion, advocacy and incitement. The Court also relied heavily upon the Indian, British and US jurisprudence on free speech to make the concept more comprehensible. This judgment further braces the base of freedom of speech and expression and expands its scope in the digital era. It has made the hazy picture clear, and now, with no doubt, it can be said that virtual speech is as protected as real speech.

Key Words- Speech, Expression, Discussion, Advocacy, Incitement.

Introduction

"Man as a rational being desires to do many things, but in a civil society his desires will have to be controlled with the exercise of similar desires by other individuals".

- Justice Patanjali Shastri[2]

With an exponential growth in IT sector, electronic commerce expanded and so did the laws. The legal framework provided by the Information Technology Act, 2000 (ITA)[3] was considered to be fittinguntil2008 when a new section 66A[4] was added relating to restrictions on online speech. In 2015, the validity of Sec 66Awas challenged. The main issue was whether Section 66A of ITA violated the right to freedom of expression

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[2] *A.K. Gopalan v. The State of Madras*, 1950 AIR 27.

[3] The Information Technology Act, 2000, (No. 21 OF 2000).

[4] S. 66A. Punishment for sending offensive messages through communication service, etc.
Any person who sends, by means of a computer resource or a communication device,—
(a) any information that is grossly offensive or has menacing character; or
(b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device,
(c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages,
Shall be punishable with imprisonment for a term which may extend to three years and with fine.

guaranteed under Article 19(1)(a) of the Constitution of India and finally, it was struck down in its entirety being violative of Article 19(1)(a) and not saved under Article 19(2). But before going into the intricacies of the case, facts of the case should be understood.

Two girls were arrested by the police, for posting and 'liking' the allegedly offensive and objectionable comments on Facebook, questioning the shutdown of the city of Mumbai for the funeral of a political leader. The arrest was made under Sec. 66A of IT Act 2000, which made it a punishable offence for any person to send through a computer resource or communication device any information that is grossly offensive, or with the knowledge of its falsity, the information transmitted for the purpose of causing annoyance, inconvenience, danger, insult, injury, hatred, or ill will. This arrest invoked a lot of criticism and later, Shreya Singhal, a law student filed a petition, challenging the constitutional validity of Section 66A. All the other nine petitions, filed by various NGOs and civil rights groups, were clubbed together and heard by a two-judge bench of the Supreme Court, in the case of *Shreya Singhal v. Union of India*[5].

In a 123-page long judgment by Justice Chelameswar and Justice R.F. Nariman, Sec. 66A was struck down. The major issue was whether Section 66A of ITA violated the right to freedom of speech and expression guaranteed under Article 19(1) (a) of the Constitution of India. Along with this, it was also contended that 66A suffered from the vice of vagueness, had a 'chilling effect' on the freedom of speech and expression and that there was no intelligible differentia, thus breaching Art. 14 and 21.

Keen Analysis of the Judgment

This judgment of the Supreme Court is deeply analyzed and an overview of the four major grounds for declaring 66A unconstitutional is discussed below.

Violation of Right to Freedom of Speech and Expression: Constitutionality of 66A

In the pertinent case, the petitioners raised a large number of arguments regarding the constitutionality of Sec 66A. According to them, it infringed right to freedom of speech and expression (Art. 19(1)) and was not saved by the eight subjects covered in Art. 19(2) namely "reasonable restrictions in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offense."

But Mr. Tushar Mehta, the Additional Solicitor General of India argued that there is a presumption in favour of the constitutionality of an enactment. The Court should so construe a statute to make it workable and mere possibility of abuse of a provision cannot be a ground to declare a provision invalid. Also, he tried to justify the usage of loose language in 66A on the ground that it was required to deal with the novel methods of using the internet as a means to disrupt other's right.

[5]Writ Petition (Criminal) No.167 OF 2012, AIR 2015 SC 1523.

The Court while preserving the view that liberty of thought and expression is a cardinal value that is of paramount significance under our constitutional scheme discussed three fundamental concepts in understanding the freedom of expression: discussion, advocacy, and incitement. According to the Court, "Mere discussion or even advocacy of a particular cause howsoever unpopular is at the heart of Article 19(1) (a). It is only when such discussion or advocacy reaches the level of incitement that Article 19(2) kicks in." Also, the information disseminated over the internet need not be information which "incites" anybody at all.

Relying largely on Indian, English and US jurisprudence on free speech, the Court connoted the persuasive value of American judgments by highlighting the case of *Indian Express Newspapers (Bombay) Private Limited & Ors. v. Union of India & Ors*.[6], stating "While examining the constitutionality of a law which is alleged to contravene Article 19 (1) (a) of the Constitution, we cannot, no doubt, be solely guided by the decisions of the Supreme Court of the United States of America. But in order to understand the basic principles of freedom of speech and expression and the need for that freedom in a democratic country, we may take them into consideration."

The Court while affirming that 66A did not have any proximate relationship to public order, not even defamatory in nature and cannot possibly be said to create an offence which falls within the expression 'decency' or 'morality', disagreed with the Government's pleadings and held that the petitioners were right in saying that Section 66A, in creating an offence against persons who use the internet and annoy or cause inconvenience to others, very clearly affects the freedom of speech and expression of the citizenry of India at large, if that such speech or expression is directly curbed by the creation of the offence contained in Section 66A. It is not open to the State to curtail freedom of speech to promote the general public interest.

As Section 66A severely curtailed information that might be sent on the internet based on whether being grossly offensive, annoying, inconvenient, etc. and unrelated to any of the eight subject matters under Article 19(2),was therefore declared as unconstitutional; falling foul of Article 19(1)(a) and not being saved under Article 19(2).

Vagueness of Provisions

The petitioner's also contended that in 66A, every expression used was nebulous in meaning. There were no criteria for setting a general standard of what was offensive and annoying. Relating 66A with other sub-section, they argued that other sub-sections are defined with some degree of specificity, unlike 66A. They further argued that the "language used in the section is so vague that neither would an accused person be put on notice as to what exactly is the offence which has been committed nor would the authorities administering the Section be clear as to on which side of a clearly drawn line a

[6]AIR 1986 SC 5151.

particular communication will fall." They also underlined that the expressions, which are ingredients for the offence of public nuisance under Section 268 of IPC, become offences in themselves when it comes to Section 66A.

In response to the petitioners' arguments, the Additional Solicitor General contended that vagueness is not a ground to declare a statute unconstitutional if the statute is otherwise legislatively competent and non-arbitrary.

The Court held that penal law is void for vagueness if it fails to define the criminal offence with sufficient definiteness. Ordinary people should be able to understand what conduct is prohibited and what is permitted. To substantiate it, the Court relied on the observations made in various judgments. In *Musser v. Utah*[7], "The U.S. Supreme Court has repeatedly held in a series of judgments that, where no reasonable standards are laid down to define guilt in a Section which creates an offence, and where no clear guidance is given to either law abiding citizens or to authorities and courts, a Section which creates an offence and which is vague must be struck down as being arbitrary and unreasonable." "It is the basic principle of legal jurisprudence that an enactment is void for vagueness if its prohibitions are not clearly defined."[8]

The Court also held the argument of severability, given by the learned Additional Solicitor General, as vague. The Court even used the two English judgments cited by him to demonstrate how vague the words used in Section 66A were. Making it quite clear that the expressions used in 66A were completely open-ended and undefined, the Court finally held that "it is clear that Section 66A arbitrarily, excessively and disproportionately invades the right of free speech and upsets the balance between such right and the reasonable restrictions that may be imposed on such right."

Lack of Intelligible Differentia

The petitioners also contended that there was no intelligible differentia between those who use the internet and those, who by words, spoken or written, use other mediums of communication, thus breaching rights under Articles 14 and 21. Also, to punish someone because one uses a particular medium of communication is itself a discriminatory object and would fall foul of Article 14 in any case. They also argued that an offence, whose ingredients are vague in nature, is arbitrary and unreasonable and would result in the arbitrary and discriminatory application of the criminal law. The difference in the time period of sentence and the nature of offence under 66A and IPC were also added to strengthen their argument.

Relying on the argument of learned Additional Solicitor General, that "something posted on a site or website travels like lightning and can reach millions of persons all over the world", the court held that intelligible differentia is clear – "the internet gives any

[7] 92 L. Ed. 562.
[8] *Kartar Singh v. State of Punjab,* (1994) 3 SCC 569 at para 130-131.

individual a platform which requires very little or no payment through which to air his views. It has a rational relation to the object sought to be achieved – that there can be the creation of offences which are applied to free speech over the internet alone as opposed to other mediums of communication." The Court, therefore, rejected the petitioners' argument.

Chilling Effect on Free Speech

By forming the ground with other issues, the petitioner further contended that 66A hada 'chilling effect' on the freedom of speech and expression i.e. it discouraged the legitimate exercise of the constitutional right to free speech. To this, the Court held that, being bound by the decisions of two Constitutional Bench, "application of 66A takes within its sweep, protected speech and speech that is innocent in nature and is liable therefore to be used in such a way as to have a chilling effect on free speech and would, therefore, have to be struck down on the ground of overbreadth." Since the provision failed to define terms, such as inconvenience or annoyance, "a very large amount of protected and innocent speech" could be curtailed.

Along with these major issues, some other issues were also discussed and the Court pronounced the verdict keeping in mind the whole facts of the situation. Having struck down the Act on substantive grounds, the Court declined to address the procedural unreasonableness aspect of the Section, as raised by the petitioners. The Court also found the Section 118(d) of the Kerala Police Act to be unconstitutional, as applied to Section 66A. The Court further upheld the validity of Section 69A, secret blocking process by which Government can choose to take down content from the Internet. The Court also upheld the validity of Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009 and Section 79 and the Information Technology (Intermediary Guidelines) Rules, 2011, subject to Section 79(3)(b) being read in a specified way.

Conclusion

After hearing both the sides and considering all the facts of the case, the Court made a historic moment for the country by quashing Section 66A of ITA, in its entirety, as it violated the right to freedom of expression guaranteed under Article 19(1)(a) of the Constitution of India. What makes this judgement special is it's being unprecedented; taking such a bold decision for the protection of humanity.

This judgment is an aid-memoire of that when, there is misuse of penal provisions by the law enforcement agencies, the spirit of Judiciary rises to limit such whimsical interpretations and confines such actions in the viable range. Section 66A had extremely wide parameters and so was misused by the authorities to arrest innocent persons, just for posting offensive comments. Stating, what may be offensive to a person, may not be offensive to others, the Supreme Court removed the section from law books as it had gone much beyond the reasonable restrictions put by the Constitution.

This commentary highlights the secured future in respect to such enactments. With the onset of digitalization, this was the first Act containing such provision. But in the near future, attributed to the close proximity between media and digitalization, the enactment of any other law being a pastiche of 66A is inevitable. But then, this judgement will act as a self-appointed guardian of the cardinal pillars of democracy, eliminating any such law that hit the root of liberty and freedom.

This judgment was a watershed moment for online free speech in India. It was a requisite for the protection of free speech and its new developing aspects like online speech. It has enlarged the scope of virtual rights available to the people. This landmark judgment was welcomed by all as this is how the public wants to see its judiciary working.

Natural Law- 'Ever-Existent' as a 'Weapon' or a 'Shield'?

Udit Raj Sharma[1]

Abstract

Out of all the schools of law, natural law school stands out not only because it is the oldest of approach but also because this is the only theory sustained by idealism. It is claimed that this idea took birth, died and got resurrected again (especially its revival in the 20th Century). The claims that the Natural law is universal and everlasting appear to be true. Sometimes the divergence in the opinions of the natural law thinkers is to an extent that it is believed to be self-contradictory in itself. The research discusses about this "all-pervasive" and "everlasting" trait of natural law mentioning about its presence from ancient to contemporary approaches including its revival in recent past and further deals with the approach of Hobbes and Locke towards natural law. Thomas Hobbes treated natural law as a shield to maintain status quo in the society and John Locke uses it as an instrument of change and interestingly, natural law was accepted both as a shield and as a weapon. The research analyses their approaches comparatively and concludes by exploring whether in modern times, natural law has been adopted as a weapon or a shield by taking inferences from the modern legal systems.

Keywords- natural law, Thomas Hobbes, John Locke, shield, weapon

Introduction

Black's Law Dictionary defines natural law as "A Philosophical system of legal and moral principles purportedly deriving from a universalised conception of human nature or divine justice rather than from legislative or judicial action; moral law embodied in the principles of right and wrong". Roscoe Pound attempts to define it as "Natural law, as it is revived today, seeks to organise the ideal element in law, to furnish a critique of old received ideals and give a basis for formulating new ones and to yield a reasoned canon of values and a technique of applying it. I should prefer to call it a philosophical jurisprudence. But one can well sympathize with those who would salvage the good will of the old name as an asset of the science of law." "Natural law is often an idealization of the opposite to that which prevails. Where inequality or privilege exists, natural law demands its abolition."

The Journey of Natural Law- The Death and Resurrection of Natural Law

The tenet of natural law which differentiates it from other schools of law is that it has been existent all the times in one form or the other. Sometimes, it is derived from human reason to question the human made laws, sometimes is inferred from the religious scriptures. It has been the biggest strength and weakness of the natural law that it has not been able to be encapsulated in a particular definition, theory or idea, which, on one hand enabled natural law to serve the interest of various legal systems at various times and on the other hand this became its biggest criticism at the hand of positivists such as Bentham and Austin who claimed it to be uncertain, ambiguous and unscientific leading to its

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debacle at the times of rising positivism. Natural Law theorist contends that the validity of state positive law relies on its adherence to unwritten higher principles of justice and morality. Different learned men have used their own manner to define and appreciate the existence and everlasting nature of natural law. It has readily been accepted that in spite of all criticisms, natural law has been at everyone's disposal. The greatest attributes of the natural law theory is adaptability to meet new challenges of the dynamic society. Jurists have identified the evolution of the 'Natural Law Theory' into four periods namely, the Ancient (involving Greek and Roman perceptions and jurists such as Plato, Aristotle, Heraclitus, Cicero etc.), the Medieval Period (period generally from 12^{th} to 14^{th} Century involving philosophers such as St. Augustine, Aquinas, Ambrose, etc.), the Renaissance period involving learned men such as Grotius, Hobbes, Locke, Rousseau, Immanuel Kant etc.) And finally the Modern period which involves the revival of natural law post its hostility and debacle.

Dr. Fried Mann has commented that the history of natural law is a tale of the search of mankind for absolute justice and its failure. The greatest contribution of natural law theory to the legal system is its ideology of a universal order governing all men and the inalienable rights of the individual.
The natural law school, over the years, acquired certain features of main characteristics, which are-

- The principles of human conduct that are discoverable by "reason" from basic human nature are absolute, immutable and universal.
- It has been used both as a weapon and a shield to change and maintain the status quo respectively. In England, natural law in the hands of Hobbes became a shield to maintain status quo while in the hands of Locke it became an instrument of change. The eternal dualism has been the chief characteristic of natural law philosophy.
- The concept of Rule of Law in England, the due process of law in US and the procedure established by law in India is embody juristic traditions of natural law philosophy by which the positive law is subjected to the inhibition of a moral order.

There was a time when the Positivism came to the forefront and natural law was pushed to the back seat and this is not just a fictional proposition but a realistic view of the world affairs. Few writers in describing the natural law have gone to an extent of describing that the natural law died and got resurrected which is also referred as revival of natural law by a number of jurists. The World Wars, its discourse and the efforts in context of human rights again brought the natural law to the driving seat when there were principles laid down on the touchstone of which every law or rule was claimed to be tested to accord it the privilege of being called a just, fair, reasonable and humane law.

This era as mentioned aforesaid is termed as an era of revival or resurrection of natural law theory almost universally. Many describe this phenomenon as addition of value based jurisprudence to the legal systems which was missing in the positivist idea of law and government in the form of revival of natural law principles of justice and morality. The

opinion of Radbruch in his work Five Minutes of Legal Philosophy (1945) becomes relevant in understanding the need for a value based jurisprudence which was served by the revival of natural law since he was a positivist who had to fall out of his faith in the leap of natural law on witnessing the horror and devastation brought by the German Riech on its neighbours.

Thomas Hobbes & John Locke- Their Ideas of Natural Law

The research tries to understand and analyse the ideas of Hobbes and Locke in context of natural law and how have both made quite contrasting observations towards the formation of a state and government. Both these jurists make a mention of the social contract in their works. Social contract, basically deals with two things which are the origin of the government and how much authority should the state have over the individual. Thomas Hobbes defends 'Philosophical Absolutism' and he does this through his work Leviathan (1651). The main points to be understood about Hobbes are-

A state of War is a 'state of war of all against all' i.e. bellum ominus contra omnes. Leviathan is a sort of ruler Hobbes wishes to see in the government. The term 'leviathan' is derived from Bible and is used in to mean a large and mighty sea animal (or sea monster) and it appears six times in the Old Testament. It denotes "any large animal that moves by writhing or wriggling the body, the whale, and the monsters of the deep". Leviathan attempts to convey the idea of something big, mighty and beyond challenges and this is the idea Hobbes has for his sovereign where he portrays his sovereign or the ruler to be beyond challenges from the subjects and then only it would be able to bring into effect the social contract entered and save us from ourselves. It could be easily inferred that for Hobbes, the life before the government was terrible which he tries to portrays through five features-

- Solitary
- Poor
- Nasty
- Brutish
- Short

He also believed that in the absence of an invincible absolute ruler, we would all kill each other. Leviathan is that sort of a ruler which is powerful enough to be beyond challenges. Hobbes presents a pessimistic and dismal perception about the 'human nature'. Hobbes believes in the concept of 'absolute government' but not actually a divine and godly 'absolute government'.

The philosophy of Hobbes was shaped directly by his experiences in the English Civil War (1642-1651). To appreciate the philosophy of Hobbes, he must be placed in the times and experiences he had with the governance and state. 'Self-preservation' is at the heart of Hobbes and he lays great emphasis on the protection of one being from other which is evident when he attempts to define the 'law of nature '. John Locke advocates

for 'Philosophical Constitutionalism'. He does this through his work 'Two Treatises of Government'. The significant points to be kept in mind are-

Locke mentions about 'Natural Rights' which he believed were given to 'Adam' in the book of Genesis and therefore he uses biblical justification for his idea along with the logic. He is concerned with the protection of the natural rights, namely, of life, liberty and property. But Locke believes that it is difficult to protect these natural rights in the 'state of nature' and therefore a 'social contract' is entered into between the human beings. Now the question crops up is 'But if a man be free, why give up freedom?' and the answer is cause he is exposed to the danger and invasion so he joins for mutual preservation.

Locke mentions about 'the right of revolution' in case the government fails to preserve the rights of the people and this is why Thomas Jefferson makes use of Locke in relation to the Declaration of Independence. This is where there exists a huge distinction in approach of Locke than that of Hobbes where the absolutist regime is negated by a constitutional government.

People can revert to the 'state of nature' in case the government fails to protect the natural rights. Here, people do not give away all rights to the government but confers only a few rights to ensure they are not oppressed and that the government essentially remains a constitutional or limited in nature.

Hobbes and Locke – A comparative look-

However there are number of points on which there is a divergence in opinion between Hobbes and Locke and some of those major points are-

- The reason why Hobbes believes government exists is to 'protect us from ourselves' whereas the reason why Locke believes the government exists is to 'protect the natural rights' of the subjects.
- In the idea of Hobbes, the sovereignty resides in the Monarch whereas in the idea of Locke, the sovereignty resides with the people.
- The idea of Hobbes is that of an 'Absolutist' government where the power of the government is not subjected to any limits whereas the idea of Locke is of a Constitutionalist government where there are limits on the powers of the government.
- In the idea of Hobbes, no 'right to revolution' is conferred with the subjects who are present with the subjects in the idea of Locke.
- Government controls in Hobbes framework and not necessarily represents the subjects whereas for Locke representation ensures a check on oppression.

It is not surprising for a person approaching Hobbes and his work to question or inquire why has Hobbes been labelled as a Natural Law theorist since his idea of sovereign and the structure of the government he tries to portray does not differ much from the positivist idea of a sovereign and the structure of the government proposed by Hobbes will not be

much different from the Austinian Model of the government. In fact, Hobbes can be labelled as the one bringing the idea of positivism and proposing a model of the government where sovereign is always right and also beyond any challenges. There is the point where Austin seems totally in agreement with Thomas Hobbes where the sovereign is believed to above law and it is beyond challenges. It would not be wrong to say that the 'sovereign' of Austin possesses the qualities of the 'Leviathan' of Hobbes.

For Hobbes, the 'social contract' is just a compromise where for preventing a situation where everyone is dangerous to everyone else, a sole 'leviathan' is created but there is not much thought about the dangers from the leviathan itself and the possible ramifications when leviathan starts abusing the unfettered authority granted to him through the social contract. Making someone too big that it becomes beyond challenges is more of a suicidal step but Hobbes agrees to enter into this compromise to prevent what according to him is a greater threat i.e. 'the state of nature'.

A Weapon or Shield

It is undoubtedly clear that natural law has existed both as a weapon and a shield in the past times and it has deliberately been made to act like both to advance various purposes and the humility of natural law has to be acknowledged for accommodating all claims whatsoever. Now the important aspect which needs to be inquired is whether in the contemporary world it exists and if it does, whether it is a weapon or a shield. It does not need a great intellect to answer the first question since the presence of natural law in various legal systems and universally as a world order can be perceived, analysed and accurately traced however the second question does need a lot of analysis to be answered. When we say it exists as a shield or a weapon, we try to respond whether Hobbes's or Locke's framework is imbibed respectively. It can be said that the legal systems owe both to Hobbes and to Locke since the former gave the foundation to positivism, utilitarianism and other claims whereas the latter laid the foundations of a limited government which became the foundation for individualism, democracy and fundamental rights and other guarantees against the State and have been cherished by majority of the countries of the world.

On this front, the contemporary world is more close to Locke than Hobbes since the concepts such as democracy, limited government, rule of law, independent judiciary are acquiring recognition nationally and globally. Responding specifically to the issue that whether it is a weapon or a shield, it is a difficult decision since it exists in both the forms even today also. If we keenly observe the criminal law and its jurisprudence, it finds tune with Hobbes since state acts like leviathan to prevent one from perpetrating crime over other and ultimately aims at a peaceful 'status quo' in the society which is a shield whereas if we analyse the development of public law in the form of constitutional law and human rights jurisprudence, it goes with Locke's idea where these are weapons a common man holds to effect change and save him/her from any kind of oppression.

Mostly, even after acknowledging the existence of natural law, it becomes difficult to state whether it exists as a weapon or a shield.

Conclusion

We get a very patent picture of natural law confronting any other law in the ideas of Acquinas, Augustine and Martin Luther King. According to them, the "grossly unjust laws" are not laws at all and few illustrations of such grossly unjust laws can be 'Blacks can be owned as slaves by Whites' or 'Women are not entitled to any property or voting rights' and these are, in their view, mere violence and not law at all. St. Augustine uses this arrangement of words to convey his idea '*lexinjustia non estlex'* by which he means that any positive law which is inconsistent or in conflict with the natural or divine law is no law at all and he further argues that there remains no moral and even legal obligation to obey such a law. They keep on insisting that human laws are genuine or real and worthy of being obliged only when they do not bring contradiction to the natural or divine laws.

It has been difficult to ascribe a particular form to the natural law or to identify by what name, label or head natural law exists but its existence cannot be questioned. Part III and IV of the Constitution of India, 1950 can be said to reflect the idea of natural law, the concepts of due process of law in America, the rule of law, the procedure established by law or the concepts of justness, fairness and reasonableness of laws, are concepts holding within themselves the flagrance of the natural law philosophy to test or question the positive laws on the touchstone of higher principles of justice even to an extent of holding the positive law unconstitutional and non-existent.

The principles of 'equity, justice and good conscience' have been instrumental in the development of Common Law which has further influenced the legal systems of many countries including India. The acceptance of natural law philosophy in US is reflected through the Bill of Rights which contains a set of unalienable rights essentially the right to life, liberty and equality etc. The UN Charter drew heavily from natural law principles in entrenching an objective set of natural fundamental rights that would apply across all nations irrespective of positive state law which applied to every person merely for being human. Extremism has always proved dangerous to humanity and it has the same logics for natural law since artificially certainty of law requires positivism and at the heart of it is required the allegiance towards higher orders of justice and morality. It does not matter much whether it exists as a weapon or shield since in both ways it would contribute in shaping the law and making it more facilitative for the sake of humanity.

References:

1. Black's Law Dictionary (Seventh Edn.), p.1049
2. Roscoe Pound, The Formative Era of American Law 29 (1938) as cited in Black's Law Dictionary (Seventh Edn.), p.1049
3. Morris R Cohen, Reason and Law 96 (1961) as cited in the Black's Law Dictionary (Seventh Edn.), p.1049

4. As per Aristotle, the law could only be understood in terms of its purpose. Cicero, believed that the positive law ought to be accessed against the 'true law' which can be accessed through 'right reason' as this law is in 'agreement with nature' and the eternal law of God. St. Thomas Acquinas, identifies four types of law, with 'natural law' being the 'eternal law' discoverable by humans through reason and thus 'natural law' was separate and superior to 'human law' which was regarded as providing the working details which 'natural law' leaves indeterminate. After that, Francisco Suarez and Hugo Grotius laid the foundations for the secularisation of the natural law.
5. Prof. Alf Christian Ross (1899-1979) in his 'On Law and Justice' § 58 (p.261) wrote: Like a harlot, natural law is at the disposal of everyone. The ideology does not exist which cannot be defined by an appeal to the law of nature. And, indeed, how can it be otherwise, since the ultimate basis for every natural right lies in a private direct insight, an evident contemplation, an intuition. Cannot my intuition be just good as yours? Evidence as a criterion of truth explains the utterly arbitrary character of the metaphysical assertions. It raises them up above any force of inter-subjective control and opens the door wide to unrestricted invention and dogmatics. See Also Roman Orator, Cicero, while defining or explaining the scope of natural law provides: True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. And it does not lay its commands or prohibitions upon good men in vain, though neither have any effect on the wicked. It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different law now and in future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge. Whoever is disobedient is fleeing from himself and denying his human nature, and by reason of this very fact he will suffer the worst penalties, even if he escapes what is commonly considered punishment.
6. Dias R. W. M.: Jurisprudence, p. 65.
7. N V Paranjape, "Studies in Jurisprudence & Legal Theory" 90-101 Central Law Agency (Allahabad) 4thEdn (2004).
8. Devan and Prabhakar Prabhu, The Revival of Natural Law and Value Oriented Jurisprudence, Unpublished (LLM), G.R. Kare College of Law. Available at- http://www.grkarelawlibrary.yolasite.com/resources/LLM-LT-1-Devanand.pdf (last accessed- 1-11-2015).
9. Supra Note 7 at 91.
10. There are principles of law that are stronger than any statute, so that a law conflicting with these principles is devoid of validity. One calls these principles the natural law or the law of reason. The work of centuries has established a solid core of them. Natural law could be synonymously called the law of nature, divine law, eternal law, etc. Natural law theories are basically theological or secular. Theological theories rely on allusion to God, the Holy Books and the prophets, in arguing for the existence or validity of natural law. These theories regard the universe as being founded and ruled by some deity, God, etc. The creator has laid down rules and principles by which the universe (including the earth inhabited by human beings) is ordered and regulated. It is from these principles that the morals or conscience of humanity derive. On the other hand, secular theories depend on human reason (or will). They canvass the view that natural law exists in rational human beings who are created by God. Because they are creatures of God, they possess the rational idea, the reasoning capacity to know what is good and what is bad. They have the intellect even without the assistance of another person to discover natural law or the law of nature. Guided by the ensuing knowledge, he is able to order his life, according to his choice, in a moral way or in an immoral manner. In other words, secular theories demystify natural law by detaching God therefrom, that is, by positing that natural law will or can be independent of God. Thus, on a rather extreme note, Hugo Grotious said that there would be natural law even if there were no God.
11. Source Available at- http://www.bibleandscience.com/bible/books/genesis/genesis1_leviathan.htm (last accessed-27/10/2015)

12. Available at- http://www.biblestudytools.com/dictionary/leviathan/ (last accessed-27/10/2015)
13. A law of nature is a precept or general rule, found out by reason, by which a man is forbidden to do that which is destructive of his life or which takes away the means of preserving the same. for though they that speak of this subject used to confound jus and lex (right and law), yet they ought to be distinguished, because Right consists in liberty to do or forbear, whereas Law binds to one of them; so that law and right differ as much as obligation and liberty.
14. When we say that the government is Constitutional, we say it is limited.
15. The decision in the Nuremberg Trails resulted in the birth of the 'Nuremberg Principle', which basically imposes an obligation upon individuals to disobey laws which are clearly recognisable as violating higher moral principles.
16. One such example is the celebrated judgment of the Supreme Court of India in Kesavananda Bharti v. State of Kerala (AIR 1973 SC 1461) where the Court laid down the Basic Structure Doctrine of the Constitution preventing Parliament from amending certain features of the Constitution by relying on the constitutional morality and prevented the Constitution from becoming the plaything at the hands of the majority party. This doctrine has become a part of Indian law and has been relied upon and upheld in plethora of cases. Now, it becomes difficult to understand whether the Apex Court of India used a shield in the name of Basic Structure or invented a weapon in the name of basic structure; whatever be the case, it reinstated the endangered democracy of the nation.

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Culpability of Parties with Special Emphasis on 'Any Other Person' In Rape Law Post 2013 Criminal Law Amendment

Nidhi [1]

Abstract

The paper analyzes the new definition of Rape under section 375 of Indian Penal Code post 2013 Amendment Act. The wider definition of 'Rape' includes all kind of penetrative assault which can also be committed by a female. But the 2013 Act makes 'Rape' a gender specific crime. It creates confusion regarding the culpability of parties involved in the offence of rape. The 'man' is liable u/s 375 if he himself commits rape or makes it happen by any other person on the woman. The later situation was already covered by the provision of gang rape u/s 376 before amendment i.e. if he makes or compels the victim to do the sexual activities with any other person but now it is included in section 375. The paper also focuses on the impunity or liability of the new category of 'any other person' that can be a man or a woman. The effect of section 375 would be that it imputes different liability for man and woman if the 'other person' is found guilty which is a subject of analysis.

Key words- Amendment Act 2013, definition of rape, Penetrative assault, any other person, culpability of parties.

Introduction

2013 criminal law amendment has changed the law of rape to a great extent by increasing the scope and ambit of the offence of rape. *The Amendment Act 2013* seeks to include all kind of penetrative assault on the women in the definition of rape[2] under section 375 of Indian Penal Code (herein after referred as IPC) which was defined earlier as non-consensual penile/vaginal intercourse. However, the section is still gender specific in nature which makes only 'man' liable for rape and only 'woman' the victim of rape. It bypasses the fact that in the new definition, a woman is also capable of committing rape since rape is not limited to penile/vaginal penetration but includes all kind of penetration which can also be done by a woman. *The section creates confusion as to the culpability of a man.* Earlier a man was liable for rape if he himself committed the non-consensual sexual intercourse. Now a man can be held liable even if he himself does not rape the woman but makes her to do the sexual activities with *any other person* meaning thereby that 'the man' who is said to commit rape is not directly involved but 'any other person' is actually committing the offence of rape. Section 375 does not make it clear what would be the liability of this 'any other person'. This 'any other person' is a new but a confusing category which is added by the 2013 Act.

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[2] JS Verma Committee Report on amendment to criminal law (23 January, 2013).

The research tries to address mainly two things- firstly, the confusion regarding the culpability of the parties involved in the offence of rape and secondly, the impunity or the liability of the new category of 'any other person'. The author focuses on few researchable questions that are- *whether 2013 amendment just stated the prior implicit thing in the newly amended section 375 regarding the culpability of parties involved in the offence rape? Whether the 'man who causes rape to be done by any other person' was ever subject of section 375? What is the liability of 'any other person' in section 375?*

When 'A Man' Is Said To Commit Rape

Section 375[3] includes two situations when a man is said to commit rape-

1. When a man himself commits rape or makes her (victim) to do the mentioned acts in clauses a, b, c & d of 375 with him.
2. When a man makes her (victim) to do the mentioned acts in clauses a, b, c & d of 375 with any other person.

The first situation is quite clear and unambiguous that the man will be directly liable for rape if he himself commits it or makes the women to do the sexual activities with him without her consent. This was the position even before the 2013 amendment although there was no express mention of the term 'makes her to do so'. Even prior to 2013 amendment if a man had compelled the woman or made her either forcefully or otherwise

[3] Section 375 after 2013 amendment reads as follows –

A man is said to commit "rape" if he—

a. penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
b. inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
c. manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any ~ of body of such woman or makes her to do so with him or any other person; or
d. applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:

First.—Against her will.

Secondly.—Without her consent.

Third/y.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourth/y.—With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifth/y.—With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome Substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.—With or without her consent, when she is under eighteen years of age.

Seventhly.—When she is unable to communicate consent.

Explanation I.—For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2.—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception I.—A medical procedure or intervention shall not constitute rape.

Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.'.

to have sexual intercourse with him against her will or without her consent he would have been liable for rape.

'Makes her to do so' with any other person

The second situation is the new addition in section 375 after 2013 amendment. Now a man will be liable for rape even if he himself does not commit the sexual intercourse or other sexual acts as mentioned in the section with the victim. Also if the man engages any other person in the offence to do the sexual activity with the woman without her consent or compels the woman to do so with that person then also he will be guilty of rape.

Position before 2013 amendment

Prior to the amendment of 2013 if a man would have compelled the woman to do sexual activity with someone he might have been liable for the offence of abetment to rape. Section 107[4] of IPC defines 'abetment of a thing' and 108[5] defines 'abettor'.

According to section 108 if a person employs an innocent carrier to facilitate any offence he is said to abet that offence. The abettor is punishable under section 109[6] although the

[4] 107. Abetment of a thing.—A person abets the doing of a thing, who—
(First) — Instigates any person to do that thing; or
(Secondly) —Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or
(Thirdly) — Intentionally aids, by any act or illegal omission, the doing of that thing.
Explanation 1.—A person who, by willful misrepresentation, or by willful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.
Illustration A, a public officer, is authorized by a warrant from a Court of Justice to apprehend Z. B, knowing that fact and also that C is not Z, willfully represents to A that C is Z, and thereby intentionally causes A to apprehend C. Here B abets by instigation the apprehension of C.
Explanation 2.—Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitate the commission thereof, is said to aid the doing of that act.

[5] Section 108 ****Explanation 3 states that—It is not necessary that the person abetted should be capable by law of committing an offence, or that he should have the same guilty intention or knowledge as that of the abettor, or any guilty intention or knowledge.
(a) A, with a guilty intention, abets a child or a lunatic to commit an act which would be an offence, if committed by a person capable by law of committing an offence, and having the same intention as A. Here A, whether the act be committed or not, is guilty of abetting an offence.
(b) A, with the intention of murdering Z, instigates B, a child under seven years of age, to do an act which causes Z's death. B, in consequence of the abetment, does the act in the absence of A and thereby causes Z's death. Here, though B was not capable by law of committing an offence, A is liable to be punished in the same manner as if B had been capable by law of committing an offence, and had committed murder, and he is therefore subject to the punishment of death.
(c) A instigates B to set fire to a dwelling-house, B, in conse-quence of the unsoundness of his mind, being incapable of knowing the nature of the act, or that he is doing what is wrong or contrary to law, sets fire to the house in consequence of A's instigation. B has committed no offence, but A is guilty of abetting the offence of setting fire to a dwelling-house, and is liable to the punishment, provided for that offence.
(d) A, intending to cause a theft to be committed, instigates B to take property belonging to Z out of Z's possession. A induces B to believe that the property belongs to A. B takes the property out of Z's possession, in good faith, believing it to be A's property. B, acting under this misconception, does not take dishonestly, and therefore does not commit theft. But A is guilty of abetting theft, and is liable to the same punishment as if B had committed theft.

[6] Section 109Punishment of abetment if the act abetted is committed in consequence and where no express provision is made for its punishment.—Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abet-ment, be punished with the punishment provided for the offence. (***)

person abetted may be completely innocent[7]. Illustrations to explanation 3 make this point clear that the person abetted may not be guilty of any offence but the person abetting would be guilty for the abetment of that offence. *Illustration (d)* makes this point more clear.

If the same principle is applied in rape cases, a man will be liable for abetment to rape if he instigates or aids the doing of an act under section 107. If D ('D' herein after refer to defendant) compels V ('V' herein after refer to victim) to have sexual intercourse with X and X honestly believes that V is a consenting party then D will be liable for abetment and X would not be guilty of any offence. If D (defendant) instigates a lunatic to have sexual intercourse with V (victim) and the act of intercourse is done by the lunatic without the consent of V, D will be liable for abetting the offence of rape. The same principle is applied if D compels V to have sexual intercourse without her consent with the lunatic. D will be liable for abetting the rape.

In *Om Prakash* v. *State of Haryana*[8] the accused Chhoti (female) misrepresented the prosecutrix, sent and pushed her in a room where the other accused (her nephew) and her husband were present. Chhoti bolted the door from outside. The victim was raped by the nephew. The court convicted Chhoti for abetment to rape under section 109 IPC. The accused Chhoti was sentenced to undergo rigorous imprisonment for three years and fine of Rs 10,000 by the trial court which was upheld by the Supreme Court.

In *State* v. *Meena Devi*[9] the facts of the case were almost similar to the previous case. The trial court in Delhi held accused Meena Devi guilty for abetment and convicted her for the offence of abetment to rape under section 376 read with 109 of IPC.
Although the above mentioned cases are examples of a female abetting crime of rape but it can be applied if the same acts are done by a man where he compels the victim to have sexual intercourse with someone.

Position in U.K. Legislation

English law makes the offence of rape punishable with life imprisonment. Section 1 of Sexual offences Act 2003 defines rape.

> Rape:
> (1) A person (A) commits an offence if—
> (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,
> (b) B does not consent to the penetration, and
> (c) A does not reasonably believe that B consents.

[7] Hari Singh Gaur, *Penal Law of India* 970(Law Publishers (India) Pvt. Ltd.Allahabad,Vol 1, 11th edn., 2014).
[8] (2015) 2 SCC 84.
[9] Session case no. 87/06, decided on 5 December 2007(FIR No. 503/03).

(2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.

Penetration by any other thing than penis is covered under section 2[10] of the act and the offence made is 'assault by penetration'.

It is clear from the wordings of the section 1 that only a male can commit the offence of rape for obvious biological reasons and he has to penetrate himself to be covered under section 1. He cannot be convicted for rape if he uses an innocent agent to commit rape on the victim. Such acts are covered by section 4 of Sexual offences Act 2003 which creates a new offence of 'causing another person to engage in sexual activity'[11].

Section 4 of the act defines- 'causing a person to engage in sexual activity without consent'

(1) A person (A) commits an offence if—
(a) he intentionally causes another person (B) to engage in an activity,
(b) the activity is sexual,
(c) B does not consent to engaging in the activity, and
(d) A does not reasonably believe that B consents.
(2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.
(3) Sections 75 and 76 apply to an offence under this section.
(4) A person guilty of an offence under this section, if the activity caused involved—
(a) penetration of B's anus or vagina,
(b) penetration of B's mouth with a person's penis,
(c) penetration of a person's anus or vagina with a part of B's body or by B with anything else, or
(d) penetration of a person's mouth with B's penis,
is liable, on conviction on indictment, to imprisonment for life.
(5) Unless subsection (4) applies, a person guilty of an offence under this section
is liable—
(a) on summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum or both;
(b) on conviction on indictment, to imprisonment for a term not exceeding 10 years.

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[10]Section 2 -Assault by penetration:
(1) A person (A) commits an offence if—
(a) he intentionally penetrates the vagina or anus of another person (B) with a part of his body or anything else, (b) the penetration is sexual,
(c) B does not consent to the penetration, and
(d) A does not reasonably believe that B consents.
(2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.

[11] Glanville Williams, *Textbook of criminal law*333(Sweet and Maxwell London, 3rdedn., 2012).

When D smuggles a woman and forces her to involve in sexual activity then he will be liable under this section. In *state* v. *B.H*[12] an extremely violent husband forced his wife by threatening violence against her to engage in sexual activity with their 7 year old son. Section 4 covers these types of cases where the victim is really given no choice and her consent is no consent.

In *R.* v. *Ayeva*[13] D grabbed V from behind and bent her arm behind her back, forced her to take hold of his erected penis and to masturbate him. This is an example of physically causing a woman to engage in sexual activity. There was no voluntary action on the part of the victim. The causation requirement is not fulfilled unless the will of the victim is overborne.

However, a man who copulates with the woman who is forced to engage in sexual activity by D will not be liable under this section or for rape unless he has reasonable grounds for believing that the woman is not consenting[14]. Thus if he knows that or has reasonable grounds for believing that she is not consenting he will be liable for rape. If X sees that the woman is being pushed in his room at gun point he has reasonable grounds for believing that she might not be consenting to have sexual intercourse with him and therefore he will be guilty for rape.[15]

Position in South African legislation- Sexual offences Act 2007 Quite a similar pattern is followed in South African legislation. Sexual offences Act 2007 provides different provision for rape and compelled rape.

> Section 3- Rape
> Any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of B, is guilty of the offence of rape.
> Section 4- Compelled rape
> Any person ('A') who unlawfully and intentionally compels a third person ('C'), without the consent of C, to commit an act of sexual penetration with a complainant ('B'), without the consent of B, is guilty of the offence of compelled rape.

Indian position

Now section 375 after amendment makes it clear that when a person makes a woman to involve in any sexual activity he will be liable for rape. This part of section is analogous to section 4 of Sexual Offences Act 2003 where one person causes another to involve in sexual activity. Although section 4 has much wider implication as it is a gender neutral offence. The accused need not be a man, it can be any person and the victim also need not

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[12]*Supra* note 10 at 347, 834 A.2d 1063(2003).
[13]*Id*., (2010)2 Cr. App. R. (S) 22.
[14]*Ibid* at 349.
[15]*Id*.

be a woman it can be any person. Whereas in section 375 accused has to be necessarily a man and the victim must be a woman. Causing the other person or making the woman to do the sexual act means her will is overborne by the accused and she is left with no real choice.

'Any other person'

Section 375 of IPC nowhere deals with the culpability of 'any other person'. This phrase has also not been defined or explained in IPC. Section 375 does not answer the question that what would be the liability of X if D makes V by using force or by threatening her to have sexual intercourse with X. There can be two situations in this case-

1. X voluntarily participates in the crime knowing that V's consent was absent.
2. X is an innocent person having no idea about absence of V's consent.

The first situation will make X liable for rape. Section 90[16] of the IPC provides that the consent is not the real consent as required by the section if it is given under fear of injury or under misconception of fact and the person doing the act knows that or has reason to believe that it is given under such fear and misconception. The two main requirements of rape i.e. sexual act as mentioned in section 375 and non- consent by victim get fulfilled. Thus in the example which is mentioned earlier where (D) forces a girl (V) to have sex with a person X and pushes her in his bedroom and bolt the door from outside. The girl is crying or requesting the person (X) not to have sexual intercourse with her. X has reason to believe that the girl is not consenting and the offence is established if X commits sexual intercourse with her. Even if X himself does not use any force or compels the girl but if he knows that she has been compelled by someone or if X has reason to believe that she is being forced then he should be liable for rape.

In the second situation where X is an innocent person not knowing that V has not consented or when X does not have reason to believe that V has not consented then X would not be liable for rape. Thus where X is the person who genuinely believes that V has come to him out of her own will and with her own consent and it is not shown from V's behavior or from any other circumstances that she has been compelled to do so then X is not liable for the offence of rape.

Now there is another aspect to the culpability of the category of 'any other person'

1. When any other person is a man.
2. When any other person is a woman.

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[16] Section 90 of Indian Penal Code, 1860
Consent known to be given under fear or misconception- A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or Consent of insane person:- if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or Consent of child:- unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

The first situation when the 'other person' is a man has been discussed earlier in this part. When this person is a man and acts voluntary knowing that the woman is not consenting then he is liable for rape. And if this man is an innocent person not knowing about the absence of consent then he will not be liable for any offence. So far as this situation is concerned there is not much ambiguity.

The second situation is that when this 'any other person' is a woman. The new definition of rape includes digital rape[17] i.e. Penetration through finger or any object and other forms of non-consensual penetrations (other than penile/vaginal). This shows that these sexual activities can be performed by any woman also. However, the definition of rape makes it very clear that only man will be liable for rape as it says 'a man is said to commit rape'.

This section creates confusion in this regard. Suppose if this 'any other' woman (X) is an innocent person not knowing about the absence of V's consent and V is forced by D to perform sexual activity mentioned in clauses (b), (c), (d) of 375 with X. X cannot be held liable for rape.

Now if X knows or has reason to believe that V's consent is forcefully given or she is compelled by D to do any of the mentioned sexual activity with X then the question arises that what would be the liability of X?

As per section 375 she cannot be held liable for rape because the section intends to make only man liable for rape. She cannot be even convicted with the help of section 34[18]of IPC because it talks about act done in furtherance of common intention and this principle is implicit in 376(2)(g)[19] read with explanation 1 of the section. So wherever principle of 34 comes into picture in rape cases, *gang rape* provision is invoked because the subject matter of both the provisions is same. Now can it be said that D and X share the common intention to rape V. To answer this question *Priya Patel* v. *State of M.P*[20] must be discussed.

***Priya Patel* v. *State of M.P.* - a fit case of overrule**

In this case the accused (woman) was charged under section 376(2)(g) for gang rape. The apex court held that since a woman can not commit rape she cannot be charged and held liable for *Gang rape* too. Explanation 1 of 376(2) provides that when a woman is raped

[17]Veer Bahadur v. State 1995 SCC Online Del 279,
See also http://www.urbandictionary.com/define.php?term=digital+rape, http://www.thehindu.com/todays-paper/tp-national/10year-jail-for-digital-rape/article2849290.ece (last visited on April 25,2016).

[18] Section 34- Acts done by several persons in furtherance of common intention—When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.

[19] 376(2) whoever,(***)
(g) commits gang rape,(***)
Explanation 1.—Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section.

[20]AIR 2006 SC 2639.

by one or more persons in group acting in furtherance of common intention. Court held that common intention in 376(2) is about intention to commit rape on a woman and it is inconceivable that a woman has intention to commit rape. The court in this case did not deal with question of abetment by the woman in rape. So this question was open and it was dealt in few later cases[21].

In this case the court gave literal interpretation of 375 and 376 and read 376(2) in the light of section 375 and concluded that a woman cannot be held guilty of gang rape. However, it is to be noted that in case of gang rape

1. It is sufficient if at least only one person in the group commits the rape.
2. Secondly, the group is a group of persons and not necessarily a group of men.
3. The Group of persons must be acting in furtherance of common intention.
4. By virtue of deeming provision each group member will be liable for gang rape.

Thus, by using the word 'group of persons' it is made clear that the said group can comprise women also. And since only one person in the group is sufficient to have actually committed the rape, the group can be of women having only one male member. Further the group must have common intention which according to the Supreme Court in *Priya Patel* case is the 'intention to commit rape'. In this case court held that a woman cannot have intention to commit rape as required in the section and therefore her participation in the group cannot be said to be acting in furtherance of common intention. This interpretation of the supreme court of 'common intention' as *'intention to commit rape'* is also questionable. It can be said that the intention required in 376(2) is the intention that *'rape must be committed'* on the victim and not that the '*accused must have intention to commit rape himself'*.

Suppose if a man is holding the hands of the victim and another is holding the legs and third one is committing sexual intercourse. It is proved that the men who were holding the hands and legs did not have the intention to rape the girl themselves but they wanted rape to be committed on the girl by the third member. In this situation can it be said that they will not be liable for gang rape. If going by the Supreme Court narrative, they should not be made liable for gang rape because their intention is different from the person who is actually committing rape. But the intent of the legislature seems to make such persons liable by the deeming provision if they have the intention that the victim be raped by any of the group member and they act in furtherance of this common intention.

And if the later interpretation is taken as correct i.e. the common intention in *Gang Rape* provision is the intention *'to have rape committed on the victim'* by any group member and not the *intention to rape the woman himself/herself*, then the women in the group who take part in the commission of the offence can be held liable for gang rape because although they cannot formulate an intention to commit rape but they can very well formulate an intention to have someone commit rape on the victim.

[21]*Supra* note 7 and 8.

Explanation 1 of 376(2) of IPC (before 2013 amendment) is the gender neutral law and it is on the same matter which is there in section 34 i.e. Act done in furtherance of common intention. Therefore, interpretation taken to read section 34 may be taken to understand scope and ambit of this explanation. In *Barendra kumar Ghosh* v. *King Emperor*[22] and *Mehbub Shah* v. *Emperor*[23] the point is made clear that 34 is not limited to participation in the actual criminal act. If two or more persons join together in a criminal act with common intention to bring out the result which is punishable by law is sufficient to hold them liable for that punishable act. For example, B is standing outside the door for raising alarm in case police or other people are seen. B did not participate in the actual killing which is committed by A. it is immaterial if B had the specific intention to kill C provided that the prosecution is able to prove that B had knowledge of A's intention of killing C and B joined A with this Knowledge.

In case of rape a person is not convicted by virtue of section 34 but provision of gang rape comes into the picture and explanation 1 of 376(2) is applied which is on the same point. Applying the same logic of section 34 IPC to gang rape, the accused is not required to have specific intent to rape, in fact if the accused facilitate the commission of the offence of rape with knowledge or with intention that rape ultimately be committed the accused should be liable for gang rape even if she is a woman[24]. The High Court in this case was of the opinion that though woman cannot commit rape but if she facilitates the act of rape explanation 1 of 376(2) comes into operation and she can be prosecuted for gang rape.

The other notable point is that section 375 to 376 D (before 2013 amendment) comes under the head of sexual offences which was substituted for the heading 'Of Rape' by 1983 amendment. It can be said that legislatures intended to treat the offences differently which is given in different sections under this head and not same as rape. There is no need to read 376(2)(g) in the light of 375 and hold that only man will be liable for all the offences mentioned under this head. 376(2)(g) can be read independently and the requirement of rape to be committed only by a man u/s 375 need not be applied.
If *Priya Patel* continues-

1. The phrase 'group of persons' in gang rape provision would be rendered as including only men and women would never become a subject of gang rape provision. Had this been the legislative intent why would the word 'persons' instead of 'man' was used in section 376 which was even retained by 2013 amendment although in section 375 the word 'man' is used which is indicative of fact that it is a gender specific provision.

[22]AIR 1925 PC 1.
[23]AIR 1945 PC 118.
[24] "They also serve who only stand and wait": Critique of Priya Patel v. State of M.P and anr. AIR 2006 SC 2639, *2 RMLNLUJ (2010) 135*.

2. The men involved in a rape would not be convicted for gang rape if it is sufficiently proved that they did not intend to commit sexual intercourse themselves on the girl.
3. It leads to the inference that common intention would be read as whether the accused has the mental or physical capacity to perform the ultimate punishable act or not. Thus, if a physically or mentally impotent person who participates in rape by beating the women and striping her naked cannot be held liable.
4. The ultimate result (offence) brought out by such criminal acts would not remain the deciding factor to hold any person liable by virtue of 34 or 376D (gang rape after 2013 amendment) for that offence.

Although *Priya Patel* has become a precedent followed in later cases[25] but it is not a good law when woman culpability is in question where she has participated in some manner or the other to facilitate the commission of crime of rape along with one or more men. The case did not deal with the liability of woman as an abettor in rape. However, there is no legal bar to convict a woman for abetment of rape under section 376 read with 109 of IPC. In *State* v. *Meena Devi*[26]a trial court in New Delhi convicted the accused for abetment of the offence of rape. This case did not even refer the case of *Priya Patel*. Similarly in *Om Prakash* v. *State of Haryana*[27]the woman accused was convicted for abetment of rape u/s 109.

Thus when 'any other person' is a woman, she cannot be liable for rape because of express bar in section 375 which holds only man liable for rape. She cannot be made liable for gang rape also even if she acts in concert with the main accused because of the Supreme Court judgment in *Priya Patel* case. The only way to hold the women liable seems to be under section 109 for abetment to rape. In such cases she may be held liable for abetment of rape whereas the man who makes the victim to do the sexual activity with that woman is liable for rape. If '*any other person'* is a man he would be liable for rape or gang rape and if that '*any other person*' is a woman she might be liable for abetment. In this manner the law is punishing man and woman differently for the same offence.

Conclusion

The modern concept of rape is to humiliate and disgrace the victim by violating her in the most intimate way. It is not just confined to taking sexual pleasure by violating her person of the body. The definition of rape in 2013 amendment has been expanded substantially to include almost all type of penetrative assault. Although the acts are such which can be performed by any female accused also but IPC has still retained the law of rape as gender specific crime.

[25]*State of Rajasthan* v. *Hemraj* (2009) 12 SCC 403.
[26]*Supra* note 8.
[27]*Supra* note 7.

The 2013 amendment Act seems to be hastily drafted in order to pacify the demand of outraged people of the country. There is very less clarity on the point that what all situations would be covered to make the parties liable and what would be the exact liability of the parties involved in a rape case. The author has tried to deal with this problem to a certain extent.

In light of the aforesaid, the following observations are made by the researcher in response to the researchable questions-

1. The 2013 amendment Act has not merely reiterated the prior position in making 'a man' liable for rape but it has added various angles to the culpability aspect of rape law. Section 375of IPC has increased the ambit of culpability in the offence of rapeto cover even those men who earlier might have been liable for abetment of rape.
2. 'A man' who causes the victim to do the sexual activity and thereby causes rape to be committed on her was never the subject of section 375. Before amendment he could have been liable for abetment of rape and not for rape. The earlier definition of rape required a man to have sexual intercourse with the woman without her consent to make him guilty. Now there is no such requirement of *actual sexual intercourse* by the man to hold him guilty for the offence of rape. He can be held liable for rape even if he causes the victim to do the sexual intercourse with any other person. The man may be held guilty of gang rape if he is committing the act of making the victim to involve in sexual activity in connivance with the person who is directly involved in committing rape on her. However, in this situation, it needs to be proved that the man and the other person form a group.
3. Liability of 'any other person' is a complex story. By using the word 'person' the section is indicating that this 'any other person' can be a 'man' or a 'woman' or 'any other person' who may be completely innocent and used as an instrument to commit violence on the woman victim. In such situation he/she may not be held liable. But if this person is not an innocent person knowing or having reason to believe that there is absence of consent then their liability would depend on their gender.

There have been much debate on 2013 Amendment but much less have been said on the issues discussed in this paper. The rape law needs clarification on these issues. The decisions of Supreme Court of India are much waited in this regard which can guide the lawyers and students on these points.